EDITOR'S NOTE

Welcome to the sixty-third Volume of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association. The works presented in this Issue reflect the *Journal*'s commitment to providing its readership with interesting, important, and timely analysis in communications law and policy. The *Journal* staff is excited about the quality of the Essays, Articles, and Notes included in this Issue.

The Issue begins with a series of Essays presenting analysis of the future of digital communications from a variety of perspectives. The Essays were supported by Time Warner Cable's Research Program on Digital Communications[1] and are introduced by Fernando Laguarda, vice president for external affairs and policy counselor for Time Warner Cable.

The first Essay is by John Palfrey, a professor of law at Harvard Law School and codirector of the Berkman Center for Internet and Society at Harvard. Professor Palfrey presents his view on the connection between law and social science, focusing on youth media policy and the importance of creating policy that reflects current research on today's youth—the digital generation. The next Essay is by Dr. Nicol Turner-Lee, vice president and director of the Media and Technology Institute at the Joint Center for Political and Economic Studies, who discusses the importance of understanding the possibilities and challenges of using digital communications as a platform for civic engagement. Dr. Scott Wallsten, who is vice president and senior fellow at the Technology Policy Institute, then examines the approach policymakers have taken to broadband technology in his Essay, emphasizing the importance of researching the long-term impact of such technologies on the business sector. The next Essay is by Dale Hatfield, executive director of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado, who discusses broadband technology and challenges policymakers to develop a deeper understanding of wireless and wireline technologies. In the final Essay, Christopher Yoo, professor of law at the University of Pennsylvania, focuses on the architecture of the Internet and calls for flexible Internet policymaking that will reflect the insight of engineers and network architects as the Internet continues to change in the future.

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1. The Essays were made possible by research stipends from the Time Warner Cable Research Program on Digital Communications. These Essays reflect the opinions and perspectives of the individual Authors and may not reflect the format of traditional *Federal Communications Law Journal* Articles.

These Essays provide the opportunity for our readership to gain access to leading thinkers in their respective fields and to see the recommendations they offer in considering digital communications policy going forward. As always, we welcome readers' responses to these Essays.

This Issue also features a timely analysis of network neutrality in light of the recent decision rejecting the FCC's attempt to impose net neutrality regulations on Internet access provider Comcast. Lee Selwyn, president and founder of Economics and Technology, Inc., and Helen Golding, vice president of Economics and Technology, Inc., offer an analysis of how best to reach important net neutrality goals. Their Article takes the position that competition for retail, mass market Internet access should be permitted to develop, which in turn will operate to enforce the FCC's net neutrality principles.

Next, Akilah Folami, associate professor of law at Hofstra University School of Law, examines the role of radio in America's cultural history, specifically during the rise of rock and roll on commercial radio. During that time, according to the author, radio offered a new forum for discussion and deliberation in America that engaged a younger audience and permitted intergenerational and interracial discourse to play out. Through an analysis of history, cultural studies, and FCC localism rules, Professor Folami offers the position that the radio and music can, through diversity on the airwaves, play an important role in the deliberative process.

In the final Article, Angela Campbell, professor of law and director of the Institute for Public Representation at Georgetown Law, revisits *Pacifica Foundation v. FCC*, the 1978 Supreme Court decision that set the stage for the position the FCC would take on indecent speech in the decades since. With the recent Second Circuit decision finding that the FCC's prohibition on fleeting expletives was unconstitutionally vague, it is expected that the Supreme Court may reconsider its decision in *Pacifica*. Professor Campbell explores this possibility by providing a behind-the-scenes look at the history of *Pacifica* and the decision the Court reached in that case, ultimately concluding that such individual adjudications may not be the most appropriate vehicles for establishing indecency policy.

Our Notes, written by members of the *Journal* staff, continue the indecency theme with Brandon Almas's analysis of the make-up of the Supreme Court, and the implications for the future of indecency cases that may come before it. Mr. Almas applies various models of judicial decision making to attempt to predict the outcome of a case in which the Court reconsiders its stance on indecency, and evaluates the individual Justices to attempt to determine how they might side if and when this reconsideration occurs.

Next, Elizabeth Steele analyzes indecency policy in light of today's media environment and the unprecedented access to broadcast material that children have. Based on that level of access, Ms. Steele argues that the regulation of indecency is no longer effective or applicable, and instead works against the First Amendment's protections.

Finally, Jessica Meredith reviews the current status of cyberbullying laws in this country, and their effectiveness in combating the rising threat to youth who are socially active on the Internet. Ms. Meredith concludes that the best approach to successfully countering this threat is education, not criminalization.

The Editorial Board would like to express its appreciation to the authors whose works are included in this Issue. We would also like to thank the editors and the staff of the *Journal* who worked diligently over these past few months to edit these Articles and Notes for publication. Finally, we would like to extend our thanks to the Federal Communications Bar Association for its continued support and guidance.

The *Journal* is committed to providing its readership with broad coverage of important communications law and policy, and we welcome feedback about this Issue or submissions for future issues. We encourage our readers to explore our newly redesigned website, available at http://law.indiana.edu/fclj. In addition, any submissions for consideration in our future issues should be sent to fcljsae@indiana.edu. Finally, any questions or comments you might have about this Issue or our future issues are welcome, and can be sent to fclj@indiana.edu.

I anticipate a great year of communications scholarship, discussion, and analysis in the pages of the *Federal Communications Law Journal*.

Ann E. O'Connor
Editor-in-Chief

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Federal Communications Law Journal

The *Federal Communications Law Journal* is co-published by the Federal Communications Bar Association and the Indiana University Maurer School of Law. The *Journal* publishes three issues per year, including articles, student notes, commentaries, and book reviews examining a wide range of domestic and international communications and information issues, including telecommunications, the First Amendment, broadcasting, telephony, computers, mass media, intellectual property, communications and information policy making, and related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to the Association's more than 2,500 members and more than 550 additional legal practitioners, industry experts, government officials, and academics. The *Journal* is also distributed by Westlaw and Lexis and is available on the Internet at http://www.law.indiana.edu/fclj.

The *Journal* is managed by a student Editorial Board, in cooperation with the Law Journal Committee and Editorial Advisory Board of the FCBA, and a Faculty Advisor.

Federal Communications Bar Association

The Federal Communications Bar Association is a nonprofit member-supported organization of attorneys and other professionals, including engineers, consultants, economists, and government officials, involved in the development, interpretation, and practice of communications law and policy. The FCBA promotes fairness and efficiency in the development and application of communications law and policy at all levels of government; excellence and integrity in the profession; education and training for those involved in communications law and policy; and equality of opportunity in the profession of law.

Founded in 1936, the FCBA has more than 2,500 members, the majority of whom are lawyers who practice in the metropolitan Washington, D.C. area. The FCBA's roster also includes members from almost all of the fifty states, several territories, and many foreign countries. The FCBA is represented as an affiliated organization in the House of Delegates of the American Bar Association.

The FCBA regularly conducts educational seminars, which apprise members of legal, technological, and policy developments in communications and related fields. The FCBA also monitors and reviews legislative, agency, and court developments relevant to the practice of communications law and makes submissions to various government agencies on matters of interest to the membership.

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The Indiana University Maurer School of Law, founded in 1842, prepares students from the United States and foreign countries for careers as lawyers—in private practice, government, business, and other national organizations—academics, and other professionals. The Law School's over 670 full-time J.D. students are drawn from more than 190 undergraduate colleges and universities throughout the United States and abroad.

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Essays from Time Warner Cable's Research Program on Digital Communications

Articles

A decade of broadband access deregulation has landed the FCC at a legal dead-end. After the D.C. Circuit's *Comcast* decision, the FCC finds itself unable to enforce its "net neutrality" goals. To reassert its jurisdiction over "net neutrality," the FCC proposes to reclassify broadband Internet access as a Title II "telecommunications service" while continuing to forbear from most other facets of common carrier regulation. The FCC's current dilemma results from

an unfortunate combination of unverified predictive judgments associating deregulation with investment; overly optimistic assessments of competition in the consumer broadband market; the abandonment of the "bright line" between transmission and content; and elimination of unbundling requirements for broadband services. The FCC needs now to revisit—and revise—the factual, legal and policy judgments that have brought it to the current situation. Reclassification is factually and legally the proper regulatory course, but its benefits would be seriously undermined by broad presumptive forbearance. Last mile broadband Internet access offered by incumbent local exchange carriers and cable companies is unambiguously pure transmission, i.e., telecommunications service. Facilities-based Internet access providers should be required to offer downstream rivals equivalent last-mile broadband access as a wholesale telecommunications service on a nondiscriminatory basis; under this framework, telcos and cable companies could continue offering broadband bundled with content and applications as competitive, non-regulated information services. Given the demonstrated ability of facilities-based carriers to use their control of bottleneck last mile access to discriminate against downstream rivals, there can be no justification for the FCC to forbear from applying most Title II obligations to broadband access providers. Combining these two threads, the authors conclude that by restoring competitors' ability to purchase "basic" broadband access as a platform for their own retail Internet access entry, the FCC has the opportunity to create more competition, with less explicit net neutrality regulation, than by reclassification alone.

There has been considerable scholarship exploring the need to breathe deliberative life back into the localism standard by requiring broadcasters to include more meaningful local news and public affairs programming, pursuant to the public interest obligations imposed on radio licensees. There has been little scholarly attention, if any, however given to broadening understandings of localism to include music and popular cultural expression *for the purpose of furthering deliberative discourse* in particular, rather than solely for entertainment purposes. This Article focuses on a particular moment in radio and America's cultural history that was rife with struggles over constructions of identity, and with contests over meaning between dominant ideological frameworks and voices of subversion that challenged these dominant normative understandings, all within a very commercialized, corporately controlled media environment. Specifically, this Article focuses on the rise of rock and roll on commercial radio and of the White rock and roll disc jockey, who came to represent the pulse of the historically marginalized (pre-World War II), White American youth. By exploring this snapshot in history of radio's subaltern past via the playing of rock and roll by radio disc jockeys on White radio, at a time when the nation's radio air waves, like the larger society, were racially segregated, and during what some have defined as the long progression into America's Cultural Revolution, this Article builds on the scholarship of others that have considered radio's influence on popular culture, discursive democracy, and the struggles over constructions of identity. This Article expands upon such analysis, however, by exploring the law's role, specifically, FCC localism rules and policies in effect at that time, in this contest over meaning and the deliberative process: a role that must be taken into account as the FCC, Congress, and the courts reconsider current media policy in light of the public outcry over the lack of diverse content on the nation's radio airwaves.

Notice:

These Essays were made possible by research stipends from the Time Warner Cable Research Program on Digital Communications. These Essays reflect the opinions and perspectives of the individual Authors and may not reflect the format of traditional *Federal Communications Law Journal* Articles.

Introduction to Essays on the Future of Digital Communications

Fernando R. Laguarda*

I. STIMULATING DISCUSSION: THE ROLE OF THE TIME WARNER CABLE RESEARCH PROGRAM ON DIGITAL COMMUNICATIONS

The Time Warner Cable Research Program on Digital Communications is pleased to have supported the five essays in this *Federal Communications Law Journal* symposium. We launched the research program with the goal of encouraging debate and discussion on ideas of importance to the future of our industry and its role in the communities we serve. We hope to do so by providing a new forum for scholars to engage with the community of stakeholders who make and influence policy. We want to encourage increased dialogue and generate new ideas that bring us closer to solving the challenges we face. The research program will award stipends to scholars to produce twenty-five- to thirty-five-page papers that increase understanding of the benefits and challenges facing the future of digital technologies in the home, office, classroom, and community.

For this symposium, we invited five noted scholars to write an essay discussing a major challenge they anticipate arising as we debate and set

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digital communications policy during the next decade. Their Essays are published in this symposium. While each author chose a different challenge, they all raise interesting questions that deserve further discussion and debate.

II. OVERVIEW—POLICY PERSPECTIVES

The first three policy papers are by a law professor, a sociologist, and an economist. John Palfrey is a professor of law at Harvard Law School and codirector of the Berkman Center for Internet and Society. Palfrey writes about the connection between law and social science and the challenge of incorporating current research into policymaking. He uses the example of youth media policy, specifically *privacy regulation*, to frame a challenge to policymakers: learn how young people actually use digital communications or risk making public policy that is irrelevant to (or poorly meets the needs of) the digital generation. Palfrey recommends establishing "mechanisms that enable collaboration between those who set policy . . . and those who best understand youth media practices."

In her paper, Dr. Nicol Turner-Lee, vice president and director of the Media and Technology Institute at the Joint Center for Political and Economic Studies, discusses the Internet as a platform for civic engagement. She explains that digital communications tools present both opportunities and perils for the next decade of social activism and political discourse. In particular, "unequal access to the Internet affects civic engagement when groups are underrepresented or on the periphery of online activity." She offers specific strategies for ensuring the Internet and social media tools provide a constructive forum for deliberative exchange. Turner-Lee's challenge to policymakers is to take steps to ensure that broadband adoption does not create or further solidify existing social stratification and alienation.

Next, Dr. Scott Wallsten, vice president for research and senior fellow at the Technology Policy Institute, reviews the approach policymakers have taken to broadband technology and challenges several key assumptions driving recommendations for the next decade. While policymakers "hope that home broadband access will [quickly] spur economic growth," Wallsten suggests that this narrow focus may be misguided. He specifically questions whether residential broadband adoption can have the transformative economic impact many assume it will have. Instead, he writes, the focus should be on "how new communications technologies affect business" because these are the impacts on productivity that will determine whether broadband will "radically reshape the economy." Wallsten calls for a deeper research agenda into the long-term impact of broadband on the business sector.

Palfrey, Turner-Lee, and Wallsten all raise questions about the status quo and challenge the reader to think outside the box. Palfrey seeks to reconceptualize the process of making public policy as a dialogue with social science research, especially when it comes to the way young people are interacting with digital media. Turner-Lee challenges the reader to rethink policy towards digital social media platforms so as to engage communities that may otherwise be alienated from broadband. Wallsten questions important assumptions about how broadband affects the economy. We hope these papers inform as well as stimulate discussion.

III. OVERVIEW—TECHNICAL PERSPECTIVES

In the remaining two papers in the symposium, two highly regarded authors review trends in technology and their impact on policy. Dale Hatfield, executive director of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado, is a noted expert on telecommunications technology and former chief technologist for the FCC. His paper addresses the challenge of encouraging broadband deployment, as set forth in the FCC's *National Broadband Plan*. Hatfield urges policymakers to seek a deeper understanding of the technology underlying different types of broadband networks, and the implications for policy arising from those differences. His analysis of the opportunities and limitations of wireless and wireline technologies leads him to challenge policymakers to consider strategies that would bring fiber significantly closer to end users.

In his paper, Christopher Yoo, professor of law at the University of Pennsylvania, reviews the impact of rapidly evolving broadband networks and notes that "change is inevitable" when it comes to the architecture of the Internet. Yoo notes that as demand on the network becomes heterogeneous, "different portions of the network will respond in different ways to meet this demand." Rather than looking to the past, he challenges policymakers to allow the network to evolve in new directions. The future success of the Internet does not depend on "preserving the architecture that has made it successful in the past." Since change is inevitable, policy should be flexible. Incorporating the insights of engineers and network architects into policy would be of great benefit, as Professor Yoo demonstrates.

The intersection of technology and policymaking is a significant component of the Time Warner Cable Research Program's agenda for the coming year. Consumers have increasing choices when it comes to digital communications services, applications, and devices. Many questions are raised as a result of rules and policies enacted without regard to the rapid evolution of digital communications technology. Yoo and Hatfield each

make a contribution to the policy debate by explaining not only *how* digital technologies work but also *why* policy choices should be informed by the best possible understanding of technology.

We are pleased that the five papers presented in this symposium offer a wide range of perspectives on the future of digital communications and the challenges that must be confronted in the next decade. Perhaps the singular theme that arises from looking at the challenges of the next decade is the need to be flexible and pragmatic, not only in terms of policy, but also in terms of the research that can help inform policymaking. We believe that a research agenda that is multidisciplinary and collaborative can make a distinct contribution to the next decade of telecommunications discussions. We hope to play a role in encouraging scholars to contribute to such an agenda.

The Challenge of Developing Effective Public Policy on the Use of Social Media by Youth

John Palfrey*

I. INTRODUCTION

Legal scholarship in the United States has evolved greatly over the course of the twentieth century and into the twenty-first.[1] A recent trend is

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* John Palfrey is the Henry N. Ess III Professor of Law and Vice Dean for Library and Information Resources at Harvard Law School. This Essay builds on the collaborative work of the Youth Media Policy Working Group Initiative at the Berkman Center for Internet & Society at Harvard University, supported by a grant from the MacArthur Foundation. The Author is grateful to his coprincipal investigators, danah boyd, and Urs Gasser, as well as colleagues Catherine Bracy, Sandra Cortesi, Alice Marwick, Diego Murgia Diaz, and Jessica Palmer for their work on which this Essay draws extensively.

This paper is made possible by the Time Warner Cable Research Program on Digital Communications, 2010.

1. *See generally* William W. Fisher, III, *Legal Theory and Legal Education, 1920–2000*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND

toward various forms of interdisciplinary scholarship in law, including the combination of legal methods with methods drawn from the social science. There are some good reasons for the growing popularity of this form of interdisciplinarity. One reason is that, in certain subfields of law, it is impossible for a lawyer to make strong policy arguments without a solid grounding in the data gathered by those who specialize in other disciplines. The field of youth media policy is one such subfield. This particular form of interdisciplinarity will be increasingly important in the future.

Policymakers working on matters related to youth media policy need to listen to the findings of the best social scientists in our shared field in order to make better decisions. The reasons for adopting this particular interdisciplinary approach—beyond mere methodological hipness—are substantive. The relevant youth practices are shifting very quickly. Social norms in digitally mediated environments are extremely powerful—often trumping law and public policy and, in turn, posing special problems for those who seek to impose traditional methods of direct regulation. Our public policy goals are often in tension with one another; reconciling them can be tricky. Social science research can help us to understand the broad frame in which these discussions are most helpfully grounded. And as we look to the future, it is important that we understand the substantial shifts in youth practice in order to be able to craft effective policy in this area.

In this paper, I set forth a broad framework, grounded in social science research, within which a policy conversation can be held. The paper also presents a case example examining privacy issues for youth where public policy might be improved by data-driven discussions.

II. THE NEED FOR A NEW FRAMEWORK

Our youth media policy ought to be grounded in a stable theoretical frame that guides our decision making at a high level. This broad theoretical frame should be informed by, and in turn inform, the kinds of questions social science researchers are asking when they are in the field. This framework should also serve as a starting point for our policymaking.

For the purposes of this Essay, I start with the theory that youth media practice holds enormous promise to help support a bright future of learning, economic growth, and civic engagement. At the same time, I recognize the limits of the use of any technology to address major social issues (for instance, inadequacies in our system of education); these issues must be addressed at a fundamental level, and not merely through more effective employment of new media. I recognize that not everyone has equal access to or skill in using new technologies, and that we risk exacerbating important

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AFTER (1920–), at 34 (Michael Grossberg & Christopher Tomlins eds., Cambridge University Press 2008).

societal problems (for instance, the gap between rich and poor) if we ignore these differences between groups of youth. I recognize the extent to which new information technologies are used by those who would do harm to our youth through child pornography, sexual exploitation, bullying, and exposure to unwanted, harmful content. I acknowledge, furthermore, the extent to which the use of new technologies amplifies other complicated trends in society that need to be addressed through policy, such as the commercialization of the childhood experience and the collection of data about our youth by many parties without sufficient protections.

The overarching public policy goal should include an affirmative effort to balance a series of interests that are sometimes, but not always, in harmony with one another. The goal is to seize opportunities associated with digital-era youth media practices (for instance, learning, creativity, innovation, entrepreneurship, and civic activism), while mitigating the challenges (for instance, safety, privacy, intellectual property, information quality concerns, and so forth). Social science research can help to determine those places where these interests are in harmony and those places where they are in discord. It can also help us to see paths forward as we track the practices of youth across time as the technologies and the patterns of use continue to change.

III. PRIVACY FOR YOUTH: A CASE EXAMPLE

I propose a method of public policymaking in the field of Internet regulation that is grounded firmly in data about human practices using new technologies. For instance, as the phenomenon of *sexting*—most commonly, the transmission of sexually explicit images via mobile device from one youth to another—rises to the attention of decision makers, the first step should be to ascertain the nature and extent of the practice and the risks posed to youth.

The range of possible solutions to the rise of sexting should be considered in light of these data, even as they change over time. For a complex problem such as sexting, the best solution is likely to involve a combination of approaches that address the underlying drivers and practices involved and bring a range of actors into the process of developing and implementing solutions. The mode of direct regulation—declaring the practice to be a violation of bans on the creation and transmission of child pornography—should be one of the tools to consider using, but not the only one. The involvement of parents, educators, social workers, and pediatricians may lead to more constructive solutions and fewer criminal prosecutions of youth involved in unfortunate but commonplace youthful behavior.

Privacy regulation, too, cries out for greater social scientific involvement in the public policymaking process. If sexting is an acute example (it

arose quickly and somewhat unexpectedly,[2] and may or may not be quickly treatable), then privacy is a chronic one (we have known about this issue for a long time and it is almost certain to persist as an ongoing challenge). In the digital age, there are more and more pressures on individual data privacy. We tend to trade convenience for control, and in turn, data about us are held in more and more hands for longer and longer periods of time.

Parents are often concerned that their children share too much personal information online. They worry that potential predators could use that information to harass or harm children, either online or offline. Since data disclosed online are often persistent, searchable, and hard to delete, youth who behave too openly may suffer consequences in the future, when their personal information is used in unforeseen ways by potential employers, educational institutions, or other parties.[3] These fears, though widespread, are generally not borne out in the research.

However, there are real concerns facing youth and their privacy in a digital age. Youth are subject to a great deal of surveillance, online and offline; their activities are frequently monitored by parents and other adults in ways that they perceive violate their privacy; and information about them is consistently collected and subject to exploitation by marketers seeking to sell them things. (These practices are the subject of the comprehensive review of research into youth practices with respect to new media, privacy, and reputation, which draws together the work of researchers from around the world.[4])

Adults tend to misunderstand youth behavior with respect to their privacy. The predominant myth is that young people do not care about their privacy. This presumption is a mistake. Youth do care about their privacy, but they care about it in specific ways. For instance, youth care about keeping certain information about themselves from their parents and their teachers. They also express their dislike of the idea that large amounts of information about them are kept in corporate hands, but they often need to be nudged to think about this issue. Given more information about their privacy and skills and tools to do something about it, youth are likely to adopt practices that are more protective of personally identifiable informa-

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2. *See* Dena Sacco et al., *Sexting: Youth Practices and Legal Implications*, THE BERKMAN CTR. FOR INTERNET & SOC'Y AT HARVARD UNIV. (June 22, 2010), http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Sacco_Argudin_Maguire_Tallon_Sexting_Jun2010.pdf.

3. *See* danah boyd, *Why Youth ♥ Social Network Sites: The Role of Networked Publics in Teenage Social Life*, *in* YOUTH, IDENTITY, AND DIGITAL MEDIA 133–34 (David Buckingham ed., 2007), *available at* http://www.mitpressjournals.org/doi/pdf/10.1162/dmal.9780262524834.119.

4. *See generally* Alice E. Marwick et al., *Youth, Privacy and Reputation* (Harvard Law Sch. Pub. L. & Legal Theory, Working Paper No. 10-29, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588163.

tion than they are otherwise.[5] (The same, to be clear, is likely true of adults, who often make the same ill-informed decisions that youth make about sharing information about themselves online.)

What studies demonstrate on this score is that both youth and adults have a range of concerns about privacy. Some children and teens do show less concern than adults about their privacy online, although the data are inconclusive on this score.[6] But studies also show that teens, in fact, are often "*more* vigilant than adults in terms of privacy-protecting behaviors, although they are more likely to engage in 'less ethical' approaches like flaming and providing false information."[7]

When youth are concerned about risk, they will engage in privacy-protective behaviors, such as adjusting their privacy settings, refusing to provide information, providing false information, or avoiding certain websites.[8] However, most youth (like most adults) do not read websites' privacy policies or practices, and may be unaware when their information is at risk of disclosure to third parties.[9] These findings put pressure on the current "notice and consent" (also described as "notice and choice") model of privacy protections in commercial websites. These models are unlikely to be the most effective ways to empower Internet users to manage their personal information in light of youth practice in digitally mediated environments.

IV. THE NEED FOR NEW COLLABORATIVE POLICYMAKING MECHANISMS

We need to establish mechanisms that enable collaboration between those who set policy—through law, regulation in schools, policies in corporations, or policy enforced by computer code—and those who best understand youth media practices. In addition, we need to establish a feedback loop that works and a dialogue that genuinely runs in two directions: between those who are under pressure to set rules and those who are in the field, listening to the way that our youth are relating to information, to one

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5. This finding emerged from focus groups that the Author, along with his coauthor, Urs Gasser, performed as part of the research for a book, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES (2008). Similar studies have also shown that youth are capable of learning to control more effectively the information that they disclose, up to a point.

6. *See* Marwick et al., *supra* note 4, at 12.

7. *Id.* at 33 (emphasis in original).

8. *See* Seounmi Youn, *Determinants of Online Privacy Concern and Its Influence on Privacy Protection Behaviors Among Young Adolescents*, 43 J. CONSUMER AFF. 389, 406 (2009).

9. *See id.* at 405–06; Valerie Steeves & Cheryl Webster, *Closing the Barn Door: The Effect of Parental Supervision on Canadian Children's Online Privacy*, 28 BULL. SCI. TECH. & SOC'Y 4, 9 (2008).

another, and to institutions. There is an important role, too, for those who focus not so much on the data, but on the theory behind our policies. Any policymaking requires a stable theoretical frame as a starting point and an ongoing refinement of these theories where the data point to the need for adjustment.

This mechanism should be deployed to address, at a minimum, a range of policy interests that affect youth and their media practices. These policy issues include both big "P" (law, rules, and regulations passed and enforced by national, state, and local authorities) and small "p" (less formal policies at schools and common practices that strongly govern behavior) versions of policy issues. The first cluster of relevant issues includes those that tend to dominate the public discourse and which frame the policy discussion in negative terms. The second cluster includes "metaissues" that relate to big-picture, forward-looking policy and funding issues that are equally important areas of focus.

A. Cluster One

In the primary cluster fall those issues that arise from problems rather than opportunities. A major issue that tends to present itself—mostly through the concerns of parents—is child safety. These fears relate to risky behaviors, predation, sexting, bullying, and access to harmful content, and tend to drive public discourse and debates about strategies such as filtering of online content and connections. Closely related in public discourse is privacy, associated with the fear that kids share too much information about themselves online. Discussions of intellectual property likewise merit our attention, from the perspective of both piracy (instances in which kids take someone else's copyrighted work for consumptive purposes without permission) as well as remix (where kids take copyrighted material for the purpose of creative reuse). Concerns about the credibility of information, information quality, and information overload are less often addressed as policy issues, but are likewise extremely important.

B. Cluster Two

In the secondary—less obvious—cluster of issues fall funding and other crosscutting issues that could have a large-scale impact on youth media practice, especially related to teaching and learning. Examples include the Obama administration's "Race to the Top,"[10] American Recovery and Reinvestment Act of 2009,[11] and related funding streams that can support innovative work to reimagine learning. The FCC's *National Broadband*

10. *See* U.S. DEP'T OF EDUC., RACE TO THE TOP FUND, http://www.ed.gov/programs/racetothetop/index.html (last visited Oct. 23, 2010).

11. Pub. L. No. 111-5, 123 Stat. 115-521.

Plan is another such example, insofar as it addresses not only issues of access to technology for all communities (including but limited to open access and network neutrality) but also how the nation can leverage access to increased broadband for learning, activism, and entrepreneurship, and funding opportunities for innovative work using the network.[12] The *National Educational Technology Plan* also falls in this cluster.[13] The internal policies and funding decisions in schools, libraries, and museums are highly relevant and broadly crosscutting. Debates about after-school and extended learning time and related conversations about learning inside and outside of schools have potentially enormous consequences. And innovation policies, designed to engage business leaders, entrepreneurs, and venture capitalists in preparing kids for a 21st-century workforce, might well play an important role in the future.

Young people tend to view the Internet as a social space.[14] The relationships that youth maintain are not segmented between "online" and "offline." The social dynamics of friendship for many youth make the sharing of information online a part of creating and maintaining a coherent sense of identity. Most youth interact online with people they already know offline. On the other hand, between forty-five and seventy-nine percent of youth report "chatting with strangers online," especially while playing online games.[15] Youth tend to focus more on the potential benefits of information disclosure than they do on potential harms.[16] Studies of twelve-year-olds and older teens have found that youth take a "risk–benefit" approach to sharing information, becoming more willing to disclose if they anticipate

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12. *National Broadband Plan: Connecting America*, BROADBAND.GOV, http://www.broadband.gov/ (last visited Nov. 13, 2010).

13. *See* U.S. DEP'T OF EDUC., NATIONAL EDUCATION TECHNOLOGY PLAN 2010, http://www.ed.gov/technology/netp-2010 (last visited Nov. 13, 2010).

14. *See generally* MIZUKO ITO ET AL., THE JOHN D. AND CATHERINE T. MACARTHUR FOUND., LIVING AND LEARNING WITH NEW MEDIA: SUMMARY OF FINDINGS FROM THE DIGITAL YOUTH PROJECT (2008), http://www.macfound.org/atf/cf/%7BB0386CE3-8B29-4162-8098-E466FB856794%7D/DML_ETHNOG_WHITEPAPER.PDF; danah m. boyd, Taken Out of Context: American Teen Sociality in Networked Publics 138 (Fall 2008) (unpublished Ph.D. dissertation, University of California, Berkeley), http://www.danah.org/papers/TakenOutOfContext.pdf.

15. Andrew Schrock & danah boyd, *Online Threats to Youth: Solicitation, Harrassment, and Problematic Content*, *in* ENHANCING CHILD SAFETY AND ONLINE TECHNOLOGIES: FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASKFORCE app. C at 39 (John Palfrey et al. eds., 2008) (literature review), http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report-APPENDIX_C_Lit_Review_121808.pdf.

16. *See* RAFI SANTO ET AL., THE FOCUS DIALOGUES, MEETING OF MINDS: CROSS–GENERATIONAL DIALOGUE ON THE ETHICS OF DIGITAL LIFE 9 (2008), http://www.macfound.org/atf/cf/%7Bb0386ce3-8b29-4162-8098-e466fb856794%7D/DML-FOCUS-DIALOGUE-REPORT-0910.pdf.

benefits from sharing.[17] For many young people, being part of popular online social network sites carries meaningful social benefits.[18]

The context in which information is solicited or shared online is very important. Youth often do not see information as strictly "public" or "private" in a binary sense of "on" or "off" (much as they do not tend to distinguish crisply between the online and offline aspects of their lives). They distinguish between different levels of privacy; for example, on the popular social network site Facebook, youth may divide friends into different groups, to which in turn they may grant access to different types of information. Youth may share passwords with friends for perceived social benefits[19] while simultaneously expressing concern about keeping their online activities private from parents.[20] Rafi Santo recently observed that "youth see benefits in sharing information online, but among peers rather than with adults in their lives."[21]

However, differences in privacy attitudes are not simply generational. Attitudes toward privacy and reputation also vary considerably among youth themselves. Age, gender, and Internet experience are important variables; research indicates that the most Internet-savvy, experienced users are the most concerned about privacy and the most likely to take privacy-protecting steps.[22] When youth are aware of and concerned about risk, they engage in protective behaviors like refusing to provide information, providing false information, or avoiding certain websites.[23] However, neither youth nor adults are always concerned about risk when they should be.

Youth also vary in terms of their behavior related to certain types of personal information. Studies have found that teens share email addresses and passwords with one another,[24] possibly in order to demonstrate trust or to get technical help with accounts.[25] Social network sites require the dis-

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17. *See* Youn, *supra* note 8, at 390; Seounmi Youn, *Teenagers' Perceptions of Online Privacy and Coping Behaviors: A Risk–Benefit Appraisal Approach*, 49 J. BROAD. & ELEC. MEDIA, 86, 98 (2005).

18. *See* boyd, *supra* note 3, at 119.

19. *See* Steeves & Webster, *supra* note 9, at 10.

20. *See, e.g.*, Anne West et al., *Students' Facebook 'Friends': Public and Private Spheres*, 12 J. YOUTH STUD. 615, 620 (2009).

21. *See* SANTO ET AL., *supra* note 16, at 10.

22. *See* Ian Grant, *Online Privacy–An Issue for Adolescents*?, PROCEEDINGS OF THE CHILD AND TEEN CONSUMPTION CONFERENCE 9–11 (2006), http://www.cbs.dk/content/download/41873/616561/file/.

23. *See* Marwick et al., *supra* note 4, at 33; Youn, *supra* note 8, at 403.

24. *See* Steeves & Webster, *supra* note 9, at 8, 10; AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, TEENAGE LIFE ONLINE: THE RISE OF THE INSTANT-MESSAGE GENERATION AND THE INTERNET'S IMPACT ON FRIENDSHIPS AND FAMILY RELATIONSHIPS 3 (2001), http://www.pewinternet.org/~/media//Files/Reports/2001/PIP_Teens_Report.pdf.pdf.

25. *See, e.g.*, boyd, *supra* note 14, at 183.

closure of certain information,[26] but studies suggest many public profiles are incomplete. Public information often includes first names, photos, and information about interests, but surnames, phone numbers, and addresses are shared less frequently.[27] Teenagers sometimes lie about their information, often because they believe that inaccurate information is necessary for online safety.[28] One study shows that females are more likely to have private profiles than males.[29] Most relevant studies have examined social network site practices among college students; supplementary research on younger children is needed to discover what information they typically share. In addition to profile information and passwords, youth commonly share user-created content, like photos, videos, or blog entries.[30]

Social network sites require sharing at least some personal information,[31] but the choice of what information to disclose is part of the dynamic process of defining identity for young people.[32] Research shows that youth do not always understand and use the current generation of privacy-protecting tools on social network sites.[33]

V. TRANSFORMING LEARNING, SOCIALIZING, AND COMMUNICATION PRACTICES

The use of electronic media has led to transformations in learning, socializing, and communication practices among youth—many of which are overwhelmingly positive. Since technologies and youth practices change rapidly, we can, at best, take only a "snapshot of a moving target."[34] As difficult as this research task is, we do know several important things about

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26. *See generally* AMANDA LENHART & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, TEENS, PRIVACY & ONLINE SOCIAL NETWORKS: HOW TEENS MANAGE THEIR ONLINE IDENTITIES AND PERSONAL INFORMATION IN THE AGE OF MYSPACE (2007), http://www.pewinternet.org/~/media//Files/Reports/2007/PIP_Teens_Privacy_SNS_Report_Final.pdf.pdf.

27. *See id.* at iii.

28. *See* boyd, *supra* note 14, at 149.

29. Amanda Burgess-Proctor, et al., *Cyberbullying and Online Harassment: Reconceptualizing the Victimization of Adolescent Girls*, *in* FEMALE VICTIMS OF CRIME: REALITY RECONSIDERED 162 (V. Garcia & J. Clifford eds., 2010).

30. AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, TEENS AND SOCIAL MEDIA: THE USE OF SOCIAL MEDIA GAINS A GREATER FOOTHOLD IN TEEN LIFE AS THEY EMBRACE THE CONVERSATIONAL NATURE OF INTERACTIVE ONLINE MEDIA i (2007), *available at* http://www.pewinternet.org/~/media//Files/Reports/2007/PIP_TEENS_SOCIAL_MEDIA_FINAL.PDF.PDF (reporting that 59% of all teens share user-created content).

31. *See* LENHART & MADDEN, *supra* note 26, at ii–iii.

32. *See* JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 23 (2008).

33. *See* Bernhard Debatin et al., *Facebook and Online Privacy: Attitudes, Behaviors, and Unintended Consequences*, 15 J. COMPUTER-MEDIATED COMM. 83, 86 (2009).

34. *See* Schrock & boyd, *supra* note 15, at 120.

current youth media practice. First, young people as a group are using media—digital media in particular—more than ever before.[35] Among young people born after roughly 1980, activities like content generation, remixing, collaboration, and sharing are important aspects of daily life.[36] Many of these activities are *friendship-driven*: most youth interact online with people they already know from their offline lives, using the Internet to maintain existing relationships.[37] Activities can also be *interest-driven*: opportunities to develop expertise in specialized skill areas, like animation or blogging.[38] In either context, the casual use of new media is an important way to develop social and technological skills.[39]

Though we often generalize about youth media practice in America, it is important to note that not all children are "born digital."[40] Not all forms of Internet access are equal—the "digital divide" still limits opportunities for many youth, especially those in lower socioeconomic brackets. Youth who do not have access to the Internet at home may be missing out on opportunities to develop important social and technical skill sets. Youth who do not have the opportunity to develop familiarity and confidence with electronic media may have trouble navigating social interactions in online communities or recognizing biased, unreliable information, placing themselves at increased risk. Access alone does not guarantee parity in experience. Youth who depend on computers in libraries and schools, which often use one-size-fits-all filtration software, may be not able at all to access certain sites and services, placing them at a disadvantage compared to peers with better access. Many youth, likewise, rely upon mobile devices rather than fixed-line connections with faster speeds, or mobile devices without the ability to download new applications in the manner that smart phones do. The notion of the participation gap between those with sophisticated skills to use digital media and those without has been developed in detail both theoretically and through empirical data.[41]

The full picture of how electronic media are changing both learning and socializing is still emerging. This orientation toward the future is yet another reason why social science—in the form of observations over

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35. VICTORIA J. RIDEOUT ET AL., THE HENRY J. KAISER FAMILY FOUND., GENERATION M^2: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 2 (2010), http://www.kff.org/entmedia/upload/8010.pdf.

36. *See, e.g.*, ITO ET AL., *supra* note 14, at 23–26; PALFREY & GASSER, *supra* note 32.

37. boyd, *supra* note 14, at 106; *see also* PALFREY & GASSER, *supra* note 32, at 95.

38. *See* boyd, *supra* note 14, at 106.

39. *See generally* ITO ET AL., *supra* note 14, at 20–21.

40. *See generally* PALFREY & GASSER, *supra* note 32.

41. *See* Eszter Hargittai, *Digital Na(t)ives? Variation in Internet Skills and Uses Among Members of the "Net Generation"*, 80 SOCIOLOGICAL INQUIRY 92, 93 (2010), http://www.webuse.org/pdf/Hargittai-DigitalNativesSI2010.pdf.

time—is so important to the establishment of a better shared understanding of youth media practices and to better lawmaking in this field. One of many challenges associated with research in this area is that we are only now observing children who have grown up with email, social network sites, cell phones, and other technologies. It is clear, however, that engagement with electronic media has great educational potential. A recent ethnographic study examined peer-based learning practices among youth, and found that electronic media provide the opportunity for intense, self-directed, interest-driven study.[42] *Geeking out*—developing specialized expertise and sharing it with others[43]—in many respects does not resemble traditional classroom-based education; yet it fosters important technological and social skills, including confidence, leadership, and communication. Youth also benefit from socializing in digitally mediated environments, learning the social skills necessary to participate in creative and collaborative work environments.[44] As we seek to protect youth from the unforeseen risks of online engagement, it is essential that we do not in turn foreclose the benefits made possible by self-directed, informal learning and socializing through new technologies or experimentation with teaching using new technologies in the classroom.

For some students, the use of new media also offers great opportunities in the context of formal education and research endeavors. Most of the studies of media in formal educational settings to date focus on college students (the study of which population poses fewer methodological challenges than young children). According to one such study, most college students use Google, Wikipedia, and friends for everyday, informal research; for course research, the most-used resources are course materials, Google, and scholarly databases.[45] While students welcome online access to library resources, their frustrations and challenges include narrowing down topics, sorting through results to find relevant resources, and assessing the credibility of sources. Some critics are concerned that the widespread practice of media multitasking impairs effective learning.[46] These observations underscore the need for more effective media literacy education. Technology can generally improve educational curricula by enabling

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42. *See* ITO ET AL., *supra* note 14, at 1–2.

43. MIZUKO ITO ET AL., HANGING OUT, MESSING AROUND, AND GEEKING OUT: KIDS LIVING AND LEARNING WITH NEW MEDIA 66 (2009), *available at* http://www.mwsmediapodcasts.com/media/documents/digitalyouth/hangingoutmessingaroundgeekingout.pdf.

44. *See id*. at 17.

45. ALISON J. HEAD & MICHAEL B. EISENBERG, LESSONS LEARNED: HOW COLLEGE STUDENTS SEEK INFORMATION IN THE DIGITAL AGE 3, 32 (2009), http://projectinfolit.org/pdfs/PIL_Fall2009_Year1Report_12_2009.pdf.

46. *See, e.g.*, Urs Gasser & John Palfrey, *Mastering Multitasking*, EDUC. LEADERSHIP, March 2009, at 16–17.

instructors to address individualized needs. Technologies can also help to support new and enhanced pedagogies to provide multiple avenues for expression, engagement, and content presentation.[47] Some promising recent efforts have focused on harnessing gaming interfaces to supplement curricula.[48] Technology can also play a crucial role in making information more accessible to youth with disabilities. For example, mobile devices (such as cell phones and smartphones) can facilitate communication between hearing-impaired students and their teachers and classmates.[49] Assistive technologies can and should go beyond basic accessibility, so students have an educational experience that is not merely adequate, but enhanced.

Social science research can also serve an important function: to help policymakers envision what might be, in terms of new potential improvements in teaching and learning, entrepreneurship and innovation, and activism and civic engagement. These lessons are too rich, and too instructive, to ignore. As we look to the future—the future in which our children and grandchildren will lead—the ability to understand how they see the world and mediate their experiences through technology will take on greater and greater importance.

Some studies suggest that children may be more likely than adults to restrict access to their information on social network sites.[50] However, if privacy settings are too complex, they may confuse or turn off youth (and adults) and render their protections useless.

The participation gap between the most sophisticated Internet users and the most naïve is extremely important in this context. Youth who are less Internet-savvy—often younger children or teens without home Internet access or supportive teachers and mentors—might be expected to have the most trouble negotiating privacy settings, and thus be at increased risk of unwitting public disclosure of personal information. While privacy settings should be complex enough to permit granular control of personal information within one's various networks and friend groups, social network hosts should also take responsibility for making these controls easier to find, understand, and use. Help should be provided, especially for younger users, and there should be a straightforward and transparent way to identify what profile information is publicly available. Social network site providers should also allow users to access what information is kept about them, how

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47. *See, e.g.*, CAST: CENTER FOR APPLIED SPECIAL TECH., http://www.cast.org (last visited Nov. 13, 2010); NATIONAL CENTER ON UNIVERSAL DESIGN FOR LEARNING, http://www.udlcenter.org/aboutudl/udlguidelines/introduction (last visited Nov. 13, 2010).

48. *See generally* JAMES PAUL GEE, WHAT VIDEO GAMES HAVE TO TEACH US ABOUT LEARNING AND LITERACY (2007).

49. *See* TRACY GRAY ET AL., NAT'L INST. FOR TECH. INNOVATION, UNLEASHING THE POWER OF INNOVATION FOR ASSISTIVE TECHNOLOGY 7 (2010).

50. *See, e.g.*, LENHART ET AL., *supra* note 30, at iii.

it is used, and who can see it. Social network site providers should set privacy defaults that favor increased security for personal information so that the least sophisticated users are protected from unwanted information disclosure.

Parents should be aware that discussing media content with their children (during web-surfing or afterward) can be an effective strategy to help reduce the amount of personal information disclosed—more so than simply prohibiting or limiting children's access.[51] Teens whose parents monitor or participate in their Internet use are more concerned about privacy than those who do not.[52] However, youth also may perceive monitoring by parents as a violation of their privacy.[53] One recent study of parent-child pairs found that children were more resistant to protective strategies involving parental monitoring and coviewing than they were to user empowerment strategies, or even some forms of government or industry protection.[54] Resources to help parents understand the ever-changing and complicated privacy settings used by websites like Facebook can be very constructive,[55] but parents should be advised that filtering and monitoring strategies can backfire by undermining the trust of their children, especially as they grow older.

VI. CONCLUSION

Based upon these social science research findings, public policymakers ought to consider five approaches to addressing the privacy concerns of youth in the online context.

1. Understand the manner in which youth are engaging in life in a digital era, both online and offline, and how they think about the concepts of public and private. What is "public" and what is "private" for youth has not changed overnight as a result of the advent of social network sites. But a

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51. *See, e.g.*, May O. Lwin et al., *Protecting Children's Privacy Online: How Parental Mediation Strategies Affect Website Safeguard Effectiveness*, 84 J. RETAILING 205, 210, 214 (2008); Alice E. Marwick et al., *Youth, Privacy and Reputation* 18 (The Berkman Ctr. for Internet & Soc'y at Harvard Univ., Working Paper No. 10-29, 2010); Seounmi Youn, *Parental Influence and Teens' Attitude Toward Online Privacy Protection*, 42 J. CONSUMER AFF. 362 (2008).

52. *See, e.g.*, Deborah M. Moscardelli & Richard Divine, *Adolescents' Concern for Privacy When Using the Internet: An Empirical Analysis of Predictors and Relationships with Privacy-Protecting Behaviors*, 35 FAM. & CONSUMER SCI. RES. J. 232, 243 (2007).

53. *See* West et al., *supra* note 20, at 617–18, 620–22; ITO ET AL., *supra* note 14, at 19.

54. Sahara Byrne, *Sahara Byrne on Parents vs Child Reports of Internet Behaviors*, THE BERKMAN CTR. FOR INTERNET & SOC'Y AT HARVARD UNIV. (Dec. 15, 2009), http://cyber.law.harvard.edu/interactive/events/luncheons/2009/12/byrne.

55. After Facebook revised its privacy controls in the Fall of 2009, Common Sense Media provided a guide for parents confused by the new settings. *Parent Advice, Facebook for Parents*, COMMON SENSE MEDIA, http://www.commonsensemedia.org/facebook-parents (last visited Nov. 13, 2010).

great deal of social life for youth is occurring in networked public spaces, which means that a great deal of information about youth as they go about everyday life is recorded, whether through their active disclosure or otherwise.

2. Adults need to acknowledge and take responsibility for their roles in supporting or violating young people's privacy, especially in ways that can backfire.

3. Teaching media literacy skills relating to privacy in a digital era should be emphasized in a manner that is not focused on scare tactics.

4. Private companies—those that hold a great deal of information about young people in particular—need to emphasize software design that makes privacy settings and rules easier to adjust and to understand. These companies should take steps to avoid commercialization of the environments in which childhood is taking place for today's youth.

5. As a matter of public policy, the dominant "notice and choice" and self-regulatory framework for data held in digital forms should be rethought. We need to rethink this issue for youth in particular to ensure a greater level of user control over and awareness of personally identifiable information over the long term, including substantive legal protections for user information privacy.

The above five approaches are in addition to traditional regulatory approaches to protecting youth privacy in digital contexts. We should consider methods of both direct and indirect regulation. Social norms are extremely powerful and can be leveraged for good. Peers can be great teachers and role models—or may reinforce risky behaviors. Technology companies have important roles to play, as do parents, teachers, social workers, doctors, and other mentors. Our approaches to public policy need to take advantage of these multiple approaches and modes of regulation, with public officials providing both leadership and a backstop where things go wrong.

Social science research can help policymakers understand the dynamics of youth media practice that give rise to the concerns associated with life online and offline that we need to address. This research can help policymakers anticipate which solutions or approaches are more or less likely to mitigate the harms that we seek, as a society, to address. The case of privacy policy for youth is illustrative of the role that social science can play in developing more effective public policies.

The Challenge of Increasing Civic Engagement in the Digital Age

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"The genius of democracies is seen not only in the great number of new words introduced but even more in the new ideas they express."—Alexis de Tocqueville[1]

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1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 478 (George Lawrence trans., HarperCollins 2000) (1835).

I. INTRODUCTION

The Internet has become the new platform for freedom of speech and the expression of civic ideas. With more than seventy percent of Americans online, virtual micro-communities, or niche web portals, have made it easier for people to deliberately seek out and sustain relationships with those that share similar interests, opinions, and backgrounds.[2] Citizens can pick and choose both the online destination where they want to share and the preferred format to communicate their opinions, whether through a blog, video, podcast, or tweet. Before the Internet, these ideas were shared at community town hall and block club meetings. People came together physically to mobilize around issues and to develop strategies for collective action. The civil rights movement of the 1960s is one such example. Civil rights leaders often planned activities in church basements, ultimately leading to well-orchestrated protests against legalized racism. These demonstrations culminated in a series of laws banning discrimination in public accommodations, public facilities, public education, federally assisted programs, employment, and voting.[3]

Most recently, the 2008 presidential election demonstrated how the Internet could drive public opinion and voter participation. President Barack Obama's campaign used online tools and social networks in a way that contributed to his victory as the first African American president of the United States. The Obama campaign used the Internet to raise half a billion dollars, the largest amount of contributions to a political operation ever received through online donations.[4] His website, MyBarackObama.com, gathered thousands of e-mail addresses, and, in turn, nurtured a vast base of national volunteers supporting the campaign's field tactics. Young supporters of President Obama, especially those under the age of thirty, used social networking sites to inspire their peers to vote, resulting in more than twenty million young people participating in the 2008 election, an increase of 3.4 million compared to 2004.[5]

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2. *See* John B. Horrigan, *Broadband Adoption and Use in America* 3 (FCC, Omnibus Broadband Initiative, Working Paper Series No. 1, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf; JON P. GANT ET AL., JOINT CTR. FOR POLITICAL & ECON. STUDIES, NATIONAL MINORITY BROADBAND ADOPTION: COMPARATIVE TRENDS IN ADOPTION, ACCEPTANCE AND USE 1 (Feb. 2010), http://www.jointcenter.org/publications1/publication-PDFs/MTI_BROADBAND_REPORT_2.pdf.

3. *See generally* Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000(f) (2006).

4. *Summary Data for Barack Obama*, OPENSECRETS.ORG, http://www.opensecrets.org/pres08/summary.php?id=n00009638 (last visited Nov. 15, 2010); Mitch Wagner, *Obama Election Ushering in First Internet Presidency*, INFORMATIONWEEK.COM (Nov. 5, 2008), http://www.informationweek.com/news/government/showArticle.jhtml?articleID=21200081.

5. Ctr. for Info. & Research on Civic Learning & Engagement, *Youth Turnout Rate Rises to at Least 52%*, CIVICYOUTH.ORG (Nov. 7, 2008), http://www.civicyouth.org/?p=323.

Today, Internet use continues to increase. As previously stated, more than seventy percent of Americans are online, and use of social networking sites has tripled.[6] College-educated, affluent minorities that were previously the slowest to use the web are now more prevalent users.[7] In many ways, this surge in online activity makes it possible for people to organize and unite in more powerful ways and voice opinions on predominant issues. Yet, disparities in digital access, especially among the less educated and poor, further contribute to the further alienation and possible disenfranchisement of these groups. Moreover, the affinity of individuals toward these online, niche-based communities can potentially inhibit broad coalition building, an essential aspect of American democracy.

While the example of the 2008 presidential election foreshadows the role of the Internet in our democracy, addressing the factors that create and maintain stratification on the web is the main focus of this Essay. I argue that unequal access to the Internet affects civic engagement when groups are underrepresented or on the periphery of online activity. Moreover, political deliberation among a diverse group of citizens is limited when individuals cluster themselves on the web within communities that essentially mirror their offline networks and experiences. In this Essay, I offer policymakers and other civic leaders interested in creating a just and inclusive democracy a series of strategies for transforming the Internet into a place for deliberative exchange that impacts future public policies, promotes digital inclusion, and restructures online platforms to more effectively broker relationships between diverse people and causes.

This Essay will first explore the tension between traditional and online civic engagement and underscore how the Internet is shaping how public opinion gets exchanged and acted on. Next, I will delve into disparities in digital access and how these restrict the less educated, able, and affluent from contributing to public discourse. Finally, I will offer a series of strategies for policymakers to ensure the Internet becomes a space for more robust civic engagement by drawing attention to its structure, experience, and role in the future of American democracy.

II. THE NEED FOR A NEW FRAMEWORK

The concepts of democracy and civic engagement have long interest-

6. *Social Networking and Blog Sites Capture More Internet Time and Advertising*, NIELSENWIRE (Sep. 24, 2009), http://blog.nielsen.com/nielsenwire/online_mobile/social-networking-and-blog-sites-capture-more-internet-time-and-advertisinga/. *See also* Scott Keeter, Juliana Horowitz & Alec Tyson, *Young Voters in the 2008 Election*, PEW RESEARCH CENTER PUBLICATIONS (Nov. 12, 2008), http://pewresearch.org/pubs/1031/young-voters-in-the-2008-election.

7. *See* GANT ET AL., *supra* note 2, at 1.

ed scholars exploring how citizens engage in civic and political processes.[8] Since 1835, when De Tocqueville outlined the challenges facing American democracy,[9] researchers have investigated civic participation and its impact on individual and collective action. Recent scholars, however, have argued that civic engagement has been steadily declining in our nation since the mid-1960s. Robert Putnam concluded that eroding family structures due to two-career households, suburbanization and urban sprawl, increasing television consumption, and generational shifts all led to waning participation in community life.[10] For Putnam, these factors negatively impact the growth of social capital, that which brings citizens together to resolve collective problems.

Other scholars echo Putnam's beliefs and perceive the Internet as the next medium to hamper the gains of democracy. Frank Rusciano pointed to a degradation in social capital, especially as the Internet prompts people to lose sight of their ability to share and form physical relationships with one another.[11] Thus, the more people are online, the less likely they are engaged in traditional, physical spaces that promote intimacy—whether at a parent-teacher association meeting or a baseball game.

Sociologist Barry Wellman took another approach to understanding the Internet as help or hindrance to civic engagement. Sharing a concept called "networked individualism," Wellman argues that new technologies are shifting the core of communities from physically fixed and bounded groups to social networks.[12] For Wellman, the Internet has not necessarily contributed to social isolation, but has created new forms of social interaction that cannot be measured against standard indicators of social capital. New online collaboration tools, such as blogs, podcasts, and wikis, may lead to the revitalization of American democracy, as more people are participating and contributing to current public discourse.

To Wellman's point, social networking sites like Facebook, Twitter, MySpace, and Meetup are becoming the new vanguards for public engagement as they build communities of similar interests and galvanize people around common causes.[13] Becoming the preferred destination for

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8. *See generally* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY (Theda Skocpol & Morris P. Fiorina eds., 1999).

9. *See generally* DE TOCQUEVILLE, *supra* note 1.

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

11. *See* Frank Louis Rusciano, *"Surfing Alone": Internet Communities, Public Opinion, and Civic Participation*, PUBLICOPINIONPROS.NORC.ORG (Apr. 2005), http://www.publicopinionpros.norc.org/features/2005/apr/rusciano.asp.

12. *See* Barry Wellman, *Physical Place and Cyberplace: The Rise of Personalized Networking*, 25.2 INT'L J. URBAN & REG. RES. 227, 228, 231, 247–48 (2001).

13. For example, since Facebook introduced *Causes* to over 175 million Facebook users in 2007, *Causes* has been the leader in getting individuals aligned with the missions of vari-

many, social networking websites are reengineering how individuals share, discuss, and exchange ideas, as well as forge connections based on similar interests, tastes, and even friends. In 2009, research from the Pew Internet and American Life Project concluded that "46% of online American adults 18 and older use a social networking site like MySpace, Facebook or LinkedIn, up from 8% in February 2005."[14] Although younger people are more likely to use social networking, over the past few years, older Americans are flocking to social networking sites and quickly becoming the fastest growing group of social network users.[15]

The earthquake in Haiti is a recent example of new media's influence on civic engagement. When news of the tragedy hit, millions of Internet users donated money toward disaster relief efforts through websites and text-messaging campaigns. These numbers were expanded by thousands of empathetic Internet users who also reached out to their social networks to forge volunteer efforts and find emergency items for Haiti's affected citizens.[16]

These dynamic online tools are also being used by government at all levels to increase citizen feedback and participation. The Benton Foundation's publication, *Using Technology and Innovation to Address Our Nation's Critical Challenges,* stated that the Internet has "tremendous opportunity to reenergize government, making it more efficient, transparent, accountable, and open to the active participation of the citizens it serves, while generating cost savings in the billions of dollars."[17] Government use of web 2.0 and 3.0 applications further promotes efficiency when citizens are able to point out waste, fraud, and abuse.

The bipartisan Federal Funding Accountability and Transparency Act of 2006—cosponsored by then-Sen. Barack Obama and Sen. John McCain and which resulted in the launching of *USASpending.gov* in December

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ous organizations.

14. Amanda Lenhart, *The Democratization of Online Social Networks*, PEWINTERNET (Oct. 8, 2009), http://pewinternet.org/Presentations/2009/41--The-Democratization-of-Online-Social-Networks.aspx.

15. *See* MARY MADDEN, OLDER ADULTS AND SOCIAL MEDIA 2 (Aug. 27, 2010), http://pewinternet.org/~/media//Files/Reports/2010/Pew%20Internet%20-%20Older%20Adults%20and%20Social%20Media.pdf.

16. *See, e.g.*, Anita Hamilton, Donating by Text: Haiti Fundraising Goes Viral, TIME, Jan. 13, 2010, *available at* http://www.time.com/time/business/ article/0,8599,1953528,00.html; M.G. Siegler, Text Message Donations to Haiti Cross $10 Million; Companies Commit Immediate Funds, TECHCRUNCH (Jan. 15, 2010), http://techcrunch.com/2010/01/15/haiti-text-donations/; $2 Million in Donations for Haiti, via Text Message, BITS (Jan. 13, 2010, 6:38 PM), http://bits.blogs.nytimes.com/2010/01/13/1-million-in-donations-for-haiti-via-text-message/.

17. JONATHON RINTELS, THE BENTON FOUNDATION, AN ACTION PLAN FOR AMERICA: USING TECHNOLOGY AND INNOVATION TO ADDRESS OUR NATION'S CRITICAL CHALLENGES 34 (2008), http://www.benton.org/sites/benton.org/files/Benton_Foundation_Action_Plan.pdf.

2007—is an example of government's promotion of the Internet for civic engagement.[18] President Obama's December 2009 *Open Government Directive* demonstrates the federal government's commitment to innovation and civic participation.[19] The FCC's use of online social networking sites and new media tools, such as YouTube, Second Life, Twitter, and Facebook, connected some 335,000 citizens to public workshops and online public feedback forums in the development of the *National Broadband Plan*.[20] The final report reflected not only the formal written input of tens of thousands of commentators, but also of the many thousands of other citizens who submitted comments to the FCC broadband blog, edited portions of draft text via IdeaScale, and submitted questions and comments during webcasted public hearings and workshops.

These examples of how the Internet is increasing civic engagement are promising, especially as people become more dispersed and diverse in our nation. Yet the question of whether or not these online exchanges can inspire collective action and generate social change remains unanswered. Historic social movements that fought for civil and women's rights were highly dependent on robust exchanges and tactics to formulate their call to action. From college students to church pastors to seasoned community organizers, the people that were a part of these movements knocked on doors, made telephone calls, and participated in nonviolent protests to draw attention to their issues. Participants in these movements were highly diverse in their racial and ethnic origin, gender, sexual orientation, socioeconomic status, education, values, and interests. While their upbringing might have differed, their overarching belief in the power of democracy led to insurgency among these groups.

Can the Internet replicate this level of diversity and influence political activism? Will broad coalitions of people emerge from an online space that is still primarily controlled by one's affinity towards one social network over the other? Getting together with others to discuss issues of public concern on the web is just one form of collective action. And in agreement with Putnam, there is probably no substitute for the intimacy that forms when individuals are physically drawn together. However, even behind the

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18. Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186; *see also* RINTELS, *supra* note 17, at 34 (noting that information about federal grants, contracts, loans, and other financial information is available to the general public on USASpending.gov).

19. *See generally* Memorandum from Peter R. Orszag on Open Government Directive (Dec. 8, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

20. Aaron M. Cohen, *Social Networking and Open Government: U.S. Agency Harnesses the Internet to Address Broadband's Infrastructure Challenge*, FUTURIST (July 1, 2010), http://www.allbusiness.com/technology/software-services-applications-internet/14683371-1.html.

isolation of one's computer, the sophistication of the Internet in bringing people closer to public issues can possibly convert naysayers into supporters of emerging social movements.

The Internet presents an opportunity to extend the reach of our democracy and heighten the mobilization of citizens around issues of importance. To get there, however, issues related to disparities in digital access and social networks need to be addressed. The next section discusses these challenges in more detail.

III. DISPARITIES IN DIGITAL ACCESS

Despite an increase in national broadband adoption, many people remain offline. A recent report by the Joint Center for Political and Economic Studies found that among the 100 million Americans who do not have broadband at home, there are significant demographic differences based on age, gender, education, level of Internet experience, and income that potentially influence their acceptance and use of the Internet.[21] While more African Americans and Hispanics are getting online, those getting online tend to be more affluent and better educated.[22] Recent data released by the FCC and the U.S. Department of Commerce affirm this trend. According to the recent FCC Working Paper on broadband adoption and use, fifty-nine percent of African Americans have broadband connections at home,[23] reflecting a considerable increase from the forty-six percent who had adopted broadband at home in 2009.[24]

Unfortunately, those Americans who stand to gain the most from the Internet are unable to use it to break the trajectories of social isolation, poverty, and illiteracy. Seniors, low-income people, people with disabilities, and the less-educated segments of the American population who are wrought with economic and social hardship are largely not reaping the benefits of digital access. Table 1 illustrates some of these disparities.

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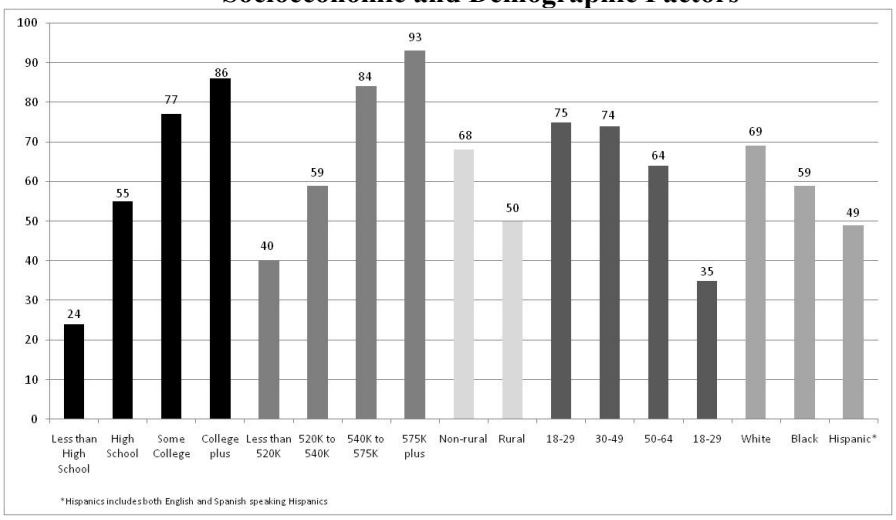
21. GANT ET AL., *supra* note 2, at 2.

22. *Id.* at 13.

23. Horrigan, *supra* note 2, at 3.

24. JOHN HORRIGAN, PEW INTERNET & AMERICAN LIFE PROJECT, HOME BROADBAND ADOPTION 2009: BROADBAND ADOPTION INCREASES, BUT MONTHLY PRICES DO TOO 4 (June 2009), http://www.pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx.

Table 1: Broadband Adoption by American Adults by Socioeconomic and Demographic Factors



Only twenty-four percent of people with less than a high school education and forty percent of households with incomes under $20,000 are likely to adopt broadband in America.[25] While differences in Internet access have slowly narrowed between whites, blacks, and Hispanics, income and educational attainment still define who benefits. The glaring statistics generated by a 2010 report published by the Joint Center for Political and Economic Studies indicated that low-income high school dropouts were three times less likely to have a residential broadband connection than were more affluent and educated individuals.[26]

The barriers of affordability, availability, and accessibility tend to be the primary reasons why vulnerable groups are not getting online.

A. Broadband Affordability

The cost of broadband continues to be a major barrier to broadband adoption by segments of the population. The recent FCC study on broadband adoption and use found that when consumers were asked what they paid for the various telecommunications services (cell phone, landline phone, Internet, cable, TV, satellite, or wireless broadband), overall respondents reported paying $40.68 per month for their broadband Internet connections.[27] Those who shared that they bundled Internet with other ser-

25. Horrigan, *supra* note 2, at 13.
26. GANT ET AL., *supra* note 2, at 2–3.
27. Horrigan, *supra* note 2, at 3–4.

vices paid on average $37.70, while others with a stand-alone connection reported $46.25 as their monthly bill.[28] The FCC data aligns with research from the April 2009 Pew Internet and American Life Project that reported an average monthly bill of $39 for users.[29] All of these findings clearly suggest that the price of monthly broadband services might serve as a barrier to individuals on a fixed or limited income.

B. Broadband Availability

The proximity to service also affects an individual's decision to adopt high-speed broadband. People from rural communities or urban markets without a proven-business case for services experience lag in getting connected to high-speed broadband services. Although penetration to underserved communities has been increasing with recent private sector investment and government stimulus programs, the need for ubiquitous access is still a persistent requirement to alleviate digital disparities that exist for vulnerable populations—especially seniors, low-income individuals, rural residents, and people with disabilities. Older minorities, especially those from rural communities, were the least likely to benefit from Internet access as compared to other groups.[30]

C. Broadband Accessibility

Having the necessary hardware, digital literacy training, and appealing online content also influences who gets online. While many policymakers see the promise of mobile broadband as narrowing digital access, people still require the hardware—whether a PC, smartphone, iPad, or netbook—to successfully navigate the web. While more minorities were likely to own cell phones, low computer ownership rates created additional obstacles to access for poor African Americans and Hispanics.[31] Moreover, individuals need the appropriate online training and experience to have an enriched online experience. Similar to driving a vehicle, novice Internet users require the training to be more effective navigators of the online world. Finally, how people perceive the value of the web is of equal importance. The majority of broadband research clearly indicates that a large proportion of Americans are simply not interested in getting online because of their preconceived notions about its value.[32] Creating relevant, meaningful content for citizens that is multilingual, literacy appropriate, and shared at different ability levels is an important catalyst for increasing online par-

28. *Id.*
29. HORRIGAN, *supra* note 24, at 5.
30. *See id.* at 13–14.
31. *See* GANT ET AL., *supra* note 2, at 2.
32. *See id.* at 29; Horrigan, *supra* note 2, at 27; HORRIGAN, *supra* note 24, at 41.

ticipation.

Digital inclusion has the greatest potential to benefit the very communities in which it is now lacking. A report issued by University of Minnesota's Institute on Race and Poverty asserts that broadband and the Internet are ultimately about access to employment, human services, and community opportunities. These opportunities improve quality of life by offering better wages, housing, social and health services, quality educational systems, and more.[33] Furthermore, being online allows these vulnerable populations to participate in the current conversations on political issues at their inception before becoming legislation.

Regrettably, civic activity, whether online or offline, tends to correlate with an individual's background. According to a 2009 report on the Internet and civic engagement from the Pew Internet and American Life Project, political activity is highly correlated with one's income and educational attainment.[34] More affluent and educated Internet users also are much more likely to be very politically engaged than those that are not well off.[35] While lack of access to a home broadband connection is a partial explanation for online differences, low-income, less educated people tend not to know what the overall issues are and do not have a means for debating them.[36] When we compare these statistics with the trend in Internet use, those segments of the population that could benefit from public policies aimed at reducing poverty and educational and social inequalities are limited by their lack of digital access. The impact of being alienated from predominant national conversations, therefore, fosters a new type of isolation, especially around the issues that matter most to our nation.

IV. DISPARITIES IN SOCIAL NETWORKS

Even with the increased use of online social network sites, there continue to be limitations. Some scholars argue that virtual communities merely mirror offline communities, especially in terms of economic, racial, and educational differences.[37] Thus, the current organization of the Internet's microcommunities might actually stratify the web and deepen the inequali-

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33. INST. ON RACE & POVERTY, DIGITAL JUSTICE: PROGRESS TOWARDS DIGITAL INCLUSION IN MINNESOTA 2 (2006), http://www.irpumn.org/website/projects/index.php?strWebAction=project_detail&intProjectID=12.

34. AARON SMITH ET AL., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND CIVIC ENGAGEMENT 36 (2009), http://pewinternet.org/~/media//Files/Reports/2009/The%20Internet%20and%20Civic%20Engagement.pdf.

35. *Id.* at 3.

36. *Id.* at 38.

37. *See, e.g.*, Eszter Hargittai, *Whose Space? Differences Among Users and Non-Users of Social Network Sites*, 13 J. COMPUTER-MEDIATED COMM. 276, 277–78 (2007); Nicole B. Ellison et al., *The Benefits of Facebook "Friends:" Social Capital and College Students' Use of Online Social Network Sites*, 12 J. COMPUTER-MEDIATED COMM. 1143, 1144 (2007).

ties that the nation seeks to narrow. Eszter Hargittai found, in her 2007 study about differences between social networking sites, that one's existing offline network not only serves to influence one's choice of social networks, but also places barriers to entry into new networks, especially when one's upbringing, race, or residence is identified.[38] In her evaluation of how college students used six popular social networking sites, she concluded that individuals were more likely to migrate to social networking sites with students from similar backgrounds because of the comfort of being around others like them.[39]

Researcher danah boyd, who studies how young people use the web, offered a similar theory by highlighting age, class, and race differences that surface between Facebook and MySpace teen users. boyd argues that Facebook teens tend to be the "good kids" who come from families where education and higher education are valued.[40] These young users are also "primarily white, but not exclusively. They are in honors classes, looking forward to the prom, and live in a world dictated by after school activities."[41]

In comparison, members of the popular MySpace social network—predominantly dominated by entertainment content—are Latino, immigrant, "gangstas," and alternative kids that do not align with status quo expectations.

According to boyd's research, "[t]hese are kids whose parents didn't go to college, who are expected to get a job when they finish high school[] [and] . . . plan to go into the military immediately after school[]."[42]

While the research in this area is evolving and more analysis needs to be undertaken, the clustering of people into online niche-based communities, even if subtle, is manifesting in social media. And many Internet users are leaning toward microcommunities that reflect their personal and professional experiences. While these locales have their place in our virtual social identities, more online applications and tools—especially those created through public-private partnerships—should facilitate broader exchanges between groups. These groups, in turn, influence more Internet users to embrace a range of opinions, needs, values, perspectives, and backgrounds that ultimately nurture more equitable solutions to public concerns.[43]

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38. *See generally* Hargittai, *supra* note 37.

39. *Id.* at 290–91.

40. danah boyd, *Viewing American Class Divisions Through Facebook and MySpace*, DANAH.ORG (June 24, 2007), http://www.danah.org/papers/essays/ClassDivisions.html.

41. *Id.*

42. *Id.*

43. The Obama Administration is currently promoting information transparency and collaboration through its Open Government initiative. The assumption in this Essay, however, is that more needs to be done to advance connections to make collaboration much more engaging.

V. THE FUTURE OF CIVIC ENGAGEMENT

Tapping into the potential of citizens is becoming increasingly important in our society. In the *National Broadband Plan*, the FCC identified civic engagement as one of many core issues that needs to be powered by the expansion of broadband. In the *Plan*'s summary, the FCC states that "[b]roadband can inform our communities and increase the level of citizen participation to strengthen local communities and the fabric of America's democracy. It can also expand opportunities to weave citizen-based innovation and collaboration into our government."[44] Stating that civic engagement is the "lifeblood" of our democracy and the "bedrock" of its legitimacy, the *National Broadband Plan* offers concise recommendations that bring people closer to government, and government information and tools closer to the government's constituents. Broadband is perceived as enhancing democratic participation, particularly as it seeks to inform and advise the public and extend the reach of information about the governing process.

The rapid transition to a digital economy as discussed in this Essay does not come without challenges. In good conscience, policymakers and other civic leaders must seek out solutions that ensure a more just and equitable Internet that not only reflects the diversity of our nation but also encourages broad coalitions among different groups of people and their causes. Based upon the findings shared in this Essay, policymakers might consider the following approaches to ensure that citizens are fully represented in the deliberative exchanges that take place on the Internet.

First, policymakers, in partnership with web developers, should consider an Internet that empowers and engages people to institute social change. This might require a different approach to its design, and a new set of implementers to develop more applications and tools that encourage citizens to participate as deeply as those already plugged in. Imagine how people and information could be organized on the web if both hackers and activists worked together to build more progressive applications that fostered alliances around causes and not just people, and enabled opportunities for collective action, not just volunteerism or special interest affiliation. The web definitely has space for more groups like Meetup and MoveOn.org that are inspiring people to make a difference.

These implementers must also create innovative strategies for connecting people with others that fall outside of their familiar social networks, and encourage users to take more risks in building these types of coalitions. While government can influence the growth of these online communities and technology experts can design them, activists whose ex-

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44. *Broadband and Civic Engagement*, BROADBAND.GOV, http://www.broadband.gov/issues/civic-engagement.html (last visited Nov. 15, 2010).

pertise is to organize people must be included on the team of designers leading these types of public-benefit applications.

Second, for Americans to drive the future of our democracy through the Internet, we must seed more online macrocommunities, proportionate to those that are niche-based, to engage broad groups of people from all backgrounds, viewpoints, and interests. These groups must then work on common causes to alleviate domestic and global issues. These macrocommunities must also play a vital role in surfacing issues to key decision makers, not just to others within the same network.

Third, policymakers must accelerate access to high-speed broadband for underrepresented groups. If the online world is becoming the central destination for sharing, exchanging, and formulating opinions on issues that improve the nation, then all people need to be involved in the conversation. Promoting ubiquitous access and broadband adoption for all citizens must be a priority to ensure that a new information divide does not emerge as the next civil rights issue for marginalized groups. Gaining the maximum amount of diversity of background and opinion is also critical to positioning the Internet as the future of civic engagement. When the Internet simply mirrors the status quo, public issues and policies will only reflect the experiences of those introducing and debating them. Finding ways to attract more people to the web through programs that address the critical barriers to adoption, like a reformed Universal Service Fund (USF) to address cost barriers and hardware challenges, or incentives to the public and private sectors for the creation of public purpose content and applications, will lead to a more diverse online community and fuel richer political deliberations.

Fourth, it goes without saying that the value of relationships is still critical in a democracy. How we relate to one another both online and offline is at the core of civic engagement. When a person goes into a store, he or she forms a relationship with the sales associate. When a child goes to school, he or she develops a connection with the teacher. Though potent in form, the Internet cannot replace these offline experiences that govern how we interact in our society and the emotional attachment often associated with our relationships.

An example of personal interaction is when President Obama's campaign leveraged the Internet to contribute to his victory. The Obama campaign married digital tools with traditional forms of community organizing. Where people from the same community might have found each other on his website, they organized meetings at each other's homes or in community centers to advocate on behalf of his positions. Obama supporters used the web to identify districts where more door knocking needed to occur, and campaign e-mails were designed to bring more people into their movement. Traditional forms of community organizing and civic engage-

ment will not disappear with the increase in online activity; instead, the web will surface new strategies for expanding civic and political participation.

The De Tocqueville quote at the beginning of this Essay is indicative of where the Internet is currently headed: a place for words that may never aggregate the depth of ideas and people needed to improve our democracy. The sentiment of this Essay is simple. As the Internet becomes a predominant force in driving civic engagement and digital communications, policymakers and other civic leaders must also ensure that it strives toward a more inclusive forum for communication, debate, and insight into public issues that improve the state of the nation. Moving forward, this will require more substantive research in this area, and a national emphasis on aligning people and systems in ways that create significant social change.

The Future of Digital Communications Research and Policy

Scott Wallsten*

"Prediction is very difficult, especially about the future."—Niels Bohr

I. INTRODUCTION

Over the past decade, broadband has become nearly ubiquitously available to households and firms throughout the industrialized world. This rapid growth has spurred interest by policymakers and academics in understanding how public policies affect—and, hopefully, encourage—investment and adoption. While such knowledge is useful, it is important to

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recognize that broadband investment and adoption are only *inputs* into societal well-being. We are ultimately interested in *outputs*: how does investment and use affect our standard of living and the economy more broadly?

These questions have become especially timely given recent poor economic growth and high unemployment. In the search for ways to increase economic growth and to "create" jobs, policymakers have identified broadband as a promising policy lever. In particular, they hope that stimulating broadband investment and adoption will accelerate its integration into the economy and translate into economic growth.

II. NEEDED: A NEW RESEARCH FOCUS

The current belief that broadband can address short-term economic concerns has led to a certain degree of incoherence in research and policy discussions about broadband. First, if broadband is a general-purpose technology that has the potential to fundamentally affect the economy, then we must recognize that its benefits will not be distributed evenly. Unfortunately, in the short run, some will lose out in a broadband-connected world.

Second, though policy and research has focused almost exclusively on residential broadband, use in the home is unlikely to be the primary driver of productivity improvements and, thus, radical improvements in our standard of living. Instead, it is how new communications technologies affect business that will affect productivity and determine whether those technologies radically reshape the economy.

Third, if broadband has the potential to fundamentally affect the economy, then those changes are likely to take place over a fairly long time period. Even to the extent that such changes have begun, we do not yet know what to measure to capture those changes.

This Essay begins by discussing, at a broad level, whether broadband and digital communications technology in general are likely to fundamentally affect the nature of the economy. The remainder of the Essay discusses what those effects may be, where they will originate, and how we should think about measuring them. It concludes with suggestions on how to build a more robust foundation for future research on the economic effects of broadband.

A. Is Broadband a General Purpose Technology?

At the core of the idea that broadband can enhance economic growth is the belief that the Internet, and broadband in particular, is a General Purpose Technology (GPT). If that is the case, then it does indeed have the potential to fundamentally alter the nature of the economy, just as electrification did.

To some, it may seem self-evident that broadband is a GPT. After all, it is by now cliché to note that broadband affects the way we work and play —that it has become a ubiquitous presence in our day-to-day lives. Pervasiveness is a necessary but not sufficient condition for a technology to truly become a GPT. Bresnahan and Trajtenberg lay out the full requirements:

> GPTs are characterized by pervasiveness, inherent potential for technical improvements, and 'innovational complementarities', . . . [meaning that] the productivity of R&D in a downstream sector increases as a consequence of innovation in the GPT . . . . [Thus,] [a]s a GPT evolves and advances it spreads throughout the economy, bringing about and fostering generalized productivity gains.[1]

Broadband's high commercial penetration rates and large numbers of consumer and business applications make it safe to say that broadband is pervasive. Its rapid increases in quality (e.g., speed), demonstrate its inherent and continuously realized potential for technical improvements. But has broadband access improved innovation in downstream sectors in ways that have brought about generalized productivity gains? Perhaps, but it is not yet possible to convincingly identify generalized productivity gains resulting specifically from the Internet or broadband. This is either because they have not yet happened, or because we do not know what to measure. Thus, almost by definition, we cannot yet know whether broadband is truly a GPT. It is probably never possible to know whether any given technology is "general purpose" until decades after its introduction.

For the sake of this Essay, however, let's assume that broadband is a GPT, or at least that it will fundamentally affect the economy, as so many people expect it will. Broadband as a GPT would have certain implications that policymakers may not like. It is clearly important to recognize that net improvements for society and the economy do not necessarily mean improvements for everyone. To date, most research on the economic effects of broadband has emphasized "job creation" with little discussion of jobs lost because of broadband.[2]

In the long run, technological change increases productivity and economic growth. That is why technological change is so important and why industrialized countries are so much richer today than they were a hundred years ago. But in the short run, radical changes can cause economic disruption as well. The Luddite movement, for example, was a reaction to jobs

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1. Timothy F. Bresnahan & M. Trajtenberg, *General Purpose Technologies 'Engines of Growth'?*, 65 J. ECONOMETRICS 83, 83–84 (1995).

2. *But see* RAUL KATZ & STEPHAN SUTER, ESTIMATING THE ECONOMIC IMPACT OF THE BROADBAND STIMULUS PLAN 2 (2009), http://www.elinoam.com/raulkatz/Dr_Raul_Katz_-_BB_Stimulus_Working_Paper.pdf; JED KOLKO, PUB. POLICY INST. OF CALI., DOES BROADBAND BOOST LOCAL ECONOMIC DEVELOPMENT? 2 (2010), http://www.ppic.org/content/pubs/report/R_110JKR.pdf. These studies are notable exceptions in that they explicitly incorporate the possibility that broadband can lead to job losses.

lost as mechanization introduced in the industrial revolution rendered some occupations irrelevant.[3] Whether the Luddites were merely opposed to change or organized as a means of protecting their jobs, they clearly were threatened by technological changes that ultimately led to vast increases in productivity and wealth.

Similarly, today we see opposition to certain uses of information technologies, though not generally to the technologies themselves. For example, digital communications technologies have made labor outsourcing more efficient. The resulting surge in help desks and data processing centers outside of the United States is probably good for productivity, but has become a perennial political issue because people believe outsourcing has contributed to American job losses.

Additionally, as discussed in more detail below, much business-to-consumer e-commerce represents transfers of economic activity from one part of the economy to another. This transfer generates winners and losers. The net economic effect of buying a book from Amazon rather than from your local bookstore may be similar; but Amazon, rather than the local bookstore, benefits from the transaction. According to the Bureau of Labor Statistics (BLS) data, that the number of workers in "book, periodical, and music stores" decreased by nearly thirty percent between 2002 and 2009, compared to a one-percent increase in total nonfarm employment.[4] BLS predicts that between 2008 and 2018 the number of those workers will decrease by another twelve percent, compared to an eight percent increase in total employment throughout the economy.[5]

The disruptive aspects of these changes in economic activity are likely to be offset by productivity improvements that ultimately contribute to new economic growth. While it is inherently difficult to identify and measure indirect effects, we at least need to be looking in the right place. The next section discusses why we should be looking harder at business use than residential use to find economic effects.

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3. RAYMOND BOUDON, THE ANALYSIS OF IDEOLOGY 95 (Malcolm Slater trans., Polity Press 1989) (1987).

4. Author's calculations from Bureau of Labor Statistics data on industry employment in NAICS 45120. *2002 National Industry-Specific Occupational Employment & Wage Estimates*, *Occupational Employment Statistics*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/oes/2002/naics4_451200.htm (last visited Dec. 15, 2010) (data for 2002); *May 2009 National Industry-Specific Occupational Employment & Wage Estimates*, *Occupational Employment Statistics*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/oes/current/naics4_451200.htm (last visited Nov. 15, 2010) (data for 2009); *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*, BUREAU OF LABOR STATISTICS, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?request_action=wh&graph_name=CE_cesbref1 (last visited Nov. 15, 2010) (data on total non-farm employment).

5. BUREAU OF LABOR STATISTICS, NATIONAL EMPLOYMENT MATRIX 2, Row 135 (2008), ftp://ftp.bls.gov/pub/special.requests/ep/ind-occ.matrix/occ_xls/occ_41-2031.xls.

B. Economic Growth Will Flow Primarily from Business, Not Residential, Use

When Robert Solow famously quipped, "You can see the computer age everywhere but in the productivity statistics" in 1987,[6] he implicitly acknowledged that productivity improvements come from business use of computers. Yet today, policymakers appear to hope that home broadband access will spur economic growth, and that it will do so quickly.

Today's focus on residential broadband is understandable. Politicians have a taste for populist themes and want to bring benefits to their constituents, both of which appear consistent with promoting residential broadband. The focus is also consistent with our historical policy focus on residential telecommunications access, often funded through implicit cross-subsidies from business, in part to achieve social equity goals. Researchers, meanwhile, want to answer relevant policy questions. To do so, they need data, which are more readily available for residential broadband than for business broadband. These factors create an incentive to investigate empirical links between residential broadband and economic growth.

To be sure, additional investment in residential broadband would require materials and labor that the economy would not have otherwise consumed had the investment not occurred. This is especially true if unemployment is high and credit markets are not working as smoothly as they typically do. The broader economic effects that might flow from such investment, however, are more difficult to estimate. One problem was discussed above—it is not realistic to expect to be able to measure macroeconomic effects of broadband on employment and economic growth yet. A second problem is that no direct conceptual reason exists why residential broadband connections would have large effects on net economic activity.

Residential connections are used primarily for personal communication, shopping, and consuming news and entertainment (fig. 1). These activities largely represent transfers of economic activity rather than net new economic activity. Much of business-to-consumer e-commerce, for example, reflects a shift in economic activity from "brick-and-mortar" to online retail, rather than new economic activity, as the changes in bookstore employment discussed above illustrate.

Even activities that did not exist before widespread broadband—like massively multiplayer online games such as *World of Warcraft*—represent economic transfers. The time spent playing those games comes from time no longer spent in some other activity, probably another type of entertainment.

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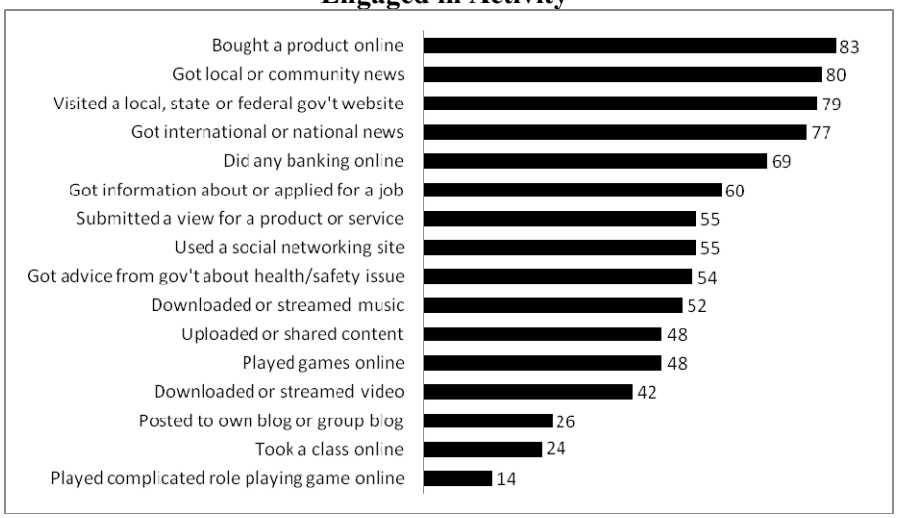
6. Robert M. Solow, *We'd Better Watch Out*, N.Y. TIMES, July 12, 1987, at 36.

Figure 1: Percentage of Home Broadband Users Who Have Ever Engaged in Activity[7]



Pointing out that much of residential broadband activity involves economic transfers does not imply that it has no net economic value. If people prefer engaging in activities online instead of those same or different activities offline, then those new activities must have at least some incremental value over the activities they replaced. That is, those activities generate new consumer surplus, which is a real economic effect, and would be reflected in increasing willingness to pay for broadband connections.

Rosston, Savage, and Waldman estimate that consumers are willing to pay about eighty-five dollars a month for a fast, reliable broadband connection,[8] which would imply a large amount of consumer surplus since on average consumers pay about forty-one dollars per connection.[9] Dutz, Orszag, and Willig estimate that consumer surplus was about $32 billion in 2009, up from about $20 billion in 2005.[10] But this additional consumer surplus, while substantial, is unlikely to have large effects on productivity, and therefore, economic growth over time.

To be sure, other benefits may ultimately flow from residential broad-

7. FCC, NATIONAL BROADBAND PLAN exh. 3-B (2010).

8. GREGORY ROSSTON ET AL., HOUSEHOLD DEMAND FOR BROADBAND INTERNET SERVICE iii (2010), http://siepr.stanford.edu/system/files/shared/Household_demand_for_broadband.pdf.

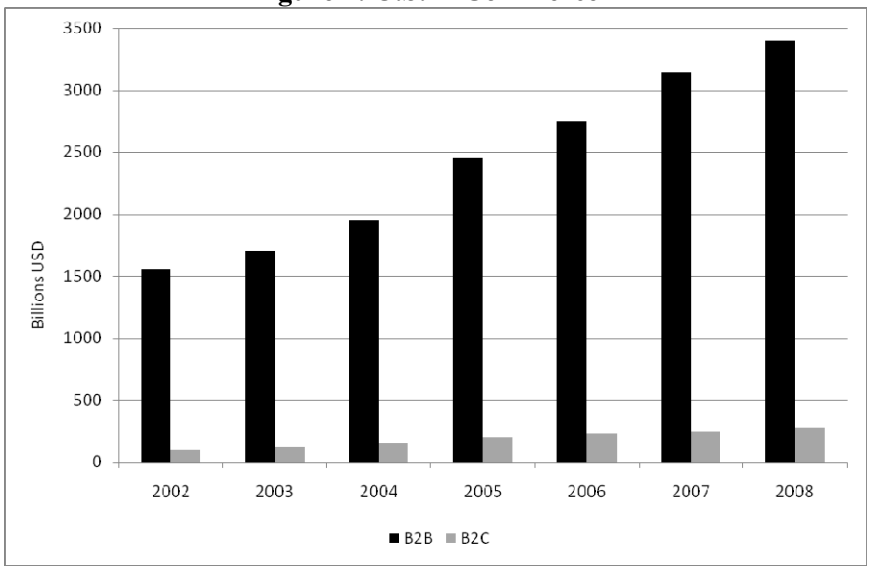
9. John B. Horrigan, *Broadband Adoption and Use in America* 15 (FCC, Omnibus Broadband Initiative Working Paper Series No. 1, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf.

10. MARK DUTZ ET AL., THE SUBSTANTIAL CONSUMER BENEFITS OF BROADBAND CONNECTIVITY FOR U.S. HOUSEHOLDS 7 (2009), http://internetinnovation.org/files/special-reports/CONSUMER_BENEFITS_OF_BROADBAND.pdf.

band. Telecommuting, for example, has the potential to reduce resources society consumes, such as those used while physically commuting. Nevertheless, how digital communications technologies change business production processes will determine whether these new technologies will have transformative economic effects. In fact, the direct economic effects of business use dwarf residential use. Figure 2 shows e-commerce revenues for business-to-consumer (B2C) and business-to-business (B2B) transactions. The figure shows that while B2C revenues reached almost $300 billion in 2008, they were an order of magnitude less than B2B revenues of about $3.4 trillion. In short, how business incorporates digital communications technologies will have a much bigger effect on our standard of living over the next twenty years than will whether we reach seventy percent household broadband penetration in six months or in a year.

Identifying a likely pathway for broadband to increase economic growth, however, is not the same as measuring those changes. The next section discusses those measurement challenges.

Figure 2: U.S. E-Commerce[11]



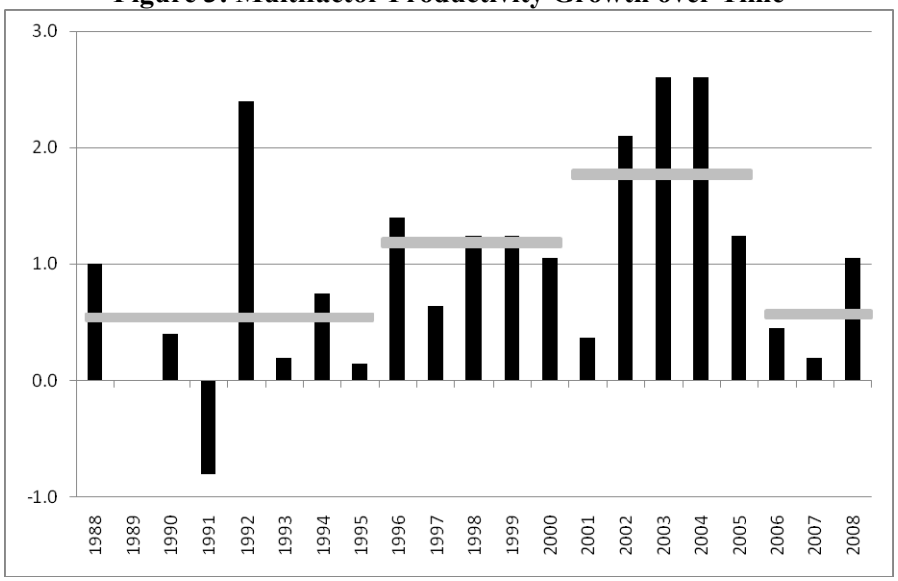
11. *2008 E-Commerce Multi-Sector Report Tables*, U.S. CENSUS BUREAU, http://www.census.gov/econ/estats/2008/2008tables.html (last visited Nov. 15, 2010).

III. WE CANNOT MEASURE THE MOST IMPORTANT EFFECTS OF RADICAL NEW TECHNOLOGIES IN THE SHORT RUN

If one believes that broadband has large, positive macroeconomic effects that can already be measured, then some recent indicators present something of a puzzle. In particular, productivity growth surged between 2001 and 2004, but then fell back to lower levels (fig. 3). Jorgenson, Ho, and Stiroh explain that much of the growth beginning in the mid-1990s came from the production and, in particular, use of information technology by businesses.[12] The recent decline begs the question, why would productivity growth retreat just as this transformative technology became widespread?

One possibility is that broadband, and new digital communications technologies in general, simply do not have large economic effects, while computerization did. But that seems unlikely. Instead, as Paul David noted when discussing the productivity paradox of the 1980s—the apparent lack of a productivity effect of business computerization—it is not realistic for us to expect to be able to measure such effects in the early days of a new technology that turns out to be revolutionary.[13]

Figure 3: Multifactor Productivity Growth over Time



12. *See* Dale W. Jorgenson et al., *Will the U.S. Productivity Resurgence Continue?*, CURRENT ISSUES IN ECON. & FIN., Dec. 2004, at 4, *available at* http://www.ny.frb.org/research/current_issues/ci10-13.pdf.

13. Paul A. David, *The Dynamo and the Computer: An Historical Perspective on the Modern Productivity Paradox*, 80 AM. ECON. REV. 355, 355, 360 (1990), *available at* http://elsa.berkeley.edu/~bhhall/e124/David90_dynamo.pdf.

Some economic effects are well defined and can, therefore, be measured rigorously. Greenstein and McDevitt estimate that the upgrade from dialup to broadband residential Internet access generated about $10 billion annually to the GDP.[14] This number is big, but is probably dwarfed by the indirect effects—changes in economic activity and behavior that result from the presence of these technologies.

Those externalities are exceedingly difficult to measure, even assuming we knew what to measure. The measurement problem is probably exacerbated in the business sector. It takes time for firms to figure out how to incorporate such technologies into their production processes in meaningful ways. Additionally, we do not yet know what to measure since, almost by definition, a revolutionary technology creates goods and services that we have not yet incorporated into our national statistics.

A. Research Should Focus on Business and on Fixing National Income Accounts

Accurately measuring the economic effects of broadband use will therefore require a timeline longer than is in the interest of most politicians. Nevertheless, if we believe that broadband and digital communications technologies will have the effect of a GPT, then it is important to focus on ways of measuring those effects.

Scholars studying the economic effects of broadband should focus on microeconomic effects, which are more likely to be identifiable and measurable, in order to establish conceptual and tested pathways from micro to macroeffects.

I do not claim that these are original observations. Some scholars, such as Erik Brynjolfsson of MIT, have spent years studying business IT and have identified key ways in which IT does and does not improve productivity.[15] Others, like Dale Jorgenson of Harvard, Steve Landefeld of the U.S. Bureau of Economic Analysis, and others, are working on modifying national statistics to better capture the effects of new technology.[16] Their efforts represent rigorous, incremental steps in the difficult process of iden-

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14. Shane Greenstein & Ryan C. McDevitt, *The Broadband Bonus: Accounting for Broadband Internet's Impact on U.S. GDP* 3 (Nat'l Bureau Econ. Research, Working Paper No. 14758, 2009), http://www.nber.org/papers/w14758.pdf.

15. *See generally* ERIK BRYNJOLFSSON & ADAM SAUNDERS, WIRED FOR INNOVATION: HOW INFORMATION TECHNOLOGY IS RESHAPING THE ECONOMY 5 (2010), http://mitpress.mit.edu/books/chapters/0262013665chap1.pdf; Erik Brynjolfsson & Lorin M. Hitt, *Beyond Computation: Information Technology, Organizational Transformation and Business Performance*, 14 J. ECON. PERSP. 23 (2000); Erik Brynjolfsson & Lorin M. Hitt, *Computing Productivity: Firm-Level Evidence*, 85 REV. ECON. & STAT. 793 (2003).

16. *See, e.g.*, Dale W. Jorgenson, *A New Architecture for the U.S. National Accounts*, 55 REV. INCOME & WEALTH 1 (2009); Jorgenson et al., *supra* note 12.

tifying and measuring the economic significance of digital communications.

The disconnect is that while some scholars and government officials are carefully evaluating how to go about properly measuring the effects of new technologies on the economy, other policymakers are not willing to wait for this solid data foundation to be built. It may be unrealistic to expect politicians to embrace the long view, but serious researchers and others who want to understand and foster the digital economy should recognize the need for an empirical and conceptual foundation. Until we have it, we should be wary about strong statements on the macroeconomic effects of broadband.

The Challenge of Increasing Broadband Capacity

Dale N. Hatfield*

I. INTRODUCTION

The recent release of the *National Broadband Plan* by the FCC has focused the attention of policymakers, industry leaders, academics, and ordinary citizens on the importance of having sufficient bandwidth available anytime and any place to support a growing array of broadband services.

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Broadband services include both wireline and wireless access to the Internet and the delivery of high-definition and even 3D television. As popular as these two terms—bandwidth and broadband—have become, and as important as they are to our future as a nation, they are not always well understood. The purpose of this Essay is to explain these terms in more technical detail, and relate the explanations to the opportunities and challenges that are associated with increasing fixed and mobile broadband capacity as envisioned in the *National Broadband Plan*.

This Essay is divided into three sections. The first section discusses the critical relationship between the digital transmission capacity of a communications channel (as expressed in binary digits or *bits* per second—bps) and the amount of bandwidth associated with that channel (as expressed in analog terms). The second section, in turn, builds upon that discussion to explore the opportunities and challenges associated with increasing the capacity of the four primary transmission technologies used in the critical access portion of the network—namely, twisted-pair copper cable, coaxial cable, wireless links, and fiber-optic cable. The third section provides a summary and offers some concluding thoughts.

II. UNDERSTANDING CRITICAL RELATIONSHIPS

Both analog bandwidth, as traditionally defined, as well as digital "bandwidth" (expressed as a bit rate), determine how much information can be sent over a communications channel in a given amount of time. The two are related to one another by Shannon's law, which is named after Claude Shannon, who is credited with being the founder of information theory—the basis of modern electronic communications. Shannon's law states that the maximum amount of information that a circuit or channel can carry per unit of time (as measured in bits per second) depends upon the (analog) bandwidth and the strength of the desired signal relative to the strength of the accompanying undesired noise and interference as measured at the receiving device.[1] For example, if the bandwidth of the channel is 1 megahertz (MHz), and the received power of the desired signal is fifteen times as strong as the accompanying noise, then the maximum digital capacity of the 1 MHz channel would be 4 megabits per second (Mbps), or 4 bps per hertz of bandwidth (bps/Hz). Shannon's law suggests two fundamental ways of increasing the digital capacity of a channel: increasing the amount of bandwidth devoted to the channel or increasing the received signal level relative to the accompanying noise and

1. Certain types of man-made noise and interference may exhibit some regularity or predictability that permits them to be dealt with more effectively at the receiver. Strictly speaking, Shannon's law assumes that the undesired signal is random rather than having some degree of predictability.

interference.[2] Bandwidth increases, however, are often constrained by the technical characteristics of the transmission medium, or, as in the case of wireless communications, by government regulation.

Increasing the digital capacity of a channel by increasing the transmitted power suffers from diminishing returns, and from practical constraints. For instance, in the example given above, increasing the received power to thirty-one times as strong as the accompanying noise only increases the capacity to 5 bps/Hz. Moreover such power increases are often impractical in the "real world" because of the increased interference that would be caused to other nearby users of the same radio spectrum (i.e., the same channel) in the case of wireless communications. Many wireless devices today are battery powered, and increasing their transmitted power can significantly decrease the length of time that the device can be operated without recharging the battery. While the base station with which the portable device communicates may be able to operate at a higher transmitter power, the power received at the base station is often limited by practical battery life considerations associated with the portable device.[3]

A. Understanding Bandwidth

The term bandwidth originated in the analog world where it is defined as a range (*band*) of frequencies measured in cycles-per-second or hertz (Hz). As a width, it represents the numerical difference between the upper and lower frequency limits of a channel of communications. In this context, a channel is a path used for the transmission of communications signals between two geographically separate points. For example, an ordinary telephone channel may have an upper frequency limit of 3.5 kHz and a lower frequency limit of 0.3 kHz and, hence, an audio frequency (AF) bandwidth of 3.2 kHz.[4] A high-fidelity audio amplifier, on the other hand, may have an upper frequency limit of 20 kHz and a lower frequency limit of 20 Hz, and thus a bandwidth of 19.98 kHz. In radio frequency (RF) communications, an ordinary television channel in the United States has a bandwidth of 6 MHz. For example, television channel 2 occupies an RF range of 54–60 MHz and channel 3 occupies an RF range of 60–66 MHz. In contrast, a single frequency modulation (FM) radio channel occupies an RF range of just 200 kHz.

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2. For more on Shannon's law, see C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379 (1948) (Part I); C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 623 (1948) (Part III).

3. As discussed in more detail later, the lower transmitted power often associated with a wireless handset reduces the maximum transmission rate achievable when the device is at the edge of its coverage area and the signal received at the base station is weakest.

4. Note that 1 kHz = 1,000 Hz, 1 MHz = 1,000,000 Hz, and 1 GHz = 1,000,000,000 Hz.

In the analog world, signals and the channels they occupy are typically classified loosely and somewhat fluidly as narrowband, wideband, or broadband. A channel that is classified as broadband because of its greater width (e.g., a television channel) can carry more information per unit of time than a channel classified as narrowband or wideband. A television signal made up of both video and sound (i.e., visual and aural) information contains more content than a simple audio signal associated with a telephone call. Hence, it requires more bandwidth to transmit in a given amount of time. Stated another way, a narrowband channel may be adequate to transmit an ordinary voice call, but totally inadequate to transmit a television signal. In short, the more information one desires to send in a given amount of time, the greater the analog bandwidth required.

Even though it is, strictly speaking, an analog expression, the term bandwidth has been carried over into the digital world. In the digital world, where information is carried as bits or "ones and zeros," the term bandwidth is also used to indicate how much information a channel can transmit in a given amount of time. However, in the digital world, bandwidth is measured in bits per second (bps). It is important to note that, in a digital network, the bandwidth is expressed as a rate—how many events happen per unit of time. Other examples of rates include a pump that can discharge water at a rate of 10 gallons per minute or a bridge that can carry 1,000 vehicles per hour. Stated again for emphasis, in the digital world, bandwidth refers to a transmission rate expressed in bits per second.

When digital networks are used to convey analog information, the analog signal is first converted to a digital signal at the originating end through a process known as analog-to-digital conversion, and then, at the terminating end, the digital signal is converted back to an analog signal through a reverse process of digital-to-analog conversion. As is the case in the analog world, in the digital world, the digital signals and the channels they occupy are classified as narrowband, wideband, or broadband.

After the analog-to-digital conversion process described above, an ordinary voice signal requires a transmission rate on the order of a few tens of kilobits per second (kbps), while the transmission of a high quality still image in a reasonable amount of time may require a transmission rate of several hundred kbps. A high-quality television signal, at the other extreme, may require on the order of several million bps (Mbps) for successful transmission in real time. Transmission rates in the tens of kbps range are typically categorized as narrowband; rates in the hundreds of kbps range are typically categorized as wideband; and rates in the Mbps range are typically classified as broadband. So, to summarize in today's terms, in a digital network, the term broadband is associated with a transmission rate

of several Mbps or more.[5]

As emphasized earlier, in the world of digital communications, bandwidth is associated with a transmission rate, but such rates are sometimes confusingly referred to as *speeds*. That is, people often speak of *high-speed modems* or *high-speed networks* when they really mean high-bit-rate modems or high-rate networks. Speed properly refers to the time it takes for an object—or, in the case of electronic communications, a signal—to travel from one point to another across an intervening space. In electronic communications, electromagnetic waves (e.g., RF signals) travel through space at the speed of light and via copper wires, coaxial cable, or fiber-optic cables, or other physical media at velocities that approach the speed of light.

In the digital world, some characteristic (or combination of the characteristics) of the transmitted electromagnetic/RF signal is rapidly changed to reflect whether the bit being sent is a one or a zero. The simplest digital transmission system to envision is one that sends a burst of electromagnetic/RF energy if the bit is a one and does not send a burst when the bit is a zero. In other words, the bursts of energy (or lack thereof) occur at regular intervals representing a sequence of ones and zeros that correspond to the information being sent. In order to send information at a higher rate, the intervals are shortened in time—that is, the ones and zeros are closer together in time and space—such that the transmission rate increases but the speed of transmitting individual bits remains the same, since the speed involved cannot exceed the speed of light. While the actual techniques used in the transmission of digital format are often much more sophisticated, the same basic principles apply.

Perhaps the distinction between speed and bit rate can be made clearer through an example drawn from the physical world. Consider a stream of semi-trailer trucks traveling down a highway at the speed limit of 60 miles per hour (mph) and assume that the trucks are physically spaced at intervals of one truck length. That would produce a transmission rate of some number of vehicles per hour. Now consider the same scenario except that the trucks are replaced by Mini Cooper automobiles traveling at the same 60 mph and also spaced one vehicle length apart. Because the vehicles, in this case, the small Mini Coopers, are spaced much closer together than the semi-trailer trucks, the number of vehicles per hour would be much greater even though the speed has not changed. This is analogous to the digital

5. To put this transmission rate into perspective, the *National Broadband Plan* suggests a goal of having at least 100 million U.S. homes with affordable access to actual download speeds of at least 100 Mbps and actual upload speeds of at least 50 Mbps by the end of the decade. *National Broadband Plan: Connecting America*, *Executive Summary*, BROADBAND.GOV, http://www.broadband.gov/plan/executive-summary/ (last visited Nov. 13, 2010).

transmission situation where the bit rate—the number of bps—is increased by spacing the ones and zeros closer together in time and space. The relationship between the maximum bit rate that a channel will support and the bandwidth of that channel (as that term is used in the analog world) will be explored later.

In the network of networks making up the Internet, the bits of information being transmitted are organized into sequences or units of bits called *packets*. In addition to the bits associated with the information being transmitted—for example, a portion of an email message or a voice telephone call—the packets include sequences of bits identifying the Internet address of the destination. These individually addressed packets of information are then routed from node to node between the origin and the destination in "store and forward" fashion. The time it takes for the packet to travel from the origin to the destination is known as *latency*. The irreducible or absolute minimum amount of time it takes for a packet to travel from the origin to the destination is constrained by the speed of light.

In addition to this irreducible minimum, the packets themselves may be processed several times at intermediary nodes along the way, thus adding to the latency. For example, an intermediary node, such as a packet switch or router, may store the packet briefly in order to read the address associated with the packet before forwarding it on to another node that is closer to the ultimate destination. This intermediary processing increases the latency. In addition, just as vehicles sometimes encounter congestion on a highway during peak travel periods, the packets from different users and applications may encounter congestion delays as well, thus adding further to the total latency. To return to the highway analogy, a vehicle traveling at the speed limit may have to stop at a toll booth and pay a toll. Moreover, there may not be enough individual toll booths to handle all of the arriving vehicles, in which case additional delays may occur. The processing delay at the toll booth and any congestion delays that occur upon arrival or departure from the toll booth add to the total time it takes the truck to reach its destination.

Latency is an important measure of performance in some Internet applications (e.g., in real-time voice applications and highly interactive games), and less important in other applications (e.g., email or simple web browsing). The important point is that the minimum amount of latency cannot be decreased by increasing the bit rate—that is, by increasing the bandwidth. Stated another way, the minimum latency, or delay, between source and destination is constrained by the speed of light; and the transmission rate merely determines how fast the packet can be "unloaded" once it arrives. Thus two major performance measures associated with the

Internet are speed/latency and bandwidth/data rate.[6]

In the "real world" today, radio systems typically achieve efficiencies of between less than 1 bps/Hz to 7 bps/Hz or so, depending upon the quality of the channel—that is, in terms of the received signal-to-noise/interference ratio. For example, today's comparatively high-powered digital television (DTV) systems achieve a transmission rate of almost 20 Mbps in a 6 MHz channel for an efficiency of approximately 3.3 bps/Hz. In its recent report to Congress on the *National Broadband Plan*, the FCC reported that over the years, the efficiencies of digital cellular radio systems have increased from much less than 0.1 bps/Hz at their inception to approximately 1.4 bps/Hz today.[7] Modern cable systems using the DOCSIS 3.0 specification[8] achieve a transmission rate of approximately 43 Mbps in a 6 MHz channel in the downstream direction—that is, from the cable system "headend" to the subscriber's premises—for an efficiency of a little over 7 bps/Hz. The techniques used to improve efficiencies as measured in bps/Hz tend to increase the amount of transmitter energy that is emitted near the edges of the channel compared to the portion of the energy emitted near the center of the channel. Thus, just as higher transmitter power can cause increased interference to other (distant) systems operating on the same channel, increasing the capacity of a channel by increasing the efficiency (again, as measured in bps/Hz) can cause increased interference to other systems operating on adjacent channels. The key point is that the efficiencies and hence the total capacities of all of these communications systems are ultimately constrained by the limitations of Shannon's law.[9]

Before discussing the opportunities and challenges associated with increasing fixed and mobile broadband capacity, it may be useful to say a few words about the noise and interference that inevitably competes with the desired signal in a receiver and constrains the capacity in accordance

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6. A third important measure of performance in the Internet is packet loss. Just as vehicles sometimes get lost on their way to their destination, packets are sometimes lost as well. For example, a packet may be discarded at an intermediary node if it has already been delayed excessively or the amount of temporary storage available at the node is insufficient.

7. *See National Broadband Plan: Connecting America*, BROADBAND.GOV, http://www.broadband.gov/plan/ (last visited Nov. 13, 2010).

8. DOCSIS is the acronym for Data Over Cable Service Interface Specifications®. The specification, which describes a technique that allows information in the digital format to be transmitted over analog cable television systems, was developed by Cable Television Laboratories (CableLabs®). Additional information on the most recent version of the specification, DOCSIS 3.0, can be found at *CableLabs: Revolutionizing Cable Technology*, DOCSIS, http://www.cablelabs.com/cablemodem/ (last visited Nov. 1, 2010).

9. Another technique that can be used to increase the capacity of a link is digital signal compression. Compression is a digital signal-processing technique that can reduce the transmission rate required to convey a signal in a given amount of time without unacceptable loss of quality. Digital compression techniques work, for example, by removing redundant information that may be present in the signal to be transmitted.

with the Shannon's law-limit just described. Radio frequency devices themselves internally generate a certain amount of electrical noise. This noise is produced by thermal agitation of electrons in a conductor. In an FM radio, this random noise would be heard as a hissing sound in the receiver, and since it is produced in the receiver itself, it would even be heard in a remote area where there were no broadcast stations operating on the channel.[10] This noise can be reduced by numerous techniques, but it cannot be completely eliminated. In addition to this internal noise, the desired signal must compete with external sources of noise that typically enter the receiver through the same path (i.e., the antenna connection) as the desired signal. There are two broad classes of external noise—natural and man made. Natural noise sources include, for example, electrical storms (i.e., lightning), which produce static in the amplitude modulation (AM) band. Man-made noise in nearby radio channels can be produced by a host of sources including automobile ignition systems, rotating electrical machinery, and devices like fluorescent light fixtures. These devices act as miniature transmitters that produce unintended RF energy. In wireless systems, this external noise and interference generally decreases in importance at higher frequency bands in the radio spectrum.

In addition to this unintentional radiation, the receiver often must contend with the intentional radiation produced by other RF systems. In wireless systems, such interference may be produced by another transmitter operating on the same channel at some distance away or by spillover effects from transmitters operating on adjacent bands or channels as explained above. Also, from a practical point of view, receivers are not perfect in filtering out signals operating on adjacent bands or channels, thus allowing in additional interference from other systems. These unintended forms of man-made radiation can be looked at as a form of environmental pollution, and the FCC has adopted rules that seek to reduce the interference from such sources.[11] Note that the policy objective should not be to eliminate all interference—indeed, that is impossible. Nor should the objective always be to minimize the probability of interference because that may be prohibitively expensive. Rather the objective, in principle at least, should be to choose the level of interference that optimizes the economic value of the resource.[12]

To summarize, there are two primary "scarce" resources associated with the design of any digital transmission link: received power and

10. In a television receiver, such noise manifests itself as "speckles" or "snow" in the picture.

11. *See generally* 47 C.F.R. pt. 15 (1999).

12. *See* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 27 (1959) ("It is sometimes implied that the aim of regulation in the radio industry should be to minimize interference. But this would be wrong. The aim should be to maximize output.").

"analog" bandwidth. The underlying capacity of such a digital transmission link as measured in bits per second depends upon both the analog bandwidth of the particular transmission media involved—twisted-pair copper cable, coaxial cable, wireless link, or fiber-optic cable—and the strength of the desired signal relative to the noise and interference at the receiving device. The following section will review some of the opportunities and challenges associated with increasing fixed and mobile broadband capacity.

III. OPPORTUNITIES AND CHALLENGES: LOOKING AHEAD

It is generally agreed that, in many cases at least, the primary technical and economic bottleneck hindering greater availability of broadband facilities and services is in the access portion of the network—that is, the portion of the network between the customer and a node in the network, which typically represents an aggregation point or point of traffic concentration. For example, in a wireless cellular system, this point might be a radio access node or base station; in the case of the telephone network, it might be a neighborhood terminal where the individual twisted-pair cables are terminated; and in the case of the cable network, it might be the location where the coaxial cables serving an individual neighborhood are terminated. Except in more-remote, less-populated, or other hard-to-serve areas, connecting this access node to the balance of the network (i.e., to the long-haul or core network) is typically less challenging because upgrades in capacity are easier and there are greater opportunities to achieve economies of scale. For this reason, the rest of this Essay will focus on this "last-mile" portion of the network—the portion between the access node just described and the customer premises.

The principle transmission media used to serve this portion of the network are those mentioned above: twisted-pair copper cable, coaxial cable, wireless, and fiber-optic cable. Since the underlying capacity of a digital transmission link depends upon the analog bandwidth of the particular transmission media and the signal-to-noise/interference ratio at the receiving device, it may be instructive to begin by focusing on these two fundamental factors in terms of each of the four types of transmission media just identified.

A. Twisted-Pair Cable

The original transmission media for both telegraph and telephone systems were open-wire lines consisting of pairs of bare conductors that were tied to insulators attached to cross-arms on wooden poles. In the access part of the telephone network, these open-wire lines eventually gave way to multipair cables consisting of individually insulated pairs of copper

wires enclosed in a common protective sheath. Each wire pair is twisted together for technical reasons and, in a modern installation, these individual wire pairs are connected to the neighborhood access node mentioned above. Often a fiber-optic cable is then used as the transmission media from the access node to the telephone company central office and the balance of the network. Because of the enormous bandwidth of the fiber-optic cable (as explained in more detail below), the characteristics of the individual wire pairs in terms of their analog bandwidth and their noise/interference susceptibility determine the digital bandwidth that can be delivered over the access portion of the network to the individual subscriber.

In terms of analog bandwidth, the individual wire pairs are capable of handling electrical signals in the AF range up to an RF frequency of perhaps 1 MHz or more. Stated another way, standard telephone wires have the bandwidth necessary to carry an ordinary analog voice conversation in one frequency range plus digital signals in the higher frequency range of the total available bandwidth. This sharing of the available bandwidth in the access portion of the network is the basis for the Digital Subscriber Line (DSL) service offerings of local telephone companies. The maximum bandwidth available on an individual wire pair depends upon a number of factors (e.g., the gauge of the wire), and is inversely proportional to distance. That is, the available analog bandwidth decreases with distance.

In terms of noise and interference, the individual wire pairs in an ordinary multi-pair telephone cable are not electrically shielded, and thus they are susceptible to picking up noise and interference from other nearby wire pairs ("cross-talk") from other sources of man-made electrical noise, and from RF sources such as nearby AM radio stations. While engineers and scientists have developed ingenious ways of dealing with these impairments, the combination of relatively limited analog bandwidth and a relatively hostile noise and interference environment has tended to limit DSL digital bandwidths to a few Mbps. Much higher data rates on the order of tens of Mbps are possible both at shorter distances and by utilizing more than one wire pair from the neighborhood node to the individual subscriber.

B. Coaxial Cable

Early Community Antenna Television (CATV) systems used *twin lead* or *ladder lines* as the transmission medium for getting television signals from a central location (the "headend") to groups of subscribers. Early in the development of the industry, however, the transmission medium was changed to coaxial cable,[13] which consists of a single wire

13. These early developments occurred in the late 1940s–early 1950s. For a more complete history of cable television perspective from the technological perspective, see

conductor centered within a cylindrical, metallic outer conductor that serves as a shield. The two conductors are insulated from one another using various materials. As explained before, in a modern cable television network, coaxial cable is used as the transmission medium between a group of subscribers and a neighborhood access node. The connection between the access node and the headend typically utilizes a fiber-optic cable creating what is known as a Hybrid Fiber Coaxial (HFC) network.

In terms of analog bandwidth, the individual coaxial cables used in cable television networks are capable of handling electrical signals with an RF frequency of up to roughly 1 GHz. Thus, one important advantage of coaxial cable as a transmission medium is its large analog bandwidth. The signals transmitted over the coaxial cables steadily weaken with distance, however, and broadband analog amplifiers are required at regular intervals to boost the signals back up to suitable levels.

The shielded construction of the coaxial cable significantly reduces the susceptibility of the medium to noise and interference from external sources, including "over-the-air" wireless signals that utilize the same RF frequency range. While the shielded construction of the coaxial cable provides protection against external sources of noise and interference, the amplifiers that are required at regular intervals do produce some electrical noise and forms of self-interference (e.g., a form of interference known as *intermodulation*) that must be dealt with by receivers at either end of the path. Because, to a great extent, only internal noise and interference must be dealt with, the environment is much more predictable and thus easier to mitigate by various engineering techniques. Moreover, the modern HFC architecture reduces the number of amplifiers required and, thus, the amount of internally generated noise and interference. Along with increasing internal noise and interference, the amplifiers employed also limit the available bandwidth. However, a modern HFC network typically has an upper RF frequency limit of 750 or 850 MHz.

In terms of digital bandwidth, it was noted above that modern (i.e., HFC) cable systems using the DOCSIS 3.0 specification are able to achieve an efficiency of slightly more than 7 bps/Hz. Thus, in gross terms, a modern cable system has an ultimate capacity of several Gbps. While the ultimate capacity of the coaxial cable is in the multiple-Gbps range even when constrained by the bandwidth of the associated amplifiers, two caveats are in order. First, reflecting the origins of the industry in retransmitting over-the-air broadcast signals, the bandwidth or spectrum associated with the cable is divided into scores of 6 MHz-wide channels

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Walter S. Ciciora, *Cable Television in the United States–An Overview* (rev. 2d ed. 1995), *available at* http://people.seas.harvard.edu/~jones/cscie129/nu_lectures/lecture13/pdf/CATV.pdf .

and the division of those channels between the downstream (i.e., between the access node and the subscriber) and upstream channels (i.e., between the subscriber and the access node) is asymmetric. That is, the number of channels (and hence the analog bandwidth) available in the upstream direction is considerably less than the number of channels available in the downstream direction. Moreover, in the traditional architecture, a substantial fraction of the downstream channels is devoted to the delivery of entertainment television signals—although with advanced digital signal compression techniques, the number of channels required to deliver such programming is significantly reduced. Over time, of course, these residual artifacts stemming from the origins of the industry can be removed, and something closer to the inherent capacity of the cable itself can be recovered.

Second, again reflecting the origins of the industry, the available capacity on the multiple coaxial cables emanating from a particular neighborhood node is shared among the various households served by that node. Sharing capacity made sense when a large fraction of the subscribers all wanted to view the same television program—for example, a championship sporting event like the Super Bowl—at the same time. Said another way, it made sense to send a single copy of the program and have multiple subscribers tap into it rather than sending multiple but identical copies of the same program individually on separate facilities to each subscriber. When the HFC network is used to supply Internet access, however, the situation is much different. With the HFC architecture using DOCSIS modems, one or more of the shared 6 MHz channels is set aside for the provision of downstream Internet access. On this shared 6 MHz channel, different subscribers are independently receiving different digital content—aural, data, image, video, or combinations thereof—in individually addressed packets of information. The protocols (or rules of the road) prevent contending transmissions from interfering with one another. Since the transmission capacity is shared among multiple households in this manner, congestion and packet loss may result as traffic peaks and individual consumers contend for the available capacity.[14]

One fundamental way of reducing congestion in an HFC network is to decrease the number of households or customers served by each of the shared stretches of coaxial cable. This can be accomplished in two fundamental ways. First, imagine an access node that connects to three runs of coaxial cable collectively sharing the same capacity or channel and connected to a fiber-optic cable link back to the headend. The capacity per household in this case can be increased by separating each of the three

14. Although this discussion deals with possible congestion/latency in the downstream direction, similar considerations apply in the upstream direction as well.

coaxial cable runs and connecting them to different fiber-optic links running to the headend. As explained in more detail below, a fiber-optic cable typically consists of multiple optical fibers, so such an approach may only require adding the necessary electronics to "light up" the additional individual fibers. In cable network parlance, this method of increasing capacity is known as *node splitting*. Second, in new construction where it is easier to modify the physical layout of the network, the capacity of the HFC architecture can be increased by increasing the density of nodes, thus decreasing the number of households or customers served per coaxial cable route and access node. Note that this process moves the broadband fiber-optic cable connection closer to the end users and allows more intense reuse of the RF bandwidth or spectrum carried within the individual coaxial cable runs. Interestingly, each of these two techniques for reducing congestion and the associated latency has analogies in the wireless space and, to a lesser extent, the DSL space as well.

C. Wireless Links

It is generally agreed that the preferred frequency range for wireless RF communications used in the access portion of the network lies in the span of roughly 300 MHz to 3,000 MHz (3 GHz).[15] Frequencies below this range are sometimes subject to long-range, highly variable interference due to atmospheric and ionospheric effects, require comparatively large antennas, and suffer to a greater extent from natural and man-made sources of radio noise and interference as explained earlier. Frequencies above this range tend to be blocked or attenuated more by intervening terrain and natural and man-made clutter, such as foliage and buildings. At extremely high frequencies (above 10 GHz or so), additional attenuation due to rain and snow becomes an increasingly limiting factor in terms of readily achievable transmission distances.[16] Although gross generalizations about the suitability of various ranges of the spectrum for different uses are often suspect, it is widely agreed that, in terms of providing fixed and mobile access, the range from roughly 300 MHz to 3 GHz is the most desirable as indicated immediately above. Indeed, it is so desirable that it is sometimes referred to as "beachfront property."[17]

Of course this entire range of spectrum from 300 MHz to 3 GHz is not available for providing wireless broadband access. Large blocks of this

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15. *See, e.g.*, Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. REV. 2007, 2065 (2003).

16. The higher frequency spectrum is useful for many purposes, especially when there is a line-of-sight path between the two ends of a communications link. It is generally less suitable for longer-range communications, especially when the link is close to the ground and mobile devices are involved.

17. Benjamin, *supra* note 15, at 2065.

spectrum range are already allocated to other important services and applications such as over-the-air radio and television broadcasting, the Global Positioning System (GPS), private- and public-safety mobile radio systems, weather radars, air-navigation systems used to provide communications between pilots and air-traffic controllers on the ground, Digital Audio Radio Satellite (DARS) broadcasting, and Mobile Satellite Services (MSS), to name just a few. The net result is that only a fraction of the spectrum in the desirable 300 MHz to 3 GHz range is currently available for the provision of fixed and mobile broadband wireless access. In fact, in the recently released *National Broadband Plan*, the FCC indicates that only 547 MHz of spectrum is available for the provision of mobile broadband services in the desirable frequency range below 3.7 GHz.[18]

The Obama administration has proposed, over the next ten years, to nearly double the amount of spectrum available for commercial use—including for the provision of broadband wireless access—by reallocating some 500 MHz of spectrum currently held by the federal government and private companies.[19] This proposal is consistent with recommendations contained in the *National Broadband Plan* and, presumably, the spectrum involved lies within the desirable range of 300 MHz to 3 GHz. If this proposal comes to fruition, it means that by the end of the decade there will be approximately 1 GHz of bandwidth available for the commercial provision of broadband wireless access within this desirable range. It is interesting and instructive to note that this net amount of spectrum is roughly comparable to the amount of analog bandwidth that is currently available on modern cable television systems that use the HFC architecture.[20]

Even though the net amount of analog bandwidth is roughly comparable (or will be if the Obama administration's proposal is implemented), there are important differences between the two methods of providing broadband access—coaxial cable and over-the-air wireless. Perhaps the foremost (and obvious) difference is the fact that a wireless

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18. The FCC's *National Broadband Plan* recommended that 500 MHz of spectrum be made available for broadband within ten years, of which 300 MHz should be made available for mobile use within five years. FCC, NATIONAL BROADBAND PLAN, BROADBAND ACTION AGENDA 1 (2010), http://www.broadband.gov/plan/national-broadband-plan-action-agenda.pdf.

19. Presidential Memorandum: Unleashing the Wireless Broadband Revolution (June 28, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution.

20. As explained before, it is important to realize that, while both cable television systems and broadband wireless access systems use RF spectrum, interference between the two uses of the spectrum is largely prevented by the metallic shielding associated with the coaxial cable transmission media used in cable television systems.

network is able to offer mobility to its customers. However, there are significant other differences in terms of the quality and "usability" of the respective analog bandwidth, and, as explained below, mobility increases the challenges associated with using over-the-air spectrum.

Among the other differences is the fundamental one that the over-the-air spectrum available for the provision of wireless broadband access is scattered throughout different frequency ranges or bands and among different providers. That is, in contrast to the coaxial cable case, the spectrum available for broadband wireless access is neither contiguous (in the frequency dimension) nor controlled by a single entity. This, in turn, produces two related technical issues. First, as explained before, practical transmitters operating in one channel/band inevitably produce spillover interference into adjacent channels/bands; practical receivers are unable to totally reject radio signals that are emitted in adjacent channels/bands, even if the energy from those signals is contained entirely within those channels/bands. The lack of perfect transmitters and receivers inevitably results in the loss of some capacity between bands due to the need to, for example, provide a buffer or guard band between the two bands to supply the necessary isolation and thereby reduce the associated interference to an acceptable level. Excessively fragmenting the spectrum among different bands reduces the overall technical efficiency of spectrum utilization for this reason.

Second, the problem is further compounded in the over-the-air case by what is known as the *near-far problem*. The problem arises when a user is attempting to receive a weak signal from a distant transmitter while in the immediate proximity of a transmitter operating on an adjacent (in frequency) channel. In such a situation, the signal from the nearby station may be so strong that it overwhelms the ability of the user's receiver to reject that signal and successfully receive the weaker, desired signal from the distant transmitter. These types of adjacent channel/band interference problems are considerably reduced in the case of cable television systems because, being under the control of a single operator, adjacent channel signals can be adjusted by the cable operator to arrive at the receiver at close to the same signal strength—there is no near-far interference problem with which to deal.

In addition to the more benign adjacent channel/band interference environment associated with the spectrum on a cable television system, the shielding associated with the coaxial cable also protects desired signals internal to the cable from external sources of natural and man-made RF noise, as well as interference from other users of the same frequency ranges that are external to the cable system. Such noise and interference can be a major factor in limiting the performance (i.e., the digital transmission

capacity) of a given amount of spectrum.

Moreover, RF signals transmitted over-the-air—wireless signals—suffer from other impairments, the most fundamental of which is the steady weakening of the signal as the receiver is physically moved farther away from the transmitter. Under ideal conditions (i.e., situations in which there is a totally clear, unobstructed path between the transmitter and the receiver), the strength of the transmitted signal decreases following what is known as the *inverse square rule*. This rule, based upon the physics involved, predicts that doubling the distance decreases the received signal power by a factor of four. Under real-world conditions (i.e., in the presence of physical obstacles, such as hills and buildings, and clutter, such as trees), the strength of the transmitted signal typically decreases with distance at a much faster rate. For example, in an urban area, doubling the distance may reduce the received signal power by a factor of sixteen rather than four. The strength of the signals in a coaxial cable network also decrease with distance, but, in a cable television network, the signals are boosted by broadband amplifiers at regular intervals so that the signal levels remain comparatively strong from the transmitter to the receiver.

This rapid falloff of signal strength with distance in the over-the-air environment has important network architecture implications. Recall once again that, according to Shannon's law, the maximum data rate (digital bandwidth) that a channel will support depends upon the strength of the desired signal relative to the received noise/interference and the analog bandwidth of the channel. This means that, as the over-the-air signal rapidly weakens with distance, the maximum digital bandwidth that is achievable over the path decreases as well. If the transmitter is at a fixed location where primary power from the fixed electrical grid is readily available, the rapid falloff of signal strength can be compensated for, up to a point at least, by an increase in transmitter power.[21] In mobile applications with portable handsets, however, the transmitter power is typically constrained by battery size and life and other considerations, such as limits on human exposure to nearby RF signals. Thus, at the edge of a coverage area, it is not the amount of bandwidth that limits the maximum digital transmission rate, but rather the strength of the transmitted signal from the handset as received at the base station receiver. This suggests that, in order to achieve broadband data rates while efficiently using the available bandwidth with portable handsets such as smartphones, the coverage areas must be kept small.

In addition to coping with adjacent-channel/band interference problems, sources of external noise and interference, and rapid attenuation

21. Directive antennas that concentrate the available transmitter power in the direction of the receiver can also be used to increase the received signal strength.

of signals with distance, over-the-air wireless systems must also contend with other RF transmission impairments found in an uncontrolled environment. These impairments include what is known as *multipath*—a propagation phenomenon that results in RF signals arriving at a receiver by two or more paths—and its attendant consequences.[22] One common cause of multipath is when the transmitted signal travels to the receiving antenna directly over both what is known as a *line-of-sight* path and also by a reflection from a terrestrial object such as a mountain or building. Since the latter path is longer than the direct path, there is an additional delay in the amount of time it takes the reflected signal to arrive at the receiver. Depending upon the time spread between the direct and reflected signals, the copies of the transmitted signal arriving at the receiver may combine in a constructive or destructive fashion. As the two terms imply, when the combination is constructive, the total received signal gets stronger, and when the combination is destructive, the total received signal gets weaker. If the location of the transmitter or receiver is changed, the geometry of the paths and, hence, the relative delay changes, as well. This means that the combined signal at the receiver will vary over the immediate geographic coverage area. This variation in signal strength is known as *fading* and is familiar to users of wireless handsets when it manifests itself in the form of dropped calls.[23]

It should be noted that all of these problems tend to be exacerbated in a wireless mobile environment when, as is often the case, the end-user terminal or handset is in motion. For example, a user may go around the corner of a building and, in the process, move from a location where the signal from a base station is very weak (because the received signal is in the "shadow" of the building) to a location where the signal is very strong (because it is within line of sight of the base station). Similarly, the cochannel and adjacent channel interference environment may change rapidly because of such movement and because of the changing multipath conditions as explained above. In short, mobility substantially increases the challenges associated with wireless communications. While the effects of the associated impairments can be reduced (or, in the case of multipath, even exploited), there are typically penalties in terms of the added processing power required in the handset (with associated impact on battery life), added latency associated with the time it takes for the additional processing, and added physical size in advanced solutions

22. *Telecommunications: Glossary of Telecommunication Terms*, INST. FOR TELECOMM. SCIENCES, *available at* http://www.its.bldrdoc.gov/fs-1037/ (click on hyperlink "M"; click on hyperlink "multipath") (last visited Nov. 13, 2009).

23. The variation of signal strength or fading produces the familiar phenomenon of cell phone users moving around trying to find a good spot to make or maintain a cellular call.

requiring multiple antennas.

So to briefly summarize, over-the-air wireless systems face a significantly harsher signal environment compared to a "closed" coaxial cable-based system carrying RF signals; and in turn, over-the-air wireless systems serving mobile (as opposed to fixed) terminals face a still harsher signal environment. The effects of this progression can be seen in relative spectrum efficiencies (as measured in bps/Hz) achieved by cable television systems, over-the-air television broadcasting systems, and mobile wireless (cellular) systems reported earlier in this Essay.

As noted, if the Obama administration's proposal to free up 500 Mhz of additional spectrum for wireless broadband uses is adopted, there will be approximately 1,000 MHz of analog wireless spectrum available for broadband wireless access in the desirable frequency range below 3 GHz. While this may at first seem like an abundance of spectrum, when viewed against the backdrop of the recent exponential increases in broadband wireless demand, it may not be as it seems. To put this in perspective, assume for a moment that each wireless broadband user is consuming 1 Mbps of digital bandwidth and that the spectrum efficiency achieved in the mobile environment is 1 bps/Hz. Under these not-unreasonable conditions, 1,000 MHz of bandwidth would support only 1,000 simultaneous users if, because of interference considerations, the spectrum could be used only once over a large geographic area. Clearly, this would be a woefully inadequate capacity for a major metropolitan area like New York City or Los Angeles, where there may be millions of subscribers. Indeed, in such heavily populated areas, the capacity would be inadequate even if the users were communicating using narrowband digital voice. While higher levels of spectrum efficiency can be achieved, the increases are constrained by Shannon's law, and, in the upstream direction, even more so by the previously noted practical limits on handset transmitter power imposed by battery life and human RF exposure considerations.

Unlike traditional high-power, high-antenna-height wireless systems that allowed spectrum to be used only once in a large geographic area, the more modern cellular mobile radio systems that emerged in the 1980s employ frequency reuse in a cellular configuration or architecture. Cellular mobile radio systems get their name from the notion of dividing the large geographic area into a series of small, geographically contiguous coverage areas called *cells*. Relatively low-power base station transmitters and receivers with relatively low-height antennas (towers) are placed in each cell and connected by wireline or microwave facilities to the balance of the network and, through interconnection arrangements, to other fixed and mobile networks as well. The relatively low power and low antenna heights of the base stations match the radio coverage to the area of these cells, and

the base stations communicate with the mobile units (e.g., cellular handsets or smartphones) in their respective cells. Because of the low power and low antenna heights involved, cochannel interference is minimized, and the same channel can be used simultaneously (i.e., reused) for different conversations or data sessions in different cells within the larger geographic area.

In contrast to the traditional systems of the 1970s and earlier, frequency reuse and the cellular architecture enables the scarce spectrum resource to be utilized in a much more intense manner. That is, rather than being used just once in a large geographic area, the assigned spectrum is reused many times, thus multiplying the capacity in that area. Another important feature of the cellular architecture is that, as demand develops, a larger number of still-smaller cells (i.e., cells covering even smaller geographic areas) can be employed to increase the amount or intensity of frequency reuse and, hence, the total capacity of the system. Or, stated another way, increased frequency reuse (and hence increased efficiency) through *cell division* can be employed to increase capacity over time.

Such increases in capacity through increased frequency reuse are not insignificant; indeed, the opposite is true because the increases in capacity are exponential. For example, early cell sites (and those cell sites in more rural areas today where spectrum capacity is not yet a consideration) might have had a radius of 10 miles. Decreasing the radius to 1 mile increases the capacity a hundredfold and decreasing the radius to 0.1 miles increases capacity by a factor of 10,000.[24] As explained before, reducing the distance between the handset and the base station also allows much higher signal strengths at the receiver, thereby increasing the digital bandwidth available at the edge of the coverage area and reducing the power consumed by the handset. Thus, while further increases in broadband wireless capacity can be partially met by (a) doubling the amount of available bandwidth allocated to such services as recently proposed, and (b) increasing the efficiency with which the available bandwidth is used by more closely approaching the Shannon's law-limit, as a practical matter, continued dramatic increases in broadband wireless demand will have to be met through the exponential increases in capacity associated with smaller cell sizes. Evidence suggests that the marketplace is already responding in exactly this way. Broadband wireless providers are not only seeking more spectrum and, with their vendors, further improving spectrum efficiency

24. This exponential increase is due to the fact that the area of a circle increases with the square of the radius. Thus, for example, decreasing the average cell radius by one-half decreases the coverage area of each cell by one-fourth and increases the amount of frequency reuse obtained by a factor of four. This increase may come at the expense of additional infrastructure investment.

within the Shannon's law-limit, but also turning to microcells, picocells, and femtocells,[25] as well as to "smart antennas" and outdoor Distributed Antenna Systems—all of which permit much more intense frequency reuse.

It is interesting to note that enhancing wireless capacity through increased frequency reuse is analogous to how the cable television industry increases its capacity by node splitting or increasing the geographic density of the access nodes, as explained earlier. In the wireless case, and in the coaxial-cable case, increasing the number of access nodes allows, respectively, the available over-the-air spectrum and the spectrum within the shielded coaxial cable to be used more intensely. In both the wireless and cable cases, shortening the access portion of the network—the distance between end user and the access node—implies the need for a denser fiber network to carry the traffic between the access nodes and the balance of the network.[26] Additionally, shortening the access portion of the network in the case of DSL would facilitate greater bandwidths for the reasons given earlier.

D. Fiber-Optic Cable

In the descriptions of the three access technologies addressed so far, it was implicitly assumed that a fiber-optic cable would be used to carry the broadband digital signals from the neighborhood node to the balance of the network.[27] In each case, the technical challenges associated with the three technologies in providing the connection between the neighborhood node and the individual subscriber were addressed. Although there are economic challenges in doing so, fiber-optic cables can be used in this portion of the network, in what is typically referred to as the Fiber-to-the-Home (FTTH) configuration or architecture.

Optical fibers consist of a very fine cylinder of glass, called the *core*, surrounded by a concentric layer of glass, called the *cladding*, and, as in the case of twisted-pair copper cable, multiple individual fibers are often grouped together to form a fiber-optic cable. In terms of analog bandwidth,

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25. The terms microcell, picocell, and femtocell are not precisely defined, but they reflect cells with increasingly smaller radii, respectively. The smallest, a femtocell, may have a radius of only 10 meters or so. *See Microcell*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Microcell (last visited Nov. 13, 2010).

26. *See* MARK MACCARTHY, THE ASPEN INST., RETHINKING SPECTRUM POLICY: A FIBER INTENSIVE WIRELESS ARCHITECTURE 3 (2010), http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Rethinking_Spectrum_Policy.pdf ("A fiber intensive wireless network architecture should be considered, in parallel with the allocation of additional spectrum, as complementary long-term solutions to the problem of exploding demand for wireless services.").

27. In some situations, especially in more remote areas, broadband point-to-point microwave systems may continue to play an important role in carrying traffic from the access node to the balance of the network.

the individual fibers making up the cable are, depending upon the type of optic fiber deployed, capable of handling optical signals with a total analog bandwidth in the terahertz (THz)[28] or even tens of THz range. Although these rates are primarily associated with long-haul or core network,[29] the basic technology permits extremely high transmission rates in the local access network as well.

In addition to their enormous advantage in terms of analog bandwidth, optical fibers also have the benefit that, since they use optical signals rather than electrical signals, they do not suffer from the natural and man-made forms of electrical noise or interference described earlier. This immunity to electrical noise and interference results from the fact that the individual optical fibers are made of glass and do not conduct electricity. In terms of digital bandwidth, the combination of substantial analog bandwidth coupled with the immunity to electrical noise and interference means that, even in residential FTTH applications, an individual optical fiber is capable of transmission rates on the order of several Gbps. The actual transmission rate delivered to the subscriber depends upon, among other things, the details of the architecture. One popular architecture called a Passive Optical Network (PON) divides the available transmission capacity among multiple subscribers while another architecture known as Point to Point (PtP) is capable of delivering the entire transmission capacity of the fiber to an individual subscriber. The former provides digital bandwidths in the tens of Mbps range, while the latter provides digital bandwidths in the hundreds of Mbps range.

IV. SUMMARY AND CONCLUSIONS

The recent release of the *National Broadband Plan* by the FCC has focused attention on the importance of having sufficient bandwidth available anytime and any place to support a growing array of broadband services that are critical to the nation's economic and social well-being and to public safety and homeland security, as well. This Essay described the relationship between the maximum digital transmission capacity of a channel and the two fundamental factors that determine that capacity. These fundamental factors are the analog bandwidth of the channel and the strength of the received signal relative to the noise. Building upon this understanding, this Essay explored technical opportunities and challenges associated with increasing the capacity of four transmission technologies used in the critical-access portion the network—namely, twisted-pair cable, coaxial cable, wireless links, and fiber-optic cable.

The opportunities and challenges associated with increasing the

28. 1 THz = 1,000 GHz = 1,000,000 MHz.

29. *See supra* Part III.

capacity of each of the four technologies described above extend beyond the pure technical characteristics of the transmission media, associated electronics, and overall architecture to include not only cost but also operational factors, such as the ease with which the provider can gain access to the necessary public and private rights-of-way or access to added base station antenna sites (in the case of wireless systems). It is beyond the scope of this Essay to address these latter factors in any detail. Rather, in the balance of this section, the opportunities and challenges associated with the technical aspects of the four digital transmission technologies will be summarized and characterized.

Of the four technologies discussed in this Essay, ordinary multi-pair copper cable used in the traditional telephone network is highly constrained in terms of analog bandwidth at longer distances, and because the wire-pairs are unshielded, it is susceptible to both internally and externally generated electrical noise and interference. As Shannon's law suggests, the resulting digital transmission bandwidth using DSL technology is limited to a few Mbps. While higher data rates are possible at shorter distances and by utilizing more than one wire-pair per customer, further increases in capacity are apt to be incremental, and dramatic increases problematical, because of the limited bandwidth and difficult noise and interference environment. An advantage of the DSL architecture, though, is that the entire capacity of a wire-pair within the cable is available to a single customer—that is, it is unshared.

The second technology, coaxial cable, in contrast, has a much larger analog bandwidth—on the order of 1 GHz—and its shielded construction reduces its susceptibility to externally generated electrical noise and interference. While the inherent bandwidth of the coaxial cable employed is large, in a traditional cable television network amplifiers are required at regular intervals to maintain the transmitted signals at an acceptable level of signal strength. These amplifiers generate electrical noise and self-interference, but—unlike wireless, over-the-air transmission—the noise and interference environment internal to the cable is much more predictable and, hence, easier to mitigate. Again, as Shannon's law would suggest, with an analog bandwidth on the order of 1 GHz and a comparatively benign and controlled noise and interference environment, the digital transmission bandwidth of a cable television network, optimally configured, is several Gbps. Artifacts stemming from the origins of the industry in delivering over-the-air broadcast television signals—for example, the placement of the signals or channels within the available analog bandwidth and the need to continue to carry such signals in the analog format—reduce the current digital capacity. However, in the longer term, it should be possible to exploit the full digital transmission capacity

of the cable itself. A disadvantage of the cable television architecture is that numerous stretches of the coaxial cable—and hence the digital transmission capacity—are shared among multiple customers. However, as explained in more detail above, the number of customers sharing the available capacity can be decreased, and accordingly, the digital transmission capacity per customer can be increased through node-splitting and shortening the distance spanned by any single stretch of cable.

The analog bandwidth available to the third technology, wireless links, depends upon the amount of spectrum allocated by the government for the provision of fixed and mobile wireless broadband access. In the United States, only 547 MHz of spectrum is currently available for such purposes. Recently, though, the Obama administration proposed the reallocation of 500 MHz of additional spectrum, which, if the reallocation is fully carried out, would bring the total analog bandwidth available to approximately 1 GHz. While wireless systems have the obvious advantage of offering mobility, their use of over-the-air spectrum presents a myriad of challenges, as described earlier. These challenges include the scattering of the available bandwidth across different bands within the desirable range and coping with adjacent channel/band interference problems, sources of external noise and interference, rapid attenuation of signals with distance, and over-the-air propagation impairments, such as multipath. In short, wireless systems face a much harsher signal environment compared to "closed" coaxial-cable-based and fiber-optic-cable-based systems. Over-the-air wireless systems serving mobile as opposed to fixed terminals face a still harsher signal environment because of the additional variability of the signal propagation conditions. The net result is still lower spectrum efficiencies (as measured in bps/Hz). Because of the harsher signal environment, the rapid falloff of signal strength with distance, and the constraints on up-link transmitter power associated with mobile handsets, the overall digital bandwidth achievable in a mobile environment is significantly reduced compared to closed coaxial-cable- and fiber-optic-cable-based systems, even when the available analog bandwidth is roughly the same.

The fourth technology, fiber-optic cable, is generally regarded as the gold standard in terms of increasing broadband digital access capacity because of its enormous analog bandwidth and its immunity to natural and man-made forms of electrical noise and interference. The actual digital transmission rate delivered to or from a customer depends upon the details of the architecture employed, but the ultimate capacity is limited more by economic factors than by the inherent technical constraints on the underlying technology imposed by Shannon's law. In this regard, fiber-optic cable is often referred to as being "future proof" because the

maximum digital transmission rates are governed more by the electronic equipment attached to the cable rather than by the actual fiber itself—thus, the capacity can be increased by upgrading the associated electronic equipment rather than by taking the more expensive step of replacing the fiber itself.

With this background on the four technologies as summarized and characterized above, it seems apparent, from a technical standpoint at least, that the exploding demand for wireless broadband capacity, the constraints on the availability of over-the-air wireless spectrum, and the challenges associated with achieving dramatic improvements in spectrum efficiencies in the mobile wireless environment, suggest a compelling need to meet a potentially large portion of that demand through even more intense frequency reuse in local geographic markets. More intense frequency reuse and greater edge-of-coverage area capacity can be accomplished with smaller cells and, in part, more directive antennas at the base station or access node. If seamless coverage is to be maintained, smaller cells require a much higher density of access nodes. Moreover, both DSL and cable modem technologies benefit from the shorter distances that are associated with a denser deployment of their access nodes. This suggests the growing need to extend fiber-optic cable capacity closer to the customer—either fixed or mobile—to minimize the distance between the customer and the access nodes.

This, in turn, further suggests that policymakers need to focus not only on the oft-stated long term goal of encouraging Fiber to the Home, but also on the more immediate need to bring fiber significantly closer to the customer to support a vastly increased number of access nodes. This is particularly important in the wireless case where the capacity added through frequency reuse is critical to facilitating wireless competition with the two major suppliers of fixed broadband capacity—the incumbent telephone and cable television companies.

The Changing Patterns of Internet Usage

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I. INTRODUCTION

The Internet unquestionably represents one of the most important technological developments in recent history. It has revolutionized the way people communicate with one another and obtain information and has created an unimaginable variety of commercial and leisure activities. Many policy advocates believe that the Internet's past success depended in no small part on its architecture and have argued that its continued success depends on preserving that architecture in the future.[1]

Interestingly, many members of the engineering community see the Internet in starkly different terms. They note that the Internet's origins as a military network caused it to reflect tradeoffs that would have been made quite differently had the Internet been designed as a commercial network from the outset.[2] Moreover, engineers often observe that the current network is ill-suited to handle the demands that end users are placing on it.[3] Indeed, engineering researchers often describe the network as ossified and impervious to significant architectural change.[4] As a result, the U.S. government has launched a series of initiatives to support research into alterna-

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1. *See, e.g.*, *Net Neutrality: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 54–56 (2006) (statement of Lawrence Lessig, C. Wendell and Edith M. Carlsmith Professor of Law, Stanford Law School), *available at* http://commerce.senate.gov/public/?a=Files.Serve&File_id=c5bf9e54-b51f-4162-ab92-d8a6958a33f8; Preserving the Open Internet, *Notice of Proposed Rulemaking*, 24 F.C.C.R. 13064, paras. 3–8 (2009).

2. For example, David Clark's seminal description of the priorities animating the Internet's initial design (which represents one of the most frequently cited articles in the literature) notes that the Internet's origins as a Defense Department initiative led the protocol architects to place a high priority on certain concerns that would be relatively unimportant to the commercial Internet (such as survivability in a hostile environment) and to downplay other priorities that would prove critical once the Internet became a mainstream phenomenon (such as efficiency and cost allocation). *See* David D. Clark, *The Design Philosophy of the DARPA Internet Protocols*, COMPUTER COMM. REV., Aug. 1988, at 106, 107, 110.

3. These lists typically include such major concerns as security, mobility, quality of service, multicasting, and multihoming. *See, e.g.*, Mark Handley, *Why the Internet Only Just Works*, 24 BT TECH. J. 119, 123, 126–27 (2006); Jon Crowcroft, *Net Neutrality: The Technical Side of the Debate: A White Paper*, COMPUTER COMM. REV., Jan. 2007, at 49, 50–51, 52.

4. *See, e.g.*, Paul Laskowski & John Chuang, A Leap of Faith? From Large-Scale Testbed to the Global Internet 2 (Sept. 27, 2009) (unpublished manuscript) (presented at Telecomm. Policy Research Conference), http://www.tprcweb.com/images/stories/papers/Laskowski_2009.pdf; *see also* OLIVIER MARTIN, STATE OF THE INTERNET & CHALLENGES AHEAD 1, 29 (2007), http://www.ictconsulting.ch/reports/NEC2007-OHMartin.doc (noting that "there appears to be a wide consensus about the fact that the Internet has stalled or ossified").

tive network architectures.[5] The European Commission has followed a similar course,[6] and university-based researchers in both the United States and Europe are pursuing a variety of "clean slate" projects studying how the Internet might be different if it were designed from scratch today.[7]

This Essay explores some emerging trends that are transforming the way end users are using the Internet and examines their implications for both network architecture and public policy. Identifying future trends is inherently speculative and, in retrospect, will doubtlessly turn out to be mistaken in a number of important respects. Still, I hope that these ruminations and projections will yield some insights into the range of possible evolutionary paths that the future Internet may take.

II. INTERNET PROTOCOL VIDEO

The development that has generated the most attention from policymakers and the technical community is the use of Internet-based technologies to distribute video programming. *Over-the-top services* (such as YouTube and Hulu) rely on the public Internet to distribute video. Other services, such as AT&T's U-verse, also employ the protocols developed for the Internet to distribute video, but do so through proprietary networks. Verizon's fiber-based FiOS service and many cable television providers already rely on these protocols to provide video on demand and are making preparations to begin using Internet-based technologies to distribute their regular video channels as well. Because these services are often carried in whole or

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5. One example is DARPA's New Arch initiative. *See* DAVID CLARK ET AL., NEW ARCH: FUTURE GENERATION INTERNET ARCHITECTURE 4, 13 (2003), http://www.isi.edu/newarch/iDOCS/final.finalreport.pdf. The National Science Foundation (NSF) is pursuing similar initiatives. One is known as the Global Environment for Networking Innovations (GENI). *See Global Environment for Networking Innovations (GENI)*, NAT'L SCI. FOUND., http://www.nsf.gov/funding/pgm_summ.jsp?pims_id=501055 (last visited Nov. 15, 2010). Another was originally known as the Future Internet Design (FIND) project. *See* VINT CERF ET AL., FIND OBSERVER PANEL REPORT (2009), http://www.nets-find.net/FIND_report_final.pdf. FIND was subsequently folded into the NSF's Networking Technology and Systems (NeTS) program. *See Networking Technology and Systems (NeTS)*, NAT'L SCI. FOUND., http://www.nsf.gov/funding/pgm_summ.jsp?pims_id=503307 (last visited Nov. 15, 2010). The NSF's major current initiative is the Future Internet Architectures program. *See Future Internet Architectures (FIA)*, NAT'L SCI. FOUND., http://www.nsf.gov/funding/pgm_summ.jsp?pims_id=503476 (last visited Nov. 15, 2010).

6. *See, e.g.*, EUROPEAN COMMISSION, INTERNET DEVELOPMENT ACROSS THE DECADES: EXECUTIVE SUMMARY (2010), http://cordis.europa.eu/fp7/ict/fire/docs/executive-summary_en.pdf; *FIRE–Future Internet & Experimentation*, EUR. COMMISSION, http://cordis.europa.eu/fp7/ict/fire/home_en.html (last visited Nov. 15, 2010).

7. *See, e.g.*, Jon Crowcroft & Peter Key, *Report from the Clean Slate Network Research Post-SIGCOMM 2006 Workshop*, COMPUTER COMM. REV., Jan. 2007, at 75, 75; Anja Feldmann, *Internet Clean-Slate Design: What and Why?*, COMPUTER COMM. REV., July 2007, at 59, 59; *Clean Slate Design for the Internet*, STANFORD U. CLEAN SLATE, http://cleanslate.stanford.edu/index.php (last visited Nov. 15, 2010).

in part by private networks instead of the public Internet, they are called *Internet Protocol (IP) Video* or IPTV. Industry observers have long predicted that video will represent an increasing proportion of total network traffic.

The growing use of IP-based protocols to distribute video has raised a number of technical and policy challenges. Not only will the growth of IPTV require more bandwidth, it may also require more basic changes in the architecture and regulatory regimes governing the network.

A. Bandwidth and Quality of Service

Industry observers have long disputed how large the video-induced spike in network demand will actually be. A recent industry report estimates that Internet video now represents over one-third of all consumer Internet traffic and will grow to more than ninety percent of all consumer traffic by 2014.[8] Experts disagree about what the future holds. Some industry observers have long predicted the coming of a video-induced "exaflood" that would require a sharp increase in capital spending.[9] The Minnesota Internet Traffic Studies (MINTS) disagrees, pointing to the lack of any sign of such an upsurge in traffic.[10] Other observers challenge MINTS's conclusions, arguing that, in focusing solely on traffic patterns at public peering points, MINTS fails to take into account the sizable proportion of the overall traffic that now bypasses the public backbone.[11] Moreover, even if the shift to IP-based video distribution has not yet by itself created a spike in the demand for bandwidth, the wide-scale deployment of high-definition (and the looming emergence of ultra-high-definition), 3D, and

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8. CISCO SYSTEMS, INC., CISCO VISUAL NETWORKING INDEX: FORECAST AND METHODOLOGY, 2009–2014 at 2 (2010), http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360.pdf.

9. *See, e.g.*, Brett Swanson & George Gilder, *Estimating the Exaflood: The Impact of Video and Rich Media on the Internet—A 'Zettabyte' by 2015?*, DISCOVERY INST. (Jan. 2008), http://www.discovery.org/a/4428.

10. *See Minnesota Internet Traffic Studies*, U. OF MINNESOTA, http://www.dtc.umn.edu/mints/home.php (last visited Nov. 15, 2010) (estimating that Internet traffic was continuing to grow at the previous annual rate of forty percent to fifty percent as of the end of 2009).

11. NEMERTES RESEARCH, INTERNET INTERRUPTED: WHY ARCHITECTURAL LIMITATIONS WILL FRACTURE THE 'NET 34–35 (2008). For example, regional ISPs that are too small to peer with backbone providers are now peering with each other in a practice known as "secondary peering," which allows them to exchange traffic without employing the public backbone. Content delivery networks such as Akamai and Limelight now use "content delivery networks" to store information at thousands of locations around the world, often in places where they can deliver traffic without traversing the backbone. Lastly, large content and application providers are building large server farms that similarly allow them to distribute their content without touching the public backbone. *See* Christopher S. Yoo, *Innovations in the Internet's Architecture that Challenge the Status Quo*, 8 J. ON TELECOMM. & HIGH TECH. L. 79, 84–90 (2010).

multiscreen technologies may cause the rate of traffic growth to increase in the future.

Aside from increased bandwidth, video requires network services that are qualitatively different in many ways from those required by the applications that formed the bulk of first-generation Internet usage. On the one hand, video is more tolerant of packet loss than web browsing and email. On the other hand, unlike the performance of email and web browsing, which depends solely on when the last packet is delivered, video quality depends on the timing with which every intermediate packet is delivered.

Specifically, video is more sensitive to *jitter*, which is variations in spacing between intermediate packets in the same stream and which typically arises when a stream of packets traverses routers that are congested. Jitter can cause video playback to freeze temporarily, which degrades the quality of the viewers' experience.

The usual solution to jitter is to delay playback of the video until the receiver can buffer enough packets to ensure that playback proceeds smoothly. This solution has the drawback of exacerbating another dimension of quality of service that is relevant for video, which is *delay* or *latency*, defined as the amount of time that it takes for playback to commence after it has been requested. Interestingly, viewers' tolerance of latency varies with the type of content being transmitted. While viewers of static video typically do not mind waiting five to ten seconds for playback to begin, such delays are not acceptable for interactive video applications, such as video conferencing.[12] Some content providers reduce latency by using data centers or content delivery networks to position their content in multiple locations, thereby shortening the distance between the content and end users. Storing content in multiple locations only works for static content that does not change.[13] It cannot work for interactive content, such as videoconferencing or online gaming, which changes dynamically.

For interactive applications, the engineering community has focused on two other means for providing higher levels of quality of service. One solution is for network owners to overprovision bandwidth and switching capacity. When combined with distributed architectures for content delivery (such as caching and content delivery networks), this surplus capacity can give networks the headroom they need to handle any transient bursts in traffic without any congestion-related delays.[14] Overprovisioning is subject to a number of limitations, however. Wireless networks cannot simply add

12. ANDREW S. TANENBAUM, COMPUTER NETWORKS 395–98 (4th ed. 2003); JAMES F. KUROSE & KEITH W. ROSS, COMPUTER NETWORKING: A TOP-DOWN APPROACH 618–19, 622 (5th ed. 2010).

13. KUROSE & ROSS, *supra* note 12, at 626–29.

14. *Id.* at 603.

capacity to meet demand. Moreover, even networks that can increase bandwidth cannot do so instantaneously. Forecasting errors are inevitable, and in those instances where a network provider has failed to anticipate a key demographic shift or the emergence of a key application, device, or other complementary technology, it may sometimes find itself unable to expand capacity quickly enough to meet this increase in demand.[15] Overprovisioning also only increases the probability that particular traffic will pass through the network without delay. It does not guarantee the quality of service that any particular traffic will receive.[16] Finally, overprovisioning inherently requires networks to guarantee quality of service through capital expenditures (CapEx) rather than through operating expenditures (OpEx). As the difficulty in raising capital in the current economic downturn eloquently demonstrates, the relative cost of CapEx and OpEx solutions typically vary across time. Simple economics thus militate against locking network providers into one or the other option.[17]

The other alternative to provide higher quality video service is to engage in increasingly sophisticated forms of network management that either reduce congestion or provide some means for providing higher levels of quality of service. Over the past two decades, the engineering community has developed a wide range of potential solutions, including Integrated Services (IntServ),[18] Differentiated Services (DiffServ),[19] MultiProtocol Label Switching (MPLS),[20] and Explicit Congestion Notification (ECN).[21] Other new initiatives, such as Low Extra Delay Background Transport (LEDBAT), also show promise.[22] Other engineers disagree with this approach, complaining that adding quality of service to the network would require devoting processing power in routers that would make the network too expensive and too slow.[23]

Leading engineering textbooks recognize that the engineering com-

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15. Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 22–23, 70–71 (2005).

16. *See* KUROSE & ROSS, *supra* note 12, at 664.

17. Yoo, *supra* note 15, at 23, 71.

18. *See* Robert Braden et al., *Integrated Services in the Internet Architecture: An Overview*, IETF RFC 1633 (rel. July 1994), http://www.rfc-editor.org/rfc/rfc1633.pdf.

19. *See* Steven Blake et al., *An Architecture for Differentiated Services*, IETF RFC 2475 (rel. Dec. 1998), http://www.rfc-editor.org/rfc/pdfrfc/rfc2475.txt.pdf.

20. *See* Eric C. Rosen et al., *Multiprotocol Label Switching Architecture*, IETF RFC 3031 (rel. Jan. 2001), http://www.rfc-editor.org/rfc/pdfrfc/rfc3031.txt.pdf.

21. *See* K.K. Ramakrishnan, *The Addition of Explicit Congestion Notification (ECN) to IP*, IETF RFC 3168 (rel. Sept. 2001), http://www.rfc-editor.org/rfc/pdfrfc/rfc3168.txt.pdf.

22. *See Low Extra Delay Background Transport (LEDBAT) Working Group Charter*, INTERNET ENGINEERING TASK FORCE, http://www.ietf.org/html.charters/ledbat-charter.html (last visited Nov. 15, 2010).

23. DOUGLAS E. COMER, INTERNETWORKING WITH TCP/IP 510 (5th ed. 2006).

munity is split over which solution—overprovisioning or network management—would be better.[24] The fact that the engineering community has yet to reach consensus counsels against regulatory intervention mandating either approach.

B. Congestion Management

The advent of IPTV may also require fundamental changes to the way the network deals with congestion. The current approach to congestion management was developed in the late 1980s, shortly after the Internet underwent a series of congestion collapses. Because congestion is a network-level problem, in many ways the logical solution would have been to address it through a network-level solution, as was done in the original ARPANET, in networks running asynchronous transfer mode (ATM), and in many other early corporate networks. However, the router hardware of the early 1980s made implementing solutions at the network level prohibitively expensive. On the other hand, although edge-based congestion management is feasible, the hosts operating at the edge of the network typically lack the information to know when the network is congested.

Van Jacobson and Michael Karels devised an ingenious mechanism that allows hosts operating at the edge of the network to infer when the core of the network has become congested.[25] This solution takes advantage of a particular feature of the Transmission Control Protocol (TCP). TCP ensures reliability by requiring the receiving host to send an acknowledgment every time it receives a packet. If the sending host does not receive an acknowledgement within the expected timeframe, it presumes that the packet was lost and resends it. Jacobson noted that packet loss typically occurs for one of two reasons: (1) transmission errors, or (2) discard by a router where congestion caused its buffer to become full. Because wireline networks rarely drop packets due to transmission errors, hosts operating at the edge of the network could take the failure to receive an acknowledgement within the expected time as a sign of congestion and a signal to slow down their sending rates exponentially.[26]

This edge-based approach is now required of every computer attached to the Internet and continues to serve as the primary mechanism for manag-

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24. The leading engineering textbook on TCP/IP notes the continuing existence of a "major controversy" over whether quality of service is necessary and feasible. *Id.* at 510, 515. Another textbook describes the "continuing debate" between those who would use network management to provide quality of service guarantees and those who believe that increases in bandwidth and the use of content distribution networks can obviate the need for network management. KUROSE & ROSS, *supra* note 12, at 602–04.

25. *See* Van Jacobson, *Congestion Avoidance and Control*, COMPUTER COMM. REV., Aug. 1988, at 314, 319.

26. *Id.* at 319.

ing congestion today. The problem is that TCP does not represent the only transport protocol commonly used on the network. In particular, by resending every packet that fails to receive an acknowledgement within the expected timeframe, TCP implicitly prioritizes reliability over delay. The DARPA protocol architects recognized from the Internet's earliest years that applications such as packet voice cannot tolerate such delays and would prefer to avoid them even if it meant sacrificing reliability altogether. To support these applications, the DARPA protocol architects created the User Datagram Protocol (UDP), which foregoes the use of acknowledgements altogether. UDP has now become the primary transport protocol for transmitting the data traffic associated with Voice over Internet Protocol (VoIP). Because IPTV makes the same tradeoff, UDP also has become the primary protocol for IPTV as well.

Because the mechanism for managing congestion described above depends on acknowledgements to signal when the network is congested, it does not work for protocols like UDP that do not use acknowledgements. While this was not a problem when UDP represented only a small proportion of bandwidth demand, the growing importance of VoIP and IPTV has caused UDP to become an increasingly significant component of network traffic. Consequently, engineers have sought to ensure that UDP acts in a way that is "TCP friendly," measured in terms of whether a UDP-based application consumes more network resources than would a similar TCP-based application.[27] Some of these solutions require the receiving hosts to send acknowledgements in a manner somewhat reminiscent of TCP, which threatens to force UDP to run unacceptably slowly.[28] Others would require reconfiguring routers to send information about congestion to sending hosts, which had historically been rejected because of cost.[29] More recently, other engineers have organized a more fundamental attack on TCP friendliness as the benchmark for evaluating bandwidth allocation, arguing that it allocates more bandwidth to users running applications that steadily generate small amounts of traffic than to users running applications that generate traffic in short bursts, even when the total amount of bandwidth consumed by both types of applications is exactly the same. It also tolerates allowing end users to seize more of the bandwidth simply by initiating multiple TCP sessions.[30]

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27. *See, e.g.*, Jamshid Madhavi & Sally Floyd, TCP-Friendly Unicast Rate-Based Flow Control (Jan. 1997) (unpublished manuscript), http://www.psc.edu/networking/papers/tcp_friendly.html.

28. *See, e.g.*, Randall Stewart et al., *Stream Control Transmission Protocol*, IETF RFC 2960 9-10 (rel. Oct. 2000), http://www.rfc-editor.org/rfc/pdfrfc/rfc2960.txt.pdf.

29. *See, e.g.*, Sally Floyd & Kevin Fall, *Promoting the Use of End-to-End Congestion Control in the Internet*, 7 IEEE/ACM TRANSACTIONS ON NETWORKING 458, 466 (1999).

30. *See, e.g.*, Bob Briscoe, *A Fairer, Faster Internet*, IEEE SPECTRUM, Dec. 2008, at 43;

Simply put, because video relies on UDP, the growth of video is putting pressure on the way the network manages congestion. Considerable disagreement remains over the best means for addressing this problem and also over the basis for evaluating the fairness or optimality of any particular solution. As a result, it is likely that different actors will pursue different solutions. Under these circumstances, policymakers must be careful to avoid the temptation to intervene to establish a uniform solution and should instead allow this debate to run its course.

C. Multicasting

TCP and UDP are *unicast* protocols, in that they transmit data between a single sender and a single receiver, with each destination receiving a separate stream of packets. While such an approach makes sense for person-to-person communications like email or file transfer, it makes less sense for mass communications. Consider, for example, what occurs if an IPTV provider uses UDP to transmit video to one million viewers. Unicast technologies require that the provider transmit one million duplicate packets to its first hop router. The first hop router must in turn pass those packets on to downstream routers that serve multiple customers even though many of those packets are duplicates as well.

Providers can avoid the inefficiency of distributing mass communications in this manner by using a *multicast* protocol. Instead of sending multiple copies of duplicate packets to the first hop router, multicasting sends a single stream of packets and depends on each downstream router to create duplicates as necessary.[31]

Although more efficient in terms of bandwidth usage, multicasting presents a number of challenges.[32] Multicasting requires the deployment of special routers in the core of the network that are capable of processing group information and duplicating packets as necessary. It also requires group management processes to inform routers when individual hosts tune in and out of the multicast stream. Effective group management also requires the security to ensure that multicasting is not used by unauthorized senders or receivers. Multicast flows are also typically not TCP friendly, so widespread use of multicasting may degrade unicast traffic and may even contribute to congestion collapse. Multicasting also presents routing chal-

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Jon Crowcroft, *TCP Friendliness Considered Unfriendly* (Dec. 6, 2001), http://www.cl.cam.ac.uk/~jac22/otalks/TCP_Too_Friendly_files/v3_document.htm.

31. In addition, *broadcast* protocols exist that transmit packets to every host connected to the network. Broadcasting is inefficient if only a fraction of the hosts are interested in the message.

32. *See, e.g.*, Ian Brown et al., *Internet Multicast Tomorrow*, INTERNET PROTOCOL J., Dec. 2002, at 2; Christophe Diot et al., *Deployment Issues for the IP Multicast Service and Architecture*, IEEE NETWORK, Jan./Feb. 2000, at 78.

lenges that are quite distinct from and more complicated than routing for unicast protocols. The lack of management tools has inhibited the deployment of multicasting that spans multiple domains. That said, many companies employ multicasting within their proprietary networks. Most notably for purposes of this Essay, AT&T relies on multicasting to distribute video through its U-verse network.

Multicasting is likely to play an increasingly important role as other video providers migrate their distribution systems to IP-based technologies.

If so, it will require widespread deployment of hardware in the core of the network with new capabilities, group management tools, and routing algorithms, many of which will represent fundamental changes to the network's architecture.

D. Regulatory Classifications

More widespread use of IPTV is also likely raise questions about its proper regulatory classification. Traditional multichannel video program distribution systems, such as cable television, are regulated as "cable services."[33] As such, they are required to pay franchising fees, provide leased access and PEG access, and provide open access to their set-top boxes, among other requirements.[34] Internet-based services have traditionally been classified as "information services" that have largely been exempt from such regulation.[35]

What is the proper regulatory classification for IP-based video distribution systems? New services provided by telephone companies—such as AT&T's U-verse and Verizon's FiOS services—that use Internet technologies to distribute video over their own proprietary networks are classified as cable services. Other video distribution platforms, such as YouTube and Hulu, do not own any access networks of their own. Instead, they distribute content over the public backbone and whatever last-mile connectivity individual end users have obtained. To date, these so-called over-the-top services have been exempt from regulation as cable services.

The increasing variety of IP video distribution platforms is starting to raise difficult definitional questions. For example, Internet-enabled gaming

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33. 47 U.S.C. § 522(6) (2006).

34. *See generally* INDUS. ANALYSIS & TECH. DIV., WIRELINE COMPETITION BUREAU, FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2008, at 9 chart 2 (Feb. 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf.

35. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 978 (2005) (citing Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798, para. 38 (2002); Federal-State Joint Board on Universal Service, *Report to Congress*, 13 F.C.C.R. 11501, para. 67 (1998)).

systems now support multiplayer gaming, as well as direct interaction through video chat features. In addition, gaming systems are now important sources of over-the-top video services, such as Netflix. The convergence of gaming into the Internet ecosystem has raised the question of whether carrying over-the-top video turns these gaming platforms into cable services.

III. WIRELESS BROADBAND

Another emerging trend that is transforming U.S. Internet policy is the emergence of wireless as a technological platform for broadband service. The most recent data released by the FCC indicates that wireless has already captured nearly twenty-five percent of the market for high-speed lines as of the end of 2008, as compared with just over forty percent for cable modem and just under thirty percent for ADSL.[36] The expansion of the U.S. wireless broadband market since 2008 and the emergence of wireless as the leading broadband platform in other countries both suggest that wireless broadband will become increasingly important in the years to come.

Policymakers sometimes suggest that the same principles applying to other broadband technologies should simply be extended to wireless. These suggestions overlook key technological differences between wireless and wireline technologies that policymakers must take into account.

A. Bandwidth Limits and Local Congestion

Wireless technologies face limitations that are quite different from those faced by wireline technologies. As noted earlier, wireless broadband is subject to bandwidth constraints that are much stricter than those confronted by wireline technologies. While wireless providers can increase capacity by relying on smaller cell sites operating at lower power, they cannot add capacity in the same manner as wireline providers.

In addition, because wireless technologies share bandwidth locally, they are more susceptible to local congestion than many fixed-line services, such as ADSL.[37] These problems are exacerbated by the fact that in wireless networks, data and voice traffic typically share bandwidth, in contrast with telephone and cable companies, which typically place data traffic in a separate channel. Thus, excess data traffic can degrade wireless providers' core business to an extent not possible for other broadband technologies.

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36. INDUS. ANALYSIS & TECH. DIV., WIRELINE COMPETITION BUREAU, FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2008, at 9 chart 2 (Feb. 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf.

37. Because cable modem systems also share bandwidth locally, they are similarly susceptible to local congestion. *See* Christopher S. Yoo, *Network Neutrality, Consumers, and Innovation*, 2008 U. CHI. LEGAL F. 179, 199–202 (2008).

B. The Physics of Wave Propagation

Those who took physics in high school will recall that waves have some unique characteristics. They can reinforce each other in unexpected ways, as demonstrated by unusual echoes audible in some locations in a room, but not others, and by whispering corners, where the particular shape of the room allows sound to travel from one corner to the other even though a person speaks no louder than a whisper. As noise-reducing headphones demonstrate, waves can also cancel each other out. Waves also vary in the extent to which they can bend around objects and pass through small openings, depending on their wavelength.

The unique features of waves can cause wireless technologies to face interference problems with which wireline technologies do not have to contend. For example, wireless signals attenuate much more rapidly with distance than do wireline signals. Moreover, in contrast to wireline technologies, there is an absolute limit to the density of wireless users that can operate in any particular area. Shannon's law dictates that the maximum rate with which information can be transmitted given limited bandwidth is a function of the signal-to-noise ratio.[38] Unlike wireline transmissions, which travel in a narrow physical channel, wireless signals propagate in all directions and are perceived as noise by other receivers. At some point, the noise becomes so significant that the addition of any additional wireless radios becomes infeasible.

Wireless transmissions also suffer from what are known as *multipath* problems resulting from the fact that terrain and other physical features can create reflections that can cause the same signal to arrive at the same location multiple times. Unless the receiver is able to detect that it is receiving the same signal multiple times, it will perceive multipathing as an increase in the noise floor, which in turn reduces the available bandwidth. If the signal arrives 180 degrees out of phase, it can even cancel the original signal out completely. Although smart receivers can avoid these problems if they know the exact location of each source, they cannot do so if the receiver or the other sources are mobile devices whose locations are constantly changing.

For these reasons, many wireless providers implement protocols that give priority to time-sensitive applications during times when subscribers are in areas of low bandwidth (such as by holding back email while continuing to provide voice service). Other wireless providers rate-limit or ban video or peer-to-peer downloads in order to prevent a small number of us-

38. *See* C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379 (1948) (Part I); C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 623 (1948) (Part III).

ers from rendering the service completely unusable.[39]

C. Congestion Management

Wireless technologies also require a significantly different approach to congestion management. As noted earlier, the Internet's primary mechanism for managing congestion is based on the inference that because wireline networks rarely drop packets due to transmission errors, any observed packet loss is likely to be due to congestion. The problem is that this inference is invalid for wireless networks, which drop packets due to transmission error quite frequently, either because of a bad handoff as a mobile user changes cells, or because of the interference problems discussed above. When a packet is dropped due to transmission error, reducing the sending rate exponentially is precisely the wrong response. Instead, the sending host should resend the dropped packet as quickly as possible without slowing down. In other words, the optimal response for wireless networks may well be the exact opposite of the optimal response for wireline networks.

These differences have caused wireless networks to manage congestion and packet loss in different ways. Some solutions place a "snoop module" at the base station that serves as the gateway used by wireless hosts to connect to the Internet and keeps copies of all packets that are transmitted and monitors acknowledgments passing in the other direction. When the base station detects that a packet has failed to reach a wireless host, it resends the packet locally instead of having the sending host do so.[40] Other solutions call for the sending host to be aware of when its transmission is carried in part by a wireless link and to distinguish between losses due to congestion and losses due to transmission errors. Still other solutions call for a split connection, in which the sending host establishes one TCP connection with an IP gateway in the middle of the network where the transmission shifts to wireless, and a separate TCP connection between the IP gateway and the receiving host.[41] Some of these solutions violate the semantics of IP. All of them require introducing traffic management functions into the core of the network to a greater extent than originally envisioned by the Internet's designers.

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39. A recent, eloquent demonstration of this strategy is the use of placards aboard the Amtrak Acela express trains asking passengers to refrain from using the WiFi service to download video.

40. *See generally* Hari Balakrishnan et al., *Improving Reliable Transport and Handoff Performance in Cellular Wireless Networks*, 1 WIRELESS NETWORKS 469 (1995).

41. *See* KUROSE & ROSS, *supra* note 12, at 585–86; TANENBAUM, *supra* note 12, at 553–54.

D. The Heterogeneity of Devices

Wireless technologies do not vary only in terms of transmission technologies. They also vary in terms of end-user devices. Instead of relying on a personal computer, wireless broadband subscribers connect to the network through a wide variety of smart phones. These devices are much more sensitive to power consumption than are PCs, which sometimes leads wireless network providers to disable certain functions that shorten battery life to unacceptable levels. In addition, wireless devices have much less processing capacity and employ less robust operating systems than do the laptop and PCs typically connected to wireline services. As a result, they are more sensitive to conflicts generated by multiple applications, which can cause providers to be much more careful about which applications to permit to run on them.

Wireless devices also tend to be much more heterogeneous in terms of operating systems and input interfaces (including keyboards and touch screens). As a result, the dimensions and levels of functionality offered by particular wireless devices vary widely. It seems too early to predict with any confidence which platform or platforms will prevail. Furthermore, as noted earlier, many wireless networks address bandwidth scarcity by giving a higher priority to time-sensitive applications, which typically require close integration between network and device. These features underscore the extent to which variations in particular devices are often an inextricable part of the functionality of the network.[42]

Even more fundamentally, wireless devices interconnect with the network in a manner that is quite different from devices connected to wireline networks. Devices connected to wireline networks have IP addresses that are visible to all other Internet-connected hosts. Wireless devices, in contrast, do not have IP addresses. Instead, Internet connectivity is provided by an IP gateway located in the middle of the network that connects to individual wireless devices using a telephone-based technology rather than IP. Stated in technical terms, wireless broadband devices operate at layer two rather than layer three of the Internet protocol stack. Wireless devices will eventually connect through the Internet protocol once fourth-generation wireless technologies such as LTE are deployed. Until that time, wireless devices necessarily will connect to the Internet on different and less open terms than devices connected through wireline networks.

E. Routing and Addressing

Another problem confronting wireless broadband results from the fact

42. *See generally* Charles L. Jackson, *Wireless Efficiency Versus Net Neutrality*, 63 FED. COMM. L.J. (forthcoming Mar. 2011).

that the Internet developed at a time when computers did not move. As a result, the architecture could use a single address to specify both the identity of a particular machine, as well as where that machine was connected to the network. The advent of mobility has caused the unity of identity and location to break down. A single mobile device may now connect to the network through any number of locations. Although the network could constantly update the routing table to reflect the host's current location, doing so would require propagating the updated information to every router in the network as well as to an unacceptably large number of programs and databases.

Instead, mobile devices typically designate a router on its home network that has a fixed, permanent IP address as a "home agent" that serves as the initial contact point for all IP-based communications. Anyone seeking to contact a mobile device would first send the packets to the home agent, which would then encapsulate the packets in another packet and forward them to wherever the mobile host is currently located. Managing mobile communications in this manner is surprisingly complex and requires protocols for a home agent to notify others of its location; to encapsulate traffic bound for the mobile host; and to allow mobile hosts to register and deregister their current location with their home agents, to notify the foreign network that they are currently attached to it, and to decapusulate the packets as they arrive. Sending communications via the home agent also suffers from the inefficiency of what is sometimes called "triangle routing," because instead of passing directly from the sending host to the receiving host, traffic must travel first from the sending host to the home agent and then from the home agent to the receiving host. In the extreme case, a communication between two mobile hosts located next to one another in a conference room on the west coast might have to travel back and forth across the country if one of them has a home agent located on the east coast. The home agent can eliminate triangle routing by passing the mobile host's current location on to the sender so that the sender may forward subsequent packets to it directly. The initial communications must still bear the inefficiency of triangle routing. Moreover, such solutions become much more difficult to implement if the mobile agent is constantly on the move.[43]

Wireless technologies are also causing pressure on the way the Internet has traditionally kept track of addresses Tier-one ISPs necessarily must maintain complete routing tables that contain routes to the IP address for every host connected to the Internet. The current system relies on route aggregation to keep routing tables from growing too large. This mechanism

43. COMER, *supra* note 23, at 339–46; KUROSE & ROSS, *supra* note 12, at 566–77; TANENBAUM, *supra* note 12, at 372–75, 462–64.

can be illustrated by an analogy to the telephone system. Consider a party in Los Angeles who is attempting to call the main telephone number for the University of Pennsylvania, which is (215) 898-5000. So long as all calls to the 215 area code pass through the same outbound link, a phone switch in Los Angeles could represent all telephone numbers in that area code with a single entry in its routing table. Similarly, so long as all telephone numbers in the 898 directory are connected to the same central office, switches within Philadelphia need not maintain separate entries for each phone number in that directory. Instead, they can represent all telephone numbers located in (215) 898-xxxx with a single entry.

The Internet employs a similar system known as Classless InterDomain Routing (CIDR) to aggregate routes. CIDR is even more flexible. It can aggregate routes at any number of digits rather than being limited in the manner of area codes and directories with the digits of course being represented in binary.

This strategy depends on the address space remaining compact. In other words, this approach will fail if the 215 area code includes phone numbers that are not located in Philadelphia. If that is the case, the routing table will have to use separate entries to keep track of every single address. Thus, the fragmentation of the address space associated with mobility will eliminate the primary mechanism on which the network has relied to prevent routing tables from expanding more quickly than the architecture can support.

Another problem is somewhat more subtle. The current architecture is built on the implicit assumption that Internet addresses change on a slower timescale than do communication sessions. So long as the address architecture changes at a slower timescale, any particular Internet-based communication may take the address architecture as given. Mobility, however, increases the rate at which the address architecture changes. In addition, because addressing is handled on a decentralized basis, information about changes in the address architecture takes time to spread across the Internet. Increases in the rate with which the address space changes can cause communications sessions to fail and create the need for a new way to manage addresses.

Others have proposed radical changes in the addressing and routing architecture. One approach would replace the single address now employed in the network with two addresses: one to identify the particular machine and the other to identify its location. Whatever solution is adopted would represent a fundamental change in the network layer that unifies the entire Internet.

IV. CLOUD COMPUTING

Cloud computing represents one of the hottest topics in today's information technology community. Under the traditional paradigm, end users run applications on data stored locally on the host computer's hard disk. Under cloud computing, data resides in the network and is accessed on demand.

The National Institute of Standards and Technology (NIST) divides the type of services offered by cloud computing providers into three categories:[44]

Software as a Service (SaaS) providers offer finished applications that end users can access through a thin client (typically a web browser). Prominent examples of SaaS include Gmail, Google Docs, and Salesforce.com. The only computing power that an end user needs to access SaaS is a netbook capable of running a web browser. The end user has limited control over the design of the application, such as minor customization and configuration. It has no control over the servers, networking, or storage infrastructure.

Platform as a Service (PaaS) providers offer suites of programming languages and software development tools that customers can use to develop their own applications. Prominent examples include Microsoft Windows Azure and Google App Engine. PaaS gives end users control over application design, but does not give them control over the physical infrastructure.

Infrastructure as a Service (IaaS) providers offer end users direct access to processing, storage, and other computing resources and allow them to deploy their own operating systems and configure those resources as they see fit. Examples of IaaS include Amazon Elastic Compute Cloud (EC2), Rackspace, and IBM Computing on Demand.

Cloud computing can also be understood in terms of the business needs motivating its adoption. Customers are often reluctant to abandon their entire corporate intranets and to rely exclusively on cloud computing. One business case that stops short of fully embracing cloud computing is *disaster recovery*, in which customers back up their data remotely on the network. It may also involve the functionality to access that data on a short-term basis, should the customer's internal network fail. Another classic scenario is called *cloud bursting*, in which the customer relies on cloud computing to provide overflow capacity to cover spikes in demand.

Proponents of cloud computing predict that it will yield substantial benefits.[45] Assuming that data centers allow multiple customers to share the

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44. Peter Mell & Tim Grance, *The NIST Definition of Cloud Computing*, NIST 2 (Oct. 7, 2009), http://csrc.nist.gov/groups/SNS/cloud-computing/cloud-def-v15.doc.

45. *See, e.g.*, Joe Weinman, *The 10 Laws of Cloudonomics*, BLOOMBERG BUSINESSWEEK

same hardware, cloud computing should allow smaller companies to take advantage of scale economies that they could not realize on their own. Even companies that are large enough to achieve minimum efficient scale by themselves may see advantages. The fact that hardware represents discrete (and often significant) investments that must typically be provisioned in advance means that companies risk running out of capacity should demand grow more rapidly than anticipated. Conversely, they may face the burden of underutilized resources should demand grow unexpectedly slowly. The fact that companies must provision hardware for peak demand also means that cloud computing is particularly helpful when demand is highly variable, since aggregating demand lowers variability.[46] The greater dispersion made possible by virtualization can reduce latency and increase reliability.

Predictions about the future of cloud computing run the gamut, with some forecasting that all information technology will eventually migrate into the cloud[47] and others arguing that it is nothing more than overhyped repackaging of existing technologies.[48] What is even more poorly understood is what increasing use of cloud computing would mean for the network architecture.

A. End-User Connectivity

Cloud-computing customers need different services from the network that provides the physical connectivity to end users (often called the "last mile"). Since the software and data needed to run applications no longer reside on end users' hard disks, cloud computing needs more ubiquitous connectivity and more substantial uptime guarantees than previously required. Because data processing no longer occurs locally, reliance on cloud computing also increases demand for the quantity bandwidth as well as its ubiquity.

Moreover, because cloud computing provides services that used to be delivered by corporate intranets, cloud computing users may well demand higher levels of quality of service from their last-mile networks. These de-

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(Sept. 6, 2008), http://www.businessweek.com/technology/content/sep2008/tc2008095_942690.htm.

46. In short, aggregating flows that are not perfectly correlated reduces variability. Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1707–08, 1707 n.471 (2003). As one industry commentator observes: "The peak of the sum is never greater than the sum of the peaks." Weinman, *supra* note 45.

47. *See, e.g.*, NICHOLAS CARR, THE BIG SWITCH (2008).

48. *See, e.g.*, *Oracle CEO Larry Ellison Bashes "Cloud Computing" Hype*, YOUTUBE (Oct. 6, 2009), http://www.youtube.com/watch?v=UOEFXaWHppE; *see also* Geoffrey A. Fowler & Ben Worthen, *The Internet Industry Is on a Cloud—Whatever that May Mean*, WALL ST. J., Mar. 26, 2009, at A1.

mands will likely vary from company to company. For example, financial-service companies typically require perfect transactions with latency guarantees measured in microseconds. In addition, the provider must be able to verify the delivery time of each and every transaction after the fact. The fact that information that used to reside exclusively within an end user's hard disk and processor must now be transmitted over the network also means that cloud-computing customers are likely to demand higher levels of security from their last-mile networks.

B. Data Center Connectivity

The advent of cloud computing also requires improvements in data center connectivity. As an initial matter, customers establishing new cloud computing instances must provision their data to the data center. Because datasets in the terabyte range would take weeks to upload, many cloud-computing providers recommend that customers download their data onto a physical storage medium and to send it via an overnight mail service, such as FedEx.[49]

The agility and virtualization demanded by cloud computing also requires the flexibility to move large amounts of data between data centers very quickly. The best-efforts architecture of the current Internet cannot offer the guaranteed levels of quality of service that these functions require. For this reason, many cloud-computing providers interconnect their data centers through dedicated private lines. Others have begun outsourcing these services to other networks, partially to gain the economies of sharing resources with other firms, and partially out of concern that operating these networks will lead them to be classified as common carriers.

Cloud computing is also placing new demands on the network's approach to routing. The BGP-based system responsible for routing traffic on the current Internet employs an algorithm that by default sends traffic along the path that transverses the fewest autonomous systems. Most cloud-computing providers need greater control over the paths taken by key traffic. As a result, many rely on MPLS or some other protocol to manage routing. On a more radical level, some industry observers note that the identity/locator split discussed above—with mobile computing assigning separate addresses to each individual machine and to the location that the machine is currently connected to the network—should be augmented still further with a third address to mark the location where the application that the machine is accessing resides.[50]

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49. *See, e.g.*, Jon Brodkin, *Amazon Cloud Uses FedEx Instead of the Internet to Ship Data*, NETWORK WORLD (June 10, 2010), http://www.networkworld.com/news/2010/061010-amazon-cloud-fedex.html.

50. *See* NEMERTES RESEARCH, *supra* note 11, at 53–54.

C. *Privacy and Security*

Finally, cloud computing has fairly significant implications for privacy and security. As an initial matter, cloud computing often requires large amounts of data that previously did not leave a corporate campus to be shifted from one data center to another. In addition, virtualization necessarily envisions that this data will reside on the same servers as other companies' data. As a result, the hardware located in these data centers and the networks interconnecting them require a higher level of security than previously necessary. Industry participants are also often very protective of information about the volume and pattern of their transactions. They are thus likely to impose stringent requirements on what data can be collected about their operations and how that data is used.

The fact that data may be shifted from one data center to another also potentially makes that data subject to another jurisdiction's privacy laws. Because customers are ultimately responsible for any such violations, they are likely to insist on a significant degree of control over where data resides at any particular moment.

V. PROGRAMMABLE NETWORKING

One of the primary architectural principles underlying the Internet is that routers should operate on a pure store-and-forward basis without having to keep track of what happens to packets after they have been passed on. This commitment is reflected in the Internet's general hostility toward virtual circuits and the belief that routers should not maintain per-flow state. Opponents of network management often point to the Senate testimony offered by officials of Internet2—a nonprofit partnership of universities, corporations, and other organizations devoted to advancing the state of the Internet—noting that, although their network designers initially assumed that ensuring quality of service required building intelligence into the network, "all of [their] research and practical experience supported the conclusion that it was far more cost effective to simply provide more bandwidth."[51]

To a certain extent, this longstanding hostility toward virtual circuits is an artifact of the Internet's military origins that has less relevance for the Internet of today. DARPA protocol architect David Clark has pointed out that the belief that routers operating in the core of the network should not maintain a per-flow state derived largely from the high priority that military planners placed on survivability.[52] As noted earlier, survivability does not

51. *Net Neutrality: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 64, 66 (2006) (statement of Gary R. Bachula, vice president, external affairs, Internet2), *available at* http://commerce.senate.gov/public/?a=Files.Serve&File_id=c5bf9e54-b51f-4162-ab92-d8a6958a33f8.

52. Clark, *supra* note 2, at 107–08.

represent a significant concern for the modern Internet.

Moreover, technologies such as IntServ and MPLS, both of which are governed by accepted IETF standards, use virtual circuits to simplify packet forwarding and to support a fairer and more efficient allocation of traffic. Although IntServ has not achieved widespread acceptance, interest in MPLS appears to be growing.

These developments can be seen as part of a broader move away from viewing routers as static devices that always operate in a particular way and toward looking at the network as a programmable switching fabric that can be reconfigured from store-and-forward routers into virtual circuits as needed. For example, Internet2 (which, as noted earlier, is often held out as proof of the engineering community's conviction that network management is unnecessary) offers a service that it calls its Interoperable On-demand Network (ION) that allows researchers to establish dedicated point-to-point optical circuits to support large data transfers and other bandwidth-intensive applications. Internet2 notes that the "advanced science and engineering communities . . . are already straining against the limits of today's network capabilities—and capacities" and that advanced media and telepresence applications often need the type of dedicated circuits previously regarded as anathema.[53]

Given the greater flexibility and functionality of today's routers and the increasingly intense demands being placed on them, there seems little reason to require that they always operate in a single, predetermined manner. That said, effective utilization of these new capabilities will doubtlessly require the development of new technical and institutional arrangements. Such innovations and changes may be inevitable if end users are to enjoy the full range of the network's technical capabilities.

VI. PERVASIVE COMPUTING AND SENSOR NETWORKS

The last development that I will discuss that promises to effect some fundamental changes to the network architecture is the deployment of pervasive computing and sensor networks.[54] Computer chips are being incorporated into an ever-widening array of devices. In addition, the growth of what the ITU calls "the Internet of things" means that more and more objects are being outfitted with radio frequency identification (RFID) chips, which combine a wireless antenna with a tiny amount of memory.[55] Al-

53. *Internet2 ION*, INTERNET2 (Sept. 2009), http://www.internet2.edu/pubs/200909-IS-ION.pdf.

54. For the seminal work on this subject, see Mark Weiser, *The Computer for the 21st Century*, SCI. AM., Sept. 1991, at 94.

55. *See* INT'L TELECOMM. UNION, ITU INTERNET REPORTS 2005: THE INTERNET OF THINGS (2005).

though RFID chips do not have their own power sources, the wireless signal from a sensor can provide enough power to activate them.

Most of the literature on sensor networks has focused on the privacy implications. What has been largely overlooked is the extent to which sensor networks and pervasive computing will require different services from the network. As an initial matter, pervasive computing and RFID chips may require a greater degree of last-mile connectivity than the network currently provides. Sensor networks also necessarily involve machine-to-machine communications, which are typically more intensive and follow patterns that are quite different from those that occur when human beings initiate the communications. These developments also represent a significant increase in the number of devices that will require network visibility, which will increase the pressure on the network to migrate to IPv6. In addition, the mobility of many of these endpoints may accelerate the rate of change within the address space, which may cause changes in routing and addressing systems.

Equally importantly, these developments represent a fairly significant increase in the heterogeneity of devices attached to the network. The current network model implicitly assumes that the network interconnects a series of general-purpose devices. Pervasive computing and sensor networks involve more specialized devices that perform a narrower range of functions. As such, they may require a different approach to networking. For example, these devices may not be able to send acknowledgements in the manner envisioned by TCP. Unleashing the functionality of these stripped-down devices may also require a much tighter integration with the network.

Consequently, these devices may not have individual IP addresses. Instead, they may reside behind an IP gateway and communicate with one another through a lower-layer protocol. If so, they may require more widescale deployment of the middlebox architecture that has proven so controversial. That said, it is probably too early to offer any reliable predictions of the impact that deployment of these technologies will have on the architecture of the network.

VII. CONCLUSION

One recurrent theme in the debates over Internet policy is the claim that the Internet's future success depends on preserving the architecture that has made it successful in the past. This claim has always struck me as inherently conservative and potentially Panglossian.[56] Policymakers must

56. Pangloss was the teacher in Voltaire's *Candide* who often remarked that we live in "the best of all possible worlds." VOLTAIRE, CANDIDE AND OTHER STORIES 4, 14, 88 (Roger Pearson trans., 2006) (1759).

be open to the possibility that fundamental changes in the way people are using the network may require the network to evolve in new directions. Indeed, a significant portion of the engineering community believes that the time is ripe for a clean-slate approach aimed at creating a network that is starkly different from the one we have today. It is also possible that the network may not have a single response to these developments. Instead, as what people want from the network becomes increasingly heterogeneous, different portions of the network will respond in different ways to meet this demand.

Exactly what architectural changes will be required to meet these new challenges is difficult to foresee. Instead of creating regulations that lock in any particular vision of the network's architecture, policymakers should create regulatory structures that give industry actors the latitude they need to experiment with different solutions. In so doing policymakers would do well to recognize that, while disruptive, change is inevitable; and to keep in mind the aphorism that in a technologically dynamic environment, businesses are either moving forward or moving backward—there is no standing still.

Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet

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I. INTRODUCTION

When the United States Court of Appeals for the District of Columbia Circuit recently shut down the FCC's attempt to impose "net neutrality" principles on the Internet access provider Comcast,[1] the FCC was forced to confront the fact that a decade's worth of steps on the slippery slope of broadband access deregulation had led the FCC to an unforeseen and ultimately untenable destination, where it was unable to enforce the fundamental principles of common carrier regulation necessary to ensure that all Internet content and application providers—including those not

1. Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, 23 F.C.C.R. 13028 (2008), *vacated by* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

affiliated with the owners of Internet access facilities—were ensured reasonable and nondiscriminatory use of those facilities. The FCC had arrived at its current dilemma through an unfortunate combination of (1) unverified predictive judgments associating deregulation with investment; (2) fanciful notions about a gold rush of competitive entry into the consumer broadband market; (3) the abandonment of the decades-old "bright line" between common carrier transmission functions and competitive services that any provider could furnish using that basic transmission (i.e., telecommunications); and (4) the elimination of unbundling requirements for services over broadband facilities. The FCC needs now to revisit—and revise—the factual, legal, and policy judgments that have brought it to the current situation. The Chairman of the FCC has proposed that the regulatory oversight the FCC considers necessary for net neutrality can be restored by reclassifying Internet access as "telecommunications services,"[2] but under his proposed "Third Way," the FCC would apply and enforce "only a handful of provisions of Title II . . . ."[3]

This Article explains why dedicated Internet access *is* a telecommunications service and, as such, why reclassification to Title II must be pursued to correct its earlier—and incorrect—treatment as an "information service." More importantly, it explains why reclassification alone will not be sufficient to assure a competitive and open Internet, and why an approach that restores competitor access to common carrier broadband facilities for purposes of offering Internet access to their own retail customers remains the best strategy for achieving this goal. To be effective, these policies need to be applied regardless of the transmission medium or the regulatory status of the incumbent service provider; for example, incumbent local telephone exchange carriers (ILECs), incumbent cable companies, and wireless carriers that furnish Internet access must be embraced within this framework. To reach this result, the FCC needs to admit to factual errors underlying its broadband Internet access decisions of the past decade, but it also needs to admit to factual errors underlying its pervasive deregulation of broadband access facilities. The FCC stands a

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2. Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, FCC, 4 (May 6, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

3. *Id.* at 5. The legal analysis supporting the Chairman's proposal was first laid out in an accompanying statement by the FCC's General Counsel. *See* Austin Schlick, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma*, FCC (May 6, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf [hereinafter Schlick Third-Way Memorandum]. And a yet more detailed analysis followed in the form of a *Notice of Inquiry* adopted by the FCC in June 2010. Framework for Broadband Internet Service, *Notice of Inquiry*, GN Docket 10-127, 2010 FCC LEXIS 3649 (June 17, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-114A1.pdf.

better chance of attaining its goals of net neutrality and competitive Internet access if it combines reclassification with a requirement for unbundled access to all network elements necessary for nonfacilities-based providers to offer retail Internet access in competition with the retail services currently available solely from incumbent facilities-based providers.

II. NEITHER FACT, POLICY, NOR PRECEDENT SUPPORT THE CLASSIFICATION OF BROADBAND INTERNET ACCESS AS ANYTHING BUT A BASIC TELECOMMUNICATIONS SERVICE

A. The Slippery Slope

The first step along the slippery slope came, innocently enough, shortly after passage of the Telecommunications Act of 1996[4] (1996 Act or TA96), in the context of the Federal-State Joint Board on Universal Service Report to Congress (the so-called *Stevens Report*).[5] As it evaluated the various potential sources for federal universal service funding, the FCC was confronted with the primary question of whether to classify Internet Service Providers (ISPs) as providers of telecommunications services subject to assessment under the federal Universal Service Fund (USF), pursuant to the specific directives of the 1996 Act.[6] Given its focus at the time, the FCC was basically trying to decide whether information services should be included in the USF funding base because they contained a "telecommunications" component. In the *Stevens Report*, the FCC expressed the view that ISPs were furnishing information, and not telecommunications, services, and that the intent of the 1996 Act was not to "break out" the telecommunications component of an information service so as to subject it to a separate universal service support obligation.[7] After all, as the Commission noted, in most cases, the ISP purchased the underlying transmission as a telecommunications service, from a common carrier; whatever "telecommunications" was incorporated into the information service was thus already contributing to the USF base. The Commission went on to find that this treatment was consistent with the fact that the definitional structure for "telecommunications services" and "information services" in the 1996 Act, which—like the *Computer Inquiry II* framework on which it was based—contained two separate (and thus

4. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

5. Federal-State Joint Board on Universal Service, *Report to Congress*, 13 F.C.C.R. 11501 (1998) [hereinafter *Stevens Report*].

6. Telecommunications Act of 1996. The questions that Congress directed the FCC to address in its Report to Congress are described at note 1 of the *Report*. *Stevens Report*, *supra* note 5, at para. 1 n.1.

7. *Stevens Report*, *supra* note 5, at paras. 33, 43.

mutually exclusive) definitions for an "information service" and a "telecommunications service."[8] In its *Report*, the FCC stated: "We find generally, however, that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'"[9]

Several key distinctions of fact and context make the analysis contained in the *Stevens Report* a poor basis for the FCC's subsequent decision to permit facilities-based common carriers (including providers of cable telephony) to provide "integrated" Internet access services exclusively as deregulated information services. Most importantly, while the FCC undoubtedly intended to continue its policy of shielding competitive information service providers from common carrier regulation, it unequivocally also intended to preserve the long-standing *Computer Inquiry II* requirement that facilities-based common carriers make the transmission (telecommunications) component of any information service available to competitor ISPs on a non-discriminatory, common carrier basis.[10] This carefully preserved the twin policies that ensured (1) that non-

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8. *Id.* at para. 13 (citing *Computer Inquiry II*, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision*, 77 F.C.C.2d 384 (1980) [hereinafter *Computer Inquiry II* or *Computer II*], *modified*, 84 F.C.C.2d 50 (1980), *reconsidered in* 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer and Comm. Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, Louisiana Pub. Serv. Comm'n v. FCC, 461 U.S. 938 (1983)). The terms "basic" and "enhanced" services in *Computer Inquiry II* correspond to the terms "telecommunications" and "information" services in the 1996 Act. *Stevens Report*, *supra* note 5, at para. 33 (citing Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 21905, para. 102 (1996) (subsequent case history omitted)). Earlier, the *Computer Inquiry II* framework was incorporated into the terms of the court-supervised Consent Decree that ended the decades-old antitrust proceeding against AT&T. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). *See Stevens Report*, *supra* note 5, at para. 42 n.85.

9. *Stevens Report, supra* note 5, at para. 13. As Kevin Werbach, who headed the FCC's Internet policy development in the period following the 1996 Act, explained:

> The issue before the Commission in these early decisions was whether an information-service provider could be found to engage in telecommunications; the issue was not whether telecommunications-service providers could be classified as offering information services. Although the possibility existed that incumbent operators could switch to Internet-protocol-based transmission, the FCC did not consider this possibility a serious threat to the regulatory structure.

Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 543 (2010).

10. Commenting on these objectives, the FCC stated:

> As long as the underlying market for provision of transmission facilities is competitive or is subject to sufficient pro-competitive safeguards, we see no need to regulate the enhanced functionalities that can be built on top of those facilities. . . . Limiting carrier regulation to those companies that provide the underlying transport ensures that regulation is minimized and is targeted to markets where full competition has not emerged.

ILEC providers of ISP services would be shielded from common carrier status merely because they incorporated "telecommunications" as an input to their end (information service) product, and (2) that the ILEC could not escape its common carrier obligations with regard to the "telecommunications" component of its information services merely by contaminating the transmission with content or processing enhancements.

This approach was also completely consistent with the nature of ISPs and ISP services at the time of the *Stevens Report*.[11] At that time, subscribers to the major ISPs were required to provide their own "last mile" connection, usually accomplished on a dial-up basis utilizing the subscriber's home (or business) local telephone service. As such, and unlike today's principal providers of broadband Internet access, dial-up ISPs did not provide last-mile telecommunications services to their customers. According to the FCC,

> In essential aspect, Internet access providers look like other enhanced – or information – service providers. Internet access providers, typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers – interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and others.[12]

Moreover, although these ISPs redirected a small portion of their end users' traffic to the public Internet, ISPs at the time of the *Stevens Report* typically continued their traditional "information services provider" role of offering end users enhanced functionalities on the ISP's own host computers.[13] In other words their principal business continued to be to "add value" to the underlying transmission, rather than simply to provide a connection for users' access to independent, third-party content. Thus, both the nature of ISPs' businesses and the regulatory framework that applied

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Stevens Report, *supra* note 5, at para. 95. Similarly, with respect to the collection of USF, the FCC stated both "that the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications' rather than 'information service,' and that the provision of such transmission should also generate contribution to universal service support mechanisms." *Id.* at para. 15.

11. *Stevens Report*, *supra* note 5, at para. 63 ("Major Internet access providers include America Online, AT&T WorldNet, Netcom, Earthlink, and the Microsoft Network.").

12. *Id.* at para. 81.

13. The role of an Internet access provider has much more in common with the functions associated with earlier enhanced/information services providers than with Internet access services offered by ILECs, cable companies, and wireless carriers over their last-mile transmission facilities. *Id.* at para. 76 ("Internet access providers typically provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others.").

continued to reflect the decades old *Computer II* framework.[14]

The first significant deviation from the *Computer II* framework came in the FCC's 2002 *Cable Modem Declaratory Ruling*.[15] In that proceeding, the FCC dealt specifically with Internet access over broadband facilities that were owned by the provider of the Internet access service. This case had another novel characteristic, however, in that the owner of the broadband transmission facility at issue was a cable television company, traditionally subject to regulation under Title VI of the Communications Act of 1934 for its "cable service."[16] In the *Cable Modem Ruling*, the FCC declared that "cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service."[17] In finding cable modem service to be a highly integrated offering of information services with telecommunications, the FCC referred back to the analysis in the *Stevens Report*, particularly highlighting applications resident on the ISP's own host computers (e.g., e-mail) as well as a function known as "Domain Name Service" (DNS).

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14. *Computer Inquiry III*—a revision to the *Computer II* rules initiated in 1985 and developed over most of the next decade—relaxed the mechanism for separating the Bell operating companies' basic and enhanced services from a fully structural approach to a nonstructural, accounting-based approach and addressed the treatment of certain specific services. However, the definitional framework and principal objectives of *Computer II* were retained. *See* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 F.C.C.2d 958 (1986) [hereinafter *Computer Inquiry III* or *Computer III*], *reconsidered in* 2 F.C.C.R. 3035 (1987), *reconsidered in* 3 F.C.C.R. 1135 (1988), *reconsidered in* 4 F.C.C.R. 5927 (1989), *vacated and remanded sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 2 F.C.C.R. 3072 (1987), *reconsidered in* 3 F.C.C.R. 1150 (1988), *reconsidered in* 4 F.C.C.R. 5927 (1989), *vacated*, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceedings, 5 F.C.C.R. 7719 (1990), *reconsidered in* 7 F.C.C.R. 909 (1992), *petitions for review denied*, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 F.C.C.R. 7571 (1991); BOC Safeguards Order, *vacated in part and remanded*, California v. FCC, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995).

15. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 (2002) [hereinafter *Cable Modem Declaratory Ruling*], *aff'd sub nom*. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

16. The term "cable service" under the Communications Act refers to "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service . . . ." Communications Act of 1934, ch. 652, § 602(6), 48 Stat. 1064 (codified as amended at 47 U.S.C. § 522(6)). Cable modem service, with or without the bundling of Internet applications and content, plainly does not fall within this definition.

17. *Cable Modem Declaratory Ruling*, *supra* note 15, at para. 7.

Although it pinned its factual analysis on these few specific functions, it became clear around this time that the FCC was actually pursuing broadband deregulation as part of a broader policy shift. The *Cable Modem Declaratory Ruling* quotes from the recently released *Wireline Broadband Internet Services* NPRM in which the FCC expressed that, as a policy matter, "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[18] Although the FCC purported to anchor this policy shift on the rather ill-defined section 706 mandate to "promote advanced services,"[19] the Commission did a poor job of analyzing or explaining why the newness or speed of broadband services made any consequential difference with respect to the long-standing economic objectives for common carrier regulation of the transmission services of providers that owned access facilities

When challenged to require the cable companies to offer the transmission component of the cable modem service separate from any "enhanced" functionalities, the FCC weakly explained that (1) *Computer II* (which would have required this result in the case of ILECs) had never been applied to cable companies,[20] and (2) in any event, if the requirement existed, the FCC was prepared to waive it.[21] In *Brand X*, the Supreme Court affirmed the FCC's decision on a six-to-three vote, largely in deference to the agency's expertise.[22] The dissent in *Brand X* was unconvinced by the FCC's conclusion that the cable company was not "offering" a telecommunications service, and it observed that

> The merger of the physical connection and Internet functions in cable's offerings has nothing to do with the "inextricably intertwined" . . . nature of the two . . . , but is an artificial product of the cable company's marketing decision not to offer the two separately, so that the Commission could . . . exempt it from common-carrier status.[23]

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18. *Id.* at para. 5 (citing Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019, para. 5 (2002) [hereinafter *Wireline Broadband NPRM*]). There is also no analysis in either the *Cable Modem Declaratory Ruling* or the *Wireline Broadband NPRM* that shows that broadband investment and innovation (the section 706 objectives purportedly relied upon by the FCC) either require or directly benefit from minimal regulation, and the FCC has never conducted a formal evaluation to confirm this prediction. Nonetheless, over time, the "investment" part of this objective has come to greatly overshadow the "innovation" and "competitive market" elements of the policy framework.

19. *Cable Modem Declaratory Ruling*, *supra* note 15, at para. 4 (citing section 706 of the 1996 Act).

20. *Id.* at para. 43.

21. *Id.* at para. 45.

22. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989 (2005).

23. *Id.* at 1009–10 n.4 (Scalia, J., dissenting) (citation omitted). It is noteworthy that the Canadian Radio-television and Telecommunications Commission (CRTC) has adopted a

Soon after *Brand X*, seeking to establish "parity" (*vis-à-vis* cable) in the treatment of ILEC-provided broadband Internet access services, the FCC compounded the errors in its *Cable Modem Declaratory Ruling* by extending the same faulty reasoning to ILEC-provided consumer broadband services.[24] The FCC once again reached back to the analysis in the 1998 *Stevens Report*[25] without probing the extensive industry evolution that had occurred in the intervening seven years. Thus, echoing its earlier discussion of the "integration" of transmission and information services[26] and of the nature of DNS[27] (both discussed in more detail below), the FCC reached the conclusion that ILEC broadband Internet access services were "information services." However, with an ILEC-provided information service, the FCC also had to confront its twenty-five-year-old rule that required "facilities-based common carriers to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs governed by Title II of the Act," such that they "offered the underlying basic service at the same prices, terms, and conditions, to all enhanced service providers, including their own enhanced services operations."[28] In order to reach the desired result—deregulated ILEC broadband Internet access with no requirement for the unbundling of the underlying transmission—the FCC also needed to remove this longstanding *Computer II* rule. To reach this result, the FCC relied upon the purported technological differences between the broadband environment and "traditional" wireline telecommunications,[29] together with unverified claims that unbundling would interfere with investment incentives.[30] The FCC also relied upon predictive judgments about the state of competition for broadband access to the Internet[31] and assurances from the ILECs that they had incentives to, and therefore would, retain

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very different approach to the classification and regulation of Internet access facilities. The CRTC has had long-standing requirements for competitor access to ILEC and cable company high-speed access facilities for the purposes of supporting retail competition for Internet access services, a policy that it has recently reaffirmed and broadened. *See generally* Wholesale High-Speed Access Services Proceeding, *Telecom Regulatory Policy*, CRTC 2010-632 (Aug. 30, 2010) [hereinafter *Telecom Regulatory Policy CRTC*].

24. *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14853 (2005) [hereinafter *BWIA Order*].

25. *Id.* at n.16.

26. *Id.* at para. 9.

27. *Id.* at para. 15.

28. *Id.* at para. 24.

29. *See id.* at paras. 32–40. Ironically, the FCC emphasized these artificial technological distinctions while at the same time proclaiming its intention to adopt a technology-neutral policy (as between various broadband platforms). *Id.* at n.342.

30. *See id.* at paras. 19, 44.

31. *Id.* at para. 62.

wholesale access offerings in the absence of regulatory compulsion.[32] In choosing to abandon common carrier regulation of the telecommunications component of Internet access, the FCC specifically relied upon being able to enforce non-discrimination requirements with respect to Internet access provided by facilities-based carriers (such as ILECs and cable companies) via its ancillary jurisdiction under Title I of the Act.[33] In fact, the FCC adopted its first formal net neutrality policy statement[34] on the same day as its *BWIA Order*.[35]

In *Comcast v. Federal Communications Commission*, the Court of Appeals for the D.C. Circuit told the FCC that the FCC's reliance upon ancillary jurisdiction as a broad-brush justification for requiring ISPs to comply with net neutrality principles was misplaced.[36] Following the

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32. *Id.* at para. 63. Large ILECs and cable providers (including Cox, SBC (now AT&T), and Verizon), had assured the FCC that their ability to protect consumers would not be eroded by classifying broadband Internet access under Title I, rather than Title II. *See* Schlick Third-Way Memorandum, *supra* note 3, at 4. Moreover, the "voluntary" Merger Conditions in the SBC-AT&T, Verizon-MCI, and AT&T-BellSouth mergers required only temporary compliance with the net neutrality principles contained in its *Internet Policy Statement*. *See, e.g.*, SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 F.C.C.R. 18290, app. F (2005) (stating under "Conditions," "Net Neutrality[:] 1. Effective on the Merger Closing Date, and continuing for two years thereafter, SBC/AT&T will conduct business in a manner that comports with the principles set forth in the FCC's Policy Statement, issued September 23, 2005 (FCC 05-151)."); Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 F.C.C.R. 18433, app. F (2005) (stating under "Conditions," "Net Neutrality[:] 1. Effective on the Merger Closing Date, and continuing for two years thereafter, Verizon/MCI will conduct business in a manner that comports with the principles set forth in the FCC's Policy Statement, issued September 23, 2005 (FCC 05-151).").

33. *See BWIA Order*, *supra* note 24, at para. 24 (citing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 996 (2005) (stating that the FCC "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction")); *see also* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, 23 F.C.C.R. 13028, paras. 14–17 (2008).

34. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, 20 F.C.C.R. 14986 (2005) [hereinafter *Internet Policy Statement*].

35. *See BWIA Order*, *supra* note 24.

36. Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010). Werbach argues, however, that the FCC's error arises from its attempt to anchor ancillary jurisdiction to section 230 of the Communications Act of 1934, as amended, rather than other provisions—in particular, sections 251 (Interconnection) and 256 (Standards). Werbach, *supra* note 9, at 571. While finding against the FCC on the Comcast BitTorrent matter, the D.C. appeals court specifically acknowledged that the Supreme Court in *Brand X* had stated that "the Commission remains free to impose special regulatory duties on [*facilities-based ISPs* including cable Internet providers] under its Title I ancillary jurisdiction" and that, "[i]n particular, the Court suggested that the Commission could likely 'require cable companies to allow independent ISPs access to their facilities' pursuant to its ancillary authority, rather than using Title II as Brand X urged." *Comcast Corp.*, 600 F.3d at 649 (citing *Brand X*, 545

Comcast decision, the current FCC began looking for a way to restore its authority to enforce the principle of nondiscrimination by reinstating its jurisdiction over the transmission component of broadband Internet access, but without also having to resurrect all aspects of Title II regulation. Not long after the FCC General Counsel and Chairman had articulated the legal and policy rationale for this "third way" of approaching the regulation of Internet access,[37] the FCC issued a *Notice of Inquiry* "to consider the adequacy of the current legal framework within which the Commission promotes investment and innovation in, and protects consumers of, broadband Internet service."[38] Opponents have opined that the FCC has no legal authority to revise its classification of Internet access services, because nothing has changed[39] since the original Title I classification was adopted.

As we demonstrate below, the "facts" relied upon by the FCC when it had decided to treat broadband wireline and cable Internet access as information services did not accurately reflect the nature of Internet access, even then, and with evolution of Internet access services since that time, the factual basis for that classification is even less appropriate today. The FCC coupled its classification mistake with erroneous findings and "predictive judgments" about the extent of competition for broadband access services generally, and for broadband Internet access in particular. The policies that the FCC adopted based upon these mistaken assumptions should not be perpetuated simply because they are the most recent "precedents" on these subjects. After all, these relatively new policies take the place of sounder, time-tested regulatory frameworks that the FCC should not have abandoned in the first place.

B. Longstanding Policies Requiring the Separation of Common Carrier Telecommunications from Information Services Should Apply Equally to Next Generation Technology

In its seminal 1980 *Computer Inquiry II* decision,[40] the FCC crafted a regulatory paradigm in which all telecommunications services under its jurisdiction were to be classified into one of only two categories—either "basic" or "enhanced": "In defining the difference between basic and

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U.S. at 996, 1002).

37. *See* Genachowski, *supra* note 2.

38. Framework for Broadband Internet Service, *Notice of Inquiry*, 25 F.C.C.R. 7866, para. 1 (2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-114A1.pdf.

39. *See, e.g.*, Comments of Seth Waxman, *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52 (rel. Apr. 28, 2010).

40. *Computer Inquiry II*, *supra* note 8.

enhanced services, we have concluded that basic transmission services are traditional common carrier communications services and that enhanced services are not."[41] Historically, common carriers—whether involved in transportation or telecommunications—were expected to carry the sender's goods or messages without modification, so that they arrived at the destination in an unaltered condition. "Basic service" embodied that same connotation: even though the signal (e.g., voice, data, image) might be manipulated to facilitate its transport, it would be restored to its original form prior to its delivery.[42]

Defined most simply under the FCC's dichotomy, "enhanced services" are not basic services. With an "enhanced" telecommunications service, the intelligence handed over to the service provider would be acted upon or manipulated in some manner before its ultimate delivery. In *Computer II*, the FCC undertook to codify this distinction between "basic" and "enhanced" services:

> We find that basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.[43]

The framework adopted by the FCC in *Computer II* recognized the importance of common carriage as a neutral platform for innovation, and created a simple but effective means of protecting nonfacilities-based providers in competition with owners of transmission facilities. Under this framework, the FCC successfully unbundled and deregulated customer

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41. *Id.* at para. 119.

42. Indeed, the definition of "basic" when used in telecommunications was actually construed more strictly than in certain transportation carriage situations. For example, when transporting oil or natural gas through a pipeline, the pipeline carrier's obligation is not to deliver the actual oil or actual gas molecules delivered to it by the shipper, but only to deliver the equivalent quantity of the commodity, adjusted to account for variations in grade or other attributes, to its recipient. Similarly, electric distribution utilities that offer their customers the ability to separately purchase their electricity from any of several sources, furnish the consumer with the same volume of electricity (kWh) being purchased, but not the very same electrons as delivered to it by the energy provider. Telecommunications transport—particularly over longer distances—typically involves some form of multiplexing in which individual signals are commingled for long-haul transport, much as individual packages are combined in the same truck, railroad car, or airplane so as to achieve comparable transport efficiencies. Prior to delivery, the signals are "demultiplexed" and delivered to their recipient in essentially the same form as had been handed off by the sender to the carrier. *See* ANNABEL Z. DODD, THE ESSENTIAL GUIDE TO TELECOMMUNICATIONS 23–25 (2d ed. 2000).

43. *Computer Inquiry II*, *supra* note 8, at para. 5.

premises equipment,[44] which as a result, emerged as a multi-billion dollar competitive and highly innovative industry. Prior to the several FCC decisions that permitted providers of last-mile broadband facilities to foreclose competitors' use of those facilities for Internet access,[45] the independent information services industry had grown to a $23 billion segment of the national economy.[46]

Not long after the *Computer II* rules went into effect, the U.S. Department of Justice entered into a settlement with AT&T and its affiliates (collectively, the Bell System) with the intention of ending a protracted antitrust action in which the DOJ had "alleged monopolization by the defendants with respect to a broad variety of telecommunications

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44. *Id.* at para. 141. Previously, telephone handsets and other customer premises equipment (CPE) were "bundled" with basic local telephone service and could not be purchased separately, or, if obtained from a source other than the local telephone company, attached to the telephone company's facilities. In its seminal *Carterfone* ruling, the FCC allowed attachments of customer-owned CPE if achieved using a protective connecting arrangement (PCA) that the customer was required to rent from the telephone company. Use of the Carterfone Device in Message Toll Telephone Service, *Decision*, 13 F.C.C.2d 420 (1968). In 1977 and 1978, this PCA requirement was replaced by an equipment certification program, permitting customers to directly connect "certified" CPE to the public telephone network. Proposal for New or Revised Calsses [sic] of Interstate and Foreign Message Toll Telephone Service (MTS) & Wide Area Telephone Service (WATS*)*, *First Report and Order*, 56 F.C.C.2d 593 (1975), *on reconsideration*, 57 F.C.C.2d 1216 (1976), 58 F.C.C.2d 716 (1976), 59 F.C.C.2d 83 (1976); Proposal for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) & Wide Area Telephone Service (WATS), *Second Report and Order*, 58 F.C.C.2d 736 (1976), *on reconsideration*, 61 F.C.C.2d 396 (1976), 64 F.C.C.2d 1058 (1977), *aff'd sub nom.* North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036 (4th Cir., 1977), *cert. denied*, 434 U.S. 874 (1977). Shortly before its *Computer II* decision, the FCC ruled as unlawful the ILEC practice of requiring the customer to use at least one telco-provided handset (the so-called "primary instrument" concept). Implications of the Telephone Industry's Primary Instrument Concept, *Report and Order*, 68 F.C.C.2d 1157 (1978). These policies culminated in *Computer II*, in which the FCC required ILECs to unbundle CPE from any basic telecommunications offering, to remove it from their regulated operations and, in the case of the largest ILECs (the Bell and GTE operating companies), to offer CPE only through a fully separate subsidiary. *Computer Inquiry II*, *supra* note 8, at paras. 150–158, 174. The Bell company CPE affiliates were retained by AT&T following the 1984 breakup of the former Bell System, effectively taking the divested Bell operating companies out of the CPE business. *See* United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 192 (D.D.C. 1982).

45. *See, e.g.*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978, para. 7 (2003) [hereinafter *Triennial Review Order* or *TRO*], *vacated and remanded in part*, *affirmed in part*, United States Telecomm. Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004) (high frequency portion of the loop, hybrid fiber-coaxial loops, and "greenfield" loops); *Cable Modem Declaratory Ruling*, *supra* note 15, para. 11 (cable broadband facilities for Internet access); *BWIA Order*, *supra* note 24, para. 5 (ILEC broadband facilities for Internet access).

46. Corey Grice, *Short Take: ISP Revenue Will Near $23 Billion, Study Says*, CNET (Feb. 15, 2000), http://news.cnet.com/Short-Take-ISP-revenue-will-near-23-billion,-study-says/2110-1033_3-236944.html.

services and equipment in violation of section 2 of the Sherman Act."[47] After a Tunney Act proceeding, the U.S. District Court approved the Consent Decree, with modifications the court deemed necessary to make the settlement consistent with the public interest. The Consent Decree, as modified (commonly referred to as the *Modification of Final Judgment* or *MFJ*), incorporated a structural approach to delinking ILEC market power in the last-mile (local access) from potentially competitive long distance services.[48] It also incorporated and reinforced the *Computer II* framework by barring the Bell ILECs from the customer premises equipment (manufacturing) and information services lines of business.[49] Many of the key structural protections in the *MFJ* were incorporated into the 1996 Act, which made provision for their phase-out once the FCC had determined that competition had been firmly established with respect to local exchange and exchange access services.[50]

With these structural protections in place, by the end of the 1990s numerous local and national ISPs had entered what by then had become an extremely competitive and unconcentrated market. When demand for dial-up Internet access had reached its peak, around the beginning of 2002, even the largest ISP at that time—America Online—served only one in five Internet-connected households.[51] By contrast, between 1980 and the passage of the 1996 Act, local telephone companies (telcos) showed little interest in being enhanced service providers beyond pursuing efforts to obtain their legal right to do so.[52] When, in the late 1990s, some ILECs finally began offering enhanced services (renamed "information services" under the 1996 Act),[53] they were compelled under *Computer Inquiry II/III* (and, in the case of the Bell ILECs, the *MFJ* provisions incorporated into the 1996 Act) to afford their ISP affiliate no preference or advantage relative to other nonaffiliated ISPs.[54]

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47. United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 139 (D.D.C. 1982).

48. *See id.* at 224.

49. *Id.* at 189–91, 224.

50. *See* 47 U.S.C. §§ 271–72 (1996).

51. *See* Patricia Fusco, *Top U.S. ISPs by Subscriber: Q1 2002*, ISP-PLANET (May 13, 2002), http://www.isp-planet.com/research/rankings/usa_q12002.html (including AOL (17.1% market share) and AOL-owned brands CompuServe and Road Runner (2.0% and 1.6% respectively) totaling 20.7% of the market share).

52. One of the "line of business restrictions" in the 1984 Consent Decree had precluded Regional Bell Operating Company (RBOC) entry into the "information services" business. However, that restriction was lifted in 1991. United States v. Western Elec. Co., 767 F. Supp. 308 (D.D.C. 1991).

53. *See infra* note 55.

54. By 1999, telephone companies were selling approximately 28.9 million additional residential lines (meaning that nearly thirty percent of households with a telephone were purchasing an additional line). INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FCC, TRENDS IN TELEPHONE SERVICE 8–6 tbl. 8.4 (Dec. 2000),

At that time, the ILECs' principal Internet focus was directed more toward selling highly profitable second residential telephone lines[55] (so that the customer's primary line remained available for voice communications when a dial-up online service was being accessed) than upon offering information services. Although by 1990, U.S. ILECs possessed technology necessary to provide customers with a dedicated data channel on the same copper loop as the customer's voice service,[56] the ILECs had little incentive to actively market these services, since it would undercut the lucrative market for second residential lines.[57] This all changed when the large ILECs began to experience competition in the form of dedicated broadband access services offered by cable companies. Confronted for the first time

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http://fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend200.pdf. By contrast, at the end of 1999, ILECs provided fewer than 300,000 high-speed (over 200 Kbps in at least one direction) ADSL lines to residential and small business customers nationwide. INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: SUBSCRIBERSHIP AS OF JUNE 30, 2000, at 5 tbl. 3 (Oct. 2000), http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf.

55. In most areas, distribution cable capacity, including drop wires into individual homes, was sufficient to provide a significant percentage of households with a second dial tone access line with little or no capital investment and minimal additional operating costs. As a result, incremental revenues derived from second residential access lines were in most cases substantially in excess of incremental costs for these services. At its peak, the market for additional residential lines being used for dial-up Internet access was generating as much as $9 billion in annual revenue for the ILECs. (This calculation is performed using usage and subscriber data found in AOL TIME WARNER INC., FORM 10-K: ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 (Mar. 2002), *available at* http://edgar.sec.gov/Archives/edgar/data/1105705/000095013002001845/d10k405.htm; industry subscriber data from Jupiter Research; and the conservative assumption that average non-AOL dial-up use was fifty percent of average AOL dial-up use.).

56. Joseph Lechleider, a scientist at Bellcore, is credited with the development of ADSL (Asymmetrical Digital Subscriber Line) in the late 1980s. ADSL is a technology that allows users to download data at a faster rate than they uploaded it, thus mirroring the way most users used the Internet—sending a small amount of information up to the provider requesting a download of a significantly large quantity of data. This technology made its first appearance on the marketplace in the form of ISDN (Integrated Services Digital Network).

57. Raymond W. Smith, Bell Atlantic's then-CEO, told a group of securities analysts at a March 1996 Merrill Lynch Telecommunications CEO Conference that the rate of additional line growth in Bell Atlantic's operating territory had been increasing, and noted that additional lines produce significant incremental revenue:

> In 1995, sales of secondary lines at Bell Atlantic increased more than 50 percent, fueled by surging demand for Internet and telecommuting applications. Unlike traditional horizontal line growth, which would have significantly added to our capital expenditures, the vertical growth we experienced in '95 brought most of the revenues down to the bottom line. *That's because we were able to provision new lines and services from idle capacity in an existing plant.*

Raymond W. Smith, Creating Shareowner Value in a Converged, Post-Legislation Environment, Speech at the Merrill Lynch Telecommunications CEO Conference (Mar. 19, 1996) (emphasis added), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=2074680011.

with a competitive threat to their lucrative second line business, ILECs finally began to market their dedicated channel Internet access services.[58] Then, when the FCC went so far as to exempt cable companies from the obligation to provide the broadband transmission on a common carrier basis, the ILECs saw an opportunity—by claiming "parity"—to prevent competitors from gaining access to their own broadband facilities for purposes of providing a competitive retail Internet access service. Under a regulatory framework in which the last-mile broadband telecommunications channel and Internet access were deemed inextricably linked, the entry opportunities that had been previously available to non-ILEC dial-up ISPs no longer existed with respect to broadband access. As the demand for dial-up Internet access waned, most nonfacilities-based ISPs—unable to migrate their mass market customers to their own broadband Internet access services—were left to atrophy and eventually go out of business.

C. Is Today's Broadband Internet Access an Information Service or Simply Basic Transmission?

In seeking to justify the decision to treat broadband Internet access as somehow different from previous transmission platforms for accessing information services, those supporting complete deregulation of Internet access (including the elimination of the *Computer II/III* framework as to these services) have relied upon various artificial—and superficial—distinctions that generally fall into one of two principal categories: technology-based and economic-based. We begin by addressing the technology-based distinctions, and explain why Internet access appropriately belongs on the "basic" or "telecommunications" side of the line. We then address the economic arguments—the purported existence of broadband competition and the claimed need for deregulation to promote investment.

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58. In a comprehensive report on broadband industry status, released in October, 1999, the Staff of the FCC's Cable Bureau stated:

> The ILECs' aggressive deployment of DSL can be attributed in large part to the deployment of cable modem service. Although the ILECs have possessed DSL technology since the late 1980s, they did not offer the service, for concern that it would negatively impact their other lines of businesses. The deployment of cable modem service, however, spurred the ILECs to offer DSL or risk losing potential subscribers to cable. In various communities where cable modem service becomes available, the ILECs would soon deploy DSL service that was comparable in price and performance to the cable modem offering. Thus, prior to cable modem deployment, the ILECs had little incentive to deploy DSL and the consumer had no choice for highspeed Internet access.

Staff Report to William E. Kennard, Chairman, FCC, BROADBAND TODAY, 27 (Oct. 16, 1999), http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf.

III. TECHNOLOGY-BASED CLAIMS THAT BROADBAND INTERNET ACCESS IS AN INFORMATION SERVICE

As discussed in the previous section, the FCC's broadband classification orders repeatedly refer back to the 1998 *Stevens Report* to support its characterization of Internet access services as involving "bundled" transmission and information services. The FCC has also relied upon analysis in the *Stevens Report* to conclude that Domain Name Services (DNS), an integral component of all forms of Internet access, is an information service. It is questionable whether either of these two conclusions was correct when they were adopted back in 1998 (or relied upon in 2002 and 2005), but they are certainly not correct as to the Internet and Internet services as these have come to exist today, in 2010 and beyond.

A. "Bundled" Information Services

In the earliest days of so-called "online" information services—such as CompuServe, Prodigy, and America Online, and even specialized online services such as Lexis/Nexis and the online reservation systems that were operated by several airlines and made available to travel agents and others—the information accessed was physically located on host computers belonging to entities known at the time as "enhanced service providers" (ESPs).[59] The subscriber sent data to the service provider, whose computers acted upon that data and sent information back to the subscriber.[60] As these services developed, service providers were able to offer end users more applications and content by adding information products developed by third parties, some of which did not reside on the service provider's own platform. Nonetheless, both the selection and the management of these third party applications or content sources continued to be within the control of the ISP.

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59. The term "enhanced service provider" originated in the FCC's *Computer Inquiry II*, and was used to generically describe pre-Internet online service providers in the 1980s, such as Telenet, Tymnet, and Electronic Data Systems (EDS), and subsequently providers such as CompuServe and Prodigy. *See, e.g.*, ADAPSO, the Computer Software and Services Industry Association, Inc., et al., *Order*, 10 F.C.C.R. 12128, para. 1 (1995). In the 1996 Act, the term "information services" was substituted for such "enhanced services." *See* Implementation of the Non-Accounting Safeguards of Sections 271 & 272 of the Communications Act of 1934, as Amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 21905, para. 103 (1996). While the acronym "ISP" today is generally used to denote *Internet* Service Providers, at the time the FCC was implementing the 1996 Act, the term "ISP" was understood to refer to the broader category of "Information Service Providers." *See, e.g.*, Access Charge Reform, *First Report and Order*, 12 F.C.C.R. 15982, para. 50 (1997); Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry*, 11 F.C.C.R. 21354, para. 313 (1996).

60. *See generally Computer Inquiry II*, *supra* note 8, at para. 97.

With the development of the public Internet, the role of the ISP has fundamentally changed. Whereas in 1996 and into the early 2000s, the prevailing model for ISPs was to maintain and provide applications and content on their own computing platforms, ISPs today (and especially providers that offer Internet access over their own local distribution facilities) act primarily, if not exclusively, as conduits, forwarding and transmitting their subscribers' data to or from one or more Internet gateways or "peering points" from which the data is routed to or from a website or other Internet location designated by the end user. Even if the ISP also offers its own proprietary "information services," it typically uses the public Internet for providing access to such proprietary content or applications.[61]

The nature of Internet services has also changed from the customer's perspective. Whereas with legacy information services, the customer interacted by default with the ISP's e-mail or web-browsing platforms, that customer is now required to affirmatively choose between content and applications offered by his ISP or the equivalent (and often preferred) services that are available from independent providers. This is true regardless of whether the ISP owns the underlying broadband transmission. For example, users are electing increasingly to utilize ISP-independent sources of e-mail services.[62] While most ISPs offer their subscribers content-rich home pages as "portals" to news, sports, weather, financial data, entertainment, shopping, and other services, these same types of content and services are also available from any number of non-ISP portals, including both general purpose portals like yahoo.com and google.com, and specialized or special interest portals, such as those maintained by local

61. AOL is a rare exception to this model in that it maintains several proprietary data centers through which its subscribers gain access to various information and content on AOL's own platform or are sent on to any Internet site. *See* Am. Online v. Pennsylvania, 932 A.2d 332, 334 (Pa. Commw. Ct. 2007), *aff'd*, 963 A.2d 903 (Pa. 2008).

62. There are significant advantages to customers electing this form of e-mail, because it allows them to change ISPs without also having to change their e-mail addresses. Google's "Gmail" is an increasingly popular source of "free" e-mail, as are any number of other such services available either "free" or at relatively little cost. The top four non-facilities-based providers of "free" e-mail—Yahoo, Hotmail, Google, and AOL—had some 226 million unique visitors in July 2009. By comparison, the top four facilities-based broadband Internet access providers—Comcast, AT&T, Verizon, and TimeWarner Roadrunner—accounted for only about 17 million unique visitors during that same month. *Yahoo Mail Still King as Gmail Lurks*, CNET NEWS (Aug. 17, 2009, 10:53 AM), http://news.cnet.com/8301-30684_3-10311150-265.html. Some universities, for example, offer their alumni "lifetime" e-mail addresses that stay with the individual irrespective of the choice of ISP at any point in time. *See, e.g.*, *GW Alumni Email Services*, GW ALUMNI, http://www.alumni.gwu.edu/benefits/email/index.html (last visited Nov. 16, 2010) (providing GW alumni free email for life: yourname@gwmail.gwu.edu). The Google search "alumni email" yields more than a hundred examples of similar alumni email offers.

newspapers, TV networks, and other organizations.[63] Conversely, ISP-owned portals (such as Comcast.net and Verizon.net) are no longer maintained on a purely proprietary basis for the benefit of the ISPs' own subscribers; rather, they can be accessed by anyone via the public Internet.[64]

Given the ease with which standard Internet browsers enable users to select their "home" page, only the least sophisticated of Internet users are likely to retain the default setting directing them to their Internet access provider's default home page. Moreover, should the customer elect to access the provider's website or e-mail services, the routing to such services will be via the public Internet in much the same manner as for most other Internet-based applications and content. Thus, while nominally "included" within the "bundle" of services that constitute broadband wireline Internet access, the actual use of these "bundled" information services is diminishing to the point of near extinction. Whatever technical linkage the FCC had earlier identified as between the broadband telecommunications and information services components of the "bundle," such linkage certainly does not exist today, if indeed it ever did. At bottom, today's broadband Internet access service—whether provided via ILEC, cable, or wireless facilities—is telecommunications, nothing more.

Wireless carriers have attempted to engineer a somewhat tighter linkage between their wireless Internet access and the content and applications that they are also offering in conjunction with these services. Unlike a wireline Internet connection where users typically access bandwidth using their own device and software (e.g., a PC or a Macintosh, any of several operating systems, a web browser, and any number of specialized web-based applications), wireless carriers in the United States sell only carrier-approved handsets with carrier-limited software.[65]

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63. *See, e.g.*, GOOGLE, http://www.google.com (last visited Nov. 16, 2010); YAHOO!, http://www.yahoo.com (last visited Nov. 16, 2010); CNN, http://cnn.com (last visited Nov. 16, 2010); THE NEW YORK TIMES, http://www.nytimes.com (last visited Nov. 16, 2010).

64. *See, e.g.*, COMCAST.NET, http://www.comcast.net (last visited Nov. 16, 2010); VERIZON CENTRAL, http://www.verizon.net (last visited Nov. 16, 2010). For example, AT&T's portal, www.att.net, is actually run by Yahoo! and is substantively identical to the publicly available www.yahoo.com. AT&T, http://www.att.net (last visited Nov. 16, 2010). The att.net domain name resolves to http://att.my.yahoo.com/, and the contents of the site are available to any user, linking to regularly available yahoo.com content. *See* AT&T, http://att.my.yahoo.com (last visited Nov. 16, 2010); YAHOO!, www. yahoo.com (last visited Nov. 16, 2010).

65. In its initial rules for cellular systems, the FCC had required full compatibility among all wireless services and handsets. An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, *Report and Order*, 86 F.C.C.2d 469, paras. 84–95 (1981). In 1988, the FCC relaxed this requirement, allowing carriers individually to specify handset properties and protocols for use on their respective networks. Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization

In the case of traditional handsets (i.e., not the so-called "smartphones"), consumers are often limited to browsing the web through a carrier-designed browser that imposes severe limits upon the form of the web content that can be viewed.[66] The consumer can purchase a limited array of add-on features such as ringtones, "themes," and games, but only through a carrier-operated portal.[67] There is no technical basis for any of these limitations; the underlying wireless data network, like the wireline Internet, is totally agnostic as to the type of content being carried and the application that receives the data at either end.[68]

The introduction of "smartphones" further demonstrates that wireless data networks have the technical capability to communicate with most ordinary HTML websites via a traditional (non-carrier) web browser, to download photos, videos, and other content directly from the web rather than only through a carrier-sponsored portal, and to run applications authored by sources other than the carrier and handset manufacturers. However, wireless carriers have continued to limit the available uses of the underlying data stream running to and from their customers' smartphones. For example, Apple and AT&T entered into an exclusive arrangement whereby Apple's iPhone would be available in the United States only for use on the AT&T network, and Apple limits the applications offered to

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of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, *Report and Order*, 3 F.C.C.R. 7033, paras. 41–43 (1988). Although consumers may still obtain carrier-approved wireless handsets from sources other than the carrier itself, the vast majority of wireless handsets sold in the United States are carrier-branded, i.e., are provided either directly through a carrier-owned retail outlet or through a carrier-authorized agent or reseller. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Fourteenth Report*, 2010 FCC LEXIS 3186, paras. 239–41 (2010) [hereinafter *CMRS Competition Fourteenth Report*]. In either case, the carrier assumes the role of gatekeeper with respect to handset functionality.

66. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Eleventh Report*, 21 F.C.C.R. 10947, para. 98 (2006).

67. For example, AT&T provides wireless access to the Internet via various applications embedded in the basic phone software. Users browse the web using the AT&T Mobility "MEdia Net" browser, shop for ringtones using the "AppCenter," and can watch videos and listen to music using the AT&T CV/Mobile Video software. *See, e.g.*, AT&T APPCENTER, https://appcenter.wireless.att.com/ (last visited Nov. 16, 2010); AT&T MEDIA NET, http://www.wireless.att.com/learn/messaging-internet/media-entertainment/media-net.jsp (last visited Nov. 16, 2010).

68. For example, AT&T offers data plans that allow users to connect laptops and other computers to the same data network that 3G phones use. AT&T GET STARTED, http://www.wireless.att.com/cell-phone-service/cell-phone-plans/data-connect-plans.jsp (last visited Nov. 16, 2010). AT&T also offers data plans for phones that include "tethering" functionality that allows users to connect to the internet on their computers using the data connection provided by the users' "tethered" phone. AT&T's standard terms describe all of its available data plans, including those with "tethering." AT&T WIRELESS CUSTOMER AGREEMENT, http://www.wireless.att.com/cell-phone-service/legal/plan-terms.jsp (last visited Nov. 16, 2010).

iPhone users by requiring that all be purchased solely through its proprietary "App Store."[69] Some of the restrictions on the App Store are clearly set by Apple, but others (such as limitations on third party VoIP access to the 3G data stream) are likely carrier-imposed.[70] These restrictions are also artificial: When hackers have utilized a process known as "jailbreaking" to remove the Apple/AT&T restrictions on available applications, the user is able to gain unfettered access to the basic TCP/IP stream of the underlying wireless data network.[71] But for these carrier-contrived, mechanical restrictions, there is no inherent difference between wireline and wireless Internet access—both require nothing more than the establishment of a telecommunications connection between users or between a user and a host content or application provider. Whatever artificial linkage may be created between wireless Internet access and certain "information services" does not alter the fundamental telecommunications character of the wireless Internet access service.

B. Domain Name Services

In the *BWIA Order*, the FCC makes a finding that Domain Name Services (DNS) provide the end user with "more than transparent transmission . . . ."[72] That assessment is wrong. DNS is purely and simply a routing database that translates a web domain name (e.g., www.anything.com) into an IP address (e.g., 123.234.345.456).[73] A master DNS database is maintained by the Internet Assigned Numbers Authority, operated by the Internet Corporation for Assigned Names and Numbers (ICANN), and is replicated at multiple locations throughout the global Internet.[74] Individual access providers typically maintain their own DNS,

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69. The trade press is rife with discussions of AT&T and Apple's exclusive iPhone agreement, with debate only over just how long AT&T will retain this exclusive arrangement. *See, e.g.*, *Report: iPhone Exclusive to AT&T Until 2012*, FIERCEWIRELESS (May 11, 2010, 9:42 AM), http://www.fiercewireless.com/story/report-t-apple-originally-locked-down-iphone-until-2012/2010-05-11; s*ee also* IPHONE APP STORE, http://www.apple.com/iphone/features/app-store.html (last visited Nov. 16, 2010).

70. See *CMRS Competition Fourteenth Report*, *supra* note 66, at para. 152.

71. Numerous websites offer software and instructions on how to "jailbreak" an iPhone, and the myriad benefits of doing so. One prominent jailbreak website, www.jailbreakme.com, details that jailbreaking "is simply the ability to run apps and use themes and tweaks not approved by Apple." JAILBREAKME 2.0 'STAR', http://www.jailbreakme.com/faq.html (last visited Nov. 16, 2010).

72. *BWIA Order*, *supra* note 24, at para. 15. As explained earlier, the analysis underlying this conclusion dates back to the *Stevens Report* on universal service matters. *See supra* Part II.A.

73. *See DNS*, TOPBITS.COM, http://www.tech-faq.com/what-is-dns.html (last visited Nov. 16, 2010).

74. *Introducing IANA*, INTERNET ASSIGNED NUMBERS AUTHORITY, http://www.iana.org/about (last visited Nov. 16, 2010).

updating it continuously as new or changed domain name registrations are propagated across the Internet by ICANN and certified domain name registrars.[75]

The routing function supported by the DNS is completely analogous to various other database-driven routing schemes that have been in use within the public switched telephone network (PSTN) for decades.

• *800 Database.* The most well-known of these routing systems is the so-called "800 Database," adopted by the FCC in 1989 as a means for de-linking customers' 800 or other toll-free numbers from specific interexchange carriers.[76] Previously, customers could not switch carriers without also changing their 800-number, thereby undermining competitive opportunities in the toll-free services market.[77] When a caller dials a toll-free 800-type telephone number, the originating local exchange carrier (LEC) performs a "dip" into the 800 Database for the purpose of identifying the interexchange carrier (IXC) selected by the toll-free service customer.[78] The call is then routed by the originating LEC to the selected IXC, which performs a second "dip" into its own proprietary database for the purpose of translating the dialed toll-free number into a network routing address to the toll-free service customer.[79] Some toll-free service providers also offer so-called "enhanced 800 services" (not to be confused with "enhanced" as the term is used in the *Computer II* basic/enhanced services distinction[80]) supporting dynamic or variable rather than simple fixed routing of the toll-free call.[81]

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75. *ICANN-Accredited Registrars*, ICANN, http://www.icann.org/en/registrars/accredited-list.html (last visited Nov. 16, 2010).

76. *See* Provision of Access for 800 Service, *Report and Order*, 4 F.C.C.R. 2824 (1989); *see also* Toll Free Service Access Codes, *Fifth Report and Order*, 15 F.C.C.R. 11939, paras. 4–9 (2000) (describing the history of the 800 database and carrier-independent number administration).

77. The "800 Database" is maintained by a neutral third-party database administrator and by individual toll-free service providers. Toll Free Service Access Codes, 15 F.C.C.R. 11939, at paras. 2–3.

78. *See, e.g.*, Qwest Corp. Tariff FCC No. 1, §§ 6.2.8, 6.2.9 (Aug. 8, 2007) (interstate access charges).

79. *Id.* The network routing address may be an ordinary ten-digit "Plain Old Telephone Service" (POTS) telephone number or a dedicated "special access" type connection to the toll-free service customer.

80. *See infra* note 98 and accompanying text.

81. *See* Qwest Corp. Tariff FCC No. 1, *supra* note 78. For example, an inbound 800-type call might be routed to any of several different "call centers" maintained by the toll-free service customer based upon time of day and/or traffic conditions at each location. In another application, the routing might be based upon the geographic location of the caller—for example, routing the call to the toll-free customer's retail location closest to the caller. The term "enhanced" here reflects the common usage of the word, i.e., "augmented." *See* Application of WorldCom, Inc. and MCI Communications Corporations for Transfer of Control, *Memorandum Opinion and Order*, 13 F.C.C.R. 18025, para. 26 (1998) ("[L]arger business users often demand advanced long distance features (advanced features), such as frame relay, virtual private networks (VPN), and enhanced 800 services (E800 services).").

• *Local Number Portability (LNP)*. Paralleling its "800 Number Portability" ruling, the FCC in 1996 ordered that wireline LECs must offer customers the ability to retain their previously assigned telephone number when switching local carriers,[82] "Local Number Portability" ("LNP") was implemented in 1999,[83] and the requirement was subsequently extended to wireless carriers as well.[84] In some cases, customers may also "port" their existing telephone number even when switching between a wireline and a wireless phone.[85] Now, in order to route a call to its intended recipient, the "next-to-last" carrier must first check the dialed number against an LNP database to determine whether it has been ported to another carrier and, if it has, to retrieve the carrier and routing information needed to complete the call.[86]

• Modern stored program controlled (SPC) digital central office switches and networks utilize a variety of routing data bases to associate logical network "addresses" with physical network elements. Digital electronic local telephone central office switches, such as the AT&T/Lucent Technologies No. 5 ESS, employ locally maintained intraswitch databases to translate the dialed telephone number into a hardware "switch port" address associated with the called party's access line.[87]

• Since the introduction of stored program control electronic switching in the 1970s, local telephone companies have offered "speed calling" services that permit the customer to maintain a small private database (list) of stored telephone numbers resident in the computer that controls the local

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The tariffing of these services (as required by 47 U.S.C. § 203) is consistent with their classification as "basic" telecommunications services, subject to Title II regulation.

82. Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8352 (1996). Although the FCC initiated this proceeding in 1995, by the time it issued its *First Report and Order*, the 1996 Act codified the requirement for all LECs to provide local number portability in the manner specified by the FCC. Telecommunications Act of 1996, Pub. L. No. 104-104, § 101(a), 110 Stat. 56 (codified at 47 U.S.C. § 251(b)(2)).

83. *See* Long-Term Number Portability Tariff Filings, *Memorandum Opinion and Order*, 14 F.C.C.R. 11883 (1999).

84. Telephone Number Portability—Carrier Requests for Clarification of Wireless-Wireless Porting Issues, *Memorandum Opinion and Order*, 18 F.C.C.R. 20971, para. 15 (2003).

85. *See* Telephone Number Portability CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23697, para. 1 (2003).

86. *See* Telephone Number Portability, *Memorandum Opinion and Order on Reconsideration and Order on Application for Review*, 17 F.C.C.R. 2578, para. 5 n.12 (2002).

87. *See* Jerry W. Johnson et al., *No. 5 ESS—Serving the Present, Serving the Future*, 59 BELL LAB. REC., 290, 290–293 (1981). *See generally* AT&T BELL TELEPHONE LABORATORIES, ENGINEERING AND OPERATIONS IN THE BELL SYSTEM 507–513 (2d ed. 1984).

central office switch, and to use one- or two-digit "abbreviated dialing" to access specific numbers in the customer's speed call list, which the computer will then translate into the full domestic or international telephone number.[88]

In each of these cases, the database and translation functions arguably involve "computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."[89] In any event, these functions are entirely analogous to the database and translation functions performed by DNS, yet each of these PSTN database services are unambiguously "basic" Title II services. Nowhere has the FCC offered or attempted to offer any explanation as to how the routing functions supported by DNS differ in any substantive manner from the comparable routing functions supported by the various PSTN databases. This is hardly surprising, because the functions involved are essentially the same. There are, in fact, no specific, identifiable attributes of DNS that would cause this particular routing function to be classified as an "information service" whereas the comparable PSTN routing activities are treated as basic.

C. Technology Transitions Are an Ongoing Part of Telecommunications Industry Progress

Other arguments in favor of treating Internet access as an information service rely upon the fact that various "translations" or "conversions" are required for Internet Protocol (IP) transmissions to coexist with transmissions via the circuit-switched PSTN. The FCC expected that its basic/enhanced distinction to be sufficiently robust to adapt "[a]s the market applications of computer technology increase," and it recognized that "[t]ransmission networks have benefitted [sic] from some of the productive breakthroughs which this relatively new field has made possible."[90] In fact, the FCC expressed confidence that its basic/enhanced distinction would "allow[] the provider of these basic services to integrate technological advances conducive to the more efficient transmission of information through the network without the threat of a sudden, fundamental change in the regulatory treatment of that service or firm."[91] In

88. ENGINEERING AND OPERATIONS IN THE BELL SYSTEM, *supra* note 87, at 58; *see also* Bell Communications Research, *Features Common to Residence and Business Customers III*, LATA Switching Sys. Generic Requirements, July 1987, at 1–3.

89. 47 C.F.R. § 64.702(a) (1999).

90. *Computer Inquiry II*, *supra* note 8, at para. 100.

91. *Id.* at para. 101.

a 1983 ruling intended to clarify the *Computer Inquiry II* framework, the FCC specifically recognized that this framework must be sufficiently flexible to accommodate an evolutionary transition to new transport technology, and that under such conditions, the use of certain format, code, or protocol conversions (to permit communication between the legacy and the new technology) would not in and of itself transform a "basic" into an "enhanced" service.[92]

Over time, there have been numerous examples of service arrangements involving such "passive" conversions that do not alter their "basic" character:

- Analog-to-digital conversion for transmission of voice or digital information on the public switched telephone network[93] (e.g., to permit transmissions to be passed between an electromechanical or analog electronic space-division central office switch and a time-division multiplexed digital switch, or from an analog voice wireline handset to a digital voice wireless handset;
- Analog-to-digital wireless conversions occurring on wireless networks and conversions required to permit traffic to be exchanged between wireless digital protocols (e.g., TDMA, CDMA, GSM);[94] and
- Utilization of computer processing to retrieve routing information from a database, as with the 800 Database and Local Number Portability databases.

The use of Internet Protocol to facilitate the transmission or routing of voice and data is consistent with these precedents and should be viewed in this same evolutionary context.

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92. *See* Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations, *Memorandum Opinion, Order, and Statement of Principles*, 95 F.C.C.2d 584, para. 28 (1983) [hereinafter *Communications Protocols*] ("Clarification is warranted that protocol processing involved in the initiation, routing and termination of calls (or subelements of calls, e.g., packets) is inherent in switched transmission [sic] and is not within the definition of enhanced service, and we have done so herein. . . . Such protocol processing or conversion may be associated either with basic or enhanced service without affecting the classification of such service under Section 64.702(a) of our rules.") (citation omitted).

93. *See* Amendment to Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 2 F.C.C.R. 3072 (1987) (citing *Communications Protocols*, *supra* note 92, at para. 16).

94. *See generally* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 15817 (2007) (concluding that automatic roaming is a common carrier obligation).

D. Neither Its Eventual Destination (on the Public Internet) nor Its Bandwidth (Speed) Set Broadband Internet Access Apart from Other Last-Mile Telecommunications Services

Inasmuch as the functionality being provided by broadband Internet access is telecommunications, is there some other unique quality that justifies treating dedicated access to the Internet above a specified data speed differently from other access? Over the past decade, the owners of last-mile facilities have sought preferential treatment for broadband Internet access relative to other telecommunications services, but there is no technological or economic basis for such a distinction.

Although few would dispute the revolutionary and global impact that the Internet has had upon almost every aspect of human life and society, in terms of telecommunications technology, the IP network—particularly in the access segment—is far more evolutionary than revolutionary.[95] Despite advances in technology in transmission media (e.g., copper loop to coaxial cable or fiber), switching (manual to electromechanical to digital), and carrier systems (direct current to frequency-division multiplexing (FDM), then to time-division multiplexing (TDM), and then packet-based systems such as Frame Relay, MPLS, and Ethernet), the access function within telecommunications networks remains largely unchanged. In particular, with respect to the last-mile facilities that establish the end user's connection to the larger network (whether the PSTN or the Internet), there is no meaningful technological distinction between the dedicated facilities that provide access to the Internet and other, earlier versions of local access. Whatever occurs on the Internet is unaffected by whether a user relies upon copper, coaxial cable, fiber, wireless, or any other transmission medium to connect to the Internet from home. In addition, and perhaps most important, as explained below, the economic principles that make it impossible for new entrants to duplicate the incumbent providers' last-mile

95. The predecessor to what ultimately became known as the Internet was conceived and implemented over the course of the 1960s as a research project within the Advanced Research Projects Agency (ARPA) of the U.S. Department of Defense and was known as ARPANET. The core Internet protocols that we use today (TCP/IP) were described in a 1974 Institute of Electrical and Electronics Engineers (IEEE) paper. Vinton G. Cerf & Robert E. Kahn, *A Protocol for Packet Network Intercommunication*, 22 IEEE TRANSACTIONS ON COMM. 637 (May 1974). The early Internet was confined mainly to government, research, and educational uses, but beginning in the early 1990s was expanded to include commercial uses and noncommercial users. In its original form as a proprietary, private network, there was no need to classify the ARPANET or any of its segments for regulatory purposes, but this changed with public access to the Internet and its now wildly successful commercialization. For a brief overview of the history of the Internet, from ARPA through the formation of the public Internet, see Barbara Esbin, FCC, *Internet over Cable: Defining the Future in Terms of the Past*, 6–13 (Office of Plans & Pol'y, Staff Working Paper No. 30, 1998), http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp30.pdf.

facilities are in no sense made inoperative merely because the underlying transmission path provides more bandwidth than "traditional" telecommunications facilities.

The policy set out at section 706 of the 1996 Act ("Advanced Telecommunications Incentives") does not alter this conclusion.[96] Section 706 establishes a policy under which the FCC and individual states, in their capacity as regulators of telecommunications services,[97] are to

> encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[98]

Beyond supporting "encouragement" of the deployment of advanced telecommunications capability,[99] section 706 does nothing whatsoever to amend or adapt the overall Title II framework. In particular, all of the regulatory mechanisms proposed to be used for promoting advanced telecommunications services arise under the FCC's powers as the regulator of common carrier telecommunications (Title II) services. The section also suggests that in working toward this end, the objectives of promoting investment, of promoting the public interest, and of promoting local competition are all complementary, not competing goals. Ultimately, the assessments that the FCC needs to make in order to implement section 706 are very similar to what it must consider under other competition and forbearance provisions in the 1996 Act.[100]

To gain forbearance and the elimination of any obligation to provide last-mile broadband transmission to rival nonintegrated ISPs and to downstream application and content providers, the ILECs advanced two patently inconsistent claims. On the one hand, they contended that the

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96. Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56 (codified at 47 U.S.C. § 157).

97. *See id. at* § 706(a). One might question the basis for the FCC's reliance on section 706 in connection with broadband Internet access if that service is not "telecommunications," or why the various tools the FCC is encouraged to use to promote "advanced telecommunications capability," such as price cap regulation and forbearance, arise under the FCC's Title II powers. *Id.* at § 706(c)(1).

98. *Id.* at § 706(a).

99. *Id.* at § 706(c)(1). Under this section, "advanced telecommunications capability" is defined "without regard to any transmission medium or technology, as high-speed, switched, broadband telecommunications capability . . . ." *Id.*

100. For example, see section 401 (forbearance) and section 271 (Bell Operating Company authorization for provision of long distance service)—each require the FCC to find that the requested relief is pro-competitive and in the public interest. *Id.* at §§ 401, 271.

broadband market is intensely competitive, such that continuing regulation and unbundling requirements are no longer necessary to protect consumers.[101] But at the same time, the ILECs also contended that further broadband investment on their part would be unsupportable without the deregulation they demanded, and warned that without those ILEC broadband investments, ubiquitous broadband deployment would never take place and the U.S. would fall into a broadband backwater *vis-à-vis* other countries.[102] Ironically, if the broadband market is as competitive as the ILECs contend, then how is it that absent their involvement no other provider can be expected to jump in and fill the gap? The FCC never seems to have focused upon or addressed that rather obvious inconsistency.

In the end, of course, the FCC gave the ILECs what they wanted.[103] The ILECs, however, still made no broadband investments anywhere other than those locations where they would have invested regardless of regulation—either because it was economically attractive (e.g., in high density areas) or because they needed to respond to the only other actual competitor (the local cable company). Broadband deployment in rural and in smaller urban areas has lagged.[104] Verizon has divested much of its footprint in these areas,[105] and most recently the company announced that it would discontinue further investment in its FiOS platform after the end of 2010.[106] AT&T's investment in mass market broadband has been confined to extremely modest upgrades to its existing infrastructure to support its U-verse offering, a decidedly inferior broadband service when compared with FiOS and with the current cable broadband state of the art.[107]

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101. *See, e.g.*, Comments of Verizon Wireless at 7–10, Review of Regulatory Requirements for ILEC Broadband Telecommunications Services, FCC CC Docket No. 01-337 (rel. March 1, 2002), *available at* http://fjallfoss.fcc.gov/ecfs/document/view.action?id=6513079790.

102. *See id.* at 14.

103. *See BWIA Order*, *supra* note 24.

104. *See, e.g.*, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 20, 37, 136 (2010) [hereinafter NATIONAL BROADBAND PLAN]; Press Release, FCC, FCC Sends National Broadband Plan to Congress (Mar. 16, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296880A1.pdf.

105. *See, e.g.*, VERIZON COMMUNICATIONS INC., QUARTERLY REPORT (FORM 10-Q) (May 9, 2005); Press Release, Verizon Communications Inc., Verizon Completes Spin-Off of Local Exchange and Related Businesses in Maine, New Hampshire and Vermont (Mar. 31, 2008); Press Release, Verizon Communications Inc., Verizon Completes Spinoff of Local Exchange Businesses and Related Landline Activities in 14 States (Jul. 1, 2010).

106. *See* Robert Cheng, *Verizon to End Rollout of FiOS*, WALL ST. J. (Mar. 30, 2010), http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052702303410404575151773432729614.html.

107. For example, there are five tiers of U-verse download speeds available: 3, 6, 12, 18, and 24 Mbps. *AT&T U-verse High Speed Internet*, AT&T, http://www.att.com/u-verse/explore/internet-landing.jsp (last visited Nov. 16, 2010). Verizon offers FiOS at 15, 25, and 50 Mbps. *FiOS Internet*, VERIZON, http://www22.verizon.com/residential/

E. Regulating the Underlying Transmission in Internet Access Services is Not, and Would Not Amount to or Result in, the Regulation of Content or Application Providers

Those that have spoken most vociferously against net neutrality have characterized these principles as requiring "regulation of the entire Internet."[108] Decades of effective separation of basic transmission (regulated) from "enhanced" services and customer premises equipment (unregulated) under the *Computer Inquiry II* framework show that this conclusion completely misses the mark. Under that framework, the FCC successfully deregulated all of the customer premises equipment and enhanced services offered by ILECs and ensured that there was no need for

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fiosinternet/#plans (last visited Nov. 16, 2010). Comcast also offers plans ranging up to 50 Mbps. *High-Speed Internet: Speed Comparison*, COMCAST, http://www.comcast.com/Corporate/Learn/HighSpeedInternet/speedcomparison.html (last visited Nov. 16, 2010). Even Qwest, using an FTTN technology similar to AT&T's, offers a 40 Mbps service. *Compare Qwest High-Speed Internet Plans*, QWEST, http://www.qwest.com/residential/internet/broadbandlanding/compare_plans.html (last visited Nov. 16, 2010).

108. For example, after Rep. Edward Markey (D-Mass.) introduced H.R. 5273, "A Bill [t]o promote open broadband networks and innovation, foster electronic commerce, and safeguard consumer access to online content and services," known by the short name, *The Net Neutrality Act of 2006*, large telephone companies, as sponsors of an organization that went by the name "Hands Off the Internet," took out a full page advertisement in the *Washington Post* depicting the eleven-page bill as thousands of pages long. Net Neutrality Act of 2006, H.R. 5273, 109th Cong. (2006); *see Hands off the Internet*, COMMON CAUSE, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=2007803 (last visited Nov. 16, 2010) (discussing the "Hands Off the Internet" advertisement in the *Washington Post*). More recently, in comments filed in the FCC proceeding Framework for Broadband Internet Service, AT&T asserted that "[i]f DNS look-up or security features were insufficient to maintain a Title I information-service classification for *broadband Internet access* providers even when those features are integrated with transmission functionality, there would be no limiting principle that would prevent Title II regulation from encompassing much of the rest of the Internet ecosystem." Comments of AT&T Inc. at 89, Framework for Broadband Internet Service, FCC GN Docket No. 10-127 (rel. July 15, 2010). In the same proceeding, Verizon claimed that

> Any theory under which the Commission concluded that broadband Internet access services included the offering of separate telecommunications service under Title II would implicate all of these players [referring to a broad range of content and application providers]. And the Commission's plan to then assert Title I ancillary authority over the information service components of broadband Internet access in order to promulgate 'net neutrality' rules would allow it to sweep even more broadly and regulate other content, applications, and information services delivered over the Internet.

Reply Comments of Verizon and Verizon Wireless at 62, Framework for Broadband Internet Service, FCC GN Docket No. 10-127 (July 15, 2010). And, in a similar vein, the National Cable & Telecommunications Association warned that "[o]pening the door to the common carrier regulation of 'connectivity' will quickly reach these information services' functionalities or other elements of the 'Internet ecosystem,' notwithstanding the Commission's stated intent to snare in its net only broadband Internet access providers." Comments of Nat'l Cable & Telecomm. Ass'n at 55, Framework for Broadband Internet Service, FCC GN Docket No. 10-127 (July 15, 2010).

any form of common carrier regulation to extend to non-ILEC providers of these services.[109]

It is also clear that the *Computer Inquiry II* framework is not confined to a single technological vintage. Neither the speed of transmission, the format of the information being transmitted, nor the switching technology used to route the information make broadband access any different from earlier basic transmission services. Even today, the transmission component for dial-up Internet access continues to be a regulated common carrier service that end users can use to reach independent ISPs that connect the user to the (unregulated) Internet. If Internet access over dial-up facilities can exist without regulation of the Internet, it is hard to see why "Internet regulation" is the logical result of treating dedicated access as a Title II service. Applying these same principles, it is clear that no regulation of content- or application-related activity occurring on the Internet need result from regulating Internet access as a Title II common carrier telecommunications service.

IV. ECONOMIC REALITIES REQUIRE REGULATORY SUPPORT FOR NONDISCRIMINATORY ACCESS BY COMPETITORS TO BROADBAND TRANSMISSION USED FOR INTERNET ACCESS

In the previous section, we discussed why the model adopted by the FCC to promote a competitive information services market—requiring that the underlying transmission be offered on a nondiscriminatory, common carrier basis—must also apply to broadband Internet access in the same manner that it has with respect to "legacy" transmission services. Predictive judgments and optimistic aspirations as to the development and growth of facilities-based mass market broadband competition will not materialize if the fundamental economics cannot support such entry—and if we have learned nothing else over the fifteen years since adoption of the 1996 Act, it is that such entry is not economically viable. But the lack of economic feasibility of facilities-based competition does not mean that competition at the retail level cannot take place and, indeed, *Computer Inquiry II* and the 1996 Act contemplate—and are expressly aimed at facilitating—precisely this form of entry.

So long as wireline Internet access remains a closed duopoly controlled by the incumbent LEC and the incumbent cable company, the FCC will need to step in as the "traffic cop" for ensuring nondiscriminatory Internet access. If the FCC promotes access competition at the retail level by mandating that nonfacilities-based ISPs be afforded nondiscriminatory access to dominant facilities-based wireline and wireless distribution

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[109] *Stevens Report*, *supra* note 5, at para. 45; *see also Computer Inquiry II*, *supra* note 8.

infrastructures, then marketplace forces, and not regulatory oversight, will ensure the development and growth of competition in all Internet segments —access, content, and applications. Put differently, and contrary to the claims of the dominant incumbents, reinstatement of full *Computer Inquiry II* safeguards with respect to broadband Internet access is a far more effective and far less regulatory approach to assuring net neutrality and an open Internet than ongoing administration of direct net neutrality regulations.

In this section, we discuss the importance of competition for broadband Internet access and how the FCC, using the tools provided in the 1996 Act and in its own *Computer Inquiry II* regulations, can ensure net neutrality by promoting Internet access entry and competition by nonfacilities-based providers.

A. Regardless of the Technology in the Upstream Network, Access Facilities Remain a Bottleneck

While *Computer Inquiry II* enabled competition to develop in markets adjacent to telecommunications, another market structure mechanism was largely responsible for enabling competition to develop for telecommunications services that were dependent upon the local access bottleneck. In 1982, U.S. District Court Judge Harold Greene approved the Consent Decree that required the restructuring of the Bell System in a manner intended to make the Bell operating companies provide access services on a nondiscriminatory basis to all providers of long distance service.[110] Prior to the 1984 structural separation of AT&T from its local Bell exchange carriers, AT&T's long distance business received highly preferential treatment from the local Bell operating companies (its affiliates)—treatment that was simply not available to competing long distance carriers. Customers of MCI, Sprint, and other long distance entrants were forced to dial as many as twenty additional digits—rather than the eleven digits that AT&T's customers were required to dial—in order to place a long distance call.[111] Network interconnection arrangements available to competing carriers were subject to a number of technical limitations, and competitors had no access at all to important signaling protocols. The denial of access to one of these capabilities, known as "Answer Supervision," made it almost impossible for rival long distance carriers to accurately time and bill their customers' calls;

110. *See* United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 220–22 (D.D.C. 1982).

111. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 F.C.C.R. 15499, para. 17 (1996) [hereinafter *First Local Competition Order*].

unavoidable charges to customers for unanswered calls caused harm to competitive carriers' business reputations and made it harder for them to gain commercial acceptance.[112]

Meaningful long distance competition did not become a reality until the structural separation of the local and long distance businesses made the local Bell companies indifferent as to their customers' choice of long distance carrier, thereby eliminating any business purpose in their maintaining these and other discriminatory practices. When the 1996 Act provided a glide path for the divested Bell companies to reenter the long distance market (upon satisfying certain requirements intended to facilitate competition at the local service level without any requirement to demonstrate that effective competition had actually developed for local exchange services[113]), and the FCC went on to permit the Bell companies to bundle their local and long distance services into a single flat-rate package,[114] stand-alone long distance competition all but disappeared.

The anticompetitive conditions that existed before the courts and the FCC ensured equal access to local exchange services clearly demonstrate that the potential for competitive foreclosure is neither theoretical nor far-fetched.[115] There is an unmistakable parallel between the long distance market prior to the break-up of the former Bell System and the broadband

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112. With respect to long distance services, these inequalities were largely addressed through the FCC's equal access regime and the provisions in the *MFJ*. *See* GTE Sprint Communications Corp., US Telecom, Inc., Allnet Communications Services, Inc., & U.S. Transmission Systems, Inc., *Notice of Proposed Rulemaking*, 1985 FCC LEXIS 2207, para. 63 (1985); *see also* Bill Correctors, Ltd. v. MCI Comm. Corp., *Memorandum Opinion and Order*, 1984 FCC LEXIS 1715, para. 4 (1984).

113. *See* 47 U.S.C. § 271(c)(2)(B) (2006) ("Competitive Checklist").

114. It took until December 2003 for Bell operating companies to receive authority to offer in-region long distance services in all of their operating states. Application of Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Serv. in Ariz., *Memorandum Opinion and Order*, 18 F.C.C.R. 25504, paras. 1–2 (2003). By 2005, when the FCC was reviewing the proposed Verizon-MCI merger, it noted "significant evidence in the record that long distance service purchased on a stand-alone basis is becoming a fringe market." Verizon Communications Inc. & MCI, Inc. Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 F.C.C. R. 18433, para. 92 (2005).

115. In her recent article, *Transporting Communications*, Professor Susan Crawford provides an excellent overview of how, throughout the history of telecommunications, "companies providing general-purpose access services given sufficient legal discretion will both discriminate against particular communications in favor of their own complementary businesses and act on the content of messages they are asked to transmit, to their own commercial advantage." Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 876 (2009). While we do not disagree with Professor Crawford's conclusion that structural separation of the common carrier's Internet access transmission offerings from its competitive activities would be a highly effective means of preventing such discrimination, *id.* at 927–28, such an approach may not be practical to implement at the present time, due to the legal and political hurdles it is likely to face.

Internet access market as it exists today. Net neutrality is about a great many things, but fundamentally it should be viewed as key to preserving and protecting competition in all non-last-mile adjacent network, application, and content markets. When a last-mile broadband provider is able to act as a gatekeeper for access to consumer "eyeballs,"[116] it has the very same ability to restrict or deny access to downstream application and content providers as the local pre-1984 AT&T telephone operating companies had with respect to downstream (non-AT&T) long distance carriers. Absent effective competition for last-mile broadband (wireline or wireless) Internet access, the last-mile broadband provider has both the incentive and the ability to impose excessive fees for such access and/or to force downstream application and content providers to direct their traffic to the last-mile provider's own backbone network—threatening the continued viability of backbone network providers that do not also have last-mile end user customers of their own. Application and content providers unwilling or unable to pay the required "tribute" could be cut off altogether from the last-mile provider's end users, or otherwise be forced to accept a degraded connection. The parallels between pre-Bell System break-up long distance competition and the current potential for vertical market foreclosure arising from the last-mile broadband access providers' market power are strikingly similar.

Although competition among interexchange carriers flourished following the Bell System break-up, the Bell ILECs subject to the *MFJ* insisted (almost from the outset) that a structural approach enforcing nondiscrimination for access services (thus enabling competition) was unnecessary. To respond to these claims, in 1994, our firm, Economics and Technology, Inc., jointly with Hatfield Associates, Inc. of Boulder, Colorado, were engaged by (old) AT&T and MCI to prepare a detailed technical and economic analysis of the role of exchange access facilities. The resulting study, *The Enduring Local Bottleneck*, demonstrated that long after regulatory and judicial mandates had permitted competition to arise in customer premises equipment, inside wiring, and long distance services, the last-mile facilities (whether switched or dedicated) that connected customers to the PSTN were available from a single source and thus remained a "bottleneck."[117] The conclusion of that study was clear: Last-mile telecommunications infrastructure involves enormous capital investments and persistently high fixed costs, and is characterized by

116. "Eyeballs" is a term of art used to refer to the target audience of mass media. In the present context, it refers to those end users potentially able to view particular content and applications on the Internet.

117. ECONOMICS AND TECHNOLOGY, INC. & HATFIELD ASSOCIATES, INC., THE ENDURING LOCAL BOTTLENECK: MONOPOLY POWER AND THE LOCAL EXCHANGE CARRIERS (1994), www.econtech.com/Bottleneck.pdf.

extensive economies of scale and of scope.[118]

Incumbency and other "first mover" advantages are massive, and "greenfield" facilities-based entry by an entity with no existing infrastructure is unrealistic—if not altogether impossible—as an economic matter. In 1994, there was much speculation as to the potential entry of cable television providers into the local telephone business, but it was not until the advent of Voice over Internet Protocol (VoIP) around 2005 that such entry became feasible.[119] Even so, and as the FCC has recently noted, no inference can be drawn that such entry by others can be anticipated from a cable company's entry into the local telecommunications market:

> We see no persuasive economic reason to predict that, just because a cable company might find it profitable to make incremental investments in a preexisting network, subsequent entrants also would find it profitable to incur the costs of building an entire new network from scratch. Indeed, given that an incumbent, such as a cable company, may have an additional incentive to invest in facilities to deter additional entry from potential rivals, even less can be inferred about subsequent entrants from the fact that most cable companies have found it profitable to upgrade their cable television networks to provide telephone and data services. Supporting this view, we have seen few new entrants in any domestic telecommunications markets that have been willing to invest in a totally new wireline network, at least to serve residential customers.[120]

Our 1994 study was undertaken at a time when the U.S. Congress was engaged in the massive rewrite of the Communications Act of 1934 that resulted in the enactment of the 1996 Act. The 1996 Act preempted all remaining state regulatory restrictions on local exchange service competition and expanded the structural approach to nondiscrimination to include competitive local services that relied upon incumbents' local exchange facilities.[121] In addition to guaranteeing competitors comprehensive interconnection rights, section 251 required that ILECs

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118. *Id.* at 4.

119. According to the National Cable Television Association (NCTA), the number of cable telephone subscribers rose from 5.9 million in 2005 to 22.2 million in 2009. *Cable Phone Customers 1998-2009*, CABLE: NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, http://www.ncta.com/Stats/CablePhoneSubscribers.aspx (last visited Nov. 16, 2010).

120. Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Memorandum Opinion and Order*, 2010 FCC LEXIS 3841, para. 36 (2010) (citations omitted) [hereinafter *Qwest Phoenix Forbearance Order*].

121. Section 271 of the 1996 Act made provision for eliminating the *MFJ*'s long distance line of business restriction, permitting the incumbent Bell companies to offer long distance services once local competition was established, in which case, so the argument went, the incentive to discriminate against competitors would no longer exist. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 151(a), 110 Stat. 56 (codified at 47 U.S.C. § 271).

offer any requesting carrier "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . ."[122] In its initial implementation of section 251, the FCC required that ILECs provide a broad set of unbundled network elements (UNEs),[123] which entrants used (along with total service resale and a limited amount of their own facilities) to expand their competitive local telecommunications service offerings and their geographic footprints.[124] The three-pronged approach to entry under section 251 (interconnection of competitor-owned facilities, unbundled access, and resale) reflected recognition by Congress and by the FCC that economic barriers made it unrealistic to expect competitors ever to fully replicate the incumbents' networks with their own facilities.[125]

The availability of wholesale UNEs permitted competitors to expand their own networks gradually, giving them the ability to achieve a broad geographic footprint and, in the case of enterprise customers, to be capable of serving all of a customer's locations, while adding its own facilities where committed revenues permitted recovery of their investment. Using UNEs (and, in particular, the local loop-switching combination, known as the UNE-Platform), carriers that had previously been competitive only in the long distance market were able to offer residential customers an alternative to ILEC local exchange service.[126] Under its section 251 authority, the FCC also required ILECs to offer other carriers access to the high frequency portion of the local loop, so that they could make a competitive offering of Digital Subscriber Line (DSL) high-speed Internet access service even when the customer retained wireline voice telephone service from the ILEC.[127]

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122. *Id.* at 47 U.S.C. § 251(c)(3).

123. *First Local Competition Order*, *supra* note 111, at para. 4.

124. *Id.* at para. 12.

125. *See id.* at para. 13–14 (citing Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong. 113, 121 (1996)).

126. "Today, the combination of unbundled elements called 'UNE-P' or 'UNE-Platform'—a combination of unbundled loops, switching, transport and signaling—is the most successful mode of competitive entry created by the 1996 Act, and its growth substantially exceeds the alternative modes of entry." T. Randolph Beard, George S. Ford, & Christopher C. Klein, *The Financial Implications of the UNE-Platform: A Review of the Evidence*, 12 COMMLAW CONSPECTUS 5, 6 (2004). Ironically, by the time this article was published, the FCC had acceded to ILEC demands for the elimination of UNE-Platform, and CLECs that had depended upon UNE-P to serve residential customers were no longer viable competitors. *See* Press Release, AT&T Corp., AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets (July 22, 2004), http://www.corp.att.com/news/2004/07/22-13163 ("As a result of recent changes in regulatory policy governing local telephone service, AT&T will no longer be competing for residential local and standalone long distance (LD) customers.").

127. Deployment of Wireline Services Offering Advanced Telecommunications

The details of how the implementation of section 251 devolved from the comprehensive requirements of the 1996 *Local Competition Order*[128] to the largely decimated set of UNEs that survived the 2003 *Triennial Review* and 2005 *Triennial Review Remand Orders*[129] is generally beyond the scope of this Article, except with respect to "elements" and capabilities that relate specifically to the provision of broadband Internet access. However, there are several policy judgments that the FCC's broadband access deregulation has in common with other deregulatory policies adopted by the FCC during the Bush years, including the decision to cut off competitor access to numerous UNEs, the maintenance of special access pricing flexibility, and the various forbearance decisions. First, the FCC embraced the notion (promoted by ILECs) that nonfacilities-based competition was detrimental to ILEC investment incentives and that, despite significant empirical evidence to the contrary, such competition was not a legitimate contributor to the long-term competitive objectives of the 1996 Act. Second, although the FCC, between 2000 and 2008, had relied repeatedly upon the "investment incentive"[130] rationale, it never looked back to reexamine the result of this "predictive judgment." In that regard, our 1994 *Enduring Local Bottleneck* study's "predictive judgments" as to the realistic prospects for facilities-based local last-mile entry have turned out to have been far more prescient than those that had been advanced—and relied upon—by the FCC.[131]

Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98*, 14 F.C.C.R. 20912, para. 6 (1999).

128. *See First Local Competition Order*, *supra* note 111, at para. 366.

129. *See Triennial Review Order*, *supra* note 45; Unbundled Access to Network Elements, *Order on Remand*, 20 F.C.C.R. 2533 (2005) [hereinafter *Triennial Review Remand Order*].

130. *See, e.g.*, Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 3696, para. 7 (1999) ("Unbundling rules that encourage competitors to deploy their own facilities in the long run will provide incentives for both incumbents and competitors to invest and innovate.") [hereinafter UNE *Remand Order*]; *id.* at para. 46 ("We agree with the incumbent LECs' concerns regarding the preservation of their investment incentives."); *see also Triennial Review Order*, *supra* note 45, at para. 178 ("In general, the incumbent LECs and equipment manufacturers take the position that unbundling deters both incumbent LEC and competitive LEC capital investment."). The FCC has relied most strongly on the "investment incentives" argument in connection with broadband services. *See, e.g.*, *Triennial Review Order*, *supra* note 45, at para. 541; *Triennial Review Remand Order*, *supra* note 129, at paras. 11, 40.

131. Despite the absence of any hard evidence in support of the ILECs' "regulation-discourages-investment" claim, its proponents persist in advancing this argument, perhaps believing that if it is repeated often enough, it will come to be accepted as fact. A recent reiteration of this same theme was offered by Janusz A. Ordover, Greg Shaffer, and Doug Fontaine in an unpublished "Vodafone Public Policy" series paper, "The Economics of Price Discrimination," commissioned by Vodafone and submitted to the FCC in an *ex parte*

The FCC also began to make various "predictive judgments" about competition based upon the fallacy that a CLEC's deployment of facilities at a particular location was evidence that the CLEC (or another competitive provider) could justify the investment to deploy facilities at any "similar" location in the MSA.[132] As the FCC's reliance upon this predictive competition analysis expanded, local competition (other than from the uniquely facilities-based cable CLEC) actually began to shrink. Only recently, in its *Order*[133] denying Qwest's *Petition for Forbearance in the Phoenix MSA*,[134] has the FCC demonstrated an awareness of the theoretical and factual flaws underlying the analytical framework it had been using to assess the status of competitive telecommunications markets.

> Recognizing the theoretical and empirical concerns associated with duopoly, the Commission, in the *Qwest Omaha Forbearance Order*, offered three predictive judgments, which it concluded would mitigate those concerns. It first predicted that Qwest would continue to make wholesale facilities, such as DS0, DS1, and DS3 facilities, available to competitors at "competitive rates and terms." Second, and relatedly, it predicted that non-cable competitors could "rely on the wholesale access rights and other rights they have under *sections 251(c)* and *section 271* . . . [to] minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct in this market." Third, it predicted that the areas where Cox currently had facilities would see further investment by Cox and by other competitors even without access to unbundled loops or transport. . . . Upon further consideration, we find that these predictions have not been borne out by subsequent developments, were inconsistent with prior Commission findings, and

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filing on April 23, 2010 in GN Docket No. 09-191 and WC Docket No. 07-52. Janusz A. Ordover et al., *The Economics of Price Discrimination*, *in* THE ECONOMICS OF THE INTERNET (Vodafone Group Plc. 2010) [hereinafter *Ordover* et al.]. A central theme of the *Ordover* et al. paper is the authors' claim that "[c]ontrary to the position taken by some net neutrality proponents, the Commission's proposed ban on price discrimination can have a significant deleterious effect on the incentives of broadband access providers to undertake necessary investments in network innovation and expansion." *Id.* at 28. The paper contains no actual data or analysis to support this claim or any of the purported negative (yet entirely unquantified) economy-wide welfare impacts that the authors describe. Moreover, the authors conveniently ignore the fact that any increase in telecommunications costs confronting application and content providers to reach end users would have a negative impact upon their willingness to invest—particularly if the payments being made to the access providers amount to a transfer of some portion of the application and content providers' potential economic profits—an outcome that would also have negative welfare impacts. An analysis such as that proffered by *Ordover* et al. that ignores the economic effects of activities dependent upon Internet access services cannot be considered as either complete or remotely accurate.

132. *Triennial Review Remand Order*, *supra* note 129, at paras. 87–90.

133. *See Qwest Phoenix Forbearance Order*, *supra* note 120, at paras. 33–34.

134. Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Arizona Metropolitan Statistical Area, WC Docket No. 09-135 (filed Mar. 24, 2009).

> are not otherwise supported by economic theory.[135]

Nowhere has the FCC been more aggressive in eliminating competitor access than in the area of mass market broadband. While continuing to recognize significant impairment in certain legacy last-mile facilities,[136] the FCC, in its 2003 *Triennial Review Order*, nonetheless eliminated ILECs' obligation to offer unbundled access to: (1) the high-frequency portion of the local loop (HFPL) (also referred to as "line sharing"), used by so-called "Data CLECs" to provide DSL to mass market residential and small business customers; (2) hybrid fiber-coaxial cable (HFC) loops; and (3) so-called "greenfield" fiber loops.[137] The FCC swept away these UNEs largely based upon broad generalizations about competitive growth. For example, in support of its decision to end line sharing, the FCC concluded that its earlier findings about "local competition and the lack of viable alternatives for a provider of broadband services"[138] no longer applied, and offered in its place a nonspecific assessment to the effect that, while "these circumstances have not been completely reversed, significant strides have been made by competitors in the local market."[139] The FCC also explicitly relied upon section 706 as justification for accepting "some level of impairment," because of the countervailing objective of encouraging more rapid deployment of broadband by the incumbent providers.[140] However, the *TRO*, like other FCC orders from this era, contains little analysis on the factual basis for expecting the elimination of wholesale access to the high frequency portion of the loop to lead to increased investment levels.

In the *TRO*, the FCC also found evidence of significant wholesale availability of the HFPL, noting that

> we can no longer find that competitive LECs are unable to obtain the HFPL from other competitive LECs through line splitting. For example, the largest non-incumbent LEC provider of xDSL service, Covad, recently announced plans to offer ADSL service to "more of AT&T's 50 million consumer customers" through line splitting.[141]

But the FCC never took a second look at this finding after the AT&T and SBC merger—i.e., once there was no longer an AT&T CLEC to split

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135. *Qwest Phoenix Forbearance Order*, *supra* note 120, at paras. 33–34 (citations omitted).

136. *See Triennial Review Order*, *supra* note 45, at paras. 248–49.

137. *See id.* at paras. 237, 247, 275. The FCC made this finding notwithstanding the fact that "[t]he record further indicate[d] that FTTH loops display several economic and operational entry barriers in common with copper loops–that is, the costs of FTTH loops are both fixed and sunk, and deployment is expensive." *Id.* at para. 274.

138. *Id.* at para. 259 (citing Line Sharing Order, 14 F.C.C.R. 20938, paras. 53, 56 (1999)).

139. *Id.*

140. *Id.* at para. 173.

141. *Id.* at para. 259.

lines with a data CLEC, such as Covad.

Other FCC decisions made it still harder for entrants to provide broadband Internet access in competition with the ILEC and cable provider. Shortly after the *TRO*, the FCC granted the Verizon, SBC, Qwest, and BellSouth petitions for forbearance from their section 271 obligations for all of the broadband elements for which the FCC, in the *TRO*, had found a lack of impairment. As in the *TRO*, the decision to eliminate RBOC broadband access provisioning obligations relies less upon market analysis than upon broad generalizations about investment incentives and "emerging" intermodal competition.[142] Finally, with its various reclassification decisions, and in particular in its *BWIA Order*, the FCC removed the issue of broadband competition from any further consideration under section 251 criteria by making broadband Internet access capability unreachable by competitors as a wholesale telecommunications service.[143]

B. Reevaluation of FCC Competition Analysis Needs to Extend to Broadband Access

There are several assumptions and predictions that appear frequently in the FCC's broadband-related decisions. Although it has relied upon these assumptions and predictions repeatedly over the past decade, the FCC has never gone back to analyze the actual experience under deregulation in sufficient detail to determine if its predictions were correct.

Assumption/Prediction #1: That permitting ILECs and cable companies to exclude LEC and ISP competitors from using the facilities-based incumbents' broadband facilities is (a) necessary to promote investment by incumbents; (b) likely to provide greater incentives for investment by competitors; or (c) the necessary and best approach to implementing the policy stated in section 706.

Reality: ILEC and cable company broadband investment decisions (as well as those of other CLECs) depend critically upon available revenues and anticipated costs. Deployment data, including that contained in the record of the *National Broadband Plan* proceeding, demonstrates that

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142. Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), *Memorandum Opinion and Order*, 19 F.C.C.R. 21496, n.66 (2004) [hereinafter *Section 271 Forbearance Order*] ("The preconditions for monopoly appear absent . . . . [W]e see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio.") (citing Inquiry Concerning the Deployment of Advanced Telecommunications Capability, 14 F.C.C.R. 2398, para. 48 (1999)). Some six years later, the FCC now expresses serious reservations about competition under the ILEC-cable duopoly that has emerged. *Qwest Phoenix Forbearance Order*, *supra* note 120, at para. 82. The other predicted competition for mass market broadband access services, including competitors on intermodal platforms, has still yet to materialize. *See id.* at paras. 82–83.

143. *See BWIA Order*, *supra* note 24, at paras. 18–19.

facilities-based providers may well not make broadband investments in areas that do not satisfy standard investment criteria—e.g., high-cost (remote) or low-revenue (low-income) areas—even with the incentive of deregulation.[144] Conversely, where the incentive to invest has existed, broadband deployment has occurred even in the presence of regulation.[145]

Insulating ILECs and cable companies from wholesale obligations means that they obtain the benefits of market power that they would not have in the presence of additional competitors. However, there is no assurance that the incumbents will use the supracompetitive profits that they derive from serving customers in one area to build out to customers in remote, higher cost, and/or lower income areas. Verizon's decision to shed those portions of its operating footprint that consist mainly of rural customers rather than submit to pressures to extend broadband deployment to such areas provides compelling evidence of this reality. As to competitor investment, with the exception of cable companies, the FCC has not demonstrated (nor could it) that CLEC investment (with the exception of cable companies) has increased as a result of the elimination of broadband unbundling requirements.

Assumption/Prediction #2: That "emerging" intermodal competition will expand consumer options beyond the duopoly of wireline ILEC and cableco-provided access.[146]

Reality: For more than a decade, the FCC has relied upon the anticipated presence of "intermodal" competition, including (among others) broadband over power lines, satellite, fixed microwave, and, finally, wireless. However, the FCC's own data show that the reality has not come even remotely close to meeting such expectations. According to the FCC's most recent report on *High-Speed Services for Internet Access (Status as of December 31, 2008)*, the combined categories of satellite, fixed wireless, and "power line and other" accounted for just over one percent of total fixed broadband in June 2005 and remained at essentially that same level (it had actually decreased slightly) as of December 2008.[147] In its *National*

144. *See id*. at para. 19.

145. In the wake of the 1996 Act (from 1997 to 2001), a period of decidedly increasing regulation, Verizon undertook $48.8 billion in additional telephone plant in service (TPIS), as compared to TPIS additions of $35.4 billion during the subsequent period of deregulation (from 2002 to 2006)—meaning that Verizon spent 37.7 percent more on telecommunications plant during the period of regulation than the subsequent period of deregulation. (This thirty-six percent growth represents the growth attributable to both of Verizon's predecessor companies: Bell Atlantic and non-RBOC GTE. Bell Atlantic's individual TPIS additions experienced growth of more than fifty-seven percent during the same period.) *See* FCC, ARMIS USOA REPORT 43-02 tbl. B-1.B. (years ending 1997–2006).

146. *See, e.g.*, *Section 271 Forbearance Order*, *supra* note 142, at para. 22.

147. INDUS. ANALYSIS & TECH. DIVISION, WIRELINE COMPETITION BUREAU, FCC, HIGH-

Broadband Plan, the FCC recommends that a significant amount of new spectrum be allocated for broadband uses, but still acknowledges that "[w]ireless broadband may not be an effective substitute in the foreseeable future for consumers seeking high-speed connections at prices competitive with wireline offers."[148]

Assumption/Prediction #3: That because broadband involves new (rather than legacy) facilities, incumbents and new entrants have the same opportunities for deployment.[149]

Reality: This conclusion partakes of both the "new technology" fallacy and the FCC's ongoing misconceptions about the ability of competitors to replicate an incumbent's network in its entirety. Broadband access facilities are deployed incrementally to carriers' (or cable companies') preexisting networks. For the ILEC, incumbency and the existence of a legacy network provide both unique cost advantages and unique revenue opportunities. As we discuss more fully below, the time has passed for the FCC to reassess the factual evidence with respect to competition, to acknowledge that competitors are unable to duplicate incumbents' ubiquitous network access facilities, and to realign its policies according to these market realities.

Ironically, while the FCC has premised the various steps in its comprehensive deregulation of broadband access services upon an expectation of impending competitive entry, these actions have had the effect of frustrating and discouraging new entry and creating a stampede of exits from the competitive telecommunications market. Indeed, it is difficult to square the various deregulatory initiatives for broadband access with the FCC's recent finding that "the [facilities-based wireline broadband] industry will probably always have a relatively small number of facilities-based competitors"[150] or with the DOJ's conclusion that wireline broadband services are characterized by "the presence of large economies of scale, which preclude having many small suppliers and thus often lead to oligopolistic market structures."[151]

C. Reconciling Recent FCC Decisions with Existing Policies on

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SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2008, at 9, tbl.1 (2010).

148. NATIONAL BROADBAND PLAN, *supra* note 104, at 41 (citing Robert C. Atkinson & Ivy E. Schultz, COLUMBIA INSTITUTE FOR TELE-INFORMATION, BROADBAND IN AMERICA: WHERE IT IS AND WHERE IT IS GOING (ACCORDING TO BROADBAND SERVICE PROVIDERS) 7 (2009)).

149. *Triennial Review Order*, *supra* note 45, at para. 227.

150. NATIONAL BROADBAND PLAN, *supra* note 104, at 36.

151. *Id.* at 62 n.4 (citing Economic Issues in Broadband Competition: A National Broadband Plan for Our Future, Ex Parte *Submission of the United States Department of Justice* 11 (filed Jan. 4, 2010)).

Broadband Internet Access

Shortly after the D.C. Circuit vacated the FCC's *Comcast* decision, the FCC issued a *Notice of Inquiry* in which it proposed to classify broadband Internet access as a telecommunications service, while maintaining "restrained oversight" of broadband Internet access service.[152] In what the FCC describes as a "third way"—that is, something other than complete deregulation or the reimposition of full Title II obligations—the *NOI* suggests that the FCC could:

> classify the Internet connectivity portion of broadband Internet service as a telecommunications service but . . . simultaneously forbear, using the section 10 authority Congress delegated to us, from all but a small handful of provisions necessary for effective implementation of universal service, competition and small business opportunity, and consumer protection policies.[153]

Leaving aside the question of whether such a broad-brush approach to forbearance comports with the statutory requirements, the larger concern is whether the FCC can achieve its stated objectives with regard to an open and competitive Internet if it simply reclassifies Internet access, but fails to adopt the additional steps necessary to ensure that ILECs, cable companies, and wireless carriers make broadband "bottleneck" facilities available in accordance with all of the provisions of Title II that support the competitive provision of telecommunications and information services.[154]

Indeed, just a few months prior to the Chairman's "third way" proposal, the FCC had released its Congressionally-mandated *National Broadband Plan*, in which it specifically noted that additional wireline facilities-based broadband entry (beyond the incumbent LEC and the

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152. Framework for Broadband Internet Service, *Notice of Inquiry*, 25 F.C.C.R. 7866, para. 7 (2010).

153. *Id.* at para. 28 (citation omitted).

154. While Professor Crawford accurately describes the problems created by failing to require the provision of broadband last-mile transmission on a nondiscriminatory basis as common carrier services, her proposed solution appears to be confined to last- and middle-mile fiber optic transmission facilities, and not copper, coaxial cable, or wireless. *See* Crawford, *supra* note 115, at 928–29. To achieve Professor Crawford's solution would require extensive deployment of last-mile and middle-mile fiber facilities where few exist today. Whereas some form of "terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps" is presently available to ninety-five percent of all households (and a slightly higher percentage of businesses), fiber-to-the-premises (FTTP) is projected to become available, over the next several years, to merely fifteen percent of U.S. households. NATIONAL BROADBAND PLAN, *supra* note 104, at 20, 42. While Congress may in the long run determine that the massive investment required to attain ubiquitous FTTP deployment is in the public interest, this resource-intensive solution could only be achieved at a significant cost, and in any event not for many years in the future. In our view, there is no justification for deferring the conditions necessary to achieve net neutrality by tying it to a technology that currently exists in a relatively small portion of the United States, when a competitive Internet access market could be achieved today by requiring nondiscriminatory access on a technology-neutral basis.

incumbent cable provider) is unlikely:

> Building broadband networks—especially wireline—requires large fixed and sunk investments. Consequently, the industry will probably always have a relatively small number of facilities-based competitors, at least for wireline service. Bringing down the cost of entry for facilities-based wireline services may encourage new competitors to enter in a few areas, but it is unlikely to create several new facilities-based entrants competing across broad geographic areas.[155]

The same conclusion with respect to broadband competition appears in an *ex parte* submission by the DOJ (which the FCC cites in the *National Broadband Plan* report):

> We do not find it especially helpful to define some abstract notion of whether or not broadband markets are 'competitive.' Such a dichotomy makes little sense in the presence of large economies of scale, which preclude having many small suppliers and thus often lead to oligopolistic market structures. The operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition. In highly concentrated markets, the policy levers often include: (a) merger control policies; (b) limits on business practices that thwart innovation (e.g., by blocking interconnection); and (c) public policies that affirmatively lower entry barriers facing new entrants and new technologies.[156]

While reinstating Internet access to its appropriate Title II status will certainly put the FCC in a better position to foster competition than if the service remained outside its direct jurisdiction, this policy change alone is unlikely to prevent incumbent broadband providers from consolidating their market power and continuing to discriminate against nonaffiliated ISPs and application and content providers.

The competitive realities of retail and wholesale access markets, which the FCC is just now acknowledging in other regulatory contexts, should inform the FCC's approach to the regulation of Internet access. Not long after releasing its *Reclassification NOI*, the FCC issued a decision denying Qwest forbearance from various forms of retail and wholesale regulation for services in the Phoenix, Arizona MSA.[157] In that *Order*, the FCC admits that the competitive analysis used in its forbearance decisions in recent years has been flawed on both theoretical and factual levels. The FCC rejects both the theoretical and factual foundations for earlier decisions that had relied upon "predicted" competitive growth based upon anecdotal and "proxy" evidence of some competitive presence. Instead, the

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155. NATIONAL BROADBAND PLAN, *supra* note 104, at 36.

156. *Id.* at 62 n.4 (citing Economic Issues in Broadband Competition: A National Broadband Plan for Our Future, Ex Parte *Submission of the United States Department of Justice* 11 (filed Jan. 4, 2010)) (internal quotation marks omitted).

157. *See Qwest Phoenix Forbearance Order*, *supra* note 120.

FCC now adopts a comprehensive antitrust type of market power analysis, with a strong emphasis upon market definition, market share, and other quantitative indicia of actual competition.

Unlike some of its earlier forbearance orders, this time the FCC views markets as "competitive" if the level of competition is sufficient to constrain the incumbent's ability to "profitably impose a small but significant and nontransitory increase in price (SSNIP)."[158] Consistent with its precedents, the FCC finds that the relevant geographic market is the individual customer location because customers cannot be expected to relocate in response to an SSNIP;[159] in addition, the FCC recognizes that in order for an entrant to serve a multilocation enterprise customer, the entrant must be able to serve the entirety of the customer's requirements at all of its business locations.[160] The FCC examines the actual levels of competition, as well as the likelihood of *de novo* entry or supply-side substitution, separately for each of the various product markets (enterprise and residential, retail and wholesale), and concludes that neither effective competition nor the short-term potential for effective competition, exists in any of them.[161] With respect to enterprise services, the FCC's analysis places particular emphasis upon competition at the wholesale level, which it finds to be almost nonexistent.[162] While it continues to consider "potential competition" (in accordance with the directive of the federal courts), the FCC also recognizes that the "potential" needs to be based on a realistic expectation of either *de novo* entry or supply-side substitution.[163]

In the *Qwest Order*, the FCC quotes extensively from earlier FCC decisions that had recognized the presence of formidable entry barriers and appears to re-embrace its earlier interpretation of the 1996 Act as supporting the development of local competition through both facilities- and nonfacilities-based entry.[164] And, as noted above, the FCC determined that the expansion of facilities by cable companies is not predictive of new entry by other competitors that lack cable's existing infrastructure platform

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158. *Id.* at para 56; *see also id*. at para. 42 & n.142–43.

159. *Id.* at para. 64.

160. *Id.* at para. 74.

161. *Id.* at paras. 71–72, 81–86, 88–91.

162. *See id.* at para. 73.

163. *Id.* at para. 72.

164. *See id.* at para. 32. Explaining the advantages of a market that includes nonfacilities-based competitors over a cable/ILEC duopoly, the FCC states:

> Were that level of competition sufficient to fulfill Congress' goals for telephone services, the 1996 Act only would have needed to require interconnection. Instead, Congress established means for additional competitors to enter without fully duplicating the incumbent's local network. It is clear Congress wanted to enable entry by multiple competitors through use of the incumbent LEC's network.

Id. (citations omitted).

and that the cable/ILEC duopoly cannot be relied upon to produce competitive conditions.[165]

In this forbearance analysis,[166] the FCC here reinforces its theoretical market power analysis with empirical findings regarding the status of competition, concluding, *inter alia*, that:

- Even the largest CLECs rely upon ILEC last-mile facilities to connect to the vast majority of the enterprise customers they serve.[167]
- Contrary to the FCC's previously stated expectations, ILECs have not continued to provide competitors with wholesale inputs at fair and reasonable prices after the FCC had forborne from requiring it—an outcome that the FCC now concedes should not have been surprising, noting that "assuming that Qwest is profit-maximizing, we would expect it to exploit its monopoly position as a wholesaler and charge supracompetitive rates, especially given that (absent regulation) Qwest may have the incentive to foreclose competitors from the market altogether."[168]
- Intermodal alternatives (such as fixed microwave service for enterprise customers) have not emerged or are not available at anywhere near the level necessary to represent a competitive alternative to ILEC special access services.[169]

The analytical framework used in *Qwest* would also be well-suited for application in any FCC proceeding involving competition policy. In particular, although the FCC suggests that a somewhat different approach may be called for in broadband proceedings, the rationalizations that have been put forward for treating broadband differently from other types of access should not be elevated over the compelling competitive concerns expressed by the FCC in the *Qwest* ruling. Today, according to the FCC's *National Broadband Plan* report, seventy-eight percent of all U.S. housing units have a choice of two terrestrial broadband providers (the ILEC and cable company), but the number of customers that can select among three

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165. *Id.* at para. 30 ("[T]he move from monopoly to duopoly is not alone necessarily sufficient to justify forbearance . . . ." This is because "economic theory holds that firms operating in a market with two or a few firms (*i.e.*, an oligopoly) are likely to recognize their mutual interdependence and, unless certain conditions are met, in many cases may engage in strategic behavior, resulting in prices above competitive levels.").

166. In a Public Notice issued the same day as the *Qwest Order*, the FCC asked whether it was appropriate to extend the analytical framework applied in *Qwest* to other forbearance proceedings. Public Notice, FCC WIRELINE COMPETITION BUREAU SEEKS COMMENT ON APPLYING THE *QWEST PHOENIX FORBEARANCE ORDER* ANALYTIC FRAMEWORK IN SIMILAR PROCEEDINGS, DA No. 10-1115 (June 22, 2010).

167. *Qwest Phoenix Forbearance Order*, *supra* note 120, at para. 87.

168. *Id.* at para. 34.

169. *See id.* at paras. 69, 89.

(or more) providers is far smaller (four percent) than the number that has only one provider (thirteen percent) or no broadband availability at all (five percent).[170] The retail access duopoly that the FCC dismisses as ineffective in disciplining rates, terms, and conditions for other wireline telecommunications services is no different in the broadband context—except to the extent that the absence of wholesale competition, rather than being a de facto condition, is legally sanctioned.

While the FCC appears to be struggling to justify restoring a framework under which broadband Internet access is classified as telecommunications and provided in a manner that shields retail competitors from discriminatory practices by incumbent providers, there is nothing particularly radical about this approach. In fact, a structural approach that facilitates the expansion of retail competition is precisely what has been adopted in Canada, where both ILECs and "cable carriers" are required to offer wholesale high-speed access facilities to retail competitors, at all speed options that the ILEC or cable carrier offers to its own retail Internet customers.[171] The CRTC recently examined—and soundly rejected—arguments by ILECs and cable companies that wholesale access was no longer necessary to ensure retail competition.[172] The CRTC found that retail Internet access would not be competitive without the continuation of a wholesale access requirement, finding that (1) a cable/ILEC duopoly was not sufficient to protect consumers' interests, and also that (2) nonwireline platforms, such as wireless and satellite, were not presently substitutes for retail Internet services provisioned over wireline facilities.[173] The CRTC thus found that, under these conditions, the only reliable way to ensure retail Internet access competition was through mandated wholesale access to high-speed ILEC and cable facilities.[174]

V. CONCLUSION: NET NEUTRALITY CAN BEST BE ACHIEVED BY THE FULL RESTORATION OF NONDISCRIMINATORY ACCESS TO BROADBAND LAST-MILE FACILITIES

As we have explained in some detail above, there is no technical basis for any requirement that a broadband Internet access service come bundled with any provider-supplied content. Facilities-based ISPs have the same opportunity as any other ISP to offer their customers various content and applications sold and priced separately from the underlying transmission.

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170. NATIONAL BROADBAND PLAN, *supra* note 104, at 37 tbl.4-A.

171. *Telecom Regulatory Policy CRTC*, *supra* note 23, at para. 10 n.11 (citing CRTC 2006 and 2007 "Speed Matching" orders).

172. *Id.* at paras. 53–54.

173. *Id.* at paras. 53–55.

174. *Id*. at para. 55.

At the same time, under the current regulatory treatment of broadband Internet access, the access provider is under no obligation to furnish the underlying telecommunications service to rival content providers. Declaring Internet access to be a bundled information service when it is not, serves only to add deregulation to the numerous other advantages that ILECs, cable providers, and wireless carriers have over competing stand-alone downstream application and content providers—i.e., those that do not also provide broadband access. This disparity in market position creates the opportunity for a facilities-based broadband provider to leverage its market power in the wireline or wireless Internet access market to discriminate against, and hence competitively disadvantage, their nonvertically integrated rivals.

The FCC is attempting to obliquely address the potential for such vertical foreclosure through the promulgation of "third way" net neutrality rules that would prohibit the integrated provider's ability to favor its own content or discriminate against rival content providers. A prohibition of this sort targets conduct—after the fact—but does little if anything to diminish the opportunity or incentives for such discrimination. If the FCC merely fixes its classification problem with respect to Internet access services, but fails to address the competitive consequences that have resulted from the misclassification, it will only solve, at the most, half of the problem.

Along with reclassification, the FCC needs also to determine what will be the most effective and efficient way to prevent abuses of market power by the owners of last-mile facilities. There are several reasons why *ex post* enforcement—which requires after-the-fact policing of discriminatory behavior either on the FCC's own initiative or, more likely, in response to specific, formal complaints filed by consumers, third-party competitive content or applications providers, or others—is less effective than an *ex ante* structural approach that removes the opportunity and incentives for discriminatory behavior in the first place. With the Internet and its derivative application and content markets moving along at lightning speed, the "snail's pace" at which the FCC responds when confronted with controversial issues[175] can permit aggrieved parties to suffer extensive damage while awaiting relief, and, as such, affords no real deterrent to discriminatory conduct by dominant incumbents.

The FCC should know from years of experience that enforcement is slow, costly, and inefficient at addressing pervasive or systematic misconduct. Complainants in FCC proceedings have the burden of proof, but are often afforded minimal discovery opportunities to develop the

175. *See, e.g.*, Core Comm., 531 F.3d 849 (2008) (compelling the FCC by mandamus to resolve issues on reciprocal compensation that had been outstanding since 2000).

evidentiary record.[176] And because any given enforcement action typically targets only one particular incident or manifestation of misconduct, it is likely that the discrimination may persist for extended periods of time and/or be perpetrated against multiple competitors before any sanction or injunction is applied. In most cases, the penalties for unlawful conduct, when they are ultimately imposed, fall far short of the gain realized by the perpetrator from its unlawful conduct.[177] The potential for such conduct on the part of dominant telecommunications carriers has been recognized for many decades, and needs to be addressed before the fact, not afterwards.[178] The mechanisms adopted in *Computer II* and in the 1996 Act represent a middle ground between outright structural separation with explicit line-of-business restrictions and the alternative of ceding all adjacent telecommunications and information services markets to the incumbent last-mile monopolies.

These extremes can be avoided if the FCC uses its existing authority to require that a nondiscriminatory offering of "basic" broadband access be made available, on an unbundled and nondiscriminatory basis, by all dominant facilities-based providers to their nonfacilities-based competitors. The findings in the *National Broadband Plan* and the evidence accumulating before the FCC in various pending proceedings all support a reversal of FCC decisions that find that competitors are not "impaired" without access to incumbents' unbundled broadband access facilities, at forward-looking, cost-based rates. These empirical results are completely consistent with what economic theory would predict with respect to the duplication of an extensive physical network. Although some of the factors affecting network expansions differ between the enterprise and mass market sectors, additional replication of the ubiquitous facilities already deployed by wireline ILECs and cable companies and by wireless carriers to provide Internet access is equally unlikely.

With a competitive market at both wholesale and retail levels,

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176. *See, e.g.*, 47 C.F.R. §§ 1.720(b), 1.721(a)(5), 1.729 (a) (1999) (permitting complainant ten initial and five follow-up interrogatories). In recognition of the tendency for complaints to go unresolved for extended periods of time, the FCC in 1998 adopted an "accelerated docket" procedure that FCC staff may use in particular cases, but at its discretion. *See* Biennial Review 2000 Staff Report, 15 F.C.C.R. 21084, paras. 172–73 (2000); *see also* 47 C.F.R. § 1.730 (1999).

177. For example, if it costs $40 to park a car in a parking lot versus a $10 fine for parking in a no-parking zone, it is cheaper to park illegally and pay the $10 than to park legally for $40. Similarly, if the fine for illegal parking is $1,000 but there is only a one-in-one-thousand chance of getting a fine, all but the most risk-averse drivers would opt to take their chances and park illegally.

178. Professor Crawford comes to a similar conclusion about the futility of nondiscrimination mandates and after-the-fact enforcement efforts. *See* Crawford, *supra* note 115, at 916–19.

application and content providers will have a choice of multiple Internet access providers to reach their consumer "eyeballs" and will thus be inoculated against attempted discriminatory conduct by any particular provider. Conversely, without the ability to profit from this type of discrimination, such practices are unlikely to be pursued by those offering broadband Internet access at the retail level. Thus, by restoring competitors' right to purchase "basic" broadband access as a platform for retail Internet access competition, the FCC has the opportunity to create more competition, with less regulation, than by reclassification alone. If real and effective competition for retail mass market Internet access is able to develop, that competitive marketplace will operate to enforce the FCC's net neutrality principles, and will do so far more efficiently, effectively, and transparently than ongoing FCC involvement in the network management and other day-to-day operating decisions of wireline and wireless broadband Internet access providers. The result: a far more effective, and far less regulatory, strategy for achieving the important net neutrality goals.

Deliberative Democracy on the Air: Reinvigorate Localism—Resuscitate Radio's Subversive Past

Akilah N. Folami*

Radio today seems so trapped in the amber of corporate control that it is easy to forget how much of radio technology and programming came from the bottom up, pioneered by outsiders or rebels who wanted something more, or something different, from the box than corporate America was providing. And what they wanted from radio was more direct, less top-down communication between Americans. . . . At times they turned . . . listening, and programming into a subversive activity.[1]

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* Associate Professor of Law, Hofstra University School of Law. I wish to thank the organizers of the 2009 Association for Law, Culture, and Humanities Conference, and the 2009 Southeast Association of Law Schools Conference, for allowing me to present a preliminary version of this Article. A special thanks to Professors Deborah Post, Lavonda Reed-Knuff, Maria Simone, and to my colleagues as part of the Hofstra Junior Faculty Forum, for their helpful thoughts and comments. Finally, I would especially like to thank Josh Winefesky, Renada King, and James Lewis for their invaluable research assistance.

1. SUSAN J. DOUGLAS, LISTENING IN: RADIO AND THE AMERICAN IMAGINATION 15 (1999).

I. INTRODUCTION

Radio is dead.[2] Dead, that is, to realizing those, at first, noble ideals of being a communicative medium created by the people, for the people, and representative of the people. At radio's mass emergence, many perceived it as the vehicle through which America's locally, regionally, ethnically, and/or socioeconomically marginalized populations could be included in America's democracy by being given an expressive and deliberative space on this newly accessible and fairly inexpensive medium. Today, however, scholars and activists[3] have argued that deregulation of the media industry,

2. Radio, here, and throughout this Article, unless otherwise specified, is referring to conglomerate-controlled, full-power commercial radio, and not to nonconglomerate, locally owned commercial radio or to low-power, noncommercial, public, or college/educational radio.

3. *See* Michael A. McGregor, *When the "Public Interest" Is Not What Interests the Public*, 11 COMM. L. & POL'Y 207, 207–08 (2006); *see also, e.g.*, Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 266–67 (2005); Robert W. McChesney, *The U.S. Media Reform Movement: Going Forward*, MONTHLY REV., Sept. 15, 2008, at 51–55; ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 74–75 (1999); FREEPRESS, http://www.freepress.net (last visited Oct. 24, 2010); MEDIA ACCESS PROJECT, http://www.mediaaccess.org (last visited Oct. 24, 2010). In addition, the public responded visibly and quite vocally in protest to the FCC's 2003 *Order*. *See* In the Matter of 2002 Biennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620 (2003) [hereinafter 2003 *Report and Order*], which permitted a further deregulation of the media industry. Such deregulation has been found by many to be the leading cause of consolidation in ownership

which began in the early 1980s and was solidified by the Telecommunications Act of 1996,[4] facilitated unprecedented consolidation in radio station ownership. As a result, radio has become a commodified and commercialized wasteland—a corporatized plaything—littered with fragmented, yet overlapping, music formats that play the same homogenized corporate-produced music playlists and are devoid of meaningful local public- and cultural-affairs programming.

These same scholars and activists also contend that radio's fate was sealed with the shift in meaning of the public interest requirement imposed on broadcasters by the FCC,[5] which required licensees to serve as "public trustees" of the nation's airwaves for the listening and deliberating public.[6] However, with the ideological shift in meaning of the public interest standard from the public trustee model—aimed at informing the listening public and at facilitating the discourse that occurs within it[7]—to the market model, the FCC's ultimate approach toward radio has effectively resulted in turning the listening audience over to advertisers as a pre-packaged and consuming demographic, a saleable commodity in and of itself.[8] As a result, and to the dismay of many, radio today focuses little on cultural diversity, norms, tastes, and interests of the local—the historically favored and distinctive quality of radio.

Is radio really dead, though? While some commentators may not have gone so far as to assert radio's death, they have suggested that radio has

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of the nation's radio stations. Several congressional leaders, including Senator Russell Feingold from Wisconsin, called for the entire 2003 *Report and Order* to be set aside, while the Prometheus Radio Project, a public advocacy group, challenged it in court. Prometheus Radio Project v. FCC, 373 F.3d 372, 386 (3d Cir. 2004). The Third Circuit stayed the 2003 *Report and Order* and required the FCC to sufficiently justify its continued media ownership deregulation. *Id.* at 435. In the five hearings held by the FCC across the nation, including one in which the Author of this Article testified, there was considerable testimony regarding the effect of deregulation on local musicians' decreased access to the airwaves, decreased coverage of local news and public affairs programs, and the overall lack of diverse content heard on the radio. *Public Hearings on Media Ownership Issues*, FCC, http://www.fcc.gov/ownership/hearings.html (last visited Nov. 14, 2010).

4. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

5. The public interest requirement was imposed on broadcasters initially via the Radio Act of 1927, Pub. L. No. 69-632, ch. 169, sec. 11, 44 Stat. 1162, and maintained in the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.), which remains, in addition to several amendments, the governing framework for the regulation of telecommunications.

6. Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613, 618 (2004).

7. *See, e.g.*, *id.* at 628.

8. *See* Catherine J.K. Sandoval, *Antitrust Language Barriers: First Amendment Constraints on Defining an Antitrust Market By a Broadcast's Language, and Its Implications for Audiences, Competition, and Democracy*, 60 FED. COMM. L.J. 407, 415 (2008).

struggled to adapt to today's rapidly evolving technological landscape.[9] With broadcast, cable, and satellite television; the Internet; satellite and Internet radio; MP3 players; and the like, the media outlet cup runneth over, providing many different choices for listeners to retrieve the programming content they desire. Despite these doomsday predictions of radio's relevance or deliberative future given corporate control of the medium and the content provided on it, there is reason for pause. Radio's history provides evidence of a rich account of resistance from the bottom up, with once-marginalized groups finding voice and expression on the nation's radio airwaves, even *within* the commercialized setting of terrestrial radio.

In spite of claims of radio's extinction and irrelevance, such history makes radio's current relevance all the more evident. History reveals that now is not the first time radio or radio programming has been slave to corporate control. For example, during the network era, the commercial broadcast networks controlled most radio programming via their affiliate agreements, which bound local affiliate stations to play content provided to them by the corporate networks.[10] Such content was provided remotely and from the top down, with little reflection of local interest or norms. Still again, during the format era which followed the network era and facilitated the rise and development of the Top 40 music format, music playlists were (and still are) selected based primarily on aggregated national surveys, which became further and further removed from the listening preferences of local community members.[11]

For deliberative purpose, it is important to note that the format era followed what some have referred to as the first "death" of radio[12] due in part to the emergence of television;[13] others, however, including cultural studies scholars, consider it to be more like a transition period in radio between the network and format eras.[14] This transition period opened up

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9. *See* MARC FISHER, SOMETHING IN THE AIR: RADIO, ROCK, AND THE REVOLUTION THAT SHAPED A GENERATION 306–09 (2007).

10. *See* DOUGLAS, *supra* note 1, at 63. Similarly, broadcast television would face the same challenges due to increasing commercial network control. Cecilia Rothenberger, *The UHF Discount: Shortchanging the Public Interest*, Note, 53 AM. U. L. REV. 689, 721 (2004) (discussing commercial networks' control and consolidation of broadcast television); s*ee also* Akilah N. Folami, *Freeing the Press from Editorial Discretion and Hegemony in Bona Fide News: Why the Revolution Must Be Televised*, 33 COLUM. J.L. & ARTS, (forthcoming Spring 2011).

11. Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 361 (2004).

12. Derek W. Vaillant, *Sounds of Whiteness: Local Radio, Racial Formation, and Public Culture in Chicago, 1921-1935*, 54 AM. Q. 25, 50–52 (2002) (discussing the first death of local voices and the turning over of radio to commercial corporate interests).

13. *See infra* Part II.B.

14. *See id.*

access in the mid-1940s to the early 1950s to the nation's radio airwaves to White[15] American youth and Black American musicians and, as a result, gave birth to voices of resistance on the nation's radio airwaves to mainstream American ideologies. These voices were from the marginalized segments of America's population. They challenged the dominant ideological norms and values that permeated mainstream society and that were reflected in the content provided from the top down by the then-existing, corporate-controlled radio network affiliate outlets and the new and emerging media outlet at the time—television.[16]

This Article zeroes in on this history to show the unique and influential role radio has played in fostering communication in what some public sphere and deliberative democracy theorists call counterpublics,[17] which Habermas has historically dismissed as less effective than his idealized formal political public sphere in mounting challenge to authority to effectuate meaningful change.[18] This Article contends that these publics, found most often in the everyday lives, conversations, and interactions of ordinary people can, despite their disorganization, still challenge the hegemonic authority of the majority. For example, by playing on radio the musical tastes of the formerly unacknowledged youth of mainstream American society, the disc jockey,[19] through his guest appearances at high schools, teen "call-in" shows, and announcements regarding local events, tapped into and came to represent this segment of the local community. He gave voice to their concerns and interests that were otherwise rendered invisible by mainstream media outlets, and that were, at times, at odds with

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15. The word "White" (as well as the word "Black") is capitalized in this Article when it is used to refer to a racial group because it refers to a "specific cultural group and, as such, require[s] denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

16. *See infra* Part III.B.

17. *See* Houston A. Baker, Jr., *Critical Memory and the Black Public Sphere* (1994), *in* THE BLACK PUBLIC SPHERE: A PUBLIC CULTURE BOOK 5 (The Black Public Sphere Collective eds., Univ. of Chi. Press 1995); Mary P. Ryan, *Gender and Public Access: Women's Politics in Nineteenth-Century America*, *in* HABERMAS AND THE PUBLIC SPHERE 259, 284 (Craig Calhoun ed., MIT Press 1992).

18. Public sphere theorist, Michael Gardiner, contends that while counterpublics may fall far short of organizing formally into the overtly political reasoning and consensus building political publics endorsed, they nevertheless are "as much sites of impassioned and embodied contestation as arenas of impartial, reasoned debate, . . . and . . . 'consensus and sharing may not always be the goal, but the recognition and appreciation of differences, in the context of confrontation with power.'" Michael E. Gardiner, *Wild Publics and Grotesque Symposiums: Habermas and Bakhtin on Dialogue, Everyday Life and the Public Sphere*, *in* AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE 28, 44 (2004) (citations omitted).

19. References to "disc jockey," "DJ," and "deejay" throughout this Article refer to White radio disc jockeys, unless otherwise specified.

the larger dominant ideals.

More specifically, in the mid-1940s to early 1950s, the playing of rock and roll—infused with the "rhythm and blues" sentiments of Black America through its Black musicians—on the nation's segregated airwaves in a racially segregated America, and its consumption by mainstream America's youth, signaled a challenge to the dominant and legally sanctioned ideology strictly prohibiting intermingling between the races, especially on such a socially and culturally pervasive medium as radio. Radio became the stage upon which the contest over social identity and meaning was fought, and it altered, via its heavy influence on popular culture, the way American youth (both Black and White) physically interacted both on and off the dance floor in a racially integrative way that was diametrically opposed to the segregated norms established and endorsed by mainstream America.

By exploring this history as support for the proposal to include music into the calls to reinvigorate localism and resuscitate democratic deliberation (even if subverted) on radio, this Article poses a challenge to deliberative democracy theorists who suggest that challenges to ruling norms can only come via the overtly political public sphere and reasoned debate.[20] Moreover, this Article also calls into question the distinctions made between high and low culture among cultural studies scholars[21] and between high and low value speech among First Amendment scholars,[22] where high value, overtly political speech is deemed worthier of greater First Amendment protections than nonovert political speech that is often inclusive of everyday popular cultural expression.

Finally, this Article ultimately encourages media scholars to include in their calls to reform radio not only local news and information, but also local music and popular cultural expression to reverse the tide of the homogenized, corporately produced content that currently stifles the potentiality of subversion. The early rock-and-roll era DJ—who once played bottom-up music and who was, as a result, instrumental in facilitating the contestation over identity meaning and making—has become more distanced from his local listening audience and its preferences due to syndicated programming, corporatized payola, and the new-market based, public interest interpretive standard promoting consumption. He now provides a more top-down, corporate-driven music

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20. *See infra* Part III.B.

21. *Id.*

22. *See* Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1586–87 (distinguishing Meiklejohn and Holmesian notions of First Amendment protections, noting the former's elevation of political news and civic information as worthy of the highest level of protection over "unregulated talkativeness").

programming platform that is increasingly sensationalized and homogenously geared toward promoting consumption, rather than discursive exchange. Moreover, despite today's current media-rich environment, radio remains relevant, not only because it continues as a mass disperser of music that can and does shape cultural norms,[23] but also because it is still a relatively inexpensive medium through which one can obtain and share information. Comparatively, the content from other media sources comes at a premium that a portion of America's population—already marginalized by socioeconomic limitations and America's widening digital divide[24]—may be unable to afford.

Part II of this Article briefly explores the history of radio and its regulation, as well as the original deliberative ideals accompanying its mass emergence and the underlying localism concept. Part III of this Article considers radio through a cultural-studies and deliberative-discourse theory framework and provides, as an example of radio's past as a "subaltern counterpublic,"[25] the emergence of rock and roll and the creation of the disc jockey persona in popular culture. Finally, Part IV advocates for a broader conceptualization of localism, one that includes music as an "arbiter of *cultural recognition*"[26] and of constructions of identity which like the formal public sphere, can also, although in different ways, serve as a significant tool in furthering deliberative democracy. In addition, this Article argues that constructions of localism should also aim to be more inclusive of the interests of those on the bottom rung of America's socioeconomic ladder, whose financial position may preclude them from

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23. For example, this Author has explored the manner in which the passage of the Telecommunications Act of 1996 contributed to the creation of the gangsta rapper through the continuous radio airplay of gangsta rap to the exclusion of a diversified representation of rap music that might include lyrical content with more social commentary and varied Black cultural expressivity. Akilah N. Folami, *From Habermas to "Get Rich or Die Tryin": Hip Hop, the Telecommunications Act of 1996 and the Black Public Sphere*, 12 MICH. J. RACE & L. 235 (2007).

24. *See generally* 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 (2000).

25. Nancy Fraser, *Politics, Culture, and the Public Sphere: Toward a Postmodern Conception*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 287, 291 (Linda Nicholson & Steven Seidman eds., Cambridge Univ. Press 1995) (defining subaltern counterpublics as "parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses. Subaltern counterpublics permit them to formulate oppositional interpretations of their identities, interests, and needs").

26. Henrik Örnebring & Anna Maria Jönsson, *Tabloid Journalism and the Public Sphere: A Historical Perspective on Tabloid Journalism*, 5 JOURNALISM STUDIES 283, 285 (2004) (distinguishing Habermas's construction of the public sphere as the site of political power from Fraser's construction of the public sphere as the space for asserting equality in cultural and identity recognition, but acknowledging the power of both to serve as participatory tools of democracy).

taking advantage of today's rich media landscape.

II. RADIO HISTORY AND FOUNDATIONAL REGULATORY PRINCIPLES

A. From Safety to Scarcity

Several years after the introduction of the telegraph in 1840, radio had its debut in America, when Guglielmo Marconi introduced wireless telegraphy by using radio waves to transmit Morse code.[27] The federal government was not originally interested in it or in regulating its use, beyond promoting safety on ships and more efficient transmission of information by segments of the government.[28] Although the government's interest in the medium was slow and radio's broad-based mass appeal did not develop for several decades following its debut, a segment of America's population—the amateur operators—found this new technology enticing almost immediately, and in the process of its exploratory use, it drew the ire of the government.[29] Within a decade of radio's debut, many amateur stations popped up all over the country, causing interference with government and business use of radio and crowding out naval and business transmissions.[30] Some operators even engaged in practical jokes, posing as Navy personnel sending out false orders to naval ships and leading them on wild goose chases.[31] With the *Titanic* disaster in 1912 and the loss of so many lives with its sinking, the public and the government, outraged over the ceaseless interference and chatter on the airwaves that occurred during the ordeal, and especially in its aftermath, directed their anger at the amateur operators.[32] Just four months after the *Titanic*'s sinking, the Radio

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27. DOUGLAS, *supra* note 1, at 41.

28. Gregory M. Prindle, Note, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 284 (2003). For example, in 1910, Congress passed a law requiring certain ocean-going vessels to be equipped with radio equipment in the event of an emergency. Wireless Ship Act, Pub. L. No. 61-262, 36 Stat. 629 (1910) (repealed 1934); *see also* ANN E. WEISS, TUNE IN, TUNE OUT: BROADCASTING REGULATION IN THE UNITED STATES 12 (1981) (discussing how the U.S. Navy was the first major military user of wireless because "[i]t did not take navy officers long to see how useful it would be to have ships linked to each other, and to shore, by wireless").

29. DOUGLAS, *supra* note 1, at 59 (noting that amateur operators were "primarily [W]hite and middle-class, located predominantly in urban areas . . . and they built their own stations in their bedrooms, attics, or garages").

30. *Id.* ("By 1910 the amateurs outnumbered everyone else—private wireless companies and the military—on the air.").

31. Prindle, *supra* note 28, at 284.

32. *See* Michael Ortner, *Serving a Different Master–The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLINE J. PUB. L. & POL'Y 139, 141 (2001).

Act of 1912 was passed.[33] It prohibited radio broadcasting without a license and gave the Secretary of Commerce the power to determine who had the right to broadcast on specific wavelengths and at what times.[34]

Despite the passage of the Act and despite increased restrictions placed on broadcasters due to the onset of World War I, radio stations grew exponentially, both among the licensed broadcasters and the outlaws—unlicensed amateur operators.[35] By 1923, there were several hundred stations broadcasting across America, and within a year, radio and radio sets acquired broad-based mass appeal with Americans.[36] Indeed, one magazine of the time declared, "[n]ever in the history of electricity has an invention so gripped the popular fancy,"[37] while another proclaimed that radio's "rapid growth has no parallel in industrial history."[38] With several stations beginning to broadcast voice, live music, and scheduled programming,[39] the radio listening craze that gripped Americans and "swept through America in the 1920s and '30s . . . disrupted the cognitive and cultural practices of a visual culture and a literate culture in a way that neither the telephone nor the phonograph did."[40] And, as recent studies have shown, radio's uniqueness then (and arguably continued uniqueness today) was due to "[t]he deeply personal nature of radio communication—the way its sole reliance on sound produces individualized images and reactions; its extension of a precommercial, oral tradition; its cultivation of the imagination . . . ."[41] Local broadcast radio stations, insulated within White ethnic communities, capitalized on the uniquely intimate nature of radio "to empower many community groups and to strengthen ethnic institutions in a display of broadcast Americanism . . . ."[42]

Growing public demand for radio and overlapping and interfering

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33. Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (repealed 1927).

34. *See* Mike Harrington, Note, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring a "Diversity of Voices*,*"* 38 B.C. L. REV. 497, 504 (1997).

35. *See id*. By 1920, there were "fifteen times as many amateur stations in America as there were other types of stations combined." DOUGLAS, *supra* note 1, at 60.

36. Prindle, *supra* note 28, at 285.

37. DOUGLAS, *supra* note 1, at 61 (internal quotations omitted).

38. *Id.* (internal quotations omitted).

39. Eric Rothenbuhler & Tom McCourt, *Radio Redefines Itself, 1947-1962*, *in* RADIO READER: ESSAYS IN THE CULTURAL HISTORY OF RADIO 367, 369 (Michele Hilmes & Jason Liviglio eds., Routledge 2002) (noting that "[t]he commercial radio system also melded advertisements, music, drama, and news together into a flow of programming unprecedented in scope").

40. DOUGLAS, *supra* note 1, at 29.

41. *Id.* at 17.

42. Vaillant, *supra* note 12, at 26; *see also id.* at 29 (noting how, as radio's appeal spread, local and community-based radio was used to celebrate and strengthen local, ethnic, religious and class-based communities).

radio station operators led to utter chaos on the nation's radio airwaves,[43] which eventually prompted Herbert Hoover, then-Secretary of Commerce, to reallocate radio frequencies to facilitate a more efficient operation of the radio industry.[44] Opponents of Secretary Hoover's allocation plan argued that he acted outside of the scope of the authority granted his office under the Radio Act.[45] Others maintained that his plan more heavily favored large commercial stations.[46] In a federal case challenging Secretary Hoover's authority and reallocation plan, the court interpreted the Radio Act of 1912 narrowly as only giving the Secretary of Commerce ministerial authority and no power to allocate radio frequencies, to refuse to grant licenses, or to otherwise regulate broadcasting.[47]

The day after the court's decision, pandemonium broke out, with over 700 stations boosting their frequencies, jumping frequencies, broadcasting at whatever time they wanted, and battling over the significantly smaller number of available channels.[48] In the midst of the pandemonium, radio stations continued to expand, both among the outlaw, amateur stations and the emerging network stations. National Broadcasting Company (NBC) emerged in 1926, and Columbia Broadcasting System (CBS) in 1927.[49] With continued calls for regulation now from all sides, Congress enacted the Radio Act of 1927, which divested the Secretary of Commerce of the ability to grant radio licenses and gave such power to a newly formed five-member Federal Radio Commission (FRC).[50] It also explicitly granted the FRC the authority to do what Secretary Hoover had attempted to do, which was to assign and distribute frequencies and to regulate broadcasting hours, time sharing, and overall use of the airwaves.[51] Moreover, the FRC

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43. *See* Kristine Martens, Note, *Restoring Localism to Broadcast Communications*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 285, 293 (2004).

44. Prindle, *supra* note 28, at 285–86.

45. *Id.* at 287.

46. *See* DOUGLAS, *supra* note 1, at 63; *see also* Prindle, *supra* note 28, at 286 ("Hoover divided the frequencies into three classes and assigned them to particular stations. The third class of frequencies included stations that served small local areas, were on the same spot on the dial, and had to share time. The second class included stations that were a little larger and had to share time and frequencies as necessary. The first class of frequencies carried little interference, broadcast over wide areas, and had almost no time-sharing. This most powerful class of radio stations was called 'clear channels.'").

47. United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926).

48. DOUGLAS, *supra* note 1, at 63.

49. Rothenbuhler & McCourt, *supra* note 39, at 367, 369. These large radio broadcast stations were referred to as networks because they sought to link local radio stations to their enterprises by telephone lines in an effort to synchronize the broadcasting of shows and content. FISHER, *supra* note 9, at xv.

50. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) (repealed 1934).

51. *See* Cindy Rainbow, Comment, *Radio Deregulation and the Public Interest:* Office of Communication of the United Church of Christ v. FCC, 4 CARDOZO ARTS & ENT. L.J. 169, 172 (1985) (citing the Radio Act of 1927 sec. 4(a)).

regulatory power under the 1927 Act was now based, less on facilitating government or business use of radio as in the very early days of its development, but more on "the idea that the broadcast spectrum is a scarce resource. Government intervention was required in order to ensure efficient use of a finite number of frequencies."[52]

B. The Public Interest Standard, Localism, and the Market Beyond

Due in part to the scarcity rationale for regulating radio airwaves, the 1927 Act required the FRC to allocate licenses with the goal of serving the "'public interest, convenience, or necessity' of the people in the local broadcast market,"[53] and not "the interest, convenience, or necessity of the individual broadcaster."[54] While the 1927 Act did not specifically define the public interest, convenience, and necessity standard, the FRC, early on, and pursuant to such mandate, endorsed laws and policies that were sanctioned by the courts and Congress, and that strongly encouraged a decentralized broadcast industry accessible to, and reflective of, the interests of the local listening audience.[55]

For example, as evidenced by the distributional authority assigned to the FRC by the 1927 Act, Congress did not cede control over broadcast to a national- or state-funded entity or to a private entity, despite the utter turmoil that had systemically plagued the radio industry in the previous decades, and despite the rapidly growing entrepreneurial and corporate interests in radio's development.[56] Pursuant to such mandate, the FRC, in structuring the overall American broadcast system, rejected the approach eventually adopted by some European countries where large frequencies were allotted to one station to reach the entire country.[57] Instead, and

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52. Martens, *supra* note 43, at 291–92 (internal citations omitted).

53. Prindle, *supra* note 28, at 288 (quoting the Radio Act of 1927 sec. 4).

54. Martens, *supra* note 43, at 293 (internal quotation marks omitted).

55. Vaillant, *supra* note 12, at 51–53. While the laws and policies implemented to facilitate broadcaster public interest obligations have varied over time, they have centered on either a regulatory or deregulatory approach. The paramount goals, however, underlying the public interest obligation of promoting localism, competition, and diversity, have not changed. These goals have often been conflated, and used interchangeably by the FRC and later the FCC as the stated basis of a regulatory or deregulatory effort. Rainbow, *supra* note 51, at 173–75. To the extent the goals can be teased apart, an analysis of FCC diversity regulations, aimed at promoting minority ownership, minority hiring, etc., is beyond the scope of this Article. This Article focuses specifically on localism (as a means of promoting diversity and competition) and briefly highlights the various programs enacted pursuant to this goal. It calls for the reinstitution of some of those programs that the Author believes would necessarily increase diversity among various ethnic and minority groups and competition in the industry.

56. *See, e.g.*, Cowling, *supra* note 3, at 286.

57. *See id.* at 286–87. Consistent with the regulatory public interest goals contained within the 1927 Act, the FRC, in implementing the Act, specifically rejected a "nationally

similar to Hoover's reallocation plan years before, the FRC divided the United States into five listening zones.[58] Each zone granted eight clear stations with maximum broadcast wattage and better slots on the AM dial, due to their more expensive and sophisticated equipment.[59] Not all listeners were happy with the practical effect of the reallocation, which led to a decrease in noncommercial and local stations.[60]

Stated congressional and FRC localism goals were undermined even more with the growth of the networks, which were expanding their control over the nation's radio airwaves by linking local stations to their centralized headquarters.[61] As a result, "national cosmopolitanism [began] to eclipse FCC-favored local particularism . . . ."[62] With decreased distribution costs, streamlined operations, and uniform scheduling, the affiliates began to attract a significant number of local independent commercial and even noncommercial stations that, in turn, became network affiliates, despite the overarching localism goals of the 1927 Act.[63] By 1930, the networks had a "near-absolute monarchy of the air"[64] because they controlled nearly all of the high-powered stations across the country, accounting for more than eighty-five percent of the nation's transmitting power.[65] While historians agree that the networks played a key role in

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oriented, centralized source of supply that had clear-channel stations . . . . Instead, the FRC allocated spectrum to only 40 clear-channel stations, which freed up spectrum for more local stations." *Id.* at 287. As referenced in the 2003 FCC report, the FRC, after setting up the initial broadcasting structure, informed Congress that it was able to allocate frequencies in a way that "'would serve as many communities as possible to ensure those communities had at least one station that would serve as a basis for the development of good broadcasting to all sections of the country.'" 2003 *Report and Order*, *supra* note 3, at para. 74 (quoting SECOND ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION TO THE CONGRESS OF THE UNITED STATES FOR THE YEAR ENDED JUNE 30, at 8–9 (1928)).

58. DOUGLAS, *supra* note 1, at 39.

59. *Id.*

60. *See id*. at 63.

61. Cowling, *supra* note 3, at 288.

62. *Id.*

63. Rothenbuhler & McCourt, *supra* note 39, at 367, 369. Indeed, "only 7% of radio stations in the United States were commercial operations in 1925. This number rose to 11% in 1926 and 59% in 1930, representing a thousandfold increase (from 21 to 223)." *Id*. In addition, seven years after the passage of the Radio Act of 1927, a fourth national network, the Mutual Broadcasting Systems (MBS), was created and joined the ranks of CBS's network and NBC's two networks (the Red and Blue). *See* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 367 (2004). The FCC's Chain Broadcasting rules forced NBC to sell its blue network. *See* Kofi Asiedu Ofori & Mark Lloyd, *The Value of the Tax Certificate*, 51 FED. COMM. L.J. 693, 695–96 (1999). Nevertheless, MBS grew to include a significant number of low-power station affiliates that were "lagging far behind the [network affiliates] in total wattage and audience share." STARR, *supra* note 63, at 367.

64. *See* Bruce Lenthall, *Critical Reception: Public Intellectuals Decry Depression–Era Radio, Mass Culture, and Modern America*, *in* RADIO READER, *supra* note 39, at 41, 53.

65. Cowling, *supra* note 3, at 288 (quoting STARR, *supra* note 66, at 367–68).

developing a national culture in the 1930s and 1940s, it came at the expense of local content, in that "[l]ocal programming would be eclipsed . . . by shows produced in New York City,"[66] which was not necessarily where all listeners, who yearned for more regional identity and local community pride, wanted to be transported.[67] Indeed,

> Network programming originating from New York City dominated local station schedules; this programming, financed by national advertisers, featured dramas, quiz shows, adventure series, and comedies, interspersed with news and informational programs. Music (almost exclusively live, rather than recorded) was secondary, largely a means of filling time during evenings, on weekends, and between programs. The industry's cultural and aesthetic standards were nationalist and middlebrow, reflected in the genteel reserve of its announcers.[68]

The major intent behind the Communications Act of 1934[69] was to unify regulation of all electronic communications (i.e., radio, television, and telephone) within a single independent agency, namely, the seven-member FCC, which replaced the FRC.[70] However, some media scholars have argued forcefully that the developing commercial hegemony over the airwaves—initiated with the original spectrum allocations dating back to Secretary Hoover and the Radio Act of 1927—was institutionalized for certain with the passage of the 1934 Act.[71] While the Communications Act of 1934 retained the 1927 Act's requirement that regulation of broadcast be in the public's interest, convenience, and necessity, some have asserted that by not directly addressing the networks' consolidation and control over content, Congress undermined the public interest standard and its own purported goal of ensuring a decentralized, unconsolidated media

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66. DOUGLAS, *supra* note 1, at 63.

67. *Id.* at 79 ("One listener warned in 1930 that 'unless we watch our step, the chain stations will be the Czars of the Air.' Added another, 'The chains . . . have nearly complete control of the air. We feel sorry for the future of Radio if this chain business gets any worse.'").

68. Rothenbuhler & McCourt, *supra* note 39, at 367, 367. Prior to the passage of the 1934 Act, local and independent nonaffiliate broadcasters continuously attempted to save their local stations from further network control and encroachment by rallying listener support over the airwaves and organizing letter writing campaigns to the FRC. The hope was to show to the FRC the value of such stations in "producing an electronic public culture of pluralism in which ethnic, local, and 'American' themes coexisted. Network representatives [however] dismissed this ideal-type and argued for a market-driven model in which heavily capitalized, centralized producers should supply a national market with programs created for mass appeal." Vaillant, *supra* note 12, at 28.

69. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections 47 U.S.C.).

70. *Id.* at §§ 4, 303.

71. *See, e.g.*, Judith E. Smith, *Radio's "Cultural Front," 1938-1948*, *in* RADIO READER, *supra* note 39, at 209, 213.

industry.[72] In fact,

> By 1935, when the regulatory dust had settled, 20 percent of previously operating stations across the country were off of the air, and commercial networks dominated the airwaves. The independent era model of many producers constituting the "American" sound of broadcasting had been replaced by a commercial network determination of that sound and the parties able to constitute it.[73]

Many radio stations continued to become affiliates of the networks and to enter into network agreements that restricted the affiliates from airing programming content of the other networks, and the networks from selling content to nonaffiliate stations.[74]

The FCC attempted to regulate network control indirectly and to breathe force into its localism ideals with its *Report on Chain Broadcasting* (*Chain Broadcasting Order*),[75] issued in 1941, and its *Report on Public Service Responsibility of Broadcast Licensees* (also commonly known as the "Blue Book"), issued in 1946.[76] Since the FCC's jurisdiction under the Communications Act of 1934 was limited to the licensee and not the networks, the FCC sought, through the *Chain Broadcasting Order*, to increase competition among the networks.[77] The FCC also sought to give local stations some independence by denying the networks the complete dominion over radio they enjoyed.[78] Generally, the *Chain Broadcasting Order* attempted to contain the network control over the content aired on radio by increasing a network affiliate's ability to air programming of another network and by limiting the network's ability to preempt prime time programming.[79] The *Order* also limited the vertical integration of networks with local stations by preventing such networks from owning more than one station in a particular market or from owning stations in areas with so few local stations that competition could potentially be stifled.[80]

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72. *See, e.g.*, 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, 149 (2006).

73. Vaillant, *supra* note 12, at 28.

74. *See* Rainbow, *supra* note 51, at 175–76.

75. Order Instituting Chain Brdcst. Investigation, *Order No. 37*, 3 Fed. Reg. 637 1938 (Mar. 25, 1938), *in* FCC, REPORT ON CHAIN BROADCASTING 95 (1941) [hereinafter CHAIN BROADCASTING ORDER]; *see also* Investigation of Chain Brdcst., *Order*, 6 Fed. Reg. 2282 (May 2, 1941), *in* CHAIN BROADCASTING ORDER, *supra* note 75, at 91.

76. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (Arno Press 1974) (1946) [hereinafter BLUE BOOK].

77. Cowling, *supra* note 3, at 289–90.

78. *Id.* at 289.

79. CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK 61 (2000).

80. CHAIN BROADCASTING ORDER, *supra* note 75, at 68–69 (1941); *see also* Christopher

Although the networks, namely NBC, challenged the *Chain Broadcasting Order* as beyond the scope of FCC authority, the Supreme Court affirmed the policies of the FCC, which encouraged localism.[81] The FCC followed up with the Blue Book to provide guidance to broadcasters in selecting programming content that would meet FCC expectations.[82] Specifically, the Blue Book endorsed the broadcasting of content that reflected the interests of the local listening community of the broadcaster.[83] In addition, the FCC continued the FRC's goal of limiting national and centralized media ownership in broadcast to prevent undue consolidation.[84] In the late 1940s and early 1950s, the FCC adopted rules limiting the number of broadcast stations any station owner could own.[85] During this same period, the FCC adopted the Main Studio rule, which related to local program origination and a local community's geographic accessibility to the station broadcasting within its community.[86] For nearly four decades following these localism rules, and up until the first wave of deregulation in the 1980s, the FCC continued to implement laws and policies encouraging localism, which included requiring broadcasters to keep detailed radio programming logs for inspection by local community members and to interview local community leaders and activists to determine the everyday

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S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 184 (2002).

81. *See generally* Nat'l Brdcst. Co. v. Columbia Brdcst. Sys., 319 U.S. 190 (1943). Although the Communications Act of 1934 did not specifically define the public interest standard, the Supreme Court determined (1) that the FCC had the power to enact regulations that would have a direct effect on program content, *id.* at 226–27; (2) that the principles of competition and localism, in particular, fell within the scope of the public interest, *id.* at 223–24, 200–01; (3) that the network affiliate agreements often led to the provision of program content that was not in the public's interest, *id.* at 198–99; and (4) therefore, that, the FCC acted within its authority when it decided not to grant licenses to applicants who were parties to these agreements, *id.* at 224.

82. Martens, *supra* note 43, at 294.

83. *Id.* at 295.

84. *See id.*

85. Martens, *supra* note 43, at 307 (citing Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regs. Relating to Multiple Ownership of AM, FM and TV Brdcst. Stations, *Report and Order*, 18 F.C.C. 288 (1953)) ("In 1946, the FCC set a defacto limit of seven stations when it denied CBS' application for an eighth station. This rule was later formally adopted by the FCC as the 'Seven Station Rule' or the 'Rule of Seven' in which a common owner could have ownership interest in seven FM, seven AM and seven TV stations . . . . The Rule of Seven remained intact without modification for nearly thirty years."). The FCC also adopted audience caps with the goal of limiting the control a national broadcaster had on residents in a particular community. *See* Amendment of Section 73.3555 of the Comm'n's Rules Relating to Multiple Ownership of AM, FM, and TV Brdcst. Stations, *Memorandum, Opinion, and Order*, 100 F.C.C.2d 74, 76 (1985); *see also* Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regs. Relating to Multiple Ownership of AM, FM and TV Brdcst. Stations, *Report and Order*, 18 F.C.C. 288, 294–295 (1953) (implementing ownership limits of AM stations).

86. Martens, *supra* note 43, at 299.

interests of the local community it served.[87]

With regard to localism rules and policies adopted up until the 1950s, critics have contended that many of these laws, while arguably well intentioned, "either had little effect on the industry, or reinforced the power of the major broadcast players and the services they provided."[88] To them, these localism rules served as a smoke screen for "the actual practices and consequences of a commercially organized, national system of network broadcasting."[89] Indeed, four years after the adoption of the *Chain Broadcasting Order*, network affiliations rose to ninety-five percent.[90] Moreover, critics of that period who despised the mounting capitalist and commercial nature of radio contended that the "commercial nature of radio forced broadcasters to appeal to broad audiences. . . . [R]adio transformed diverse groups of humanity into a collective audience that denied the distinctive and had no use for creative or intellectual advance."[91]

Radio was believed to have become "a vehicle, perhaps the leading vehicle, of mass culture,"[92] that

> at best, neglected those individuals and groups who did not conform to a bland, standardized, and artificial common taste. At worst, mass culture eroded the foundations of democracy . . . . [and] conceived of people not as individuals or thinkers . . . but only as undifferentiated consumers.[93]

Moreover, to the anticapitalist media critic at that time, "programming and popularity [of content] were easily manipulated by those who paid for the air time . . . ."[94] In the end, the critics claimed, local and network broadcasters alike abdicated their public trustee programming responsibilities to commercial sponsors given the price tag advertisers were willing to pay for air time on radio.[95] For such critics, the possibility of radio and radio content enhancing democracy, and what they deemed high

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87. *See id.* at 30205.

88. ROBERT BRITT HORWITZ, THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS 194 (1989). An in-depth analysis of the programming log and ascertainment rule requirements are beyond the scope of this Article as these laws were implemented after the period, namely the mid-1940s to early 1950s, that is the subject of this Article.

89. *Id.*

90. STARR, *supra* note 63, at 381.

91. Lenthall, *supra* note 64, at 41, 44.

92. *Id.*

93. *Id.* at 47 (citing William Orton, *The Level of Thirteen-Year-Olds*, ATLANTIC MONTHLY, Jan. 1931, at 1,7).

94. *Id.* at 54.

95. *See* Jennifer Hyland Wang, *The Case of the Radio-Active Housewife*, *in* RADIO READER, *supra* note 39, at 343, 346 (noting that "in 1943 over 97% of radio programming was controlled by advertisers and over 60% of network billings for NBC and CBS came from just ten advertising agencies") (citations omitted).

cultural values, had long gone.[96]

III. COUNTERPUBLICS, CULTURAL STUDIES, AND RADIO'S SUBVERSIVE PAST

A. Habermas's Theorized Public Sphere and the Efficacy of Counterpublics on Deliberative Democracy

For Habermas, mass media (including radio) helped lead to the disintegration of his theorized formal public sphere, and to the creation of the mass audience and the manipulated and manufactured consent of such audience by mass media.[97] Habermas's vision of the "formal" public sphere was introduced in his seminal book, *The Structural Transformation of the Public Sphere*,[98] where he examined the rise and decline of a specific form of the public sphere—the liberal model of the bourgeois public sphere—that developed in Britain, France, and Germany in the eighteenth and early nineteenth centuries. For Habermas, the bourgeois public sphere was a domain where private individuals sought out information for the purpose of self-education and of cultivating a collective public voice that could hold the ruling feudalist authority accountable on issues important to this newly formed public.[99] The formal public sphere was not premised on a specific physical space per se, but was envisioned more as a "domain of social life in which such a thing as public opinion could be formed."[100] The public sphere represented a considerable shift in power and was "defined as a forum in which people without official power 'readied themselves to compel public authority to legitimate itself before public opinion'—a public opinion whose authority depended on its mode of open

96. *See id.* at 345–46.

97. Lisa McLaughlin, *Feminism and the Political Economy of Transnational Public Space*, *in* AFTER HABERMAS, *supra* note 18, at 156, 158.

98. *See generally* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger & Frederick Lawrence, trans., 1991). References to the formal or political public sphere are to the overtly political and organizationally structured public sphere discussed in detail in this Section, and do not refer, unless otherwise noted, to the less overtly political and informal spheres that Habermas considers to be ineffectual in directly contesting ruling authority and normative understandings.

99. *See* Ken Hirschkop, *Justice and Drama: On Bakhtin as a Complement to Habermas*, *in* AFTER HABERMAS, *supra* note 18, at 49, 49–50. *See generally* THE STRUCTURAL TRANSFORMATION, *supra* note 98.

100. Maria Simone & Jan Fernback, *Invisible Hands or Public Spheres? Theoretical Foundations for U.S. Broadcast Policy*, 11 COMM. L. & POL'Y 287, 291 (2006) (citing JÜRGEN HABERMAS, JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER 231 (Steven Seidman ed., 1989)) (quotation marks omitted). "For a society founded on a principle of self-government, the development of public opinion is vital to its health. Said differently, self-government is only an illusion if the powerful are not held accountable to public opinion." *Id.*

argument."[101]

As Habermas pointed out, the formal, bourgeois, public sphere did not spontaneously appear with organized and consciously articulated demands for reform and accountability, but was instead the result of a long, sociocultural transformation that reshaped the manner and place of social communications and topics of discussion.[102] Conversations emerged in bourgeois coffeehouses, taverns, and literary clubs and evolved into voluntary associations and civic societies of enlightenment.[103] Within these social networks, alternative means of expressing and forming tastes, beyond that prescribed by the ruling authority, were created. They were to become "a future society's norms of political equality."[104] The formal public sphere was to operate separate and apart from the state and the market, where inequities abounded due to ethnic and socioeconomic differences.[105] In operating separately and independently from the market and state, it was housed in the "lifeworld"—which was situated in civil society—and was to be protected at all costs from being colonialized by the systems world that housed both the market and the state—two mutually exclusive spheres in their own right.[106]

Indeed, in this theoretically egalitarian space, all had access, with participants bracketing differences, social inequalities, and even private interests for the sake of the common good. The common good was to be determined by consensus of the participants, reached by reasoned, truthful, and enlightened debate, a process Habermas considered to be representative of the ideal speech scenario.[107] Through this process, participants, who started out with views based on their individual experiences and self-interest, experienced a "'self-revelation', whereby private needs are brought to consciousness and adjudicated through rational dialogue . . . . Ideal speech must bracket off potentially distorting material forces and inequities . . . ."[108] To Habermas's dismay, private interests undermined those of the common good and cut short the maturation of the

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101. Hirschkop, *supra* note 99, at 49, 50 (citing THE STRUCTURAL TRANSFORMATION, *supra* note 98, at 25).

102. *See* Jürgen Habermas, *Further Reflections on the Public Sphere* (Thomas Burger trans.), *in* HABERMAS AND THE PUBLIC SPHERE, *supra* note 17, at 421, 423.

103. *Id.*

104. *Id.* at 424.

105. *See* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE, *supra* note 17, at 109, 113.

106. *See id.* at 111; *see also* Gardiner, *supra* note 18, at 28, 35.

107. Gardiner, *supra* note 18, at 28, 29.

108. *Id.* at 35 (citing JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION 330 (Beacon Press 1987)).

formal public sphere and the independence of public opinion.[109] "[C]ritical scrutiny of the state gave way to . . . mass-mediated staged displays and the manufacture and manipulation of public opinion."[110]

Like the radio critics and reformists of the 1930s and 1940s who opposed the increasing commercial nature of radio during that period, Habermas, a disciple of the Frankfurt School, viewed mass media (including radio) with disdain.[111] He, like other disciples of the Frankfurt School, regarded mass media as a highly suspect vehicle through which deliberative goals could be achieved.[112] Mass media was a tool used by private interests for dispersing information primarily for manipulation and coercion rather than for enlightenment and empowerment.[113] It was perceived then as "part of the baggage of ruling class ideology, a sophisticated barrage of loaded imagery which seduced people into a life of mindless consumption and diverted them from an authentic confrontation"[114] with life conditions as they were. As a result, "public communication, by this means at least, [became] moderated by the demands of big business and . . . led to a regressive 'dumbing down' of the level of public debate . . . ."[115]

B. The Connection: Cultural Studies, Deliberative Democracy, Counterpublics, Radio, and Music

While many scholars find Habermas's public sphere theory appealing, some have, however, found his historical reading and use of the liberal bourgeois public sphere as the ideal model of his theorized public sphere to be problematic due to its inherently ideological contradictions.[116] A more expansive reading of eighteenth-century European history reveals that the liberal bourgeois model was anything but accessible to all, and that participants certainly did not bracket social inequalities when cultivating

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109. Fraser, *supra* note 105, at 109, 113.

110. *Id.*

111. *See* Michele Hilmes, *Rethinking Radio*, *in* RADIO READER, *supra* note 39, at 1, 7 (discussing the Frankfurt School's position on mass media).

112. *Id*.

113. Folami, *supra* note 23, at 265 ("The market's infiltration of communication led to the demise of the public sphere because information was no longer disseminated to foster critical communication and scrutiny but for manipulating and coercing public opinion for the benefit of private interests.").

114. Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 540 (1986); *see also* John Michael Roberts & Nick Crossley, *Introduction* to AFTER HABERMAS, *supra* note 18, at 1, 6 ("As the mass media began to establish itself as a viable economic market, [Habermas] argues, it was both hijacked for the purpose of selling goods, via advertising, and became a considerable saleable commodity in its own right.").

115. Roberts & Crossley, *supra* note 114, at 1, 6.

116. Fraser, *supra* note 105, at 109, 115.

public opinion through reasoned debate.[117] Instead, women, people of color, and unpropertied men were excluded from Habermas's theoretically egalitarian public sphere, which ultimately represented the interests of White, propertied males only.[118] Moreover, while the participants' goal may have been to resist the absolutist rule of their geographically distant feudal lords, it was also to establish and sustain their control of the lower classes—not through physical force but through hegemonic domination instead.[119]

By idealizing the bourgeois public sphere and its definition of civic participation via reasoned debate and the ideal speech scenario, Habermas did not acknowledge the truly repressive nature of his idealized bourgeois public sphere but instead exalted it as *the* public.[120] In doing so, he ignored the presence of other nonbourgeois public spheres and their means of political engagement and discourse.[121] To the contrary, other scholars have argued that the public sphere in European history never did conform to the realm of sober and virtuous debate of the sort that Habermas claims to have identified, but instead was "witness to a tumultuous intermingling of diverse social groups and widely divergent styles and idioms of language, ranging from the serious to the ironic and the playful."[122] In the real public sphere, "existing social hierarchies were often questioned and subverted through carnivalesque strategies of remarkable variety and invention, including the use of parodic and satirical language, grotesque humour, and symbolic degradations and inversions."[123]

Indeed, Habermas has not only conceded that the lifeworld—the "realm of personal relationships and . . . communicative action"[124]—can contain several formal political public spheres, but has also agreed that the lifeworld contains various informal, organizationally fluid, and spontaneous nonformal publics (or networks) that are not expressly

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117. *See id.* at 114.

118. *See* Folami, *supra* note 23, at 246.

119. Hegemonic domination required the bourgeois class to convince subjugated groups that they were meant to be the next moral and intellectual leaders of society by completely permeating society and the societal order, including normative values, morals, beliefs, and customs, with such messages of domination and subjugation. *See* Geoff Eley, *Nations, Publics, and Political Cultures: Placing Habermas in the Nineteenth Century*, *in* HABERMAS AND THE PUBLIC SPHERE, *supra* note 17, at 289, 322.

120. Folami, *supra* note 23, at 247.

121. *Id.*

122. Gardiner, *supra* note 18, at 28, 38 (asserting that "[t]here never was a 'golden age of the communicative utopia': the *real* public sphere was always marked by a pluralistic and conflictual heteroglossia").

123. *Id.*

124. Craig Calhoun, *Introduction* to HABERMAS AND THE PUBLIC SPHERE, *supra* note 17, at 1, 30.

political in objective.[125] As such, public sphere theorists have maintained that to Habermas, these disorganized publics would more than likely not sufficiently challenge ruling authority due to the lack of organizational structure necessary to support and sustain the reasoned and formal debate Habermas felt was essential to forming public opinion.[126] They are instrumental, nonetheless, because they often represent a diverse range of identities in the civil society and can and should influence the dialogue that occurs within the formal political public sphere.[127] For example, to highlight the influence of these informal public spheres on the development of the formal political one, Habermas referenced the rise of identity politics in the 1960s[128] (which incidentally had their roots in the cultural transformations and challenges posed in the preceding decades with the emergence of rock and roll and other countercultural expressivity on radio). He referenced these post-1960s movements to show that they provided the "raw materials of the public sphere."[129]

Moreover, Habermas's acknowledgement of these informal publics signaled his shift in views regarding who could serve as "key agents of social change . . . ."[130] Habermas deemed them now as "crucial for generating [but not engaging in directly themselves] a public sphere of debate[, which] are not those asking about *what we should get* but those asking about *who we are*, *how we live*, and *who is accountable*."[131] They seek to "defend traditional lifestyles or institute new ones on their own terms"[132] and to resist the continued colonialization of the lifeworld where "everyday realms of action are increasingly organized, not on the basis of the norms we have mutually agreed . . . but on the basis of the money and power that already drive our political and economic system . . . ."[133] Indeed, Habermas included theatrical performances, and even rock concerts, as more modern examples of the informal publics[134] (to the surprise of some

125. *See id.*; *see also* Folami, *supra* note 23, at 248 (citing Habermas, *supra* note 102, at 421, 423).

126. *See id.* at 248–49.

127. *See* Roberts & Crossley, *supra* note 114, at 1, 18–20 (discussing various scholars' interpretations of the role of the public sphere).

128. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 373–74 (William Rehg trans., 1996) (1992).

129. Gemma Edwards, *Habermas and Social Movements: What's 'New'?*, *in* AFTER HABERMAS, *supra* note 18, at 113, 113.

130. *Id.* at 114.

131. *Id.* at 115.

132. *Id.* at 116 (citing Jürgen Habermas, *New Social Movements*, TELOS, Fall 1981, at 33 (1981)).

133. *Id.* (citing JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION (Beacon Press 1987)).

134. *See* BETWEEN FACTS AND NORMS, *supra* note 128, at 374.

deliberative theorists), because such examples ironically seem to be more "aimed at a symbolic intervention in public space rather than at a rational-critical debate on policy."[135]

While, to Habermas, these informal publics compliment, and are intertwined with, the political public sphere in that they provide raw material for dialogic discourse in the political public sphere,[136] they are not as influential as the formal sphere, especially since "[o]ne can discover public spheres in every nook and cranny of popular culture . . . ."[137] Although Habermas believes that space must be provided for such informal spheres for purposes of self-exploration and understanding, he stops short of conceding that they too can, by themselves, impact ruling hegemonic control.[138] To go that far is to sacrifice the larger vision of holding the state accountable through the force of public opinion, which, to him, can only be cultivated in the political public sphere through rational debate.[139] The formal public sphere remained the place and space where public opinion was vetted by reasoned debate and dialogue.[140]

Many deliberative theorists, however, have envisioned a wider understanding of deliberative democracy that extends beyond dialogic exchange.[141] Such understandings therefore encompass the many subverted ways in which individuals, who are marginalized by societal inequalities, might express their contestation to the status quo—an oversight that has led Habermas to misread the contestatory impact of these informal publics.[142] Part of this ideological shift in conceptualizing wider exchanges comes from "locating culture and its role in the formation of identities centre-stage,"[143] rather than seeing culture and its articulation as a "pure and corrupting epiphenomenon imposed on a pristine realm of rational

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135. Hirschkop, *supra* note 99, at 49, 51 (citing Jürgen Habermas, *Right and Violence—A German Trauma*, CULTURAL CRITIQUE, 1985, at 125–39).

136. *See* Hirschkop, *supra* note 99, at 62.

137. *Id.* at 50. As Habermas understands it, the analysis undertaken in the informal public sphere evidences no "attempt to link such an analysis with any remnants of a normative political theory," Habermas, *supra* note 102, at 421, 465, even though it may be "part of a social psychological approach to some sort of an analysis of an expressivist, somehow aesthetic, need for self-representation in public space. . . . [T]his [cannot] lead back to a theory of democracy . . . ." *Id*. at 466.

138. Gardiner, *supra* note 18, at 28, 29.

139. Hirschkop, *supra* note 99, at 49, 52.

140. *See id*.

141. *See* Gardiner, *supra* note 18, at 28, 44.

142. *See id*. at 43 (arguing that Habermas's public sphere theory still contains a level of elitist idealism "because it supposes that material conflicts of a socio-economic nature can be effectively transcended or at least effectively sublimated into a rational discourse that can suspend ingrained power differentials").

143. *Id.* at 44.

openness in which citizens once communicated transparently . . . ."[144] These alternative publics, which public sphere theorist Nancy Fraser has called "subaltern counterpublics," are participatory spaces where participants create counterdiscourses to ruling authority, the formal political public sphere, and even other subaltern counterpublics.[145] They often contain sociocultural challenges to the established order that are "entirely legitimate on their own terms, but which do not conform to Habermas' model of rational dialogue . . . ."[146] In fact, marginalized groups, excluded from mainstream society or formal discourses, "are often motivated to pursue quite different strategies of action and representation than their more privileged counterparts."[147] Their strategies are often "rooted in the particularistic concerns of everyday life, are formulated at some distance from the official public sphere and aim to celebrate difference through diverse expressions of identity and community."[148]

Such alternate forms of expression and communications in these informal publics that might differ substantially from that required in Habermas's formal public sphere can serve as "a crucial resource through which the popular masses can retain a degree of autonomy from the forces of sociocultural homogenization and centralization."[149] For Bakhtin and others, who reject deliberative democracy theorists that consider formal dialogic debate as the only forum through which meaningful or effective challenges to ruling ideological constructions can be fought, what matters most are the discourses, interactions, and expressive exchanges that occur

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144. *Id.* (internal quotation marks and citations omitted); *see also id.* at 35 (explaining Habermas's view that other forms of language used in everyday life and culture, including humor, irony, or parody, in comparison to reasoned debate and the ideal speech scenario, are "secondary and 'parasitic', presumably because they compromise the lucidity and openness that ideally marks the communicative process").

145. *See* Nancy Fraser, *Politics, Culture, and the Public Sphere: Toward a Postmodern Conception*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 291 (Linda Nicholson & Steven Seidman eds., 1995); *see also* Roberts & Crossley, *supra* note 114, at 1, 14–15.

146. *See* Gardiner, *supra* note 18, at 28, 44.

147. *Id.* (discussing the work of Alberto Melucci). Moreover, Habermas calls for no hidden agendas in dialogue, *id*. at 37, a call that would leave the relatively powerless in society vulnerable and at a considerable disadvantage if they accepted without reservation the type of transparency that Habermas endorses. In contrast, Bakhtin argues that, despite Habermas's suggestion that rational actors can set aside and bracket societal inequalities and differences, such inequalities play out in the public sphere and everyday communication in a way that often leads marginalized participants to engage in a form of strategic "'double-voicedness,'" "'indirect speech,'" or "'words with a sideways glance'" to evince a multiplicity of actual and potential contested meanings that might fall far short of Habermas's ideal speech expectations. *Id*. at 36–37 (citing MIKHAIL BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS 233 (Caryl Emerson ed., 1984)); *see also* Folami, *supra* note 23, at 271 (discussing subversive discourse by gangsta rappers as a form of "contradictory consciousness") (internal citations omitted).

148. Gardiner, *supra* note 18, at 28, 44.

149. *Id.* at 39.

in everyday life and that in and of themselves can serve as challenges (even if subverted) to ruling authority. For example, by focusing on everyday dialogue and cultural expression in civil society where ordinary people live their lives daily, Bakhtin's desire is to show that "power relations can be inverted through popular, 'earthly', 'grotesque' and wildly funny culture."[150] Furthermore, in highlighting the fluidity, multiplicity, spontaneity, and informality of everyday human communication, public sphere theorists contend that Bakhtin both draws attention to the "underlying sociocultural forces that continually subvert our received commonsensical notions and habitualized viewpoints, and . . . encourage[s] a renewed awareness of the hidden and all-too-often suppressed potentialities that lie within 'the dregs of an everyday gross reality.'"[151] By tuning into everyday conversations of ordinary citizens, such attention exposes the participatory constraints of the ideal speech scenario preferred in Habermas's idealized public sphere.[152] Such attention also shines light on the "crevices in discourse which allow one to 'open up' the discussion of life experiences . . . [and to] connect problems experienced in individual life histories to wider social structures."[153]

One such discourse through which the lived experiences and interests of formerly marginalized American citizens, namely White American youth and Black Americans, found expression was in and through the nation's radio airwaves during the rise of rock and roll. Black and White youth found expression through such music at a time when Congress and the FCC struggled, through the enactment of a number of localism orders and policies, to contain the networks' increasing hegemony over media content—content, which, this Article contends did little to foster intergenerational discourse between mainstream America and its youth, or interracial discourse between mainstream America and its Black American counterpart.[154] By framing public sphere contestation to the ruling authority too narrowly—with a vision of a formal, structured, reasoned debate that is perhaps overtly political—Habermas, as discussed above, overlooks and thereby deemphasizes the importance and efficacy of such politically disorganized and informal spheres in challenging the mainstream social order themselves.

Finally, some theorists contend that the role of the law in society is to protect the discourse that occurs within the public sphere and to facilitate

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150. Roberts & Crossley, *supra* note 114, at 1, 19.

151. Gardiner, *supra* note 18, at 28, 42 (citing MIKHAIL BAKHTIN, THE DIALOGIC IMAGINATION: FOUR ESSAYS BY M. M. BAKHTIN 385 (Michael Holquist ed., 1981)).

152. *See id*. at 45.

153. Hirschkop, *supra* note 99, at 60.

154. *See infra* Part III.B.2.

the transmission of interests and concerns to the state or ruling authority, such that the ruling authority may in turn be held accountable.[155] However, because such informal publics may not be acknowledged as discursive, contestory, or of direct deliberative value in and of themselves, the need for laws to protect them and their various means of expression, including music or other popular forms, may be overlooked or not given their due weight in shaping a robust deliberative democracy. Similarly, by failing to frame music within the call for reinvigorating localism, especially given that history has shown that music can be a valuable deliberative tool just as much as local news and public affairs programming,[156] scholars and reformists that focus solely on a call for more local public affairs programming also run the risk of overlooking music's relevance in the real lives of everyday citizens, most especially by those excluded or rendered invisible by the mainstream American discourse.

Fortunately, a theoretical paradigm developed in the early 1980s by students of the Birmingham School—a discipline that came to be known as cultural studies[157]—served as a direct challenge to Habermas's and other Frankfurt disciples' pessimistic view of mass media and culture.[158] Such scholars turned to media studies with a different critical eye, one that rejected the more established proposition in media scholarship that created a favorable distinction between "high culture" (represented by film and television) and "low culture" (represented by radio), with the latter being critically dismissed along with its related cultural byproduct—popular culture.[159] They approached media with an eye toward "[d]eliberately calling into question assumed hierarchies of high and low, of seriousness and triviality, of 'quality' and 'trash,'. . . [and] turned their attention to formerly disparaged media forms such as girls' magazines, working-class style, popular music, romance novels, television, and eventually even radio."[160] The focus was broadened then beyond the sphere of the producers and artists of mass media and culture, who, to Habermas and other Frankfurt School disciples, used mass media and culture as a tool to

155. *See generally* Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005); William E. Forbath, *Short-Circuit: A Critique of Habermas's Understanding of Law, Politics, and Economic Life*, 17 CARDOZO L. REV. 1441, 1444–45 (1996).

156. *See, e.g.*, DOUGLAS, *supra* note 1, at 222–23.

157. Hilmes, *supra* note 111, at 1, 8.

158. *See id.*

159. *Id.* at 8 (discussing some scholars' dismissal of radio, and the transition period explored in this Article, as a "local medium playing rock and roll to racial minorities and unruly youth [that] hardly represented the kind of high culture that film and television advocates—industrial or academic, left-wing or conservative—were anxious to endorse").

160. *Id.* (citations omitted).

solidify hegemonic domination.[161] Attention was turned to the audience and the audience's use and reception of dominant images and messages in popular culture, countercultural expression, and constructions of identity that in itself could serve as a challenge to dominant social understandings.[162] As a result of this reconfiguration and focus, radio's cultural significance came to the fore, especially in light of its earlier expulsion from the acceptable realms of academic and scholarly endeavors.[163]

With the advent of television in 1939 and resulting scholarly focus on television and America's newly emerging visual culture, radio's unique aural culture was virtually erased from America's memory banks.[164] As a result, for decades, little scholarly attention was given to its role in making music preeminent in everyday American life and on everyday perceptions and understandings, most especially in the 1950s with the emergence of rhythm and blues and rock and roll.[165] As an aural medium, radio, from the onset, activated people's imaginations, especially as it related to listening to music.[166] Dating back to at least the 1920s when music became a regular part of radio programming, radio revolutionized and transformed Americans' relationship with music and helped make it "one of the most significant, meaningful, sought after, and defining elements of day-to-day life, of generational identity, and of personal and public memory."[167] Moreover, radio's influence on a song's popularity and success soon became readily apparent, as did its ability to spread and diffuse cultural understandings.

For example, in the 1920s, with the advent of jazz—a musical art form through which a segment of Black Americans found expression—and with its subsequent radio airplay, the controversial nature of music's airplay on radio became quite visible.[168] Jazz's radio airplay soon increased the consumption and exposure of it to White listeners and, in so doing,

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161. *See* Mezey & Niles, *supra* note 155, at 96–97; s*ee also* Hilmes, *supra* note 111, at 1, 9.

162. *Accord* Hilmes, *supra* note 111, at 1, 9.

163. *See id.*

164. *See* DOUGLAS, *supra* note 1, at 220.

165. *Id.* at 253.

166. As some research has shown in comparing listening to visual stimulation, "listening often imparts a sense of emotion stronger than that imparted by looking." *Id.* at 30. Moreover, listening to music in particular solicits even more of an emotional response because "the brain's musical networks and emotional circuits are connected." *Id.* at 32. Indeed, "[m]usic so effectively taps our emotions . . . that we develop deep, associative memories between particular songs and our own personal narratives." *Id.* at 11–12 (internal citation omitted).

167. *Id.* at 83.

168. *See id*. at 88.

"opened a small crack between [W]hite and [B]lack culture . . . ."[169] in an impermissible way, given America's legally sanctioned system of segregation of the races.[170] This specific crack was quickly closed, however, with the rise of the networks and with their increasing control over who was granted access to the nation's radio airwaves and over the content played on the air, which reflected their homogenized and noncontroversial approach to radio programming.[171] Indeed, while a few Black musicians (jazz and otherwise) had broken through the color line on the air by the mid-1920s, with the spreading control of the networks, "the homogenization of radio fare by the early 1930s—and the persistent racism of the industry—meant that rigid and ridiculous conventions circumscribed the representations of [B]lacks on radio."[172] Jazz, as a result, was co-opted and stifled by the White jazz bands that were granted access to the nation's radio airwaves to the exclusion of jazz's originators.

C. The Emergence of Rock and Roll on White Radio as an Example of Radio's Subversive Past

1. Radio and Rock and Roll's Subversive Challenge to the Then-Existing Economic Order

Although jazz created a small crack through which Black music crept indelibly into White culture and imagination, the rise of rock and roll almost two decades later widened into a culturally explosive crevice that many in the media industry and society at large in no way could have anticipated. The infusion of rhythm and blues—a musical byproduct of Black America's post-World War II frustration with the nation's segregationist and exclusionary policies toward it—into what was renamed, repackaged, and aired as rock and roll across the nation's radio airwaves represented much more than a generation's or ethnic minority's entertainment preference.[173] Indeed, by the 1950s, at rock and roll's heyday, "[r]adio listening became highly politicized . . . ." because "[r]adio—more than films, television, advertising, or magazines in the 1950s—was *the* media outlet where cultural and industrial battles over how much influence [B]lack culture was going to have on [W]hite culture were

169. *Id.* at 85.

170. *Id.* at 84–85.

171. *See* Cowling, *supra* note 3, at 290–91; s*ee also* DOUGLAS, *supra* note at 1, at 228, 234.

172. DOUGLAS, *supra* note at 1, at 234.

173. *See* Reebee Garofalo & Steve Chapple, *From ASCAP to Alan Freed: The Pre-History of Rock 'N' Roll*, *in* 2 AMERICAN POPULAR MUSIC: THE AGE OF ROCK 63, 68–69 (Timothy Scheurer ed., 1989); DOUGLAS, *supra* note 1, at 228.

staged and fought."[174]

Despite Habermasian notions of the efficacy of weak publics at challenging state or ruling authority, the playing and consuming of such music served as a direct challenge to racial segregation both on the nation's radio airwaves and in society at large.[175] At the time, many did not see this cultural revolution coming—a change that was initially fought out on radio and was arguably instrumental in fueling the momentum for the long journey toward desegregation, the civil rights movement, and the ideological generational divide within White America.[176] Also unforeseen was the manner in which the emergence of rock and roll challenged the economic hierarchy in the music industry.[177] Its emergence and popular reception on radio not only posed a threat to America's broader racial and socioeconomic racial order, but also "posed a financial threat to established [W]hite music interests in the industry."[178]

For example, by the late 1940s, to many listeners and media critics, radio was a mass medium through which low culture was disseminated.[179] It had lost its potential for generating any type of civic discourse and was thought of as all but dead due to its commercial exploitation by the networks and their affiliates, the top-down homogenization of radio content, and the ultimate unveiling of television.[180] The networks essentially relegated radio to secondary, and, in some ways, insignificant status, and came to view radio's purpose as generating revenue via advertising exploits to fund their growing commercial interests in developing the emerging technology at the time—television.[181] Once their commercial interests regarding television were sufficiently funded and financially viable, the networks reallocated their popular and successful radio programs and personalities to television, and to a welcoming and growing television audience.[182] As a result, with television's debut,

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174. DOUGLAS, *supra* note 1, at 222.

175. *See* Timothy J. Dowd & Maureen Blyler, *Charting Race: The Success of Black Performers in the Mainstream Recording Market, 1940 to 1990*, 30 POETICS 87, 97 (2002); *see also* DOUGLAS, *supra* note 1, at 253 ("Whites gained access to [B]lack music and language, which invigorated their own sense of America and of the possibilities for opposing mainstream culture.").

176. *See* Barbara Savage, *Radio and the Political Discourse of Racial Equality*, *in* RADIO READER, *supra* note 39, at 231, 231.

177. DOUGLAS, *supra* note 1, at 250.

178. *Id.*

179. *See* Lenthall, *supra* note 64, at 41, 44–45.

180. *See* Rothenbuhler & McCourt, *supra* note 39, at 367, 376.

181. *See* PETER FORNATALE & JOSHUA E. MILLS, RADIO IN THE TELEVISION AGE 6 (1980).

182. Rothenbuhler & McCourt, *supra* note 39, at 367, 376 ("Television clearly eclipsed radio as the dominant broadcast medium for advertising, audiences, and investments. Throughout the early 1950s the networks virtually abandoned their radio operations to focus on television, and radio network programming became less valuable to local radio

network affiliate stations were left to fend for themselves for content and advertising revenue.[183]

Affiliates were not only left to scramble for revenue and content but were also left to compete with the independent nonaffiliate stations for an audience that was fast becoming fascinated with television. Moreover, at the same time of the networks' decreasing interest in radio, the number of local independent radio stations grew considerably due to the *Chain Broadcasting Order* that, among other things, reduced the regional bandwidth requirement between stations, thereby making space for more stations in a particular community.[184] While the *Chain Broadcasting Order* may have opened up space for more local radio stations pursuant presumably to the FCC's localism goals at the time, it was not until the networks abandoned their affiliates, however, that the networks' hegemonic control over radio content was released. Therefore, the networks' abandonment left all local stations, including their former affiliates, in the collective position not only of competing among themselves for a listening audience and for advertising revenue,[185] but also of filling the radio programming day and evening with content.

In search of demand (e.g., an audience) and even for supply (e.g., content and funding via advertisers),[186] radio station owners eventually turned to the local market[187] and found value in the localism that Congress and the FCC had endorsed for years, albeit for different reasons—one arguably market-based and the latter based on deliberative principles.

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stations.") (citation omitted); *see also* Garofalo & Chapple, *supra* note 173, at 63, 70; DOUGLAS, *supra* note 1, at 220 ("The famous 'talent raids' of 1948–49 lured stars like Jack Benny, Bing Crosby, and Ozzie and Harriet away from radio to television . . . .").

183. *See, e.g.*, Rothenbuhler & McCourt, *supra* note 39, at 367, 376.

184. DOUGLAS, *supra* note 1, at 224–25; *see also* FORNATALE & MILLS, *supra* note 181, at 7 (noting that the number of AM radio stations increased from 1,000 at the end of the War to 2,391 stations by 1953). Indeed, although small independent AM stations eventually tripled in number, the increase was overshadowed, however, by the sixty-fold increase in television during this same period. *See* Rothenbuhler & McCourt, *supra* note 39, at 367, 371; DOUGLAS, *supra* note 1, at 223.

185. *See* DOUGLAS, *supra* note 1, at 225; *see also* Kristen Lee Repyneck, Note, *The Ghost of Alan Freed: An Analysis of the Merit and Purpose of Anti-Payola Laws in Today's Music Industry*, 51 VILL. L. REV. 695, 699 n.21 (2006).

186. With the post-World War II proliferation of low-power stations, radio's audience "dropped from 60,000 to 30,000, and thus there were more stations vying to sell smaller audiences to local advertisers." DOUGLAS, *supra* note 1, at 233.

187. *See* Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 350 (2004) ("Competition from network television forced radio to reinvent itself . . . ."); DOUGLAS, *supra* note 1, at 225 ("[A]fter the rise of television [was] the devolution of radio, a reversal of the centralization that gripped the industry in the 1930s and '40s. Hundreds of stations disaffiliated from the networks, finding their audiences and their advertising revenues in local markets.").

Unforeseen at the time was the real benefit of radio's loss in status due to larger corporate broadcast interests in television. With the network abandonment, "[t]he veneer of network paternalism was stripped off . . . ," and "[a]s radio sought to redefine itself, traditional business models were discarded in favor of new opportunities for entrepreneurial innovation and cultural expression."[188] Such innovation inadvertently subverted existing business models in the media industry at the time and was instrumental in the development and flourishing on the radio of rhythm and blues and its musical cousin, rock and roll.[189]

Rock and roll was played predominantly on independent nonaffiliate radio stations, which was a result of subverted entrepreneurial maneuvering.[190] For example, from the beginning of music's regular radio airplay, musicians demanded a fee from radio station owners for the radio airplay of their songs. In the early 1920s, the American Society of Composers, Authors, and Publishers (ASCAP), a music publishing firm, required networks and their affiliate stations to pay a set royalty fee to its members in exchange for the right to play their members' music on air.[191] The networks and, by extension, their affiliates also subsequently agreed to play only live music (which was preferred anyway over playing low culture and *déclassé* recorded music).[192] Independent, nonaffiliate stations, ignored and overlooked by ASCAP, were excluded from these agreements and were, as a result, free to showcase new, upcoming, and local music talent, produced by ASCAP's competitor, Broadcast Music, Inc. (BMI).[193] These stations relied heavily on recorded music produced by BMI because it was cheaper than showcasing live bands on the air.[194]

Moreover, many new and younger artists were attracted to BMI over ASCAP because of ASCAP's fee structure, which paid more to older, more established musicians while the newly formed BMI paid all musicians equally.[195] "By the 1950s BMI controlled the majority of R&B, blues, and rock 'n' roll music,"[196] with the independent radio stations serving to

188. Rothenbuhler & McCourt, *supra* note 39, at 367, 368.

189. *See* DOUGLAS, *supra* note 1, at 222.

190. *See id.* at 222–28.

191. *Id.* at 250.

192. *Id.* at 86, 229.

193. DOUGLAS, *supra* note 1, at 250.

194. *See id.*; *see also* Rothenbuhler & McCourt, *supra* note 39, at 367, 369. The networks were the cofounders of BMI and established it to counter ASCAP's control over music content and to retaliate against ASCAP's demand of an increase in royalty fees to its members. DOUGLAS, *supra* note 1, at 250. BMI provided the majority of the recorded music to these independent stations that were in a position, unlike the network affiliates, to take advantage of BMI's recorded musical selections. *Id.*

195. DOUGLAS, *supra* note 1, at 250.

196. *Id.*

provide exposure for musicians in these genres. Exempt from major music publishing deals, these stations were free to take advantage of BMI's music selections and were ultimately successful in attracting two segments of the much needed local listening audience—White American youth and Black Americans—due to radio airplay of such music. As the popular demand of such music content increased dramatically, hundreds of new recording companies developed in the late 1940s to meet such demand and to provide programming content to the growing number of independent stations (and soon-to-be disaffiliated network stations) willing to play such music.[197]

2. Radio and Rock and Roll's Subversive Challenge to the Then-Existing Mainstream Discourse on Identity and Race Relations in America

In addition to using recorded music to cut operating costs, independent stations implemented another entrepreneurial initiative early on to compete more effectively with the networks and to raise additional capital. Such stations not only gave air time to Black disc jockeys, but also allowed them to air their own programming content.[198] At the time, Whites were the primary owners of the nation's radio stations,[199] and to the extent Blacks were permitted on the air, it was within the context of maintaining the normalization of "Whiteness" as superior to Blackness via racial stereotypes.[200] Indeed, the airwaves, like society at large, were racially

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197. *See id.* at 224–25. Some have argued that this shift in music production, distribution, and airplay was the underlying reason for the 1950s congressional payola investigations, instigated by ASCAP, that targeted these rising musicians, their music, and the rock-and-roll disc jockeys who were perceived as the main culprits in orchestrating this shift. *Id.* at 251.

198. Jack Cooper's *The All-Negro Hour*, on Chicago's WSBC, was the first Black-oriented show in Chicago and was the first on that station to switch "from live music and guests to a deejay-and-records format in 1932." Rothenbuhler & McCourt, *supra* note 39, at 367, 370.

199. Although there is no explicit data to support the contention that the FCC engaged in discriminatory practices at that time in distributing licenses, the fact remains that radio stations were owned by Whites. Following the civil unrest in Black urban America that followed Martin Luther King, Jr.'s assassination and the release of the Kerner Commission's report on the effect on Blacks of the limited and disparaging images of Blacks in media, the FCC affirmatively adopted diversity-based regulations and policies aimed at increasing minority ownership in broadcast, such as tax incentives, the distress policy, etc. For a more detailed discussion, *see generally* Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235 (2005).

200. *See* Smith, *supra* note 71, at 209, 211 ("The [W]hiteness of radio broadcasting grew out of unspoken, widely accepted, and long-standing conventions, but it was carefully monitored and enforced."). Since radio stations generally only hired White employees for permanent staffing, Black personnel had temporary positions as programming consultants for shows that reinforced mainstream society's or the entertainment industry's racially stereotypical norms of Blackness. Indeed, "[a]s a medium, radio was nearly impenetrable

segregated.[201] These Black disc jockey pioneers were given the late-night graveyard shift because it was at a time when most advertisers were disinterested in purchasing airtime.[202] It was also at a time when station owners assumed that their White listening audience was least likely to be listening and, hence, offended by Black-oriented programming.[203]

With the increasing competition in the local market, and especially after several studies indicated the growing social and economic status of Black Americans after World War II, independent station owners began to view the Black community as less of an afterthought and more of an under-tapped market.[204] In seeking to attract the Black audience, station owners, rather than hiring more Black disc jockeys, instead hired White disc jockeys who sounded Black and played Black music; such DJs were ultimately given free rein of programming content.[205] Following the television talent raids of the late 1950s, radio station owners turned to the disc jockey "to get the first television generation to [still] want to" tune into radio.[206] By doing so, station owners soon realized that they had also inadvertently tapped into the White teenage market. White disc jockeys were charged with appealing to both Black and White audiences, and they

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for nonwhite performers, who could only find work in broadcasting by playing parts as servants or minstrels if they approximated the accents [W]hite actors, directors, and producers had popularized as '[B]lack.'" *Id.* In 1945, famed Black poet Langston Hughes wrote of radio,

> [c]onsidering the seriousness of the race problem in our country . . . I do not feel that radio is serving the public interest in that regard very well. And it continues to keep alive the stereotype of the dialect-speaking amiably-moronic Negro servant as the chief representative of our racial group on the air.

Savage, *supra* note 176, at 231, 235 (citing a letter from Hughes to historian Erik Barnouw, Mar. 27, 1945) (internal quotation marks omitted).

201. Some have argued that the FCC historically and implicitly endorsed the racism that permeated radio almost from its inception, but particularly in the 1930s when "the expanding dominion of the national networks and their commercial sponsors *increased* the power of southern segregationists to demand radio representations reinforcing customary racial separation, and to keep anything else off of the air." Smith, *supra* note 71, at 209, 211.

202. Rothenbuhler & McCourt, *supra* note 39, at 367, 374; FISHER, *supra* note 9, at 37.

203. *See* FISHER, *supra* note 9, at 37.

204. DOUGLAS, *supra* note 1, at 234 ("In the postwar period, with the increased availability of radio licenses for small local stations, the networks' gradual abandonment of radio in favor of television, and the discovery that African Americans were an important new niche market . . . certain independent stations began courting the [B]lack audience."). A New York radio station owner "commissioned a study, . . . which found that one million [B]lacks spent $1 billion a year and that the city's [B]lack population had tripled in the previous decade. Those families were going to buy cars, clothing, and furniture . . . ." FISHER, *supra* note 9, at 51. In the years "between 1940 and 1953 [B]lack median income rose 192 percent, and [B]lack home ownership increased by 129 percent. In most regions of the country, especially in cities, 90 percent of African Americans now owned radios." DOUGLAS, *supra* note 1, at 234.

205. *See* DOUGLAS, *supra* note 1, at 230, 243; *see also* FISHER, *supra* note 9, at 51.

206. DOUGLAS, *supra* note 1, at 222.

often accomplished such a daunting task in a racially segregated America, at least as it related to America's developing youth and the Black American audience, by engaging in "racial ventriloquy."[207] While radio station owners, at the time, were "focused on the bottom line, [they] unwittingly reshaped the cultural landscape of the United States."[208]

Indeed, their appointed disc jockeys, through their on-air personas and vernacular, helped to redefine radio and its relevance in the then-existing media landscape,[209] where corporate interests focused more on television, and to create a popular culture that challenged mainstream authority's socially constructed identities. The disc jockey came to be known around town as the DJ, and was essential to the survival of local radio.[210] "By 1958 [a popular broadcast journal] admitted that the disc jockey 'has emerged as the big business factor in today's new concept of radio.'"[211] Each DJ's job was predicated on the need to attract the listening audience and advertising sponsorships, which, in radio—a largely aural medium—turned on developing a memorable and distinct voice, style, and personality.[212] On air, these local DJs, through their voice, personality, and radio content alone, had to create an intimacy with their audience such that its members felt like part of the particular DJ's community. While off air, the DJ attended lodge meetings, emceed social events, was the guest speaker at local functions, sat in on meetings with record label executives, staged live shows, and, in some cases, managed upcoming talent,[213] all in an attempt to "be seen . . . as an intrinsic part of the community, an enviable celebrity and a respected altruist."[214]

Eventually, many listeners came to bond personally with the disc jockey, who, to them, personified postwar sentiments and interests. In essence, he symbolized the voice, interests, and understandings of the everyday lives and exchanges of his listening audience. For White

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207. *Id.* at 243. There was a segment of the White listening audience, White youth, that was not offended by Black-oriented programming, but was drawn to it. As a result, eventually radio station owners hired Black personnel to serve as voice coaches for White disc jockeys who engaged in racial ventriloquy (i.e., attempts to sound Black), to attract that audience. WILLIAM BARLOW, VOICE OVER: THE MAKING OF BLACK RADIO 165–66 (1999).

208. Rothenbuhler & McCourt, *supra* note 39, at 367, 372.

209. DOUGLAS, *supra* note 1, at 230 (explaining that "through language and music," the DJ had to be "invented and had to serve—and mediate between—very particular cultural and corporate interests"). *See generally* ARNOLD PASSMAN, THE DEEJAYS (1971).

210. DOUGLAS, *supra* note 1, at 229.

211. *Id.* (citation omitted); *see also* ROY SHUKER, UNDERSTANDING POPULAR MUSIC 42–43 (2nd ed. 2001) (1994).

212. *See* PHILIP H. ENNIS, THE SEVENTH STREAM: THE EMERGENCE OF ROCKNROLL IN AMERICAN POPULAR MUSIC 136 (1992) (discussing the DJ as an on-air salesman); DOUGLAS, *supra* note 1, at 232.

213. DOUGLAS, *supra* note 1, at 233.

214. *Id.*

teenagers in particular, "DJs around the country became switchboards on the air for their young listeners, making themselves privileged conduits within their listeners' imagined communities."[215] Moreover, for White teenagers, these DJs who embraced and played Black music—namely rhythm and blues (and eventually rock and roll)—engaged in racial ventriloquy,[216] and in doing so, symbolized a generation's rebellion against the normative status quo.[217] Although the Black DJs, during the late 1940s and early 1950s, were the originators who brought jive, hipster talk, and rhyming and rapping games to their shows and on-air personalities,[218] it was the rock-and-roll disc jockeys' adaptation of such style that led to the music's broader racial crossover appeal to White youth.[219]

Through its rock-and-roll disc jockeys, radio became a trading zone and facilitator of discourse between Black and White Americans, and White adults and rebelling White youth. When radio, the disc jockey, and the airing of rhythm and blues (and, subsequently, rock and roll) are viewed through the lens of theorists who adopt an understanding of participatory democracy that embraces popular cultural expression,[220] they reveal much generally "about the emptiness and forced conformity of [W]hite culture . . . ."[221] Moreover, and perhaps more importantly for discourse theory, also revealed is their individual and collective subversive resistance to such conformity.

For example, as some cultural historians have pointed out, for a generation of White middle class youth (boys in particular), America at the time demanded homogeneity, obedience, and a "phony[] surface conformity that threatened to suck all the spirit and individuality"[222] out of

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215. *Id.* at 231.

216. *See* BARLOW, *supra* note 207, at 157; *see also* DOUGLAS, *supra* note 1, at 236 (explaining how DJs' imitation of their Black counterparts "represented a conscious turning away from the official 'announcer speak' that had been institutionalized since the early 1930s: deep-voiced, bell-shaped tones in homogenized English that policed the boundaries of acceptable public address by men").

217. *See* RAY PRATT, RHYTHM AND RESISTANCE: EXPLORATIONS IN THE POLITICAL USES OF POPULAR MUSIC 140 (1990).

218. DOUGLAS, *supra* note 1, at 236. BARLOW, *supra* note 207, at 157 (discussing "racial masquerading").

219. *Cf.* ENNIS, *supra* note 212, at 31. Indeed, it was through the White disc jockey that the teenage audience was discovered, since what was played on radio came to be determined by what was bought in the record stores. *See* DOUGLAS, *supra* note 1, at 227–29. At the time, teenage consumption of records was more voluminous than his or her adult counterpart. *Id.* at 227. With a smaller targeted audience, local radio stations, through their disc jockeys, turned what was once a problem (a shrinking listening audience), into an advertising advantage.

220. *See supra* Part II.A.

221. DOUGLAS, *supra* note 1, at 223.

222. *Id.* at 241.

a generation "[r]aised on independent, brave pop culture heroes like the Shadow, [and] the Lone Ranger . . . ."[223] American boys were influenced early on by popular television images touting aggression and independence; however, by adolescence they were expected by societal norms to submit to authority figures.[224] By the late 1940s, juvenile delinquency became a national obsession, with middle class parents moving out of cities in hope of helping their children to avoid the lure of punks and motorcycles, and to adopt the more acceptable and restrained bourgeois norms:[225]

> As America became more repressive in the 1950s, with the grip of conformity and McCarthyism tightening, [B]lack music became especially attractive to the young "because it could generate emotional release" and because it promised a kind of commentary about life ignored or frowned upon in the schools, in the family, and on television.[226]

During this time, network television not only continued to perpetuate the dominantly inscribed racial stereotypes of Black Americans, but also, through its programming, replicated the phony innocence, conformity, and forced homogeneity that American youth sought to escape.[227]

In that way, radio filled the cultural vacuum left by television and the larger dominant discourse.[228] First, the Black slang expropriated by the White DJ "signaled membership in a special, outcast community that seemed to laugh at and be above [the] clueless, cookie-cutter, tightassed [W]hite folks."[229] Additionally, like jazz music two decades earlier, Black American music of the early 1940s and late 1950s, in particular, symbolized to White youth "the cultural alienation, rebellion, and sexual energy of the younger generation,"[230] and widened the crack between Black and White American cultures, first "in the form of rhythm and blues and then rock 'n' roll . . . ."[231]

So what was it in particular about rhythm and blues that White youth found so subversively appealing? Rhythm and blues was "[B]lack artists'

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223. *Id.*

224. *See id.* at 241–42. *See generally* STEPHEN TROPIANO, REBELS & CHICKS: A HISTORY OF THE HOLLYWOOD TEEN MOVIE (2006).

225. DOUGLAS, *supra* note 1, at 242; *see also* ERIC AVILA, POPULAR CULTURE IN THE AGE OF WHITE FLIGHT: FEAR AND FANTASY IN SUBURBAN LOS ANGELES 17 (2004).

226. DOUGLAS, *supra* note 1, at 243.

227. *See id.* at 241. *Cf.* Brian W. Ludeke, *Malibu Locals Only: "Boys Will Be Boys," or Dangerous Street Gang? Why the Criminal Justice System's Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 329 n.96 (2007) (discussing how one rock-and-roll band's lyrics appealed to youth and increased a "militant and disenchanted counterculture as the decade wore on") (internal quotation omitted).

228. Rothenbuhler & McCourt, *supra* note 39, at 367, 375.

229. DOUGLAS, *supra* note 1, at 244.

230. *Id.* at 228.

231. *Id.*

pop-tinged tunes with a heavy beat and lyrics packed with sexual innuendo."[232] It displaced jazz as the musical passion of Black Americans and represented a blending and evolution of various Black musical forms, including blues, gospel, and jazz.[233] Underlying each of these musical traditions was soul—distinct from "'[f]eeling' [which] was something everybody had"[234]—which captured the "emotional center of [B]lack cultural experience,"[235] and served as a subversive "challenge to the technocratic rationalism threatening to enslave" White youth, especially by the 1950s.[236] By the 1950s then, Black America's musical "soul" was in rhythm and blues which symbolized "negation of Western analytic process . . . that posited a near mystical naturalness, reaffirming biological priorities and denying the Puritan ethic of middle America."[237] As one historian noted with respect to the crossover appeal of Black musical culture, "White Americans may have turned to [B]lack culture for guidance because [B]lack culture contains the most sophisticated strategies of signification and the richest grammars of opposition available to aggrieved populations."[238]

Veiled in the soul of rhythm and blues was the collective and communal frustration of being Black in segregated post-World War II America. During World War II, job opportunities, mostly in factories, prompted a significant number of Black Americans to leave the rural south and move to larger cities like Los Angeles and Detroit, ultimately settling in to form large urban ghettos.[239] Despite the considerable ideological differences in Black American discourse prior to the war regarding the best way of achieving liberation, the dominant discourse of postwar Black Americans included a call and struggle for full rights of American citizenship.[240] Rhythm and blues arose out of these new postwar urban

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232. FISHER, *supra* note 9, at 31.

233. *Id.* at 31–32.

234. DOUGLAS, *supra* note 1, at 243.

235. *Id.* (quoting BEN SIDRAN, BLACK TALK 126–29 (New York: Da Capo Press 1971)) (quotation marks omitted).

236. DOUGLAS, *supra* note 1, at 243.

237. *Id.* (quoting SIDRAN, BLACK TALK 129) (quotation marks omitted).

238. DOUGLAS, *supra* note 1, at 242 (quoting GEORGE LIPSITZ, A RAINBOW AT MIDNIGHT: LABOR AND CULTURE IN THE 1940S 305 (1994)) (quotation marks omitted).

239. Garofalo & Chapple, *supra* note 173, at 63, 66.

240. Indeed, after the war, membership in the National Association for the Advancement of Colored People (NAACP) (an organization founded on the premise of facilitating full civic and citizenship rights for Black Americans) soared from 50,000 to 450,000. DOUGLAS, *supra* note 1, at 223. Prior to the war, however, various organizations were aimed at attaining equality for Black America, and were organized around different ideologies that ranged from Black nationalist claims for a separate political and economic state to anti-imperialist or anti-colonialist calls for a physical revolution. Savage, *supra* note 176, at 231, 250.

localities and found its way onto independent radio stations willing to sell air time to Black disc jockeys.[241] Through their late-night broadcasts, these Black DJs connected with the sentiments of a community alienated, due to socially constructed racial identities, from the larger society. Young White Americans—who also felt alienated—listened in as well.[242]

Through cultural and musically coded songs, Blacks "waged a mind war against the shameful paradox of a segregated democracy . . . although it would take two decades of mass protests, litigation, and deaths to overcome virulent [W]hite resistance to dismantling its edifice."[243] In addition to enjoying the entertainment value of rhythm and blues, White teenagers "grasped the veiled yet complex codes of self-discovery and liberation that often threaded their way through rhythm and blues, codes that became overt with the development of rock and roll."[244] Moreover, as this Article contends, rock and roll served as a counterpublic, which *in and of itself* served to subvert and challenge established segregationist norms—a challenge that occurred alongside the developing civil rights movements.[245] Disc jockeys were given free rein over programming content and implicitly stomped all over the color line by playing Black music on White radio, which was avowedly about much more than the fun and entertainment value of the music alone.[246] Not only did their shows foster an intermixing between Black and White cultures on air, but they also set the stage for direct physical intermingling between the youth of both races.

For example, even the self-proclaimed Father of Rock and Roll, Alan

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241. *See* Rothenbuhler & McCourt, *supra* note 39, at 367, 370.

242. *See* DOUGLAS, *supra* note 1, at 249. *See generally id.* at 372–74. Soon, White youths' favorite artists were Black Americans and their favorite disc jockeys were White ventriloquists, who both sounded Black and interacted with Blacks. *See id.* at 243, 249. Before Elvis Presley, virtually all R&B artists that White teens heard on the radio were Black artists. *Id.* at 249. *See generally* Rothenbuhler & McCourt, *supra* note 39, at 367, 372–74.

243. Savage, *supra* note 176, at 231, 231.

244. Rothenbuhler & McCourt, *supra* note 39, at 367, 374.

245. DOUGLAS, *supra* note 1, at 228. Here, Habermas is partially correct in asserting that informal publics can be influential to form more organized movements that overtly challenge the ruling authority or state apparatus. *See supra* Part III.A. He underestimates, however, the power of these informal publics to challenge the ruling ideologies in and of themselves.

246. *See* DOUGLAS, *supra* note 1, at 244–45. Black disc jockeys were much more explicit about the racial issues of the day that affected the Black community. Many radio stations, by observing Black DJs and their connection with the Black community, would see the value in attracting and connecting with a local listening audience. *See* FISHER, *supra* note 9, at 52; *see also* DOUGLAS, *supra* note 1, at 239 ("Linguistically and musically, these stations acknowledged that much of the community's identity derived from a distance from mainstream, [W]hite, bourgeois culture, a distance that [W]hite DJs would mimic and cultivate to great profit.").

Freed, avoided talking directly or overtly about Blacks or race on air, despite his use of racial ventriloquy.[247] He was, however, known to publicly embrace Black male and female musicians at shows or events he hosted.[248] And, while these disc jockeys, their station owners, and eventually White rock-and-roll artists, like Elvis Presley, expropriated and exploited Black music without directly addressing the conditions of Black Americans in America, they flung the door open wider for Black disc jockeys, Black musicians,[249] and the listening Black audience. This audience found pleasure in the visibility and attention given to Black musical and cultural expression (even if coded and subverted) since, for so long, they had been completely ignored and objectified on radio, and were continuing to be ignored on television.[250]

Moreover, these disc jockeys hosted shows and concerts, which led to racial intermingling and were, in themselves—like the formal civil rights movement that was soon to come—challenges to the mainstream prohibitions against social interactions between the races.[251] At the time, rock and roll was seen as an overnight shift in popular culture, but was instead actually a manifestation of sentiments that had been festering for decades. With rhythm-and-blues-infused rock and roll music played on the air symbolizing an "imagined" racial interaction on air, and with the literal and spontaneous everyday interactions on the dance floor between Black and White youth, mainstream racial segregationist norms "were starting to buckle, and a huge new generation of young people was beginning to flex its demographic muscle."[252] In fact, as disc jockeys spoke at record stores, emceed, and coordinated dances and events, they saw the crowds growing more racially mixed and the physical divide meant to partition the Black and White youth soon disappeared.[253] By surveying local record stores and

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247. FISHER, *supra* note 9, at 53–54 ("Indeed, [Freed] never called the music he played 'rhythm and blues,' instead using the term 'rock and roll'—the old blues metaphor for sexual intercourse—as a euphemism.").

248. DOUGLAS, *supra* note 1, at 249. Alan Freed was known to kiss Black female performers, share the stage with and embrace Black male performers, and "was even seen sharing a cigarette or a drink with these performers after the show." *Id.*

249. DOUGLAS, *supra* note 1, at 240 ("[B]lack musicians like B. B. King, James Brown, and Aaron Neville felt grateful to such DJs because they gave [B]lack music a much wider audience; exposed [B]lacks and [W]hites to gospel, rhythm and blues, boogie-woogie, and jazz; and often gave these same musicians their first break.").

250. *See id.*; *see also* FISHER, *supra* note 9, at 47 ("The illicit sound of the new music drove radio further and further from the innocence of TV America and the pretense of racial separation.").

251. *See* DOUGLAS, *supra* note 1, at 249.

252. FISHER, *supra* note 9, at 28; *see also* ENNIS, *supra* note 212, at 140.

253. DOUGLAS, *supra* note 1, at 249.

> Many DJs sought to boost their ratings with teenagers by hosting dance parties, which often resulted in integrated crowds. Whites' embrace first of R&B and then

interacting directly with his local audience, the DJ played what he thought his audience wanted to hear, an observation that ultimately led to the development of the Top 40 format.[254] "Top 40 radio was [originally] designed to reflect what had been widely accepted, not to showcase anything avant-garde."[255]

Therefore, the disc jockey helped to make visible the musical tastes and preferences of two formerly ignored segments of mainstream America. He also helped to make radio a center of business in the entertainment industry, at least as it related to rock and roll—the music genre that most influenced popular culture at the time and exemplified the intergenerational and interracial battle over identity and identity formation. With the growing connection between radio, disc jockeys, the small up-and-coming grassroots record labels, and the effect of radio airplay on a song's sales, radio became a serious site of contestation to self-appointed guardians of both old-guard segregationist ideology[256] and established business practices in radio.

3. Commercializing White Youth Culture

In response, a campaign against rock and roll developed with the goal of beating back the wave of sociocultural change underlying the music's popularity. Rock-and-roll disc jockeys were targeted as the culprits for instigating and fueling the desires for such transformative cultural understandings, which, within a decade, advanced to a demand for change

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> of [B]lack rock and pop stars disrupted the old patterns of segregated shows, and this was especially revolutionary in the South, where segregated facilities were commonplace. Now [B]lacks and [W]hites would enter the same building to hear the same R&B group they had heard on the radio, but they were separated from each other by ropes or other dividers. Once everyone started dancing, however, these barricades often fell, and there they would be, dancing together.

Id. Popular movies such as *Hairspray*, *The Frankie Avalon Story*, *Ray*, and *Cadillac Records* touch on this American cultural phenomenon that was fueled by the radio airplay of such music.

254. Rothenbuhler & McCourt, *supra* note 39, at 367, 370–71 ("[S]tations surveyed record stores for their most popular songs, and local interest, rather than national popularity, determined airplay . . . ."). Top 40, at the time, was not as scientific as it has come to be in terms of being based on national surveys and market research. The number forty originally represented "the approximate number of songs a deejay could play in a three-hour shift." FISHER, *supra* note 9, at 16. It reflected the music tastes and preferences of the local listening audiences as determined by the disc jockey, who surveyed what music and records were being bought in the local community record store, which, during this time, were primarily rhythm and blues and rock and roll records purchased by teenagers. *See* DOUGLAS, *supra* note 1, at 227–28.

255. FISHER, *supra* note 9, at 28.

256. *Id.* at 50–51. "When [W]hite deejays put [B]lack acts onstage in front of [W]hite audiences, and [W]hite deejays were buddies with [B]lack musicians, and [W]hite deejays went out of their way to talk and walk like [B]lack men, the reaction ranged from queasy discomfort to unchecked rage." *Id.* at 50.

by Black Americans via the civil rights movement and the 1960s protest movements.[257] In the 1950s, though, "[t]he enemy was not . . . the handful of . . . stations that appealed to [B]lack America, but rather the rebel deejays who breached the color line, bringing [B]lack music to [W]hite teens."[258] Local and city governments banned rock-and-roll concerts within their jurisdiction in an effort to prevent further racial intermixing, while churches and several civic organizations issued anti-rock statements on behalf of parents, and civic and religious leaders.[259]

The main assault, however, came in the early 1950s and ultimately led to the dethroning of the disc jockey and a dismantling of the threats to the then-established economic and racial hegemonies in the industry and society at large. Payola, "gifts and payments to deejays made as inducement for playing records[,]" while not illegal in the 1950s,[260] was the subject of a federal investigation into corruption in radio, due in large part to the lobbying efforts of ASCAP.[261] ASCAP's objective was to bring down the rock-and-roll DJ, who played primarily rock-and-roll and rhythm-and-blues music—both published by its competitor, BMI.[262] Due to the payola investigations, disc jockeys quit in droves, and stations fired many others.[263] To communications scholar Susan Douglas, the payola surge was the apex of

> a massive fight over listening, over the barely articulated understanding that radio listening was playing a central role in shaping the identities of millions of young people. This was a recognition that despite the highly visual nature of American culture, especially with the ubiquity of television, radio was addressing and cultivating young people in a way that television didn't dare.[264]

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257. *Id.* at 50–51.

258. *Id.* at 50.

259. *See* DOUGLAS, *supra* note 1, at 249; FISHER, *supra* note 9, at 52.

260. FISHER, *supra* note 9, at 79. *Accord* 47 U.S.C.A. § 508 (2006). In fact, payola dated back to the 1930s in one form or another to when songwriters offered band leaders certain incentives to play one of their songs in a set or performance on radio. Devin Kosar, Note, *Payola—Can Pay-for-Play Be Practically Enforced?*, 23 ST. JOHN'S J. LEGAL COMMENT 211, 217 (2008). As disc jockeys gained in popularity and control over the content that was aired on the radio, they began to receive paid incentives from an endorsing record company to play a particular record. *Id.*

261. *See* DOUGLAS, *supra* note 1, at 251.

262. *Id.* The stage was set for a national inquiry determined to bring Top 40 radio back within the control of corporate leaders.

263. FISHER, *supra* note 9, at 91.

264. DOUGLAS, *supra* note 1, at 251; *see also* FISHER, *supra* note 9, at 89.

> Those who lived through the payola scandal came to see the purging of rock radio as the older generation's desperate effort to hold on to what they knew, to their ideas of how parents and children should relate to one another, to their concept of race in America, to their sense of respect and propriety.

Id.

In the end, after the payola surge, the disc jockey's autonomy was eroded.[265] Stations turned to national surveys to give an appearance of a scientific methodology of choosing playlists, which ultimately served as "the first big step away from the localism of the 1950s," and led to the resurfacing of the "blandness" and homogeneity of the network era.[266] Developing AM programming formats soon favored management selections over the DJs and often "gave DJs even less time to talk and made them hew to a thirty-record playlist. . . . [with] rotations emphasiz[ing] the top six to eight records, playing the hits over and over and over."[267] While rock and roll on the air continued and the disc jockey personality remained, racial ventriloquy and music with overt identifications with Black culture did not. They were replaced instead with "more generic youth slang like 'sockin' it to you' and 'groovy'"[268] and "crossover music that was clearly [B]lack, but not threatening, and very danceable."[269] AM radio became highly "predictable and routinized," and filled with "so many jingles, ads, and promos to tune out."[270]

In essence, the youth rebellion was commercialized and harnessed by a controlled and predictable playlist. Youth began to turn away and tune out of AM radio, especially as the youth rebellion became overtly politicized in the years to come.[271] But even prior to Congress' payola

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265. Kielbowicz & Lawson, *supra* note 187, at 352 ("Station managers reined in deejays by imposing more centralized control over programming, which led, according to some observers, to the rise of formula play lists such as Top 40 formats."). Indeed, "payola would never really go away; it merely changed direction. Now it was music directors and station managers, rather than deejays, who made deals with record companies and their distributors." FISHER, *supra* note 9, at 91.

266. FISHER, *supra* note 9, at 91.

267. DOUGLAS, *supra* note 1, at 252; *see also* BILL BREWSTER & FRANK BROUGHTON, LAST NIGHT A DJ SAVED MY LIFE: THE HISTORY OF THE DISC JOCKEY 40 (2000). Moreover, smaller independent record labels would be hurt considerably with fewer opportunities for their songs to get airplay due to the subsequent development of Top 40 music play lists—which were based on national surveys, including music listings in *Billboard* magazine—and to a reduction in the number of songs played on the radio airwaves, an increase in advertising jingles, and rapid-fire disc jockey talk. DOUGLAS, *supra* note 1, at 251–52.

268. DOUGLAS, *supra* note 1, at 252.

269. *Id.* (internal quotation marks omitted).

270. *Id.* at 254; *see also* FORNATALE & MILLS, *supra* note 181, at 26 (stating that Top 40 has come to mean the playing of the best selling records over and over in what industry calls rotation).

271. They would turn to FM radio, *see* DOUGLAS, *supra* note 1, at 256–59, a phenomenon, which while fascinating in its own right and which provides yet another example of radio's subversive capabilities, is beyond the scope of this Article. This exodus played out repeatedly on broadcast radio as different subversive voices on radio found their way onto the airwaves only to be eventually commercialized or co-opted—a situation not too different from the current status of radio. Interestingly enough, when FM stations, too, became restricted by tight Top 40 playlists, those excluded or marginalized from the nation's radio airwaves turned to college radio and community radio. *See id.* at 282–83.

surge that dethroned the DJ and initiated the move away from localism, FCC localism rules and policies up until the 1950s fell far short of facilitating the discursive struggle against mainstream norms related to identity and race that were occurring at the time.[272] Early on, the FCC did little to further the contesting voices of those in the Black community and, furthermore, was indifferent to those voices being given access to the radio airwaves.[273] Indeed, the FCC failed to effectively adopt and enforce localism rules or policies that called for the inclusion of Black interests, local or otherwise, which were notoriously absent or objectified on radio pursuant to the firmly entrenched industry norm regarding the Whiteness of radio.

One could argue that what this trip down America's historic sociocultural legal lane shows is that the market, and not the law, was instrumental in the subversion and diversity that appeared on radio during the transition period. Despite all the FCC's calls for localism, this Article contends that the law implicitly endorsed the Whiteness ethos on radio, and it did little, if anything, to facilitate the discourse that ultimately surfaced, despite the law's indifference to the limited access to Blacks on radio or even to the mainstream American youth.[274] Both segments of the population remained invisible and did not gain access to the nation's radio airwaves until after their buying power increased and the market demanded their entry.[275] But as this history has also shown, demographics and market demand were not the only factors, but two of many that led to the inclusion of these voices. These other factors are no longer present in the deregulated and ownership-consolidated radio (and music) industry in which radio now exists. Therefore, government intervention is clearly necessary. The government needs to reinvigorate a localism policy that ensures that radio, in particular, given its unique qualities, is more representative and inclusive of contesting voices, especially those of the underserved. Continued adherence to the predominant market-based analysis of the public interest obligations imposed on broadcasters, where buying power of a particular demographic is the dispositive force, will not lead to such inclusion, as evidenced by the current state of radio.

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272. *See supra* Part II.B.

273. *See generally* LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE. J. CIVIL RTS. & SOC. JUST. 97 (2006).

274. *See* BLUE BOOK, *supra* note 76, at 15, 36; *see also* Lenthall, *supra* note 64, at 41, 53–54.

275. *See* FISHER, *supra* note 9, at 45–47.

IV. REINVIGORATING LOCALISM

A. Deregulation and Its Effect on Music Content on Radio

The deregulatory efforts that began in the 1980s, and were cemented with the passage of the Telecommunications Act of 1996, have virtually eliminated many of the factors that were once present and relevant to the rise of rock and roll on radio. Specifically, as previously discussed in this Article, the countercultural sound of rock and roll made its way onto the airwaves, despite premature predictions of radio's demise, since fierce competition existed between local radio station owners and because radio stations were connected and responsive to local communities through their local DJs, musicians, and independent record labels. These factors considerably influenced the emergence of the local and contesting voices heard on radio in the 1940s and 1950s, which have been undermined due to the exclusive market-based deregulatory approach ultimately adopted by the FCC.[276] For nearly four decades, and up until the early 1980s, communications regulatory policies incorporated localism ideals and aimed "to restrict [media] ownership concentration."[277] During that time, the "presumption was relentlessly against concentration and toward maximizing the number of independent media voices."[278] Although the FRC and FCC struggled to effectuate localism early on in light of the rising dominion of the networks, the FCC, through the *Chain Broadcasting Order*, encouraged the development of more nonnetwork, independent stations. In addition, the increased competition among these independent radio stations for content and a listening audience gave rise to a number of smaller, independent record labels that provided such content and to the rise of the local disc jockey, who was intimately connected with his listening audience.[279]

Now, radio has essentially become centralized in the hands of very few conglomerates that control the majority of what the nation hears.[280]

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276. *See, e.g.*, Amendment of Section 7.3555, [formerly Sections 73.35, 73.240, & 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM, and TV Broadcast Stations, *Report and Order*, 100 F.C.C.2d 17, paras. 8–10 (1984).

277. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 869 (2002).

278. *Id.*

279. *See generally* DOUGLAS, *supra* note 1, at 227.

280. Mark Anthony Neal, *Rhythm and Bullshit?: The Slow Decline of R&B, Part Three: Media Conglomeration, Label Consolidation and Payola*, POPMATTERS (June 30, 2005), http://popmatters.com/music/features/050630-randb3.shtml.

> In the aftermath of the Telecommunications Reform [sic] Act, the massive consolidation in radio has left fewer people making the decisions about what music will be played. The ten largest radio conglomerates in the U.S. control more than two thirds of the national radio audience, with Clear Channel and Viacom . . .

Moreover, the public trusteeship interpretive standard applied to the public interest obligations imposed on broadcasters, from the outset, incorporated localism concepts. It, however, has been replaced with the marketplace interpretive standard, premised on the belief that the public interest requirement could best be met by market forces.[281] Marketplace ideology rejected the scarce-airwaves theory underlying the trusteeship standard because, in principle, all resources, including the airwaves, were scarce. Therefore, according to the marketplace model, the belief was that the efficient use of the airwaves (like other scarce resources) could best be determined by the market and the laws of supply and demand.[282] Such demand turned primarily on buying demographics and consumption habits and in treating radio content as a consumer good. Gone by the wayside was the concern for local access to, and content on, the airwaves.

Moreover, pursuant to this market-based ideology, the Telecommunications Act of 1996 was ultimately enacted, removing ownership caps on local and, to some extent, national station ownership.[283] Immediately following its passage, media conglomerates bought and consolidated most local stations in order to decrease competition among them and thereby maximize profits.[284] "With media conglomerates having no commitment to the idea of the local interest, they 'laid off hundreds, decimated community programming and all but standardized play lists across the country . . . .'"[285] To increase profits, many stations soon

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controlling more than 40 percent of that.

Id.

281. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 233 (1982) (written by a former FCC Chairman, who was the first in history to advocate for abandonment of the public trustee model of broadcast regulation for the market-based approach).

282. *See* R. Randall Rainey & William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1937 (1996).

283. Telecommunications Act of 1996 § 202, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

284. *See* Prindle, *supra* note 28, at 306. Originally, proponents of deregulating ownership in media opined that multiple ownership of radio would foster more diversity in content, given that an owner of multiple stations would seek to provide a more diverse array of content options on its differing sister stations to attract a differing listening demographic. Krotoszynski & Blaiklock, *supra* note 24, at 831–32. In that way, perhaps even niche markets could be served. *Id*. However, with common ownership, radio conglomerates found economies of scale much more appealing. Martens, *supra* note 43, at 311. This, in turn, cut short the goal of catering to niche or even local tastes. Today, conglomerates generate more advertising profits by marketing and selling to advertisers a well-studied and known commodity—a particular listening and buying demographic. Rather than appealing to the intricacies and nuances of a particular local listening audience, the content provided, then, is more national and mainstream in appeal. *Id.* at 311–12 (stating that radio has become more like a "McRadio" than the intimate connection to the local that it once was).

285. Folami, *supra* note 23, at 296 (quoting JEFF CHANG, CAN'T STOP WON'T STOP: A

replaced live disc jockeys, both Black and White, who "understood local tastes and intricacies"[286] with prerecorded announcers. In addition, with the adoption of software that permitted disc jockeys to "voice track" or "cyberjock" their shows,[287] disc jockeys became further removed from their local audience.

Shows were prerecorded with voice-tracking technology, which allowed disc jockeys to tape their shows with sound bites; other technological developments made it possible to patch in listener calls, songs, promos, and other commercials. Such shows were subsequently sent out to other conglomerate-owned stations in other local and regional areas.[288] With cyberjocking and voice tracking, radio conglomerates "cut down the total number of disc jockeys and spotlight[ed] its top talents."[289] As a result, many DJ positions were eliminated "by simply having one company jock send out his or her show to dozens of sister stations. Thanks to clever digital editing, the shows still often sound[ed] local."[290] The nationally syndicated radio personality was soon to follow and was, by definition, further removed from the many communities that received the syndicated broadcast.[291] Although syndication of programming has benefits in that it can give national exposure to information or talent that might have otherwise remained local, syndicated programming is, however, a huge problem to the extent that it only (or primarily) recycles top-down, national content and contributes to erasing local access and expressivity on the airwaves.[292] There also exists a concern that calls for the recognition of local and particularized interests and tastes may lead to further fragmentation of the public sphere. However, attention to localized viewpoints, especially as they relate to radio access, is necessary to capture the concerns of those rendered voiceless in the mainstream discourse and to facilitate a more robust and inclusive democracy.

With consolidated radio and radio's continued ability to influence

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HISTORY OF THE HIP-HOP GENERATION 441–42 (2005)).

286. Adam J. van Alstyne, Note, *Clear Control: An Antitrust Analysis of Clear Channel's Radio and Concert Empire*, 88 MINN. L. REV. 627, 660 (2004).

287. Randy Dotinga, *'Good Mornin' (Your Town Here),'* WIRED NEWS (Aug. 6, 2002), http://www.wired.com/news/business/1,54037-0.html.

288. *Id.*

289. *Id.*

290. Eric Boehlert, *Radio's Big Bully*, SALON.COM (Apr. 30, 2001), http://archive.salon.com/ent/feature/2001/04/30/clear_channel/.

291. *See* Dotinga, *supra* note 287.

292. *See* Martens, *supra* note 43, at 315 (stating that post-consolidation, voice-tracking technology of the syndicated DJs on radio is not locally responsive). *See generally* Ortner, *supra* note 32 (arguing that, while syndicated programming allows some local issues to be heard nationally, it has generally led to a loss of radio's historically unique connection to the local community).

consumer preferences, media conglomerates were soon positioned to generate more advertising fees and to ultimately enhance their control over what the public hears on the radio. For example, given their growing market power via station ownership, station owners knew that they could "leverage their access to the airwaves to coerce labels and artists in the form of pay-for-play . . . because [the labels and artists] ha[d] no comparable means to promote their material."[293] Playlists were no longer determined by the local disc jockey, but by distant radio stations' regional managers and directors, and were played by the distant nationally syndicated disc jockey. Presumably, radio stations were also hesitant to introduce new talent or to vary from such nationally generated playlists for fear of offending advertisers concerned about upsetting the core listening demographic.[294] Therefore, "[w]ith few open spots for new music on tightly controlled play lists, it [became] increasingly difficult for new artists to enter the airwaves."[295] Moreover, independent labels fared no better in the post-Telecommunications Act consolidated radio industry environment because "they simply were unable to compete with the expensive advertising costs for radio air play of their talent."[296] Radio programming, in the end, not only has become further removed from the local listening audience, but also has become devoid of social commentary and is filled with jingles, advertising, and feel-good music meant to entice listeners into buying and consuming.[297]

Because radio continues to influence the popularity of a particular song, it is still very relevant in shaping mass and popular culture[298] and, by extension, societal perceptions, understandings, and constructions of identity. It is therefore imperative for a thriving and deliberating participatory democracy that such perceptions are not merely shaped or passed down from the top. Space must be provided to musicians (and their

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293. Van Alstyne, *supra* note 286, at 653.

294. Rachel M. Stillwell, *Which Public? Whose Interest? How the FCC's Deregulation of Radio Station Ownership Has Harmed the Public Interest, and How We Can Escape From the Swamp*, 26 LOY. L.A. ENT. L. REV. 369, 406 (2006) ("Programmers' decisions about music are driven by financial considerations, aimed at particular demographics for purposes of selling advertising.").

295. Van Alstyne, *supra* note 286, at 659.

296. Folami, *supra* note 23, at 300. The intense consolidation in radio, coupled with the subsequent consolidation in the record industry—where approximately four major record labels came to be responsible for more than eighty percent of what makes it on to commercial radio—practically squeezed out new artists that were not backed by one of the major labels. Neal, *supra* note 280.

297. *See* DOUGLAS, *supra* note 1, at 356–57; *see also* Neal, *supra* note 280 (claiming that, on urban radio, in particular, the overarching message is buy, buy, buy).

298. *See generally* Mezey & Niles, *supra* note 155. "Popular culture makes use of the mass cultural resources that capitalism provides, and mass culture often co-opts and markets pop cultural practices." *Id.* at 99.

listening audiences) who might contest the current cookie-cutter lyrical messages of consumption and frivolity that currently pervade the corporately controlled, market-driven radio airwaves. Given what seems like the exclusive application of the market-model approach to current media policies, and the disappearance now of most of the factors that were present during the period in which rock and roll emerged, it is difficult to see how contestatory voices would or could now find their way onto the conglomerate-controlled airwaves. Radio ownership consolidation by the major conglomerates of small and local radio stations has swallowed up competition such that there is no longer a competition for advertising dollars, an audience, or even content.[299]

Without government intervention, it is difficult to see how or why radio conglomerates would not continue with business as usual, maximizing advertising profits by maintaining predictable buying demographics. Indeed, the Third Circuit, in staying the 2003 *Report and Order* further deregulating the media industry, seemingly acknowledged as much by ordering the FCC to listen to the everyday concerns and conversations of the local public through a series of public hearings across the nation.[300]

B. Opening Up Access: Suggested Approaches

Radio ownership consolidation is more than likely here to stay, despite concerns raised by the current presidential administration.[301] Moreover, while concerned with the effects of consolidation on localism generally, the Third Circuit neither raised the issue of dissolving the current consolidation in broadcast to remedy its current status, nor required conglomerates to divest some of their consolidated holdings.[302] Such divesting would more than likely only occur if media conglomerates, like the networks in the 1950s, decided to release some of their ownership holdings voluntarily. While the law, through localism rules and policies,

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299. *See* Prindle, *supra* note 28, at 299; *see also* DOUGLAS, *supra* note 1, at 350.

300. Prometheus Radio Project v. FCC, 373 F.3d 372, 435 (3d Cir. 2004).

301. President Barack Obama, while Senator and during his presidential campaign, stated his displeasure with the current consolidated and hyper-commercialized status of the media and has suggested possible remedies, including reinstituting a meaningful localism standard and adopting policies to pave the way for more low-power FM stations across the country. *See* John Eggerton, *Obama, Bush at Odds over Media-Ownership Vote*, BROADCASTING & CABLE (May 16, 2008), http://www.broadcastingcable.com/article/113739Obama_Bush_at_Odds_Over_Media_Ownership_Vote.php; *see also* Associated Press, *Changed Media Landscape Awaits FCC Move*, CBS NEWS (June 20, 2010), http://www.cbsnews.com/stories/2010/06/20/ap/tech/main6600896.shtml (discussing FCC stance on issues confronting broadcast, including concentrated conglomerate ownership).

302. *See Prometheus Radio Project*, 373 F.3d 372.

was not particularly helpful historically in destabilizing the racial and economic status quo on the nation's airwaves during the transition period of the mid-1940s to early 1950s, there were a number of other factors at the time beyond market demand that contributed to bringing marginalized voices to the forefront. Now, however, many of those factors, such as the intense competition between local radio station owners and their intimate connections with their local listening audiences via the DJs, have disappeared, due to ownership consolidation in the industry.

Therefore, this Article proposes a few possible remedies for opening up access on the nation's radio airwaves *within* the context of ownership consolidation, which are informed by radio's subversive past explored herein. First, this Article calls for the continued imposition of public interest obligations on broadcasters, a return to the public-trusteeship interpretive standard, and a reinvigoration of localism as part of such obligations.[303] This Article also argues for a more expansive understanding of localism that would incorporate music and popular culture expressions, especially as expressed by those most marginalized in society. It also proposes that broadcasters be required to allot a specific amount of time to the airing of local music and that a more meaningful review process for broadcast license renewals be imposed to consider the extent to which broadcasters provide radio access to local musicians and content.[304]

With regard to the first suggestion on the continued imposition of public interest obligations on broadcasters and a return to the public-trusteeship interpretive model, such obligations should remain in force because, despite the motley of other media outlets available—Internet radio, satellite radio, cable and digital television, and the like—the reason underlying such obligations in the first place is still present: electromagnetic spectrum is still scarce. Despite the high demand for its use, spectrum is still finite and regulation of its use remains justified.[305]

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303. *See also* Folami, *supra* note 10 (discussing potential remedies—that do not include increased FCC regulatory oversight—for increasing public affairs and political news, rather than music and other cultural programming explored herein, on broadcast television within the context of its commercialization and consolidated control).

304. Currently, pursuant to the deregulatory policies adopted via the passage of the Telecommunications Act of 1996, broadcaster licenses are, for the most part, presumptively renewed with nonrenewal relegated to the last punitive option should a licensee fail to meet renewal requirements. *See* Telecommunications Act of 1996 § 309, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

305. Krotoszynski & Blaiklock, *supra* note 24, at 817–18 ("Because physical constraints limit the number of broadcast licenses that the Commission may issue, government regulation of the airwaves . . . . [is] necessary to ensure that those granted the privilege of broadcasting do not abuse that privilege by failing to operate their stations in the public interest."); *see* Varona, *supra* note 72, at 153 (asserting that the scarcity doctrine is still applicable and justifiable despite the increase in other media outlets). *See generally* FCC, SPECTRUM POLICY TASK FORCE: REPORT OF THE SPECTRUM RIGHTS AND RESPONSIBILITIES

Moreover, unlike many other scarce resources, radio is still a pervasive medium, and its uniqueness continues to rest in its ability to facilitate deliberative discourse. The Supreme Court, nearly forty years ago, acknowledged the unique status of broadcast as a deliberative tool and established as its primary goal exposing listeners to a marketplace of ideas and diversified viewpoints.[306] With such deliberative goals of radio still firmly in place, the governing public-trusteeship interpretive standard and localism policies (and related localism dictates), which were in place for well over three decades, should be resurrected. Relying solely on the market model and on demand in the market to determine the public's interest (especially when public demand turns narrowly on a particular buying demographic) is the equivalent of turning a public resource over to private interests for their own self-regulation. Such self-regulation diametrically conflicts with the foundational principles underlying radio's regulation, with the interests of the listening audience significantly sacrificed as a result. Therefore, not only should the public trusteeship standard be reapplied to the public interest standard as a part of FCC policy and regulatory authority, but localism requirements must also be read back into the public-trusteeship model of the public interest standard.

Indeed, almost from the inception of radio's regulation, localism requirements have been part of such public interest obligations, with due weight given to them in facilitating the articulation of community norms and interests. These regulations and policies, like the Blue Book and *Chain Broadcasting Order*, implemented during the network era, were aimed at ensuring that radio was a medium representative of the interests of those in the local listening audience of a radio broadcast station. Most attempts at increasing localism were abandoned, however, by the FCC during the deregulatory process, which began in the 1980s. The market-model approach to broadcasting has, for the sake of efficiency, not only set aside local interests generally, but has also reinforced demographic inequalities that tend to further marginalize and render invisible the socioeconomically vulnerable.[307] Therefore, some type of regulation, requiring a broadcaster to consider and address the preferences of its local community, may be necessary to reverse the tide of the mass-produced and rarely local, top-

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WORKING GROUP (2002), *available at* http://www.fcc.gov/sptf/files/SRRWGFinalReport.doc (discussing potential methods of allocating spectrum and the typical rights and responsibilities the FCC assigns to licensees).

306. Red Lion Brdcst. Co. v. FCC, 395 U.S. 367, 390 (1969).

307. Randall Rainey and William Rehg argue that, while an unregulated media grounded in market-based ideology may be more economically efficient (via costs and economies of scale), deliberation on radio is sacrificed. Rainey & Rehg, *supra* note 282, at 1937. Moreover, radio and the facilitation of such public discourse cannot be reduced to a consumer good. *Id.* The net result of such approach is the elevation of the interests of those with more wealth and buying power above those with less. *Id.* at 1943.

down basis upon which radio content is currently provided.

Specifically, in reinvigorating localism, the FCC should do so with a particular eye toward ensuring that members of the local listening audience in the lower economic order are granted access to the nation's radio airwaves and are provided with culturally expressive content, including music, which reflects their particular interests—and perhaps subversive discourse.[308] As has been discussed, cultural expression has proved to be essential in helping an individual process, accept, challenge, or reformulate community norms and related constructions of identity and social order: localism principles have been built on culture's processing function.[309] Radio's importance on this front cannot be underestimated despite the availability of other outlets in the media landscape because radio—unlike the other media outlets that might also have the ability to encourage discourse—is still relatively inexpensive, without a premium attached for access. As a result of such costs, a significant portion of America's population, constrained by socioeconomic limitations, cannot perhaps afford the price tag of these other media options. There is growing and continued digital divide between America's poorer communities and mainstream America.[310] Moreover, continuing to follow primarily a market-based approach to media policy has led, and will continue to lead, to the creation of technology "'haves' and 'have nots,'" resulting in an increased marginalization of the socioeconomically vulnerable.[311]

In order to fulfill localism objectives and, thereby, radio's deliberative aspirations, radio stations, at a minimum, must be required to reach out and reconnect to the local community by hiring local personnel that could, in turn, directly affect the representation of local voices.[312] Since this Article

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308. This Article contends that, by directly targeting an increase in the representation on radio, in particular, of those on the lower socioeconomic ladder, the FCC may diversify the airwaves with minority voices in a way that more than likely will not face as many constitutional challenges, given *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) (decided a few weeks after *Adarand* and establishing that targeting of a socioeconomic community is not an impermissible racial distinction, provided that race was not the predominate factor motivating the government's decision).

309. Cowling, *supra* note 3, at 312.

310. *See, e.g.*, Krotoszynski & Blaiklock, *supra* note 24, at 864 (discussing how government intervention in media access allocation is needed due to imperfect market conditions).

311. *Id.*

312. While a return to the programming logs and ascertainment rules are not specifically being proposed here, as there does seem to have been some value to the arguments that such requirements were unduly burdensome on smaller to mid-sized radio stations, something akin to it is in order. *See, e.g.*, Martens, *supra* note 43, at 304–05. The FCC has recently announced that radio stations must establish an advisory council that consults with local community and civic leaders to determine what local, news, and public affairs issues and programming would be of interest to their community; but many critics have found such

argues for a more expansive reading of localism that includes music and popular culture as reflective of local discursive interests and concerns, hiring local Black or White disc jockeys (or of other diverse ethnic backgrounds) might prove, as history has shown, quite beneficial to representing on the airwaves the cultural discourses, which necessarily might include music of the local community.[313]

With regard to the second suggestion on opening up access, this Article also calls for broadcasters to provide a specific portion of airtime to local musicians,[314] to provide space for voices that, by their very nature, might contest the top-down corporate-selected and -endorsed music that currently pervades the nation's airwaves. Admittedly, there are a few challenges to this time allotment requirement. One such challenge is that the allotment requirement assumes that local music will be different than that provided on a corporate-driven national level or that local music will contain social commentary or contestatory messages that challenge the status quo. Such replication is certainly a possibility given the effect radio has on consumer preferences, especially as it relates to music and popular cultural expression.[315] However, the main point here is to ensure that access is provided. While some of the music may simply be about frivolity and pure entertainment, the belief is that, even within the realm of

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promulgation too vague to be effectual. *See id.* at 286 (citing Press Release, FCC, FCC Chairman Powell Launches "Localism in Broadcasting" Initiative (Aug. 20, 2003)). Moreover, the announcement for advisory council consultations also seems to focus primarily on local news and public affairs to the exclusion of local music.

313. Such a policy would not run afoul of the ruling in *Bechtel v. Federal Communications Commission*, 10 F.3d 875 (D.C. Cir. 1993). The court in *Bechtel* struck down the FCC's owner-manager integration rule, which gave a preference to a prospective licensee applicant who committed to hire managers from the local community, on the grounds that the causal connection that the FCC drew between hiring local employees and granting licenses was arbitrary and capricious and without factual support. *Id.* at 887. As has been discussed in this Article, in terms of increasing local, culturally expressive content on radio, the local disc jockey has had, up until the massive industry consolidation and the implementation of economies of scale measures, a historically proven and far from arbitrary role in increasing local and diverse viewpoints on radio.

314. This proposition has found support with other scholars albeit for different reasons related to general programming entertainment enhancement and not necessarily for deliberative purposes as this Article specifically endorses. *See, e.g.*, Krotoszynski & Blaiklock, *supra* note 24, at 857 n.310; *see also* Martens, *supra* note 43, at 313–14.

315. *See* Cowling, *supra* note 3, at 349 ("Consumer choice is also constrained by '"gatekeepers,' 'chokepoints' and 'tastemakers"' deciding 'which products get shelf space and which will be excluded from audience consideration.' Consumers get what gatekeepers approve[,] . . . positing the pure consumer sovereignty/marketplace model as an illusory ideal.") (citing PETER S. GRANT & CHRIS WOOD, BLOCKBUSTERS AND TRADE WARS, POPULAR CULTURE IN A GLOBALIZED WORLD 51 (2004)). In the context of radio and music airplay, the gatekeepers are the record industry that pays a premium, often in the form of payola, to regional and corporate managers that then require DJs to play the paid-for song on air. *See* Folami, *supra* note 23, at 291–92; *see also* Kosar, *supra* note 260, at 214–15.

entertainment, commercialization, and what some might call manufactured consent, voices of contestation (even if coded) can and will surface. For example, in his book, *Happy Slaves*, Don Herzog explored slave songs and other culturally expressive conduct in slave communities that, on the surface seemed to be solely entertaining and established that subversive messages of resistance were also often found in such expressivity.[316]

A different but related challenge to requiring an allocation of time to local musicians in hopes that subversive music might surface is that such exposure might, in the end, lead to the commercialization or co-optation of it, as was the case with jazz, rhythm and blues, rock and roll, and, even more recently, gangsta rap.[317] The answer to that challenge again is that only access is being called for here. The goal here is not to ensure that subversive music maintains its authenticity, but that continued spheres of musical contestation are given space to flourish continually and find expressive release in hopes of facilitating a discursive exchange or a "nudge"[318] toward such dialogue.

The question remains, however, as to why space for such contestation must be made on commercial radio when there are other broadcast options available, like low power stations, national public radio stations, and college radio. Part of the answer lies in the belief that such fights must occur within the very commercially saturated realm of entertainment and mass media. Indeed, in a highly commercialized and commodified society, contestation must, at least on some level and at some point, be staged right where the battle lines are being drawn—within the very site of commercialization where identities are being reinforced, constructed, and, in some ways, manufactured.[319] Moreover, even noncommercial, public, and college stations are beginning to feel the weight and pressure of commercialization due to their underfunded budgets.[320] In the end, there is evidence that even their radio programming is beginning to buckle under the commercial pressure, resulting to the solicitation of commercial advertisements on their websites and to tying of financial incentives to donation (e.g., offering consumer products at a discount with a donation).[321]

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316. DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989).

317. *See generally* Folami, *supra* note 23, at 264, 274–75.

318. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE (2008) (discussing the ways in which regulation can encourage individuals to make certain choices relevant to their everyday lives).

319. *See generally* David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223 (2002).

320. *See* David Weir, *NPR, Newsweek Announce Layoffs*, BNET (Dec. 11, 2008), http://industry.bnet.com/media/1000490/npr-newsweek-announce-layoffs/ (discussing NPR layoffs and programming cuts to meet a $23 million deficit, including axing shows targeted to attract youth and Blacks).

321. *See, e.g.*, Reuters, *'Radio Bookmarks' a Hit with NPR Listeners*, PCMAG.COM (Jan. 29, 2009), http://www.pcmag.com/article2/0,2817,2339805, 00.asp ("It is important for

And the final challenge to the required time allotment might come from broadcasters asserting First Amendment rights to control the radio content they wish to air on their own licensed stations. The Supreme Court, however, has established that the First Amendment rights of broadcasters are not absolute and take a back seat to the higher governmental interest in ensuring that the radio remains a medium through which a wide variety of ideas, perspectives, and viewpoints are presented.[322] In doing so, the Court recognized a right of the listening audience to have access to a multiplicity of ideas over the airwaves, which as history has shown can include music.[323] Moreover, the First Amendment rights of broadcasters to provide the content they want has been and still continues to be limited pursuant to other FCC orders requiring broadcasters to provide (or not to provide) content the FCC deems valuable (or of lesser value) to the listening audience. For example, the FCC has prevented broadcasters from airing an unlimited amount of advertisements during children's viewing hours and has required broadcasters to provide children's educational programming.[324] In addition, Congress has established that cultural expression does have societal value by creating the National Endowment for the Arts and Humanities and the Corporation for Public Broadcasting, and by subsidizing the airing of such content.[325]

Finally, with regard to the third suggestion, this Article contends that, in order to provide incentives for broadcasters to consider and internalize the needs of their local listening communities, the FCC must reestablish a meaningful review process of each broadcaster's license renewal application. In determining whether a license should be renewed completely or partially, the FCC should consider the extent to which a licensee has provided, or plans to provide, content that is reflective of the needs, interests, and preferences of the local community, which are not

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public radio stations to offer enticing premiums because they would not have enough money to keep broadcasting without support from their listeners.").

322. *See* Nat'l. Brdcst. Co. v. Columbia Brdcst. Sys., 319 U.S. 190, 226–27 (1943).

323. Despite its entertaining nature, music has been accorded First Amendment protections, even for lyrics deemed as not overtly political in nature. *See e.g.*, Jason Talerman, Note, *The Death of Tupac: Will Gangsta Rap Kill the First Amendment?*, 14 B.C. THIRD WORLD L.J. 117 (1994) (discussing how rap lyrics were challenged as unprotected speech that encouraged the murder of a police officer); Jeffrey B. Kahan, Note, *Bach, Beethoven and the (Home)boys: Censoring Violent Rap Music in America*, 66 S. CAL. L. REV. 2583 (1993) (discussing how rap lyrics were challenged as obscene and violent).

324. *See, e.g.*, Children's TV Programming & Advertising Practices, *Report and Order*, 96 F.C.C.2d 634 (1984); *see also* Martens, *supra* note 43, at 314.

325. *See* Rainey & Rehg, *supra* note 282, at 1984; *see also* 47 U.S.C.A. § 396 (2006); Daniel Reid, Note, *An American Vision of Federal Arts Subsidies: Why and How the U.S. Government Should Support Artistic Expression*, 21 Yale J.L. & Human. 361, 367–370 (2009).

otherwise serviced by other radio stations in the community.[326] Such review will also ensure that broadcasters are not attempting to satisfy the time allotment obligations proposed herein by relegating such programming to graveyard shifts to avoid airing them during prime times that generate considerable advertising revenue.[327]

V. CONCLUSION

History has shown that now is not the first time radio has been controlled by corporate, market-driven commercial interests, which have threatened radio as a medium through which societal understanding and participatory democracy can be achieved. Radio has survived through the commercial hegemony over content in the network era and the format era, and it can do the same in the conglomerate era. During the transition period between the network and format eras, ruling hegemonies were shaken by the voices that made it onto the airwaves in the form of rhythm and blues and rock and roll, thereby validating the contestatory power of music, popular culture, and culturally expressive conduct.

The net effect of consolidation in radio ownership (and the record industry) has been the near extinguishing of even the potentiality of voices of contestation making it to the airwaves. By breathing life back into the localism standard and by reading in a broader understanding of localism—one that incorporates music and popular cultural expression—the FCC can adopt localism rules and policies that acknowledge fully the deliberative capacity of music that can (and does) influence popular constructions of identity and societal understandings. As history has shown, because those most marginalized and excluded from mainstream society may adopt nonovertly political means of expressing their concerns, including via subversive and coded music, due regard must be given to such possibilities in any reexamination of media and localism policy. Local music must be included in the call for more responsive local programming and in promoting a more participatory and deliberative democracy, using radio as a tool. And with that, radio will live on, with its deliberative ideals still intact.

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326. *See* Krotoszynski & Blaiklock, *supra* note 24, at 857.

327. To provide additional incentives to broadcasters, the government could subsidize the time allotted for local music and cultural expression as it does with other government-mandated programming, or could generate funds by imposing certain structural fees on broadcasters. *See* Rainey & Rehg, *supra* note 282, at 1975–76 (discussing the ways in which funds could be raised by imposing a federal surcharge or excise tax on broadcasters to subsidize the creation of a new nonprofit corporation established with the specific task of collecting content representative of the formal public sphere of civic associations, etc., in the local community).

Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency

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I. INTRODUCTION

This Article tells the story behind the Supreme Court's 1978 decision in *Federal Communications Commission v. Pacifica Foundation*.[1] Using interviews with participants, documents from the case, and papers of some of the Justices who heard the appeal,[2] it explains how a single letter complaining about "dirty words" in a comedy routine broadcast by a radio station ended up in the Supreme Court. It also relates how a closely divided

1. FCC v. Pacifica Found., 438 U.S. 726 (1978).

2. All of Justice Blackmun's papers cited in this article are from Box 274, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. [hereinafter Blackmun Papers]. All of Justice Powell's papers cited in this article are from Box 198, Lewis F. Powell Jr. Papers, 1921-1998, Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA [hereinafter Powell Papers]. Justice Marshall's papers may be found in Box 215, Thurgood Marshall Papers, Supreme Court File, 1967-1991, Manuscript Division, Library of Congress, Washington, D.C. [hereinafter Marshall Papers].

Court found the FCC's admonishment of the radio station to be constitutional even though the broadcast was protected by the First Amendment and its distribution by other means could not be prohibited.

The *Pacifica* case was controversial when it was decided in 1978. It became even more controversial during the George W. Bush administration when the FCC stepped up its enforcement of restrictions on indecent speech. Two FCC enforcement actions have come before the Supreme Court. In the *Fox* case,[3] the FCC admonished Fox Television for broadcasting "fleeting expletives." In the *CBS* case,[4] the FCC fined CBS over a half-million dollars for the brief exposure of Janet Jackson's breast during a Super Bowl halftime show.

In both cases, the networks argued, among other things, that the FCC's action violated the First Amendment and that *Pacifica* should be overturned. The Court remanded both cases without addressing the constitutional claims. This Article is timely because the Court may consider the soundness of *Pacifica* when it reviews the decisions on remand.

Part I describes the state of the law before *Pacifica.* Part II describes the FCC's decisions in *Pacifica*, and Part III discusses the D.C. Circuit's opinion reversing the FCC. Part IV describes the progress of the case in the Supreme Court, from the decision to grant certiorari to the five-to-four decision to reverse the D.C. Circuit and uphold the FCC. Part V discusses the contemporary reaction to the *Pacifica* decision, while Part VI summarizes the FCC's enforcement of the prohibition against broadcasting indecent material after *Pacifica*. Part VII describes the Supreme Court's decision in *Fox* and the decision of the Second Circuit on remand. Part VIII concludes by reflecting on the implications of this reassessment of *Pacifica* for these later indecency cases.

II. THE STATE OF THE LAW BEFORE *PACIFICA*

Although *Pacifica* is usually studied as a First Amendment case, it also resolved important statutory questions about the meaning of § 1464 of the Criminal Code, which prohibits the broadcast of "obscene, indecent, or profane language";[5] the FCC's authority to enforce § 1464; and the anticensorship provision in section 326 of the Communications Act.

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3. Fox TV Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009), *vacated*, 2010 WL 2736937 (2d Cir. Jul. 13, 2010).

4. CBS Corp. v. FCC*,* 535 F.3d 167, 172 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009).

5. 18 U.S.C. § 1464 (2006) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

A. The Statutory Scheme

Both § 1464 of the Criminal Code and section 326 of the Communications Act originated in the Radio Act of 1927, which created the Federal Radio Commission to license radio stations in the public interest.[6] Section 29 of that Act read:

> Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.[7]

This language was reenacted in section 326 of the Communications Act of 1934.[8] In 1948, the Criminal Code was revised, and the last sentence of section 326 was moved to Title 18 of the Criminal Code to join other federal criminal statutes regulating offensive matter.[9] This revision made the Department of Justice (DOJ) responsible for criminal enforcement of § 1464.[10] It was unclear whether this change was intended to remove the FCC's authority to enforce § 1464 administratively, since other sections of the Communications Act seemed to give the FCC authority to impose various sanctions for violations of § 1464.[11] The Court resolved this uncertainty in *Pacifica* and concluded that rearranging the provisions did not limit the FCC's authority to impose sanctions on licensees for broadcasting indecent material.[12]

B. Enforcement of Section 1464 Prior to Pacifica

In practice, neither the DOJ nor the FCC actively enforced § 1464

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6. Radio Act of 1927, ch. 169, 44 Stat. 1172–73 (1927).

7. *Id.* § 29.

8. Communications Act of 1934, Pub. L. No. 73-416, § 326, 48 Stat. 1064, 1091 (codified as amended at scattered sections 47 U.S.C.).

9. Criminal Code of 1948, ch. 645, § 1464, 62 Stat. 769, 866 (1948). For example, § 1461 prohibits the mailing of "obscene, lewd, lascivious, or filthy book . . . or other publication of an indecent character . . . ." *Id.* § 1461.

10. Ann-Ellen Marcus, Casenote, *Broadcasting Seven Dirty Words*, 20 B.C. L. REV. 975, 983, 988 (1979).

11. These sanctions included monetary forfeitures, fines, and revocation of licenses. *Id.* at 985–87.

12. FCC v. Pacifica Found., 438 U.S. 726, 738 (1978). The Court interpreted § 326's anticensorship provision as denying the "[FCC] any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves" but not "the power to review the content of completed broadcasts in the performance of its regulatory duties." *Id.* at 735.

prior to 1970.[13] In 1969, the Senate Subcommittee on Communications held a hearing and strongly suggested that the FCC do more to curb offensive broadcasting.[14] This hearing was prompted, at least in part, by the Subcommittee's unhappiness with the FCC's grant of an additional license to the Pacifica Foundation despite the large number of complaints about its programming.[15]

Shortly after the hearing, the FCC issued a Notice of Apparent Liability (NAL) for violating § 1464 against WUHY-FM, a noncommercial station in Philadelphia.[16] WUHY-FM had broadcast a fifty-minute, taped interview with the Grateful Dead's Jerry Garcia at 10:00 p.m. in which Garcia repeatedly used the words "fuck" and "shit."[17] The FCC explained that the issue was not whether the station could present Garcia's views, but:

> whether the licensee may present previously taped interview or talk shows where the persons intersperse or begin their speech with expressions like, "S - - t, man . . .", ". . . and s - - t like that", or ". . . 900 f - - - - n' times", ". . . right f - - - - - g out of ya", etc.
>
> We believe . . . we have a duty to act to prevent the widespread use on broadcast outlets of such expressions . . . For, the speech involved has no redeeming social value, and is patently offensive by contemporary community standards . . . [I]t conveys no thought to begin some speech with "S - - t, man . . . ", or to use "f - - - - - g" as an adjective throughout the speech.[18]

The FCC found that the broadcast was not "obscene" under § 1464 because it did not appeal to the prurient interest.[19] However, it concluded that "the statutory term, 'indecent', should be applicable, and that, in the broadcast field, the standard for its applicability should be that the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value."[20] The decision cited no authority for this assertion, and indeed, recognized that there was no applicable judicial or administrative precedent.[21] The FCC imposed a one-

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13. Marcus, *supra* note 10, at 983. The FCC referred complaints about obscene or indecent programming to the DOJ, and imposed civil sanctions only after a successful prosecution by the DOJ or a determination by the DOJ that the offense was prosecutable. The DOJ rarely acted on such complaints. *Id.* at 983 n.77 (noting that DOJ brought only five prosecutions against broadcasters under § 1464).

14. *Proposed Amendment to the Communications Act of 1934: Hearings on S. 2004 Before the S. Subcomm. on Comm.*, 91st Cong., 343–74 (1969).

15. Marcus, *supra* note 10 at 987 n.93.

16. WUHY-FM Eastern Education Radio, *Notice of Apparent Liability*, 24 F.C.C.2d 408 (1970).

17. *Id.* at para. 3.

18. *Id.* at paras. 6–7.

19. *Id.* at para. 10.

20. *Id.*

21. *Id.* at para. 11.

hundred-dollar fine and stated that it welcomed judicial review.[22] Despite this invitation and strong dissents,[23] WUHY-FM did not appeal.[24] Undoubtedly, it would have cost far more to appeal than to pay the fine.

Henry Geller, who served as a special assistant to the Republican FCC Chairman Dean Burch at the time of the WUHY case, explained why the FCC brought this case. The Chairman wanted this type of language off the air. Geller advised him that the broadcast did not violate § 1464 because it was not obscene. He suggested that Burch use the "raised eyebrow" approach, but Burch did not want to do that. Geller then suggested arguing that indecent speech differed from obscene speech under the statute. Even though Geller thought the FCC would lose in court, Burch wanted it done under the statute, and Geller thought he had no other choice but to follow Burch's wishes.[25]

The next FCC case enforcing § 1464 involved a commercial radio format known as "topless radio."[26] This term refers to call-in shows, typically aired midday, which include explicit discussions of sex.[27] After receiving complaints about this format, the FCC issued a NAL in April 1973, proposing to fine Sonderling Broadcasting Corporation, licensee of WGLD-FM in Oak Park, Illinois, two thousand dollars for broadcasting "obscene and indecent" matter in violation of § 1464.[28]

Like WUHY, Sonderling paid the fine rather than incur the expense of an appeal.[29] However, the Illinois Citizens for Broadcasting and the Illinois Division of the ACLU filed a petition alleging that the FCC's actions had deprived listeners of their First Amendment rights to hear constitutionally protected programming.[30] The FCC denied the petition, and the petitioners appealed to the D.C. Circuit.[31] The FCC Associate General

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22. *Id.* at para. 16.

23. Commissioner Nicholas Johnson dissented, accusing the majority of condemning "a culture—a lifestyle it fears because it does not understand," and "simply ignor[ing] decades of First Amendment law . . . . What the Commission tells the broadcaster he cannot say is anyone's guess—and therein lies the constitutional deficiency." *Id*. at 422 (Johnson, dissenting). Commissioner Kenneth A. Cox dissented in part because he thought the Commission had exaggerated the problem way out of proportion. *Id*. at 417–18 (Cox, dissenting in part).

24. Marcus, *supra* note 10, at 986–87.

25. Interview with Henry Geller, in Washington, D.C. (Oct. 20, 2008) [hereinafter Geller Interview].

26. Sonderling Brdcst. Corp., WGLD–FM, *Memorandum Opinion and Order*, 41 F.C.C. 2d 777 (1973).

27. *Id.* at para. 5.

28. *Id.* at para. 1.

29. Illinois Citizens Comm. for Brdcst. v. FCC, 515 F.2d 397, 400 (D.C. Cir. 1974), *reh'g denied*, 515 F.2d at 407 (1975) (per curiam).

30. *Id.*

31. *Id.* at 400–01.

Counsel, Joseph A. Marino, who would later argue the *Pacifica* case in the Supreme Court, argued this case in the D.C. Circuit.[32] The court affirmed the FCC in a decision written by Judge Leventhal, who agreed that the broadcasts were obscene and that the sanction did not violate the First Amendment.[33]

In *Sonderling*, "[t]he FCC found [the] broadcasts obscene under the standards of Roth v. United States and Memoirs v. Massachusetts."[34] While the appeal was pending, the Supreme Court formulated new obscenity standards in *Miller v. California*.[35] *Miller* did not address whether indecent speech should be assessed using the same standard as obscenity. This question came to the fore in *Pacifica*.

III. THE FCC DECISION IN *PACIFICA*

On December 3, 1973, the FCC received a letter dated November 28, from John H. Douglas, 385 Madison Avenue, New York, NY. The entire letter stated as follows:

> On October 30th, in the early afternoon (from approximately 1:30 to 2:30 p.m.,) while driving in my car, I tuned to radio station WBAI in New York City.
>
> I heard, among other obscenities, the following words: cocksucker, fuck, cunt, shit, and a whole host of others. This was supposed to be part of a comedy monologue.
>
> Whereas I can perhaps understand an "X-rated" phonograph record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control. Any child could have been turning the dial, and tuned in to that garbage.
>
> Some time back, I read that "topless" radio stations were fined for suggestive phrases. If you fine for suggestions, should not this station lose its license entirely for such blatant disregard for the public ownership of the airwaves?

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32. *Id.* at 400. Marino also argued FCC v. Pacifica Found., 438 U.S. 726, 728 (1978).

33. Illinois Citizens Comm. for Brdcst., 515 F.2d at 404. Judge Leventhal explained that the "excerpts cited by the Commission contain repeated and explicit descriptions of the techniques of oral sex" presented "in a context that was fairly described by the FCC as 'titillating and pandering.'" Moreover, they were broadcast from 10:00 a.m. to 3:00 p.m. "when the radio audience may include children—perhaps home from school for lunch, or because of staggered school hours or illness." *Id.* The citizens groups unsuccessfully sought rehearing en banc. *Id.* at 408 (per curiam order denying en banc rehearing). Judge Bazelon, the only one who voted for rehearing, issued a lengthy statement explaining his vote. *Id.* at 407–25.

34. *Id.* at 404 (citations omitted).

35. Miller v. California, 413 U.S. 15 (1972). The new standard had three parts: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (citations omitted).

> Can you say this is a responsible radio station, that demonstrates a responsibility to the public for its license?
>
> I'd like to know, gentlemen, just what *you're* going to do about this outrage, and by copy, I'm asking our elected officials the same thing.
>
> Incidentally, my young son was with me when I heard the above, and unfortunately, he can corroborate what was heard.[36]

Although the letter does not state the age of his son, Douglas later told *Broadcasting* magazine that he was fifteen at the time.[37]

The FCC forwarded the complaint to Pacifica. Pacifica responded:

> Mr. Douglas' complaint is based upon the language used in a satirical monologue broadcast of a regularly scheduled live program "Lunchpail," hosted by Paul Gorman. The selection was broadcast as part of a discussion about the use of language in society. The monologue in question was from the album, "George Carlin, Occupation: FOOLE," . . . On October 30, the "Lunchpail" program consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language. . . . Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society.
>
> The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. . . . To our knowledge, Mr. Douglas is the only person who has complained about either the program or the George Carlin monologue. . . .
>
> George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. . . .Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words

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36. The letter is reproduced in the Appendix to the Brief of Petitioner FCC at 2–3, FCC v. Pacifica Found., 438 U.S. 726 (No. 77-528). Douglas was a planning board member of Morality in Media. R. Wilfred Tremblay, *FCC v. Pacifica Foundation*, *in* FREE SPEECH ON TRIAL 219 (Richard A. Parker ed., 2003). Morality in Media's amicus brief described Morality in Media as

> [A] New York not for profit inter-faith charitable Corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states. It corresponds 8 times a year with over 50,000 recipients of its newsletter located in every state of the United States. Its Board of Directors and National Advisory Board are composed of prominent businessman, clergy and civic leaders.

Brief for Morality in Media as Amicus Curiae Supporting the FCC at 2, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528).

37. *WBAI Ruling: Supreme Court Saves the Worst for the Last*, BROADCASTING, July 10, 1978, at 20.

> to satirize as harmless and essentially silly our attitudes towards those words.
>
> [T]he inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding on the subject.[38]

Instead of issuing an NAL as it did in *Eastern Education* and *Sonderling*, the FCC issued a declaratory order.[39] According to Marino, an investigator in the Broadcast Bureau originally drafted a "boilerplate" forfeiture notice on grounds that the program was both obscene and indecent.[40] Marino knew that in a prior case, Judge Leventhal had expressed concern that the FCC's use of forfeitures pre-judged culpability.[41] He took a copy of the Carlin transcript home to his wife.[42] She read it and started laughing.[43] At that point, he knew that the FCC could not successfully prove the monologue was obscene.[44] Thus, he and others at the FCC drafted a declaratory order for the FCC's consideration.[45]

A. The FCC's Declaratory Order

The *Declaratory Order* recognized that section 326 of the Communications Act prohibited the FCC from engaging in censorship, but noted that the FCC also had an obligation to enforce § 1464. While the *Declaratory Order* claimed it was "not intended to modify our previous decisions recognizing broadcasters' broad discretion in the programming area," it asserted that the broadcast medium had "special qualities" that distinguished it from other forms of expression and was, therefore, subject to a different mode of analysis.[46] Specifically, it found that:

> Broadcasting requires special treatment because . . . (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference . . . ; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of

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38. The letter is reproduced in the Appendix to the Brief of Petitioner FCC at 3–4, *Pacifica*, 438 U.S. 726 (No. 77-528).

39. Citizen's Complaint Against Pacifica Foundation Station WBAI, *Memorandum Opinion and Order*, 56 F.C.C.2d 94 (1975) [hereinafter *Declaratory Order*].

40. Telephone Interview with Joseph Marino (Oct. 15, 2008) [hereinafter Marino Interview].

41. *See* Illinois Citizens Comm. for Brdcst. v. FCC, 515 F.2d 397, 403 (D.C. Cir. 1974) ("The procedure used by the FCC in issuing the Notice of Apparent Liability raises questions with regard to the rights of the licensee. First, it includes terms of conclusions, while the statute contemplates only charges.").

42. Marino Interview, *supra* note 40.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Declaratory Order*, *supra* note 39, at paras. 7–8.

> which the government must therefore license in the public interest.[47]

The *Declaratory Order* acknowledged that "the term 'indecent' ha[d] never been authoritatively construed by the Courts in connection with § 1464."[48] In light of the *Miller* and *Illinois Citizens* decisions, the FCC decided to "reformulat[e] the concept of 'indecent.'"[49] It concluded that "patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance" and thus, should be channeled to a more appropriate time rather than prohibited all together.[50] The FCC suggested that a more lenient definition of "indecent" would be appropriate during "late evening hours" when few children would be in the audience.[51]

Applying these considerations to WBAI's broadcast of the Carlin monologue, the FCC concluded that the language was indecent and prohibited by § 1464 because:

> [W]ords such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards . . . and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast.[52]

The FCC also explained its decision to issue a declaratory order instead of an *NAL*:

> A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language." Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.[53]

Although the FCC imposed no fine, it said that if subsequent complaints were received, it would take them into account at license renewal.[54]

At that time, the FCC had seven Commissioners—four Republicans and three Democrats. The FCC Chairman, Richard E. Wiley, a Republican,

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47. *Id*. at para. 9.
48. *Id*. at para. 10.
49. *Id*.
50. *Id*. at para. 11.
51. *Id*. at para. 12.
52. *Id*. at para. 14.
53. *Id*. at para. 15 (citations omitted).
54. *Id*. at para. 14.

concurred in the result.[55] Two Commissioners, Charlotte Reid and James Quello, issued concurring statements indicating that they believed that the broadcast of the language used in the Carlin monologue would be inappropriate at any time.[56] Commissioner James Quello explained that he disagreed with the majority's view that "such words are less offensive when children are at a minimum in the audience. Garbage is garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political, or scientific value."[57]

Commissioner Glen Robinson considered the First Amendment concerns at greater length in his concurring opinion, which was joined by Commissioner Ben Hooks.[58] But he ultimately concluded that the FCC could regulate offensive speech to the extent it constituted a public nuisance and that the FCC's decision represented a reasonable balance between the conflicting right of free speech and the right to have some protection from the undesired speech of others.[59]

B. The Purpose of Using a Declaratory Order

Several contemporaneous and subsequent events emphasize that the FCC intended the *Order* to have a broad application and to serve as a test case for its new interpretation of indecency.

Around the same time it issued the *Declaratory Order*, the FCC sent to Congress its *Report on the Broadcast of Violent, Indecent, and Obscene Material*.[60] The *Violence Report* discussed how despite the FCC's enforcement actions in *Eastern Educational Radio* and *Sonderling*, it was "apparent . . . that particularly on radio the problem of 'indecent' language has not abated and that the standards set forth in prior opinions has [sic] failed to resolve the problem."[61] The FCC expressed hope that its recently

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55. Marino was stunned that Wiley concurred. Marino Interview, *supra* note 40. However, Wiley did not remember concurring or why he would have done so. He said that he rarely wrote separate opinions when he was FCC Chairman because he felt that the FCC opinion spoke for him. He told me he supported the FCC's action at the time and still believes it was correct today. Telephone Interview with Richard E. Wiley, Former Chairman, FCC (July 24, 2009) [*hereinafter* Wiley Interview].

56. *See Declaratory Order*, *supra* note 39, at 102 (Reid, concurring); *id*. at 102–03 (Quello, concurring).

57. *Id.* at 103. Quello filed an amicus brief in *Fox*, along with others agreeing with the Second Circuit that the FCC acted arbitrarily and in violation of the First Amendment. Brief of Former FCC Commissioners and Officials as Amici Curiae Supporting Respondents, FCC v. Fox TV Stations, 129 S. Ct. 1800 (2008) (No. 07-582).

58. *Declaratory Order*, *supra* note 39, at 103–07 (Robinson, concurring).

59. *Id.* at 107.

60. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975) [hereinafter Violence Report].

61. *Id*. at 425.

issued *Declaratory Order* in *Pacifica* would "clarify the broadcast standards for obscene and indecent speech . . . ."[62]

In an interview with WBAI radio after the Supreme Court decision, then-former Chairman Wiley explained that the FCC had to enforce § 1464 but was not clear on the difference between obscenity and indecency.[63] The FCC had no position, but wanted finality more than anything else.[64] He noted that the FCC almost invited judicial review.[65] He thought that the FCC was uncomfortable in this area because of the First Amendment and wanted to know whether the FCC's responsibility extended beyond hardcore obscenity.[66] He noted that most broadcasters would not have used such language and that it was "too bad" that WBAI had not acted more responsibly.[67]

Commissioner Washburn confirmed in a 1979 speech that the FCC intentionally chose to issue the *Declaratory Order* to Pacifica to establish standards for "indecency." He explained that:

> When the "Seven Dirty Words" case reached us, . . . [o]ur dilemma was how to handle this and other complaints being received by the Broadcast Bureau about indecent language over the air. Congress mandated the FCC and the Department of Justice to enforce Section 1464 . . . But, unlike "obscenity," in the area of "indecency" we had no legal guidelines or definitions. We were searching for a way to meet the statute.
>
> The offensive speech, in the Pacifica complaint, . . .was not "obscene" within the appeal-to-the-prurient standard of the Supreme Court. Our General Counsel at that time, Ashton Hardy, advised that . . . it was doubtful the Commission would ever see a stronger case on which to establish FCC policy on what constitutes indecent speech within 1464 and to invite judicial review thereof. . . . I recall [Commissioner] Bob Lee saying at the time, "We need direction from the Court . . ."
>
> Our purpose, thus, was to clarify Commission authority. It was not our intention to penalize Pacifica Station WBAI, because the legal meaning of "indecent" was then so vague.[68]

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62. *Id*. The FCC attached a copy of the *Declaratory Order* to the *Violence Report*. *Id*. at 430 app. E.

63. *The Carlin Case: Interviews by Joey Cuomo & Mickey Waldman* (WBAI radio broadcast Mar. 30, 1978), a*vailable at* http://pacificaradioarchives.org/browse/recording.php?recid=296&catid=3.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Abbott Washburn, FCC Commissioner, Luncheon Address Before the Federal Communications Bar Association, Washington, D.C.: Indecency and the Law in Broadcasting (Mar. 7, 1979) [hereinafter Washburn Speech]. Commissioner Washburn sent a copy of this speech to Justice Blackmun, who filed it in the *Pacifica* case files.

C. Reconsideration and Review

Under the Communications Act, a person aggrieved by an FCC action may appeal the decision directly to a United States Court of Appeals, except in two situations: where the person (1) was not a party to the proceeding below, or (2) was a party, but intends to raise facts or arguments that had not been presented to the FCC.[69] In those situations, the person must seek reconsideration at the FCC before seeking judicial review.[70] Even though the FCC invited persons aggrieved to file petitions for reconsideration and to subsequently seek judicial review, only one party took up this invitation. The Radio Television News Directors Association (RTNDA) filed a petition for clarification seeking a ruling that the FCC "'does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as a part of a bona fide news or public affairs program.'"[71]

Pacifica opted to seek immediate judicial review in the D.C. Circuit. In its brief, Pacifica emphasized the relationship between the *Declaratory Order* and the *Report to Congress*:

> Although the *Order* was issued by way of response to a listener complaint, the *Order* itself is not limited to the facts of the specific complaint. Rather, it was issued in conjunction with, and as an integral part of, the *Commission's Report on the Broadcast of Violent, Indecent, and Obscene Material* . . . which [it] submitted to Congress on February 19, 1975, in response to Congressional directives.[72]

Pacifica further argued that while the *Declaratory Order* referred to patently offensive language, which describes sexual or excretory activities and organs, the sweep of the *Order* is much broader.[73]

> [U]nder the [FCC's] definition of 'indecent' any and all uses of certain words which . . . refer in a patently offensive manner to sexual or excretory functions or organs are banned whether such words, as actually used in context, describe sexual or excretory activities or organs or whether they are used colloquially in contexts where they

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69. 47 U.S.C. § 405(a) (2006).

> The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

Id.

70. *Id.*

71. Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Foundation, Station WBAI(FM), *Memorandum Opinion and Order*, 59 F.C.C.2d 892, para. 3 (1976) [hereinafter Citizen's Complaint].

72. Brief for Petitioner at 5–6, Pacifica Found. v. FCC, 556 F.2d 9 (D.C. Cir. 1977) (No. 77-528) (citation omitted); *see also* Violence Report, *supra* note 60.

73. Brief for Petitioner, *supra* note 72, at 11.

> cannot conceivably be construed as describing or even referring to sex or excretion.[74]

Thus, the effect of the FCC *Order* was to prohibit the broadcasts of the White House tapes, political speeches and rallies, and "many of the great works of literature including Shakespearean plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*."[75]

Pacifica also argued that § 1464 was unconstitutionally vague unless the term "indecent" was subsumed by the term "obscene" as defined in *Miller*.[76] The Carlin monologue was not obscene under the *Miller* test because (1) it did not appeal to any prurient interest and (2) it had literary and political value.[77] Finally, Pacifica argued that the special qualities of the broadcast medium did not justify suppressing nonobscene speech.[78]

In its brief, the FCC defended its special treatment of broadcasting based on the four factors identified in the *Declaratory Order*.[79] It argued that its order merely channeled patently offensive language to times when it was least likely to "be thrust upon unsupervised young children."[80]

> Accordingly, Pacifica's lengthy compilation of allegedly prohibited quotations from the Bible, secular works of literature, and the "Nixon tapes" represents a serious misinterpretation of the Commission's order. These materials were not presented to the Commission, even though Pacifica could have sought reconsideration.[81]

Thus, the FCC suggested—but did not explicitly argue—that Pacifica was precluded by § 405's exhaustion requirement from challenging the breadth of the FCC's ruling because it had not made that argument before the FCC.

A week before the oral argument, the FCC issued an order on reconsideration that narrowed the reach of the *Declaratory Order*. It rejected RTNDA's claim that the *Declaratory Order* would cause licensees

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74. *Id.* at 7.

75. *Id.* at 23.

76. *Id.* at 26–28.

77. *See id.*

78. *See id.* at 46. An amicus brief in support of Pacifica was filed by the San Francisco Chapter of the Committee for Open Media. It argued that the *Order* would have an especially harsh effect on the broadcast of plays attempting to realistically depict ghetto life. Brief of Committee for Open Media, San Francisco Chapter as Amicus Curiae Supporting Petitioner at 2, Pacifica Found. v. FCC, 556 F.2d 9 (D.C. Cir. 1977) (No. 75-1391) [hereinafter Open Media Br.]. As further evidence that the *Order* was overbroad, it cited studies showing that large numbers of children were in the broadcast audience even in the late evening hours. *Id.* at 16–17.

79. Brief for Respondents at 16–23, Pacifica Found. v. FCC, 556 F.2d 9 (D.C. Cir. 1977) (No. 75-1319).

80. *Id*. at 24.

81. *Id*. at 28.

to censor programming and inhibit broadcast journalism.[82] It emphasized that the order was "issued in a specific context."[83] It clarified that a licensee would not be held responsible for indecent language in covering live public events where journalistic editing was not possible.[84] However, it declined to provide further guidance in the absence of a concrete factual situation.[85]

III. THE D.C. CIRCUIT

The case was argued before Judges Tamm, Bazelon, and Leventhal by Joseph Marino for the FCC and Harry Plotkin for Pacifica. Marino did not expect that Judge Bazelon would vote to affirm the FCC, but had hoped Judge Tamm, a conservative jurist, would.[86] However, the D.C. Circuit voted two to one to reverse the FCC.[87] Writing for the court, Judge Tamm found that "[d]espite the Commission's professed intentions, the direct effect of its *Order* is to inhibit the free and robust exchange of ideas on a wide range of issues and subjects by means of radio and television communications."[88] He rejected the FCC's claim that it was merely channeling indecent language to certain times of the day: "In fact the *Order* is censorship, regardless of what the Commission chooses to call it."[89] Citing ratings that showed over one million children were watching television until 1:00 a.m., he agreed with Pacifica that the "Commission's action proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*."[90]

Because Judge Tamm found the FCC's action constituted censorship, which was prohibited by section 326 of the Communications Act, he did not address the FCC's argument that "indecent" differed from "obscene."[91] But, assuming *arguendo* that the FCC had the power to prohibit nonobscene speech from being broadcast, he found the FCC's order overbroad because it "sweepingly forbids any broadcast of the seven words *irrespective of context* or however innocent or educational they may be. . . . Clearly every use of these seven words cannot be deemed offensive even as

82. Citizen's Complaint, *supra* note 71, at para. 4.
83. *Id.*
84. *Id*. at 893 n.1.
85. *Id.* at para. 5.
86. Marino Interview, *supra* note 40.
87. Pacifica Found. v. FCC, 556 F.2d 9 (D.C. Cir. 1977).
88. *Id.* at 13.
89. *Id.*
90. *Id.* at 14.
91. *Id.* at 15.

to minors."[92] Thus, he characterized the FCC's action as a "step toward reducing the adult population to hearing or viewing only that which is fit for children" and a "classic case of burning the house to roast the pig."[93]

Judge Bazelon concurred, but thought it was necessary to go beyond Judge Tamm's decision and rule that, under the *Miller* test, the FCC's definition of "indecent" speech was "massively overbroad" because it failed to use local community standards, consider whether the work appealed to prurient interest, and judge the work as a whole.[94] He rejected the FCC's argument that regulation was justified by the privacy interests of unconsenting adults in their homes because any offense could be minimized by changing the channel.[95] He likewise dismissed the claim that regulation was justified by the presence of children in the audience.[96] While conceding that "no one would dispute that there is a public interest in stations airing programming suitable for children or that government has greater power to regulate speech aimed at children than speech aimed at adults,"[97] adults with normal sleeping habits would be limited to programs fit for children. If it were impractical to accommodate the competing interests of children and adults, the court should err on the side of under regulation because the harm to children could be minimized with warnings and parental supervision, but harm from over regulation was irremediable.[98]

Judge Leventhal dissented. He stressed that the FCC had only held that the specific broadcast was indecent, not that the broadcast of any one of the seven words would be indecent.[99] He thought that the "Commission's decision must be read narrowly, limited to the language 'as broadcast' in the early afternoon."[100] While he recognized that Carlin was "a comedian of stature, and a social satirist," whose monologue might be appreciated by a "mature audience,"

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92. *Id.* at 17 (emphasis added). Judge Tamm also concluded that the FCC's action was vague because it failed to define "children," noting that a nineteen-year-old had different needs than a seven-year-old. *Id.*

93. *Id.* at 17 (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)). He also found no empirical support for the FCC's claim that, had it not taken action, "filth [would] flood the airwaves," and suggested that market forces would limit the broadcast of offensive language. *Pacifica*, 556 F.2d at 18.

94. *Pacifica*, 556 F.2d at 21 (Bazelon, J., concurring).

95. *Id*. at 26.

96. *Id.* at 28.

97. *Id.* at 27.

98. *Id.* at 27–28. Judge Bazelon also found the FCC's decision based on undocumented assumptions that most parents would consider such language unsuitable for children and that parents were less able to control their children's listening habits than their access to other media. *Id.* at 28.

99. *Pacifica*, 556 F.2d at 31 (Leventhal, J., dissenting).

100. *Id.* at 32.

> every society has special vocabularies appropriate only for special groups, times and places. What the licensee did here was to broadcast them broadside, in houses and elsewhere; and to present the persistent, almost lavishly loving reiteration of the special words in an afternoon broadcast when children were likely in the audience.[101]

In Leventhal's view, the FCC's action reflected "a broad consensus of society, the view that the great bulk of families would consider it potentially dangerous to their children . . . ."[102] While families should have the means to choose programming appropriate for children, the pervasiveness of broadcasting radio made that impossible. Since a majority of families with school-aged children had working mothers, children would be listening unsupervised.[103] Although children might hear these words elsewhere, hearing them broadcast created the impression that their use was generally acceptable.[104]

Judge Leventhal saw the FCC's action as an appropriate time, place, or manner regulation rather than censorship.[105] While acknowledging that vagueness was "to some extent inherent" in the concept of indecency, he thought that the judicial review would ensure protection for works of literary, artistic, political, or scientific value.[106] In sum, the FCC had made an appropriate constitutional trade-off between assisting parents in protecting young children and protecting privacy versus free speech interests.[107]

The FCC, with the support of the DOJ, promptly sought rehearing *en banc*.[108] Its petition emphasized the importance of deciding the statutory question—that is, "whether the word 'indecent' as used in § 1464 has a separate meaning from the term 'obscene.'"[109] The FCC agreed with Judge Leventhal that its "order was a declaration on a specific set of facts. When the Commission is confronted with a different set of facts, it can then determine whether the principles announced in this order should be applied, modified, or extended."[110] The D.C. Circuit denied rehearing in an unpublished order on May 10, 1977.[111]

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101. *Id.* at 33.
102. *Id.*
103. *Id.* at 34.
104. *Id.*
105. *Id.* at 34 (Leventhal, J., dissenting).
106. *Id.* at 35.
107. *Id.* at 37.
108. Petition for Rehearing and Suggestion for Rehearing En Banc, Pacifica Found. v. FCC, 556 F.2d 9 (D.C. Cir. 1977) (No. 75-1391).
109. *Id*. at 1–2.
110. *Id*. at 8.
111. Although the suggestion for rehearing en banc was denied per curium, the *Order* notes that four of the nine Judges—Leventhal, McKinnon, Robb, and Wilkey—would have

IV. THE SUPREME COURT DECISION IN *PACIFICA*

The FCC filed its petition for certiorari on October 7, 1977.[112] Normally, the Solicitor General's office would represent the FCC in seeking review in the Supreme Court.[113] Here, although the DOJ joined the FCC in defending its *Order* in the D.C. Circuit, it did not join in the petition for certiorari.[114] This change of position may have been due to the change in administration. Democrat Jimmy Carter became President in January 1977, and in March, he appointed Wade H. McCree to replace Robert H. Bork as Solicitor General.[115] However, the Republican Chairman of the FCC, Richard Wiley, served until October 13, just a few days after the FCC's certiorari petition was filed.[116]

A. Decision to Grant Certiorari

The Court took up whether to grant certiorari at its conference on January 6, 1978.[117] The pool memo prepared for this conference by Justice Powell's clerk, Jim Alt, summarized the facts, decisions below, and contentions of the parties.[118] The FCC had argued that certiorari should be granted to decide whether the unique quality of the broadcast media

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granted the suggestion. A copy of the *Order* is attached to the FCC's Brief. Brief of Petitioner FCC app. at 1, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528).

112. Petition for Writ of Certiorari, *Pacifica*, 438 U.S. 726 (1978) (No. 77-528).

113. The United States, represented by the DOJ, is automatically a party in appeals of the FCC taken under § 402(a) of the Communications Act. 47 U.S.C. § 402(a) (2006); 28 U.S.C. § 2344 (2006). However, even though the Attorney General is responsible for the interests of the Government in all court proceedings under that chapter, an agency whose interests would be affected if its order were set aside may appear as a party and be represented by its own counsel. 28 U.S.C. § 2348 (2006).

114. Brief for the United States, *Pacifica*, 438 U.S. 726 (No. 77-528).

115. Marino recalled that Bork decided not to support seeking certiorari. Although Marino did not attend the meeting with Bork, he suspects that the petition was circulated for comment, and that the Criminal Division, which was responsible for enforcing § 1464, had a different view than the Antitrust Division, which had been involved in the case in the D.C. Circuit. This theory is consistent with the explanation given at oral argument. *See* Marino Interview, *supra* note 40.

116. Because the FCC is an independent agency, Commissioners may continue to serve out their terms after a new administration takes over. In this case, Wiley agreed to remain as Chairman until a new Chairman could be appointed and confirmed. Wiley Interview, *supra* note 55. Democrat Charles Ferris became FCC Chairman on October 17, 1977.

117. Preliminary Memorandum for Jan. 6, 1978 Conference, No. 77-528 (Dec. 13, 1977) [hereinafter Pool Memo]. Copies of this Pool Memo were found in the papers of both Justice Blackmun and Justice Powell.

118. Pool Memo, *supra* note 117. The practice of pooling clerks, dividing up the filings, and having a single memo circulated among all the participants began in 1972 as a way to reduce the workload as a result of the increasing number of cert petitions being filed. Some Justices, including Justice Stevens, did not participate in the pool. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 140 (8th ed. 2008).

justified its action.[119] In opposing certiorari, Pacifica argued that the D.C. Circuit correctly found the Commission's *Order* overbroad and that the DOJ's decision not to support certiorari demonstrated that the case posed no important issue of federal law.[120]

The pool memo recommended against hearing the case, noting that "[b]ecause of the legislative nature of the Commission's order and the divergence of views on D.C. Cir., this case comes here in rather an unfocused state."[121] Moreover,

> it seems likely that the Commission's approach, with its focus on words, rather than on words and context, was not sufficiently discerning even taking into account the special problems of the broadcast media. The Commission made it quite clear that a broadcast's claim to serious merit would make no difference in determining whether it was "indecent" except, perhaps, if the broadcast were late at night. As Judge Tamm pointed out, this would keep a fair number of serious works off the air at times when most adults could listen. Even granting validity to the Commission's "channeling" approach, one would think that it might have taken into account both the adults' interest in access to such works, and the possibility that children could be shielded from them.[122]

The memo concluded that "[g]iven the breadth of the declaratory portion of the Commission's order, and its potential chilling effect on broadcasters, the majority's overbreadth approach seems more appropriate than the dissenter's as-applied approach. Thus, unless the Court is inclined to review the majority's overbreadth holding, the case probably is not worth taking."[123]

The Justices vote at conference whether to hear a case. Generally, four votes are needed for a case to be accepted.[124] Chief Justice Burger and Justices White, Rehnquist, and Stevens voted in favor of certiorari.[125] Justices Powell and Blackmun voted "join 3," meaning that they would

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119. Pool Memo, *supra* note 117, at 8.

120. *Id*. at 9.

121. *Id*.

122. *Id*. at 9–10.

123. *Id*. at 10. On Justice Powell's copy of the pool memo, Alt wrote on the first page: "I would deny this petition." On the last page he explained: "Because I think the FCC's declaratory order was overbroad and showed a *startling insensitivity* to the interests of everyone except children, I would deny." *Id*. Justice Blackmun's clerk, Ruth Glushien, agreed with the recommendation, adding: "The FCC clearly intended its order to guide broadcasters generally; hence the overbreadth concern is apt. I think the majority's view that the order *was* overbroad under 47 USC § 326 is well-supported. Hence, I see no reason to take the case." *Id.* at 10 (on file in Blackmun Papers).

124. O'BRIEN, *supra* note 118, at 211.

125. Tally Sheet (Jan. 6, 1978), FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528) (Powell files) (showing vote at conference).

vote in favor of hearing the case if three others did.[126] Justices Brennan, Stewart, and Marshall voted to deny certiorari.[127]

Justice Powell's notes on the tally sheet indicate that the Chief Justice voted to hear the case because he wanted to reverse the D.C. Circuit. Powell's join-3 vote seems to have been prompted by his agreement with Judge Leventhal and disagreement with Judge Bazelon. At the top of the pool memo Powell wrote: "the [FCC's] definition [of indecent language] is certainly broad, but J. Leventhal (not a judge unsympathetic to 1st amend') read it narrowly & would sustain the FCC order. TV & Radio should not have the latitude of the Miller standard & FCC was addressing an urgent need."[128] And, next to the statement that Bazelon had questioned the FCC's premise that parents did not want children to hear indecent language and were unable to control children's listening, he wrote: "Bazelon must not have children."[129]

B. The Briefs

The FCC's brief presented two issues.[130] The first was whether the term "indecent" as used in § 1464 was subsumed within the term "obscene" or had a special meaning as applied to broadcasting.[131] The FCC argued that the term should be given special meaning because (1) children have easy access to radio and are often unsupervised; (2) "radio receivers are in the home, where individual rights to privacy are entitled to particular respect;" (3) nonconsenting adults may tune in without warning; and (4) the scarcity of frequencies required licensing in the public interest.[132]

The second issue was whether the FCC reasonably concluded that certain words in the Carlin monologue were "indecent" as broadcast.[133] The FCC argued it was reasonable to conclude that Pacifica "abused its special trust by broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual and excretory organs and activities in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience."[134]

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126. O'BRIEN, *supra* note 118, at 215.

127. Certiorari was granted on January 9, 1978. FCC v. Pacifica Found., 434 U.S. 1008 (1978).

128. Pool Memo, *supra* note 117, at 1.

129. *Id*. at 7.

130. Brief for the FCC at 2, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528).

131. *Id.*

132. *Id.* at 24–25.

133. *Id.* at 2.

134. *Id.* at 27. Amicus briefs in support of the FCC were filed by Morality in Media, Brief of Morality in Media, Inc. as Amicus Curiae Supporting Petitioner FCC, *Pacifica*, 438 U.S. 726 (No. 77-528), and the U.S. Catholic Conference, Brief of United States Catholic Conference as Amicus Curiae Supporting Petitioner FCC, *Pacifica*, 438 U.S. 726 (No. 77-

Respondent Pacifica argued that the FCC's ruling set a "standard of 'decency' applicable to all broadcasters" that prohibited the "unexpurgated broadcast of great works of classical and contemporary literature, including even passages from the *Bible.*"[135] Pacifica also argued that the FCC's construction of the term "indecent" was precluded by *Hamling v. United States*, which had construed "indecency" as used in § 1461 of the Criminal Code, which contained language similar to § 1464, as "subsumed" by the definition of "obscene" set forth in *Miller.*[136]

Pacifica further argued that the FCC's order could not be justified based on the unique qualities of broadcasting. First, Pacifica argued that the scarcity rationale "cannot justify the Commission's action which serves to lessen the number of available voices, and thus aggravates, rather than alleviates, the problem of scarcity."[137] Second, the FCC's attempt to protect unsupervised children was a "classic example of unconstitutional overbreadth."[138] Third, the FCC's action unconstitutionally intruded into the role of parents.[139] Fourth, radio and television broadcasts did not invade the privacy of the home, but were invited; thus, undesired content could be avoided.[140]

The United States, represented by the Solicitor General, also filed a brief as a Respondent. It argued that it was "impossible to read the Commission's order in any way except as an absolute ban, for most

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528).

135. Brief for Pacifica Found. at 11, *Pacifica*, 438 U.S. 726 (No. 77-528).

136. *Id.* at 26.

137. *Id.* at 44.

138. *Id.* at 47.

139. *Id.* at 53–55.

140. *Id.* at 56–59. Several amicus briefs were filed in support of Pacifica. For example, the ABC, CBS, and NBC networks, filing jointly with the NAB, RTNDA, and others, argued that

> Although the Commission has only proscribed here the broadcast of a comic monologue discussing society's use of and attitude toward 'dirty words,' the authority it has asserted would clearly extend much further. If successful here, the Commission would be placed in the position of a censor, free to forbid whatever is objectionable to "the most vocal and powerful of orthodoxies."

Brief for American Broadcasting Company, Inc. et al. as Amici Curiae Supporting Respondent at 13, *Pacifica*, 438 U.S. 726 (No. 77-528) [hereinafter ABC Br.] (citations omitted). The ACLU and others argued that the FCC's *Order* was intended to establish broad, nationwide standards for the broadcast of "indecent" language, that minors had a First Amendment right to listen to the radio free of FCC censorship, and that the FCC lacked legal authority to issue a declaratory ruling. Brief of the American Civil Liberties Union et al. as Amici Curiae at 6–11, *Pacifica*, 438 U.S. 726 (No. 77-528). The Writers Guild argued that "to forbid the use of words is to forbid the expression of ideas and feelings," and that it violated the First Amendment to equate principles of free speech "with those which govern property nuisances." Brief of Writers Guild, West, Inc. as Amicus Curiae in Support of Respondent at 2, 5, *Pacifica*, 438 U.S. 726 (No. 77-528) (original formatting omitted).

broadcasting hours, on the utterance of any of the specified words, regardless of context."[141] Because section 326 of the Communications Act prohibited the FCC from censoring broadcasts protected by the First Amendment, the FCC could not invoke the Act's public interest authority to "wholly ban from the airways, at least for most hours, one species of language on grounds that have nothing to do with 'balance' or diversity."[142]

At the same time, the United States disagreed with Pacifica that the term "indecency" was subsumed by the term "obscene." It argued that the "use of the disjunctive indicates that the prohibition encompasses language which is *either* obscene *or* indecent *or* profane."[143] While acknowledging that the "category of 'indecent' words and phrases is not self-defining," most of the words used by Carlin would fall into that category.[144] It concluded that if "the First Amendment does not prevent it, we believe the Commission still remains free to apply the statute as a nuisance law."[145] However, the United States concluded that the FCC's action did violate the First Amendment. It could not be justified as a "time, place, and manner restriction" because offensive broadcasts could easily be avoided by turning the radio off and the "rights of adults cannot be abridged for the sake of the children."[146] The United States suggested that a carefully drafted partial ban on indecent broadcasts could be consistent with the First Amendment.[147] However, the FCC's suggestion that indecent language might be permitted after 10:00 p.m. was "too grudging, and too arbitrary, to salvage the rule."[148]

C. Preparation for Oral Argument

To prepare the Justices for an oral argument, the clerks typically draft "bench memos," summarizing the facts, issues, and arguments; recommending questions for oral argument; and suggesting how their

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141. Brief for the United States at 14, *Pacifica*, 438 U.S. 726 (No. 77-528).

142. *Id.* at 19.

143. *Id.*

144. *Id.* at 20.

145. *Id.* at 23.

146. *Id.* at 35. The United States also suggested that children hearing "indecent" language on the radio was hardly a "matter of the gravest concern" because they heard the same words elsewhere. *Id.* at 35–36.

147. Brief for the United States at 36–37, 38 *Pacifica*, 438 U.S. 726 (No. 77-528).

148. *Id.* at 38. In the final section, titled "A Caveat," the United States stressed that neither the FCC nor the DOJ was entirely powerless to deal with extreme cases, suggesting that sanctions could constitutionally be imposed where indecent words were "spewed forth without any arguable justification in a conscious attempt to shock, offend or outrage" or in broadcasts specifically directed to young children. *Id.* at 39–41. The FCC's short reply brief highlighted the areas of agreement between the DOJ and the FCC and stressed that its ruling "was limited to the facts complained about" and had "not imposed a flat ban on these or any other words." Petitioner's Reply Brief at 4, 7, *Pacifica*, 438 U.S. 726 (No. 77-528).

Justice might vote.[149] Both the Powell and Blackmun clerks recommended that their Justices affirm the D.C. Circuit's decision.[150]

1. Justice Powell's Chambers

James Alt's bench memo for Justice Powell identified three issues for decision. On the first issue, whether the validity of the *Order* should be considered on its face or as applied, Alt disagreed with Judge Leventhal, despite his respect for him.[151] Alt thought that the FCC's express intent in issuing a declaratory ruling was to lay down general rules to govern future conduct, and that Judge Leventhal gave insufficient weight to concerns that the rules would deter constitutionally protected speech.[152] Alt wrote: "Although I realize that you are no great fan of overbreadth analysis, I would urge that, at least in the first instance, you consider whether the rules are 'substantially overbroad,' and hence subject to facial invalidation."[153]

As to the second issue, whether the term "indecent" could be construed to mean something other than "obscene," Alt concluded that "Congress probably meant to reach all language that constitutionally could be proscribed, whether or not it is 'obscene.'"[154] Justice Powell agreed, noting in the margin: "Since 1464 include[s] 'indecent', we must reach const. issue."[155]

Regarding the third issue, Alt found two features of the FCC's order especially troublesome.[156] First,

> the fact that unwilling adults are free to tune out offensive programming - to avert their ears, in effect - seems to me to cut strongly against the notion that the FCC must be able to protect adults whose sensitivities might be offended.
>
> The second feature . . . is that the FCC Order makes almost no attempt to accomodate [sic] the asserted interest in protecting children with adults' interest in hearing programming that is permissible for willing

149. *See* O'BRIEN, *supra* note 118, at 141.

150. Bench Memorandum from Ruth Glushien, Clerk to Justice Blackmun, to Justice Blackmun (Apr. 17, 1978) (on file in Blackmun Papers) [hereinafter Glushien Bench Memo]; Bench Memorandum from James Alt, Clerk to Justice Powell, to Justice Powell (Apr. 17, 1978) (on file in Powell Papers) [hereinafter Alt Bench Memo].

151. Alt Bench Memo, *supra* note 150, at 4.

152. *Id.* at 4–5.

153. *Id.* at 5.

154. *Id.* at 6.

155. *Id*.

156. *Id*. at 14. Alt thought Pacifica's strongest argument was that under *Cohen v. California*, 403 U.S. 15 (1971), the FCC could not ban nonobscene speech because it offended some people. In *Cohen*, the Court noted that people who were offended by a man's jacket bearing the words "Fuck the Draft" "could effectively avoid further bombardment of their sensitivities by simply averting their eyes." *Id.* at 21.

adults.[157]

Alt believed that "context must count for something, both to protect the children's own First Amendment rights, and to provide a measure of protection to adults' rights."[158] Because the FCC completely failed to take context into account, he "would hold the FCC order overbroad on its face."[159]

Alt attempted to sketch out a "constitutionally permissible scheme of regulation"[160] and, noting that Powell took the position in his dissent in *Rosenfeld v. New Jersey* that some language, which was neither obscene nor fighting words, may be so offensive that government could protect unwilling listeners,[161] Alt suggested that the FCC could constitutionally prohibit "deliberately assaultive language" that lacked any value.[162] Works of value with offensive language, such as the Carlin monologue or the Nixon tapes, could be channeled into time slots where the fewest number of unsupervised children would be listening. He also suggested that the FCC could not constitutionally prohibit the broadcasts that "contain only occasional offensive language," such as "filmed news reports of public demonstrations."[163] Thus, he recommended that the case be sent back to the FCC for a "second attempt."[164]

Justice Powell was not impressed by Alt's arguments. In handwritten notations in the margins, he indicated that although he believed that verbal assaults on an unwilling audience could be constitutionally prohibited, he did not view this case "as involving adults" or preventing them from having access to programming.[165] Next to Alt's observation that it is "not easy" to sketch out a constitutionally permissible regulation, he wrote "impossible."[166]

In pre-argument notes, Powell wrote that "[m]uch depends on how one reads FCC order" and that Judge Leventhal read it narrowly.[167] He

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157. *Id.* at 14 (internal quotation marks omitted).

158. *Id*. at 15 (citations omitted).

159. *Id*.

160. *Id.*

161. Rosenfeld v. New Jersey, 408 U.S. 901, 905–06 (1972) (Powell, J., dissenting). In this case, the defendant was prosecuted under a New Jersey statute for using the word "motherfucker" four times during an address to a public school board meeting. *See generally id.*

162. Alt Bench Memo, *supra* note 150, at 15.

163. *Id.* at 16.

164. *Id.*

165. *Id*. at 2, 13–14.

166. *Id*. at 15.

167. Miscellaneous Preargument Notes by Justice Powell, 77-528 FCC v. Pacifica Foundation (Apr. 18, 1978), *in* THE LEWIS F. POWELL, JR. PAPERS, 1921–1998, at 2 (Lewis F. Powell, Jr. Archives, Washington and Lee U., Lexington, Va.).

observed that "Leventhal's view – strongly endorsed by FCC's briefs – is that it is the 'holding' that must be viewed as being all that is before us," and that the rest of the FCC's order was only "informational."[168] Thus, before oral argument, Justice Powell seemed to lean strongly in favor of reversing the D.C. Circuit, even though his clerk had recommended otherwise.

2. Justice Blackmun's Chambers

Blackmun clerk Ruth Glushien also recommended affirming the D.C. Circuit and finding the FCC *Order* overbroad under either the First Amendment or section 326 of the Communications Act.[169] As to how broadly to read the FCC *Order*, she observed that Judge Leventhal had read it "merely as proscribing Mr. Carlin's particular language 'as broadcast.'"[170] However, she had the impression that the FCC was "trying to reduce the size of its target after the fact," because

> this was the first occasion since Miller v. California's reformulation of the definition of obscenity, that the Commission had had a chance to treat the problem of "indecent" language and that the opinion would "clarify the standards which will be utilized in considering the public's complaints" about the broadcast of indecent language. [Paragraphs] 11 and 12 of the opinion deliberately sketch out the applicable principles and only then, in [Paragraph] 14, does the Commission go on to apply them to the Carlin broadcast.[171]

Moreover, the FCC issued a *Declaratory Order* instead of an *NAL* because it was "admirably suited . . . to clarify[ing] the standards which the Commission utilizes to judge indecent language."[172] Thus, Glushien "would take the Commission's order as a broad ranging one."[173]

Next, she considered whether the FCC had authority to regulate nonobscene speech.[174] Glushien agreed with the Solicitor General that "the

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168. *Id*.

169. Glushien Bench Memo, *supra* note 150.

170. *Id.* at 4.

171. *Id*. at 5 (citations omitted).

172. *Id*. at 6. (internal quotation marks omitted).

173. *Id*. at 7.

174. Pacifica had argued that the FCC lacked authority because when § 1464 "states that 'any obscene, indecent or profane language by means of radio communication' is punishable, 'indecent' is mere surplusage, subsumed in the category of 'obscene' language." *Id.* at 8. Pacifica relied on two cases, *United States v. Twelve 200-Foot Reels of Super 8mm Film*, 413 U.S. 123 (1973), and *Hamling v. United States*, 418 U.S. 87 (1974), which had construed similar language in § § 1462 and 1461, respectively, of Title 18, as limited to material meeting the *Miller* standard for obscenity. The FCC responded that that "although *Hamling* and *Twelve 200-Foot Reels* might support Pacifica's argument, the unique nature of the airwaves suffices to impute to Congress the intention to regulate non-obscene speech, because of the medium's scarcity and intrusiveness, particularly as to children." Glushien Bench Memo, *supra* note 150, at 10.

use of the disjunctive [in § 1464] indicates an intention to have three separate categories" of prohibited broadcasts—obscene, indecent, and profane.[175]

Third, Glushien considered whether the rule was overbroad. She disagreed with the FCC's argument that overbreadth scrutiny was improper in an adjudicatory proceeding because "the agency functionally intended to use the adjudicatory proceeding as the occasion for announcing a new standard; [and i]f allowed to stand unchallenged, the de facto rule would chill the exercise of First Amendment rights by other broadcasters."[176] She noted that Judge Leventhal's argument that Pacifica had failed to object to the breadth of the rule by seeking reconsideration presented the "most serious challenge to overbreadth analysis."[177]

On the substance, Glushien thought that the Solicitor General had provided the "best analysis."[178] Its brief argued that the Court had never applied a "special standard for mixed audiences of children and adults."[179] Moreover, it distilled a three-part test from the "nuisance regulation cases: (a) How offensive, to how many people, is the disputed speech; (b) how captive is the audience of unwilling listeners; (c) how great a deterrant [sic] effect on speech will the ban have?"[180] Although Glushien thought that the FCC's action could be found reasonable under this test, the United States reached the opposite conclusion.[181]

Finally, Glushien addressed the "close question" of whether the rule was constitutional as applied.[182] The FCC had presented no empirical data to support children's viewing patterns, while *amici* American Broadcasting Company et al. offered data suggesting that few children listened to the radio at 2:00 p.m.[183] Moreover, the FCC had received only one complaint, and the radio station had warned that vulgar language would be used.[184] Additionally, "the premise that such language was completely unexpected . . . is also a little hard to swallow . . . [because] WBAI . . . is widely known for 'hip' Greenwich Village-type broadcasting, with several hours a week

175. Glushien Bench Memo, *supra* note 150, at 11. Because the FCC had authority under § 1464, she saw no reason to reach the question of whether section 303(g) of the Communications Act, which allows the FCC to regulate to promote the effective use of radio, granted the FCC authority to regulate indecent speech. Glushien Bench Memo, *supra* note 150, at 12.

176. Glushien Bench Memo, *supra* note 150, at 13.

177. *Id*. at 14.

178. *Id.*

179. *Id.*

180. *Id.* at 15.

181. *Id.* at 16–17.

182. *Id.* at 18.

183. *Id.*

184. *Id.*

of programming on gay rights, Puerto Rican nationalists, and what-have-you."[185] On the other hand, the Carlin monologue "focuse[d] on indecent words in a concerted and protracted way, and in the hands of a jury I would not be surprised if the dialogue was held to constitute 'a conscious attempt to shock, offend or outrage.'"[186] Glushien recommended affirming the D.C. Circuit "either on the ground of over-breadth or by holding Section 1464 to have been applied beyond its constitutional limit."[187]

Justice Blackmun's notes suggest, however, that he was more inclined to agree with Judge Leventhal. Next to the summary of the D.C. Circuit judges' opinion, he wrote "Leventhal did his best to save."[188] In the margin, next to the question of whether the case presented only the narrow question of whether the words were indecent as broadcast, he wrote "Quaere whether overbreadth properly raised below" and "this is difficult."[189] At the bottom of the page, he wrote "Stay with Leventhal."[190]

D. The Oral Argument

The oral argument took place on April 18–19, 1978. Joseph A. Marino argued for the FCC.[191] He began by pointing out that the FCC and DOJ agreed that in enacting § 1464, Congress intended to prohibit the broadcast of both obscene and indecent speech and that they were not the same thing.[192] He described the words in the Carlin monologue as "verbal taboos" or "verbal slaps."[193] He argued that Judge Leventhal's dissent had properly construed the FCC's *Order*.[194] Although Pacifica and the DOJ presented the FCC's *Order* as a "flat ban," it was only a *Declaratory Order*

185. *Id.* at 18–19.

186. *Id.* at 18.

187. *Id.* at 19.

188. Miscellaenous Preargument Notes of Justice Blackmun, 77-528 FCC v. Pacifica Foundation (on file in Blackmun Papers).

189. *Id.*

190. *Id.*

191. By this time, Marino was no longer the head of Litigation and was working in the Common Carrier Bureau. He asked to keep the *Pacifica* case when he went to the Bureau, so he was able to work on the briefs and argue in the D.C. Circuit. By the time briefs needed to be filed in the Supreme Court, Ferris had become Chairman. Marino was surprised when then General Counsel Robert Bruce asked him to write the brief. Marino agreed to do the brief if he could argue the case. He had never argued in the Supreme Court before. Marino Interview, *supra* note 40.

192. Transcript of Oral Argument at 2, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528), *reprinted in* 101 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1977 TERM SUPPLEMENT 678 (Philip B. Kurland & Gerhard Casper eds., University Publications of America 1979) [hereinafter Kurland & Casper].

193. *Id.*

194. *Id.* at 677.

limited to the facts presented, and at heart, an attempt to protect children by channeling such programming to times when children were unlikely to be in the audience.[195]

Marino finished his argument in about nine minutes with no interruptions and was about to sit down when the Justices started asking questions.[196] Justice Stevens wanted to know whether saying the same words on CB radio would be a crime, since the statute seemed to apply to all forms of radio communication.[197] Marino was flustered by the question, and after a long pause, said that the FCC had no position on that issue.[198] Justice Stevens tried again, asking whether the same words in the same statute could mean different things in different proceedings.[199] Marino explained that the DOJ was responsible for criminal enforcement, while the FCC could take only administrative action.[200] The Chief Justice asked whether the FCC might consider that a CB operator used such words when the CB license came up for renewal, and Marino agreed that the FCC would consider it under the public interest standard of the Communications Act.[201]

Another Justice tried again to pin Marino down as to whether the word "indecent" could mean one thing for purposes of the FCC's administrative enforcement, and something else for purposes of the DOJ's criminal enforcement.[202] The Chief Justice tried to help him out: "The same conduct, the same words, whether they were ultimately found to be criminal or non-criminal, might constitute the basis for not renewing a license, might they not?"[203] Marino agreed that the FCC could, and did, address indecent language under the public interest standard, but "felt that since that specific prohibition has been in the statute [18 U.S.C. § 1464], it would try to give some concrete meaning to it, and limit it as much as possible in the light of this Court's opinions in First Amendment cases."[204]

Harry M. Plotkin, of Arent Fox Kintner Plotkin & Kahn, argued for

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195. *Id.* at 679.

196. This can be heard when listening to the oral argument. FCC v. Pacifica Foundation *Oral Argument*, OYEZ.ORG, http://www.oyez.org/cases/1970-1979/1977/1977_77_528/argument (last visited Nov. 15, 2010).

197. Kurland & Casper, *supra* note 192, at 680; *see also* FCC v. Pacifica Foundation *Oral Argument*, *supra* note 196, for clarification of which Justice was speaking throughout.

198. *See* Kurland & Casper, *supra* note 192, at 680–81; *see also* FCC v. Pacifica Foundation *Oral Argument*, *supra* note 196, for descriptions of tone and nature the oral argument.

199. *Id.* at 681.

200. *Id.* at 681–82.

201. *Id.* at 682–83.

202. *Id.*

203. Kurland & Casper, *supra* note 192, at 684.

204. *Id.*

Pacifica. He stressed that WBAI was a "noncommercial educational station in New York, with a limited audience."[205] It aired the Carlin recording preceded by a warning in the context of a serious discussion program. One Justice asked whether the warning would lead young people to turn off the program or whether it was intended as a "come-on."[206] Plotkin replied that it was not intended as a come-on because "this is not the type of station that's devoted to commercial enterprises, this was not a [pandering] program, it's not a titillating program, it's a station which does devote itself to the unusual programs, to highly controversial programs, to a wide variety of programming."[207]

Justice Marshall seemed skeptical:

> THE COURT: But of course the child that happens to tune in knows what kind of station it is?
>
> MR. PLOTKIN: Oh, yes; yes. The child was sitting with his father, and presumably—
>
> THE COURT: No, I say the average child knows that this is an educational station which has a broad range of programs—how in the world could a child know that?
>
> MR. PLOTKIN: How could he know it's educational?
>
> THE COURT: Yes.
>
> MR. PLOTKIN: Well, this particular child, we know very little about him.[208]

Plotkin moved on to argue that the FCC had acted inconsistently by taking action against Pacifica for indecent language, while at the same time concluding that the First Amendment precluded it from taking action against violent programs. Although conceding that § 1464 prohibited indecent but not violent programming, Plotkin argued that the statute did not give the FCC authority to issue a general declaration that certain words were banned "even though they have literary, artistic or scientific value."[209]

This claim prompted Justice Marshall to interject:

> THE COURT: Are you arguing now that this has literary or artistic value?
>
> MR. PLOTKIN: Well, as a matter of fact, in the over-all context, yes, there was; yes. The words themselves may not, but in the over-all context, yes, Your Honor. . . .
>
> THE COURT: This is educational, in your view?

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205. *Id.* at 685. The Chief Justice asked for clarification and Plotkin replied: "It's a noncommercial educational station. That means it's a station licensed [to] a nonprofit organization . . . there can be no commercials on it, and its programs are of an educational nature. It's like WETA here in Washington; the same type of station." To which Justice Rehnquist quipped, "Almost!" and the audience laughed. *Id.* at 686.

206. *Id.*

207. *Id.*

208. Kurland & Casper, *supra* note 192, at 687.

209. *Id.* at 688.

> MR. PLOTKIN: The question as to whether it's educational or not was not involved in this case. As to whether it has artistic literary or scientific value, yes. Even Commissioner Robinson, who concurred in the case, on a very narrow point, said that if he had to judge upon whether it had artistic, literary or scientific value, said he would come down and decide that it did have it. But, he agreed with the Commission that you don't look at context when children are likely to be in the audience.
>
> THE COURT: Well, I'm not an expert, but if that's artistic, deliver me.[210]

After the laughter died down, Plotkin moved on to his statutory argument. He pointed out that in *Federal Communications Commission v. ABC*, the Court overturned an FCC regulation interpreting a criminal statute differently than the DOJ.[211] He drew a parallel to this case, claiming that § 1464 used "exactly the same type of words" as § 1461,[212] which had been before the Court in *Hamling*.[213] He said, "this Court has specifically held that, as a matter of statutory construction, that when those words are used, the words 'indecent, filthy, vile and obscene' must mean the same as 'obscene'" to avoid vagueness.[214] At this point, Justice Rehnquist interjected, "To say 'hell' may be a little bit of an overstatement, may it not?"[215] Noting that Justice Rehnquist wrote the *Hamling* opinion, Plotkin conceded it was not a holding:

> technically that was 1461 there and this is 1464. But the words in the statute are the same. The meaning was the same. We have a First Amendment medium here just as we do there, and it seems to me that not only do we have a First Amendment medium under the First Amendment, but Section 326 of the Communications Act specifically says that the Commission shall have no power of censorship.
>
> Now, this is an entirely different thing from the fairness doctrine, or lack of balance, where, because this is a medium where scarcity is a factor, the Court has said that in order to make sure that the medium was made available to a maximum number of people, we will impose

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210. *Id.*

211. In *FCC v. ABC*, 347 U.S. 284 (1954), the Supreme Court upheld a decision enjoining enforcement of the FCC's rules implementing § 1304 of the Criminal Code, formerly section 316 of the Communications Act. This statute prohibited the broadcast of lotteries and certain "give-aways" and was jointly enforced by the FCC and DOJ. *Id.* at 284. The FCC's rules implementing the statute were more restrictive than the statute. The Court agreed that the FCC's interpretation had "stretch[ed] the statute to the breaking point." *Id.* at 294. While acknowledging the FCC's rules did not apply to criminal cases, the Court found that the statute could not be construed one way by the FCC and another by the DOJ. *Id.* at 296.

212. Kurland & Casper, *supra* note 192, at 689.

213. In *Hamling v. United States*, 418 U.S. 87 (1974), a closely divided Court upheld a conviction under 18 U.S.C. § 1461, which prohibits the mailing of "[e]very obscene, lewd, lascivious, indecent, filthy or vile article." *Id.* at 98 n.8.

214. Kurland & Casper, *supra* note 192, at 689.

215. *Id.*

certain duties upon broadcast stations to make sure that all can use it.

But that's an entirely different thing from the Government coming in and saying that you are forbidden to do something; and in the *Red Lion* case, which Mr. Justice White authored, you made that very point, that where there's a fairness doctrine and the personal attack doctrine might be sustained, because it's expanding the medium . . . an entirely different question would be presented if the Government here were trying to suppress speech; and that's exactly what they are doing here, they are trying to suppress speech. And if they are trying to suppress speech, they must be asked to pass the same test here as they do in any other First Amendment meaning. The fact that this is radio does not make a difference.

THE COURT: Well now, you say the question was reserved in *Red Lion*, as it certainly was, that doesn't necessarily mean that in the case of regulated airwaves they have to pass the same tests as they would if they sought to impose this test on a newspaper, does it?

MR. PLOTKIN: I think 326 does mean that, Your Honor. . . . I think Congress was saying that in Section 326, when it says "the Commission shall have no power of censorship." When it comes to suppression, I think the same test is applicable to radio and television as is applicable to a newspaper.

THE COURT: Well, then you say literally the FCC can never tell any station that it may not put out any particular message?

MR. PLOTKIN: I say that they . . . cannot suppress what a radio or television station can do any more than they can any other.[216]

Justice Rehnquist pressed Plotkin further:

Well, supposing under your definition of censorship that a station just decided that for an hour it would put on a record consisting of one four-letter word repeated over and over again for the hour, no one would make any claim that it had any coherent message . . . . Under your definition, would the FCC be powerless because of the censorship statute to effect that?

MR. PLOTKIN: I think it would be powerless to tell them to stop doing it. I would have the same problem in response to your hypothetical question if the station did nothing, say, but play "The Music Goes Round and Round" all day. It is not because of the content, but because a station is required to operate in the public interest. . . .

But not because the particular words are bad, not because particular words have a particular taboo. Here the Commission was saying that just because you use these seven words, no matter in what context, if you put on a show where people call in and discuss a live subject, a controversial issue, and if some of the people came from the kind of culture that uses these kinds of words as part of their discussion, particularly in anger and heat, the Commission would say that if you did that in the afternoon that this would be a violation of the Criminal Code so far as the Commission can see it, and it would also be ground

216. *Id.* at 690–91.

> for revoking their license. I don't think the Commission has that authority.[217]

When the argument resumed the next day, Louis F. Claiborne from the Solicitor General's office immediately faced a barrage of questions about whom he represented and why the United States' position differed from the FCC's. He explained that he represented the Executive Branch of the government, and that the FCC, along with several other agencies, had been authorized by statute to represent itself in certain situations.[218] In addition, the DOJ had a separate interest because it had an independent responsibility to enforce § 1464 as a criminal matter.

Justice Rehnquist asked:

> if this Court upholds the FCC, the Government will have no problem prosecuting cases under the statute, because it will be given a fairly broad construction, I would take it.
>
> MR. CLAIBORNE: Mr. Justice Rehnquist, the Government, that is, the Solicitor General and the Department of Justice, takes the view that they should not press for broader prosecutorial discretion than in their view the constitutional reach of the statute would authorize. And, accordingly, it seems to us that the Court ought to have the benefit of the views of the Department of Justice as to the constitutional reach of the statute.
>
> THE COURT: Would you think the Government is ever entitled as an institutional litigator through the Solicitor General to assert that an act of Congress is unconstitutional?
>
> MR. CLAIBORNE: Mr. Justice Rehnquist, there may be rare occasions when that is so. This is not such an occasion. We do not suggest that the statute is unconstitutional, we suggest that it has a limited application and that the Commission has construed it beyond that constitutional reach.[219]

Justice Powell pointed out that the DOJ had supported the FCC below. Claiborne admitted that it did, and that it was an "embarrassment."[220] He explained that the Antitrust Division had handled the matter in the lower court, while the Criminal Division handled the decision whether to file a petition for certiorari.[221] He added that, although the DOJ thought that the lower court decision was correct, and that it had a duty to give the Court the benefit of its views, it did not oppose the FCC filing the petition for certiorari on its own.[222]

In the little time that remained, Claiborne tried to sum up the DOJ's position:

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217. *Id.* at 691–92.
218. *Id.* at 697–98.
219. *Id.* at 698.
220. Kurland & Casper, *supra* note 192, at 701.
221. *Id.*
222. *Id.*

> we construe Section 1464, the only statute which really is involved in this case, as one that cannot consistently, with the First Amendment, be applied so as to ban absolutely, for any substantial period of time, the airing of particular words on radio or television, wholly without regard to circumstances or to the context.[223]

Justice Powell asked if it was fair for the DOJ to "construe what the Commission actually held so sweepingly" when neither the FCC nor Judge Leventhal saw it that way.[224] Claiborne replied:

> Mr. Justice Powell, I fear it is. Judge Leventhal sought to save the Commission's order by narrowing it, and the Commission rides his coattails.
>
> But the order, which is what is before the Court and not counsel's representation of it, is very clear that the Carlin dialog was not judged except only in so far as it contained certain words. Those words, regardless of how they were spoken or the manner in which they were spoken, regardless of the surrounding words, were adjudged by the Commission to be indecent language. The definition of indecent language, which the Commission gave was clearly one which did not have any relation to the context. They ruled that indecent language could in no circumstances, except perhaps after 10 o'clock in the evening, be redeemed by its context.[225]

Justice Powell then asked whether the FCC could act if such language aired on Saturday morning, which is "prime time for small children."[226] Claiborne said the FCC could if it could show that children were watching and the program was intended for children. Justice Stevens asked whether, if the Court adopted Judge Leventhal's view and said that "all that is before us is the broadcast," the DOJ would still take the position that the FCC acted unconstitutionally.[227] Claiborne said that it would.[228]

Marino got up to give his rebuttal:

> Yesterday in his argument, Mr. Plotkin, and this morning in his argument, Mr. Claiborne, keep referring to the Commission's order as banning, suppressing. We thought the Commission's order makes it very clear that it wasn't banning, it wasn't adopting a flat ban, that it was trying to channel this material to periods when there wouldn't be a reasonable risk that children would be exposed to it.[229]

Marino insisted that the FCC's action did not constitute censorship. He explained:

> when Congress wrote 326, it quickly added at the end of it that it will be unlawful to use "any obscene, indecent or profane language by

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223. *Id.* at 703.
224. *Id.* at 704.
225. *Id.*
226. *Id.* at 706–07.
227. *Id.* at 707.
228. *Id.*
229. *Id.* at 708.

> means of radio communications." That was written in by the same people who wrote the section in 1927. And so when we approach these cases, we have Congress' indication in 326 itself that we should concern ourselves.[230]

One of the Justices asked whether it was "the Commission's position that if the Commission regards something as indecent, profane or obscene, its expert judgment . . . then it's entirely outside the prohibition against censorship?"[231] Marino explained that it was not the FCC's view that mattered, but whether "those words are found to be patently offensive by contemporary community standards in that community."[232] Justice Marshall asked:

> What about this community you keep mentioning? All I have heard argued here today is one protest, by one man, with one son—am I right?
>
> MR. MARINO: We only received one complaint, Your Honor, that's correct.
>
> THE COURT: Well, where do you get community action out of one man? He wasn't the mayor, was he?
>
> MR. MARINO: I'm sorry, Your Honor.
>
> THE COURT: He didn't speak for the community, did he?
>
> Mr. MARINO: He certainly did, Your Honor. He came in in a representative capacity, we think. We've been—
>
> THE COURT: [W]hat made you think that? You've only got one.
>
> . . .
>
> MR. MARINO: One citizen can raise a legitimate public interest question—
>
> THE COURT: Well, if you've got one citizen, that doesn't give you the right to say he speaks for the community, does it?
>
> . . .
>
> THE COURT: [A]m I correct that if nobody had protested, you wouldn't have taken action?
>
> MR. MARINO: We wouldn't have known about it, Your Honor, because . . . we just don't have the funds or . . . even instructions to monitor. So we would have never known about it, except [for] a citizen bringing this to our attention.
>
> THE COURT [Chief Justice Burger]: Well, I suppose one citizen can call the attention of the police department or the fire department to a nuisance, and that triggers the procedures; is that what you're suggesting?
>
> . . .
>
> THE COURT [Justice Marshall]: Well, this wasn't a fire![233]

Again, the courtroom broke into laughter. In closing, Marino stressed

230. *Id.* at 709–10.
231. *Id*. at 710.
232. *Id*.
233. *Id.* at 711–12.

the narrowness of the FCC's ruling:

> I don't understand why the United States feels that they have to expand the Commission's order to reach constitutional questions, when it could have been read very narrowly, as it was by Judge Leventhal, and as it was by the Commissioners, who instructed us to come and seek cert before this Court on the basis of Judge Leventhal's opinion, knowing that we were going to rely on that opinion.[234]

Henry Geller, who attended the first day of oral argument, told me that he was certain the FCC would lose.[235] Not only did he think the FCC was wrong on the merits, but Plotkin's argument was direct and easy to understand, while Marino got stage fright and did not argue well.[236] Similarly, Richard Bodorff, who had worked on the FCC's brief in the D.C. Circuit, had expected the FCC to lose in the Supreme Court.[237] He clearly recalls hearing from his FCC friends who attended the argument that they were sure that the FCC had lost at the Supreme Court.[238]

E. The Conference After Oral Argument

At the conference held two days later on April 21, five Justices voted to overturn the D.C. Circuit (Burger, Powell, Blackmun, Rehnquist, and Stevens), and four voted to affirm (Brennan, Stewart, White, and Marshall).[239] However, Justice Powell's notes indicated that the vote to reverse was "tentative."[240]

The Justices vote in order of seniority. Chief Justice Burger voted to reverse, stating that he agreed with Judge Leventhal.[241] Justice Brennan voted to affirm even though he did not agree with any of the three opinions below.[242] He observed that while government has greater power to regulate with regard to children, such regulation had to be narrowly framed, and here it was not.[243] The FCC could properly prohibit the broadcast of the

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234. *Id.* at 713.

235. Geller Interview, *supra* note 25.

236. *Id.*

237. Telephone Interview with Richard J. Bodorff, Partner, Wiley Rein LLP (July 29, 2009).

238. *Id.*

239. THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 372–74 (Del Dickson ed., 2001) [hereinafter THE SUPREME COURT IN CONFERENCE].

240. Notes of Justice Powell from April 21 Conference (April 21, 1978) (on file in Powell Papers) [hereinafter Powell Conference Notes].

241. THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373.

242. According to the Powell Conference Notes, *supra* note 240, Brennan thought that Judge Leventhal might be correct in reading *Miller* as going beyond *Roth*, but he was unconvinced. Brennan could not agree with Judge Tamm because he thought section 326's anticensorship provision was congruent with the First Amendment. *Id.*

243. Powell Conference Notes, *supra* note 240.

Carlin monologue on a children's program, but most children would be in school at 2:00 p.m. To survive, the FCC would need to spell out the restriction as to time and content.

Justices Stewart, White, and Marshall also voted to affirm. Justice Stewart thought the case turned on the meaning of § 1464.[244] Since the Court had previously construed similar language in § 1464 to require material to be "obscene" before allowing it to be suppressed under the First Amendment, he thought the Court was required to construe § 1464 in the same way. [245] Justice White thought the FCC lacked jurisdiction to bar anything short of obscene.[246] Justice Marshall thought the FCC was engaging in censorship in violation of the First Amendment and the Court's decision in *CBS v. DNC*.[247]

Justices Powell, Blackmun, and Rehnquist joined the Chief Justice in voting to reverse. Justice Blackmun observed that the "FCC's order was not a very good one, and Leventhal tried to save it. I come out with him."[248] Justice Powell agreed that Leventhal was "on target" and "right" to "construe what the decision is as narrowly as possible."[249] Justice Stevens noted that he had:

> flip-flopped on this case and may do so again. This is TV and radio, and the government has greater latitude to regulate them than in newspapers. So even if this material would be protected in newspapers, even apart from protecting children anything that goes into my living room under TV and radio may be regulated in the public interest. So constitutionally, I would sanction this ban as Leventhal says. We should also accept the FCC representation that Leventhal correctly read its order.[250]

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244. THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373.

245. *Id.*

246. Notes of Justice Blackmun from April 21 Conference (April 21, 1978) (on file in Blackmun Papers) [hereinafter Blackmun Conference Notes]. He also thought that this case was different from *Red Lion*. *Id*.

247. Columbia Brdcst. Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); *see* THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373.

248. THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373. Powell's notes on Justice Blackmun's vote are similar to Brennan's: "Leventhal did good job of saving this order. Disagrees with PS as to 1464." Powell Conference Notes, *supra* note 240. Justice Powell also reported that Justice Rehnquist "[a]grees with Leventhal. FCC has general public interest powers so long as 1st Amend is not violated." *Id.*

249. Blackmun Conference Notes, *supra* note 246. Powell read from the Solicitor General's brief, which he thought was "outrageous." *Id.*

250. THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373. Blackmun's and Powell's notes provide similar accounts. For example, the first line of Blackmun's notes under Stevens's name reads: "Has flipflopped & may do so again." Blackmun Conference Notes, *supra* note 246. He further notes: "HL [Leventhal] correct. Keep it narrow: this particular [broadcast]." *Id.* But it was "hard to give a [different] meaning to § 1464 than to § 1461," a reference to the statutes at issue in *Hamling*. *Id.* The last line notes that Stevens was "still uncertain on the [statute]." *Id.* Powell's notes indicate that Stevens voted to

F. Drafting the Opinions

Justice Stevens was assigned to draft the decision for the Court. Justice Powell drafted a concurring opinion. Justices Stewart and Brennan drafted dissents. Although drafts of each opinion were circulated among all the Justices, very few substantive changes were made between the initial drafts and the published opinions. This is likely due to the short amount of time left in the term.

1. Justice Stevens's First Draft

Justice Stevens circulated his first draft on June 14, only nineteen days before the decision was announced. The introduction framed the issue as whether the FCC "has any power to regulate the broadcast of recorded material that is indecent but not obscene,"[251] and set forth four questions.

Part I addressed whether the scope of judicial review encompasses more than the FCC's determination that the monologue was indecent "as broadcast."[252] It stressed that the FCC's decision resulted from an adjudication, not a rulemaking, and was issued in a specific factual context. It also noted that the Court reviews judgments, not statements in opinions.[253]

Part II addressed whether the FCC's action violated section 326 of the Communications Act, which denies the FCC the power to censor broadcasting.[254] After reviewing the statutory history and case law, the draft concluded that section 326 denied the FCC the power to edit in advance but not to review the content of completed broadcasts.[255] Moreover, section 326 was not intended to limit the FCC's power to regulate the broadcast of indecent language.[256]

Part III addressed "whether the afternoon broadcast of the 'Filthy Words' monologue was indecent within the meaning of § 1464."[257] Although Pacifica conceded that the monologue was offensive, it contended that it was not indecent within the meaning of § 1464 because it lacked prurient appeal.[258] Part III found that the plain language of the statute did not support Pacifica's argument:

"[r]everse (tentative as to construction of statute)," and that "Electronic media is different. Also children are different." Powell Conference Notes, *supra* note 240.

251. Draft Opinion by Justice John P. Stevens 1 (June 14, 1978) (on file in Blackmun Papers) [hereinafter Stevens Draft Opinion].

252. *Id.* at 7.

253. *Id.* at 7.

254. *Id.* at 8.

255. *Id.* at 8, 11.

256. *Id.* at 11.

257. *Id.* at 12.

258. *See id.* at 13.

> The words "obscene, indecent, or profane" are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality. The Commission is clearly correct in its view that the statutory prohibition was not intended by Congress to be limited to prurient matter.[259]

Part IV addressed Pacifica's constitutional claims. First, it rejected the overbreadth argument because "our review is limited to the question whether the Commission has the authority to prescribe this particular broadcast."[260] It dismissed concerns that some broadcasters would censor themselves: "At most . . . the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern."[261]

Next, the opinion stated that "[w]hen the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. For if the government has any such power, this was an appropriate occasion for its exercise."[262] After a review of the case law, it concluded that the First Amendment did not prohibit all regulation of speech that depends on content.[263] The draft acknowledged that speech could not be suppressed just because it was offensive or because of its political content.[264] It also assumed that the Carlin monologue had artistic value and would be protected in other contexts.[265] But here, the words were offensive "for the same reason that obscenity offends."[266]

The draft explained that the Court has "long recognized that each

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259. *Id.* at 13 (footnote omitted). The last sentence of this passage was not included in the published opinion. *See* FCC v. Pacifica Found., 438 U.S. 726, 739–40 (1978).

260. Stevens Draft Opinion, *supra* note 251, at 16. The opinion noted that its approach was consistent with its action in *Red Lion*, rejecting the claim that the FCC's Fairness Doctrine was too vague. *Id.* at 16–17.

261. *Id*. at 17 (footnote omitted). The footnote observed that the primary impact would be "on the form, rather than the content, of serious communication. There are not too many thoughts that cannot be expressed by the use of less offensive language." *Id.* at 17 n.18. The next sentence, which does not appear in the published versions, went on to note that humorists would probably be most affected, but that it has been long understood that the appropriateness of some forms of humor depend on the setting. *Id.*

262. *Id.* at 18 (footnote omitted). Footnote 19 noted that adopting Pacifica's position would deprive the FCC of any power to regulate erotic telecasts unless they were obscene under the *Miller* test. It also rejected Pacifica's assurances that market forces would keep smut off the air, quoting Judge Leventhal's dissent. *Id.* at 18 n.19.

263. *Id.* at 19–20.

264. *Id.* at 20.

265. *Id.* at 21.

266. *Id.* at 20.

medium of expression presents special First Amendment problems" and that broadcasting has received the most limited protection under the First Amendment.[267] Two characteristics of broadcasting were particularly relevant here:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder. Rowan v. Post Office Department, 397 U.S. 728. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. . . .
>
> Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. . . . We held in Ginsberg v. New York, 390 U.S. 629, that the government's interest in the "well being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. Id., at 640 and 639. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.[268]

The final paragraph emphasized the narrowness of the holding. It did "not involve a conversation between a cab driver and a dispatcher or a telecast of an Elizabethan comedy."[269] It stressed that the FCC's action "rested entirely on a nuisance rationale under which context is all-important. . . . We simply hold that when the Commission finds that a pig has entered the parlor, its regulatory power does not depend on proof that the pig is obscene."[270]

The Chief Justice and Justice Rehnquist quickly joined Justice Stevens's opinion.[271] Justice Stewart advised Justice Stevens that he would

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267. *Id.* at 22 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502–03 (1952)).

268. Stevens Draft Opinion, *supra* note 251, at 23–25 (footnote omitted). Footnote 27 rejected the claim that the FCC's action reduced adults to hearing only what was fit for children, noting that adults could purchase tapes and records, go to nightclubs and theaters, and perhaps, because the FCC had not decided this question, even listen to such programming broadcast in the late evening hours. *Id.* at 25 n.27.

269. *Id.* at 25.

270. *Id.* at 25–26.

271. The Chief Justice's only suggestion was to add a citation to *Office of Comm. of United Church of Christ v. FCC*, 359 F.2d 994 (1966). Letter from the Chief Justice to Justice Stevens (June 16, 1978) (on file in Blackmun Papers). The published opinion cites that case to support the point that the FCC was not prevented from denying the license

be circulating a dissent, and both Justices White and Marshall indicated they would await the dissent.[272] To obtain a majority, Justice Stevens needed the support of both Justice Powell and Justice Blackmun. But both had concerns with Justice Stevens's draft. Justice Blackmun's clerk advised him that "there may be some problems joining JPS's Pacifica opinion as written, because he resorts to the 'semi-protected speech'/zoning theory that you rejected in joining [Stewart's] dissent in Young v. American Mini Theatres."[273] Similarly, Justice Powell's clerk advised him that "[a]lthough there is much in this opinion with which you can agree, you may . . . have some trouble joining all of Part IV."[274] Justice Stevens had made many of the same points he made in Part II of *American Mini Theaters*,[275] which Justice Powell "pointedly did not join," and "he beat[] the drum loud and long for the proposition that government can regulate speech on the basis of its content."[276] Alt observed that Justice Stevens's approach "simply carries one step further what the Court has been doing all along," because the Court looks to content to decide whether the speech is protected.[277] But because it required the Court to decide the value of speech, it created the "danger . . . that the justices' own varying values will feed into the decision too much."[278] Justice Powell underlined this sentence and wrote "yes" next

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renewal of a broadcast station for improper programming. FCC v. Pacifica Found., 438 U.S. 726, 737 (1978). The *UCC* decision was written by Burger when he was on the D.C. Circuit. It held that listeners and viewers had standing to raise objections to a station's programming, in this case, that the station had failed to comply with the Fairness Doctrine and engaged in racially discriminatory programming, and that the FCC was required to consider those objections in determining whether to grant the license renewal. *UCC*, 359 F.2d at 1007–09.

272. Letter from Justice Stewart to Justice Stevens (June 15, 1978) (on file in Blackmun Papers); Letter from Justice White to Justice Stevens (June 15, 1978) (on file in Blackmun Papers); Letter from Justice Marshall to Justice Stevens (June 16, 1978) (on file in Blackmun Papers). Justice Stewart circulated his draft dissent on June 16.

273. Memorandum from Ruth Glushien, Clerk to Justice Blackmun, to Justice Blackmun (June 16, 1978) (on file in Blackmun Papers).

274. Memorandum from Jim Alt, Clerk to Justice Powell, to Justice Powell 1 (June 16, 1978) (on file in Powell Papers) [hereinafter Alt's June 16th Memo to Powell]. Alt described Part II as holding that section 326 means no more than that the FCC may not exercise prior restraint. He was "a little surprised to find that the opinion does not hold that the sweep of § 326 is the same as that of the First Amendment" because the meaning of the First Amendment had changed since the time section 326 was enacted in 1927. *Id.* at 1–2. But even if section 326 were "viewed as static, the First Amendment itself always will be available to challenge FCC actions that arguably infringe on broadcasters' rights, but do not constitute 'prior restraints.'" *Id.* Justice Powell wrote "yes" in the margin next to this sentence. *Id.* at 2.

275. Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).

276. Alt's June 16th Memo to Powell, *supra* note 274, at 2. Powell inserted by hand the phrase "but TV & Radio only" after the word "regulate." *Id.*

277. *Id.* at 4.

278. *Id.*

to it.[279]

Alt noted that "[t]here is a parallel to be drawn" to the debate in equal protection law as to whether to apply only the "strict scrutiny" and "rational relation" tests, or Justice Marshall's "sliding scale."[280] If Justice Powell was "not inclined to adopt the 'sliding scale' approach to the First Amendment – which, I gather from your Mini Theaters concurrence, you may not be – the problem remains as to what to do here."[281] Alt did not think the Court could hold that Carlin's language was unprotected altogether. Thus, he recommended emphasizing three points: (1) the FCC's holding did not bar adults from access to Carlin's record but was like the zoning upheld in *Mini Theaters*; (2) the Court had recognized the value of protecting children from "objectionable but protected speech" in *Ginsberg v. New York*,[282] and radio was uniquely accessible to children; and (3) the speech here was "akin to a 'verbal assault' even to some adults."[283]

Alt concluded that while the case was difficult to decide without some reference to content, it was not "necessary to downplay the Court's tradition that the degree of protection due speech should not depend on the content of speech quite so much as Justice Stevens does."[284] He suggested that since Justice Stevens needed Justice Powell's vote, it might be possible to get Justice Stevens to remove portions of his opinion, and if not, Powell might wish to write his own opinion.[285]

A few days later, Glushien reported to Justice Blackmun that the current lineup was three to three, but Powell had not yet voted and was planning to write a concurring opinion. She noted:

> My own recommendation in the case has to be of a first order/second order kind, since our views on this case have been conscientiously different. I still would be inclined to affirm CADC on First Amendment grounds because I am not at all sure how one distinguishes . . . between George Carlin's monologue and such works of serious literary merit as Joyce's Molly Brown soliloquy in Ulysses, the work of Henry Miller or D.H. Lawrence, several portions of Samuel Beckett's plays, Miguel Pinero's Short Eyes play about prison life, or indeed some of the bawdier punning parts of Shakespeare. [286]

Recognizing that the Justice would not likely agree, she continued:

> However, assuming you are still inclined to reverse and thus uphold

279. *Id.*
280. *Id.*
281. *Id.* at 4–5.
282. 390 U.S. 629 (1968).
283. Alt's June 16th Memo to Powell, *supra* note 274, at 5.
284. *Id.* at 6.
285. *Id.*
286. Memorandum from Ruth Glushien, Clerk to Justice Blackmun, to Justice Blackmun 1 (June 18, 1978).

> the Commission's order, I would recommend that we await, and most probably join LFP's concurrence in the judgment of reversal, rather than JPS's opinion. This is because JPS's opinion relies so heavily on his American Mini Theatres theory which you did not join, that there is a middle category of "peripherally protected" speech. His theory is that "offensive references to excretory and sexual organs and activities," while non-obscene, "surely lie at the periphery of First Amendment concerns" and thus deserve only limited First Amendment protections. . . . JPS's theory . . . would seemingly apply to books, magazines, plays, and phonograph records as well as to television/radio broadcasts. It ignores that fact, which I think important, that emphatic rough language can at times be used conscientiously by an artist in portraying certain ethos and ways of life, and that the ability to use such language where artistically necessary is an important First Amendment value.[287]

She notes that Powell's concurrence would "be based on two narrower factors: the unique intrusiveness of broadcast into the home, and the problem of involuntary exposure of children to broadcasting."[288] She viewed the Powell approach as superior because it was "not capable of such easy transplantation to other media."[289]

2. Justice Powell's Concurring Opinion

Justice Powell circulated his draft concurrence on June 19, 1978**.** Part I explained his reasons for upholding the FCC. He emphasized that the FCC's primary concern was to prevent this broadcast, which the FCC correctly found "'patently offensive' to most people regardless of age" and "was at least wholly without taste," from reaching unsupervised children who were likely to be in the audience at 2:00 p.m.[290] He supported the FCC's effort to "zone" the monologue to hours when few unsupervised children would be exposed to it.[291] He noted that:

> children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the

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287. *Id.* at 2.

288. *Id.* at 3.

289. *Id.*

290. Draft Concurring Opinion by Justice Lewis F. Powell 3 (June 19, 1978) (on file in Powell Papers) [hereinafter Powell Draft]. I also found an earlier, uncirculated draft in the Powell Papers. This draft had several deletions, additions, and corrections in Justice Powell's handwriting. For example, on the first page, he deleted a sentence that read, "Since I expect the Commission to proceed in a cautious and reasonable manner in the future, as it has done in the past, cf. Brief for Petitioner 42–43, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights." On page three, he added in reference to the Carlin monologue, "it was at least, however, wholly without taste." On page eight, he inserted a new sentence acknowledging that making judgments was not easy, but that "[the] responsibility ha[d] been reposed initially in the FCC and its expert judgment [was] entitled to respect." Powell Draft, *supra* note 290, at 8.

291. Powell Draft, *supra* note 290, at 8.

> unwilling through the exercise of judicious choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than an adult.[292]

While in many cases, dissemination of such speech to children could be limited without also limiting the access of willing adults, it was not possible in broadcasting, and this distinction justified the differential treatment of broadcasting.[293]

Another relevant difference was that "broadcasting – unlike most other forms of communication – comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sound."[294] While the First Amendment might require unwilling adults to absorb the first blow of offensive but protected speech when they are in public, "a different order of values obtains in the home."[295]

Finally, although the argument that the FCC's ruling reduced adults to hearing only what was fit for children was "not without force," it was "not sufficiently strong to leave the Commission powerless to act" in these circumstances.[296] The FCC's decision did not prevent willing adults from obtaining access to the Carlin monologue, nor did it "speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the linguistic shock treatment administered by respondent here."[297]

In Part II, Justice Powell explained why he did not join in Part IV of Justice Stevens's opinion addressing the constitutional claims. He did not believe that the Court should "decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."[298] Rather, the result should turn "instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech agreed to be inappropriate for their years, and secondarily with the interest of unwilling adults in not being assaulted by such offensive speech in their homes."[299] Justice Blackmun quickly joined Justice Powell's concurring opinion after Justice Powell agreed to make some minor changes.[300]

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292. *Id.* at 4.
293. *Id.* at 5.
294. *Id.* at 6.
295. *Id.* at 7.
296. *Id.* at 8.
297. *Id.* at 9.
298. *Id*. at 9–10. (citing Young v. American Mini Theatres, 427 U.S. 50 (1976)).
299. *Id.* at 10.
300. Letter from Justice Blackmun to Justice Powell (June 20, 1978) (on file in

The next day, Justice Stevens sent a personal letter to Justice Powell with a copy to Justice Blackmun:

> Because you indicated that you might be able to join in portions of Part IV, I have broken it into three subsections. I think everything with which you took issue is in subpart B. . . .
>
> To a certain extent the review of overbreadth analysis in subpart A rests on the premise that this speech in not very important and therefore your problems with subpart B may carry over to subpart A as well. Nevertheless, I would hope that you would at least think about joining subpart A because it is an important part of the picture. I believe, also, that it is consistent with the analysis in Harry's opinion in Bates.
>
> Some of my changes are the product of further thinking prompted by your concurrence, but I do not mean to take issue with anything you have said and will welcome any suggestions you care to make notwithstanding our rather narrow area of disagreement.
>
> Thank goodness we are at last on the home stretch.[301]

Blackmun's clerk described Justice Stevens' changes as "mostly cosmetic," and recommended against joining Subparts A, B, and C unless Powell had "strong feelings about wishing to make a gesture to [Stevens]."[302] Ultimately, both Justices Powell and Blackmun joined Parts I, II, III, and IV(C) of Justice Stevens's opinion, providing him with the votes he needed to reverse the D.C. Circuit and affirm the FCC.

3. The Dissenting Opinions

Justice Stewart circulated the first draft of his dissent on June 16. The published opinion is not significantly changed from this initial draft. Justice Stewart thought the term "indecent" in § 1464 should be read as meaning no more than "obscene."[303] He noted that the Court had recently held in *Hamling* that the term "indecent" had the same meaning as "obscene" as that term was defined in the *Miller* case, and nothing suggested that Congress intended a different meaning.[304] He concluded that "[s]ince the Carlin monologue concededly was not 'obscene,' I believe that the Commission lacked statutory authority to ban it," and it was thus

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Blackmun Papers). Justice Blackmun suggested (1) deleting the word "judicious" from the sentence quoted in the *supra* text accompanying note 293, explaining that "I suspect adults have a choice whether it is or is not judicious." and (2) eliminating the citation to the *Carey* case not only because he thought it was unnecessary but also because he was on the other side in *Carey*. *Id.*

301. Letter from Justice Stevens to Justice Powell (June 20, 1978) (on file in Blackmun Papers).

302. Memorandum from Ruth Glushien, Clerk to Justice Blackmun, to Justice Blackmun (June 21, 1978) (on file in Blackmun Papers).

303. Draft Dissenting Opinion by Justice John P. Stewart 3 (June 16, 1978) (on file in Blackmun Papers).

304. *Id.* at 3, 4–5.

unnecessary to reach the constitutional question.[305]

Justice Brennan advised the other justices on June 19 that he would probably join Justice Stewart's dissent, but was also writing something on the constitutional question.[306] On June 24, Brennan circulated his draft dissent.[307] He agreed with Justice Stewart that the word "indecent" in § 1464 prohibited only obscene speech.[308] Ordinarily, he would have refrained from addressing the constitutional issues, but he found "the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its sadly myopic notions of propriety on the whole of the American people so misguided, that I am unable to remain silent."[309]

Part I of the draft pointed out that despite unanimous agreement that the Carlin monologue was protected speech and that a majority of the Court refused to "create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content," the majority found the FCC's imposition of sanctions for airing this speech constitutional.[310] The majority also ignored the fact that individuals voluntarily admitted radio communications into their homes and that, unlike other invasive modes of communications such as sound trucks, the radio could be turned off. It also ignored the constitutionally protected interests of those who wished to transmit or receive broadcasts that the FCC might find offensive.[311]

Although Justice Brennan recognized the government's interest in protecting children, he thought this interest had already been accounted for by the "variable obscenity standard" set forth in *Ginsberg v. New York*.[312] Under that standard, the Carlin monologue was not obscene because it did not appeal to the prurient interests of children. Moreover, he argued, while both the Stevens opinion and prior cases "stress the time-honored right of a parent to raise his child as he sees fit," this decision actually undermined parents' rights to make decisions about what their children should be able to hear.[313]

Justice Brennan also argued that the majority's attempt to justify its

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305. *Id.* at 2.

306. Letter from Justice Brennan to Justice Stevens (June 19, 1978) (on file in Powell Papers) (copied to The Conference).

307. Draft Dissenting Opinion by Justice William J. Brennan (June 24, 1978) (on file in Powell Papers) [hereinafter Brennan Draft].

308. *Id.* at 1.

309. *Id.* at 1–2.

310. *Id.* at 3.

311. *Id.* at 6–7.

312. *Id.* at 9.

313. *Id.* at 13.

decision based on the intrusive nature of broadcasting and the presence of children in the audience both lacked "principled limits."[314] He notes that "[t]aken to their logical extreme, these rationales would support the cleansing of public radio of any 'four-letter' words whatsoever, regardless of their context," and could justify the banning of a myriad of literary works.[315]

Part II of the draft attacked his colleagues' assertion that their actions would "not significantly infringe on the First Amendment values [as] both disingenuous as to reality and wrong as a matter of law."[316] He thought that Justice Stevens's claim that avoiding indecent language would affect only the form, not substance of the communication was "transparently fallacious," because "[a] given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image."[317] Moreover, the claim that willing adults were not prevented from purchasing the record or attending a performance, displayed

> a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing the [sic] hear Mr. Carlin's message may not be able to afford, and a naïve innocence of the reality that in many cases, the medium may well be the message.[318]

Brennan also found that Justices Stevens and Powell's opinions were "disturbing" for evidencing

> a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.[319]

He noted that the words found unpalatable by the Court "may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that comprise this Nation."[320] Because the decision would have the greatest impact on those who did not share the Court's views, it should be seen as "another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking."[321]

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314. *Id.* at 14. In footnote 4, Brennan agreed that the FCC's action was not justified by spectrum scarcity. Spectrum scarcity could justify regulation to increase diversity as in *Red Lion*, but not to justify censorship. *Id.* at 14 n.4.

315. *Id.* at 15.

316. *Id.* at 18.

317. *Id.*

318. *Id.* at 20.

319. Brennan Draft, *supra* note 307, at 22.

320. *Id.*

321. *Id.* at 24.

4. Reactions to Justice Brennan's Draft Dissent

Justice Powell and his clerks took offense to Justice Brennan's draft dissent. A handwritten note from "Bob" attached to Justice Brennan's first draft found in Justice Powell's files read: "This is the poorest, most self-impeaching piece of drivel from their Chambers yet! I wish now that we had left our Jewish quota language in."[322] Justice Powell wrote at the top of the draft, "This is 'garbage'!"[323] He circled phrases such as "sadly myopic notions of propriety," "fragile sensibilities," and "acute ethnocentric myopia,"[324] and underlined phrases such as "naïve innocence of the reality," "patently wrong result," "dangerous as well as lamentable," and "depressing inability to appreciate that in our land of cultural pluralism."[325] Next to Justice Brennan's assertion that the majority rationale suffered from "lack of principled limits," Justice Powell wrote, "This – by [the] author of Bakke!!"[326]

Alt's memo to Justice Powell characterized Justice Brennan's draft as "intemperate in some places, smugly self-righteous in others, and ludicrously overwritten in yet others."[327] But, he concluded that Justice Brennan made no points worthy of reply and suggested only a few minor changes to Justice Powell's draft. Alt's most substantive proposed suggestion was to delete the observation that Carlin's monologue "was at least wholly without taste" because it was in tension with Part II, which eschewed making value judgments.[328] Powell agreed, "Yes, I already had decided this sentence was out-of-place."[329] Alt's memo concluded, "After re-reading the three opinions in this case that deal with the constitutional issues, I would immodestly venture the thought that yours makes the most sense by an appreciable margin." To which Justice Powell replied, "I find it difficult to disagree with this 'modest' assessment."[330]

Justice Powell sent Justice Blackmun a copy of his revised concurrence along with a cover note stating:

> No doubt you have read Bill Brennan's dissent in which he pays his "respects" to my dissent [sic] as well as the Court's opinion.

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323. "Bob" is likely Robert D. Comfort, one of Justice Powell's clerks from 1977–1978.

323. Brennan Draft*, supra* note 307, at 1.

324. *Id.* at 2, 22.

325. *Id.* at 22.

326. *Id.* at 14.

327. Memorandum from Jim Alt, Clerk to Justice Powell, to Justice Powell 1 (June 25, 1978) (on file in Powell Papers) [hereinafter Alt Memo on Brennan Dissent].

328. *Id.*

329. *Id.* Alt also suggested deleting a reference to what most people think because it seemed to express a personal view and the concurrence would be stronger without it, to which Powell responded "So do I." *Id.*

330. *Id.* at 2.

> Perhaps you will not wish to be associated with an opinion said to display "acute ethnocentric myopia," "a sad insensitivity", and "naive innocence of reality".[331]

Justice Blackmun replied that "Writings of late, particularly in dissent, demonstrate once again that we are at the end of a term."[332]

Justice Brennan recirculated his draft on June 29. Most of the language that offended Justice Powell remained in this as well as the published version.[333] Indeed, Justice Powell wrote across the top of the recirculated draft: "File & keep in file as example of how not to write an opinion."[334]

V. REACTION TO THE *PACIFICA* DECISION

The Court issued its decision at the end of the term on July 3, 1978.[335] It received decidedly mixed reviews in the press, at the FCC, and by legal scholars.

A. The Press

On July 5, *Washington Post* television critic Tom Shales characterized the Court's decision as "unthinkable" and "stupefying."[336] He wrote:

> That the First Amendment is being trampled in such a decision, announced on the eve of the Fourth of July, is obvious. But then, it's already obvious that the First Amendment is not one that the Burger Court holds in high regard.
>
> Possible deleterious effects of the decision are more disturbing still. The Supreme Court has given managements and owners of TV and radio stations terrific new ammunition to use against reporters, news directors, producers and writers who want to put potentially explosive or controversial material on the air.

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331. Letter from Justice Powell to Justice Blackmun (June 26, 1978) (on file in Blackmun Papers).

332. Letter from Justice Blackmun to Justice Powell (June 26, 1978) (on file in Powell Papers).

333. The phrase "sadly myopic" was omitted in the second printed draft circulated June 30 and in the published version. Second Printed Draft Dissenting Opinion by Justice William J. Brennan, No. 77-528, (June 30, 1978) (on file in Marshall Papers). However, the other language that Justice Powell objected to remained.

334. First Printed Draft Opinion by Justice William J. Brennan 1 (June 29, 1978) (on file in Powell Papers). Justice Powell underlined passages and wrote comments in the margin on this draft as well. For example, he again noted, "strange words from the author of the Brennan plurality in Bakke." *Id.* at 9. Next to a passage reading "for those of us who place an appropriately high value on our cherished First Amendment rights, the word 'censor' is such a word[,]" Justice Powell wrote "Pious." *Id.* at 12.

335. On October 2, 1978, it denied rehearing. FCC v. Pacifica Found., 439 U.S. 726, 883 (1978).

336. Tom Shales, *'Seven Dirty Words' and the Burger Court . . . Free Speech, the FCC and TV Censorship*, WASH. POST, July 5, 1978, at B1, B7.

> And the Court has given the FCC, of all the all-thumbs regulatory agencies, new power to harass and intimidate TV and radio stations whose counterculture, antiestablishment or just offbeat programming may include vocabularies acceptable to their electronic constituencies but offensive to little old ladies, elderly judges, near and far right wingers, or parents unable to regulate the listening and viewing habits of their kiddies.
>
> The stations most endangered will be the struggling, minority-interest, fringe stations who can least afford expensive lawyers to defend them against the FCC. [337]

Two days later, however, a *Washington Post* editorial agreed with the Supreme Court's decision.

> All heck has broken loose in the radio and television world this week as a result of the Supreme Court's decision Monday in the case involving seven naughty words. The outcome was unexpected. The court, according to many experts, had been regarded as almost certain to hold unconstitutional the warning the Federal Communications Commission had given a radio station for broadcasting a 12-minute-long monologue in which those bad words were used over and over again. But the justices didn't go according to form; they upheld the warning by a vote of 5 to 4. We are glad they did.
>
> This is one of those cases that never should have reached either the Supreme Court or the FCC. The monologue—recorded in a California theater by comedian George Carlin—may be regarded as funny by some; the transcript indicates he was interrupted 83 times by laughter or applause. But its prime appeal is its shock value . . . . Even as part of a program about society's attitude toward language—which is the way the station owner, Pacifica Foundation, described its use—the monologue did not belong on the air, as a matter of policy, in mid-afternoon.[338]

The editorial disagreed that the decision opened the door for substantial censorship since neither Justice Stevens nor Justice Powell suggested "that the FCC should require that the occasional dirty word be bleeped out or that programming should always be aimed only at family audiences."[339] However, the *New York Times* editorialized against the decision, noting that "[g]overnment action of this sort, however moderate, tends to make us uneasy . . . ."[340]

B. The FCC

The FCC Chairman Charles D. Ferris, a Democrat, did not agree with the Supreme Court's decision. According to Ferris's chief of staff, Frank Lloyd, Ferris said,

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337. *Id.* at B1.
338. Editorial, *Seven Naughty Words*, WASH. POST, July 7, 1978, at A18.
339. *Id.*
340. Editorial, *Cleaning Up After Dirty Words*, N.Y. TIMES, July 31, 1978, at A14.

> let's find the first possible indecency complaint that comes in and make it clear that that case will never reoccur at the FCC. There's an infinitesimal chance of FCC ever coming out with a ruling that something is indecent.
>
> So we went down to the Media Bureau—Broadcast Bureau at that time—and said send us all of your complaints and we'll pick one. And we picked one against WGBH, the Boston public TV station for a rendition of Molly Bloom's soliloquy in *Ulysses* which had all the seven dirty words in it. [341]

Within a matter of weeks, the FCC issued an unanimous ruling in favor of WGBH.[342] The FCC distinguished this case from *Pacifica* because petitioner "made no comparable showing of abuse by WGBH-TV of its programming discretion."[343] It also stated its intention to "construe the *Pacifica* holding consistent with the paramount importance we attach to encouraging free-ranging programming and editorial discretion by broadcasters."[344]

The same month, Ferris told the New England Broadcasting Association that he would consider it "'a tragedy' if the Supreme Court's recent decision on the use of indecent language on television and radio were to become a reason for broadcasters to avoid controversy."[345] He asserted that the recent WGBH case demonstrated that "the [FCC] is not going to become a censor."[346] Ferris stressed that *Pacifica* would apply only to situations where the facts were "virtually recreated" and in his view, "[t]he particular set of circumstances in the Pacifica case is about as likely to occur again as Halley's Comet."[347]

While Ferris was not on the FCC when it issued the Pacifica

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341. Frank Lloyd, Former FCC Chief of Staff, Comments Made at a Presentation at the Historical Society for the District of Columbia Circuit, FCC Indecency Cases in the D.C. Circuit: An Historical Perspective (Oct. 15, 2008). A webcast of this program is available at *Videos of Society Programs*, HISTORICAL SOCIETY OF THE DISTRICT OF COLUMBIA CIRCUIT, http://www.dcchs.org/news/videos.html (last visited Nov. 15, 2010) (Lloyd's remarks start approximately seven minutes into segment labeled Discussion and Conclusion).

342. WGBH Educational Foundation, *Memorandum Opinion and Order*, 69 F.C.C.2d 1250 (1978). Morality in Media had filed a petition to deny the license renewal of WGBH, alleging that WGBH had "failed in its responsibility to the community by consistently broadcasting offensive, vulgar and otherwise material harmful to children without adequate supervision or parental warnings." *Id.* at para. 2 (internal quotation marks omitted). The programs complained of included an episode of *Masterpiece Theater* and *Monty Python's Flying Circus*. *Id.*

343. *Id.* at para. 10.

344. *Id.* at para. 11.

345. Les Brown, *Ferris Says F.C.C. Will Not Act as Censor of Controversial Issues*, N.Y. TIMES, July 23, 1978, at 34.

346. *Id.* (internal quotation marks omitted).

347. Jeff Demas, *Seven Dirty Words: Did They Help Define Indecency?*, 20 COMM. & L. 39, 51 (1998). Democratic Commissioner Tyrone Brown delivered a similar message in his speech to the Oklahoma Broadcasters Association. *Id.* at 49.

Declaratory Order, Commissioner Abbott Washburn was. He disagreed with the *New York Times* editorial that the *Pacifica* decision should make one "uneasy."[348] He asserted that Justice Stevens's "carefully drafted opinion [was] an important and welcome clarification" of the meaning of § 1464 and the definition of "indecent language," and that the overwhelming majority of the American public would agree that the Carlin broadcast was indecent.[349]

In a speech to the Federal Communications Bar Association, Washburn defended the *Pacifica* decision while assuring his audience that the FCC "ha[d] no intention of going on a regulatory spree as a consequence."[350] He did not think that the *Pacifica* decision would lead to timidity in programming.[351] But given the awesome power of television as a "socializing force comparable to the school, the church, even the home," broadcasters had special responsibilities.[352] He compared industry "spokesmen deploring their orphan status with respect to the First Amendment" to "an orange wanting to be a banana."[353] He reminded broadcasters that the spectrum they used was a limited resource and there were "considerable advantages to being an orange."[354] He asserted that most broadcasters were not concerned about the indecency prohibition since they would not use such words in any event.[355]

C. Academic Reaction

Most academic articles criticized the Supreme Court's decision. For example, the *Harvard Law Review*'s end-of-term review portrayed the majority's reasoning as inconsistent, the privacy argument as makeweight, and the protection-of-children rationale as lacking support.[356] It also criticized Justice Stevens's sliding scale approach for ignoring the emotive impact of speech.[357] The review concluded that unless the Court confined

348. Abbott Washburn, Letter to the Editor, *'Seven Dirty Words' and the Court*, N.Y. TIMES, Nov. 16, 1978, at A26. Commissioner Washburn sent a copy of this letter to Justice Blackmun (on file in Blackmun Papers).

349. *Id.*

350. Washburn Speech, *supra* note 68, at 4.

351. *Id.* at 10.

352. *Id.* at 8.

353. *Id.* at 10.

354. *Id.* at 10–11.

355. Washburn Speech, *supra* note 68, at 12.

356. *The Supreme Court 1977 Term*, 92 HARV. L. REV. 57, 157–162 (1978) [hereinafter *1977 Term*]; *see also* Case Comment, FCC v. Pacifica Foundation: *An Indecent (Speech) Decision? (George Carlin's "Filthy Words")*, 40 OHIO ST. L.J. 155 (1979) (arguing that the *Pacifica* decision would have a chilling effect and threatened the vitality of the First Amendment).

357. *1977 Term*, *supra* note 356, at 156.

its decision to this extraordinarily limited context, it would pose a "serious setback for those who prize our pluralistic society's commitment to the free exchange of ideas."[358]

A case note in the *Boston College Law Review* found it "surprising that the Court in *Pacifica* chose to uphold the right of a citizen to insulate himself at the cost of the rights of other persons to transmit and receive the broadcast," especially since one could easily avoid offense by turning off the radio.[359] That author also found it troubling that by disregarding all but one of the *Miller* elements (offensiveness), the Court effectively imposed a harsher standard for protected indecent speech than for unprotected obscene speech. Because few children were likely listening to the radio at 2:00 p.m., it was difficult "to conceive of a fact pattern which would be more appropriate than the one in this case to trigger this adult standard for indecent speech."[360] Moreover, by failing to assess the work as a whole, failing to identify what community standards were applied, and taking no expert testimony, the *Pacifica* Court "perpetuated the very absolutism and imposed uniformity that the Court in *Miller* attempted to correct."[361] Finally, the author criticized the majority decision as leaving "in its wake confusion, unpredictability, and serious questions concerning the overbreadth of the standard and its constitutional limits" and as "substantially infring[ing] . . . the constitutional rights of broadcasters, recording artists, and listeners."[362]

VI. FCC ENFORCEMENT OF INDECENCY PROHIBITION AFTER *PACIFICA*

In the first ten years after *Pacifica*, the FCC "chose to use its regulatory power simply to focus on broadcast uses of the 'seven dirty

358. *Id.* at 163.

359. Marcus, *supra* note 10, at 992.

360. *Id.* at 997.

361. *Id.* at 999.

362. *Id.* at 1000, 1002. Although the academic treatment of *Pacifica* over the past thirty years is beyond the scope of this Article, the decision has few supporters. *See, e.g.*, R. Wilford Tremblay, *FCC v. Pacifica Foundation*, *in* FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS 218–33 (Richard A. Parker ed., 2003). Many articles have argued against extending *Pacifica* to nonbroadcast media. *See, e.g.*, Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606 (1983) (concluding that no acceptable interpretation of *Pacifica* would permit government to exclude from cable even the most indecent nonobscene programming). In fact, the Court did refuse to extend the *Pacifica*-type analysis to cable television in *United States v. Playboy Entm't Group*, 529 U.S. 803, 815 (2000); to telephone dial-a-porn in *Sable Commc'ns v. FCC*, 492 U.S. 115, 127–28 (1989); and to indecent content on the Internet in *Reno v. ACLU*, 521 U.S. 844, 866–67 (1997).

words' identified in *Pacifica*."[363] In the early 1990s, the FCC created a safe harbor for indecent broadcasts between the hours of 10:00 p.m. and 6:00 a.m.[364] The FCC "made it a point to reassure broadcasters that fleeting sexual references or depictions would not likely be problematic" and indicated that it would wield its regulatory power with restraint.[365]

The FCC's approach to indecency changed dramatically under the administration of George W. Bush. The FCC used a complaint about NBC's *Golden Globe Awards* program, which aired on January 19, 2003, to announce its stricter policy against indecency.[366] Members of the Parents Television Council (PTC) alleged that Bono's comment ("this is really, really, fucking brilliant") violated § 1464.[367] The FCC's Enforcement Bureau denied the complaint, finding that in context, the word "fucking" did not describe sexual or excretory organs or activities, but was used "as an adjective or expletive to emphasize an exclamation."[368]

The full FCC, however, voted unanimously to overturn the Bureau's decision. The FCC explained that indecency findings involved two separate determinations:

> First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition . . . . Second, the broadcast must be *patently* offensive as measured by contemporary community standards for the broadcast medium.
>
> In making indecency determinations, the Commission has indicated that the "*full context* in which the material appeared is critically important," and has articulated three "principal factors" for its analysis: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate,* or *whether the material appears to have been presented for its shock value.*"[369]

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363. Lili Levi, *The FCC's Regulation of Indecency*, 7 FIRST REPORTS 1 (2008). The Second Circuit's decision in *Fox* also contains a thorough description of the evolution of the FCC's indecency policy. *See* Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 448–51 (2d Cir. 2007).

364. Levi, *supra* note 363, at 13. After several years of litigation, the D.C. Circuit upheld the safe harbor in *Action for Children's TV v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

365. Levi, *supra* note 363, at 2.

366. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, 18 F.C.C.R. 19859, para. 1 (2003).

367. *Id.* at paras. 2–3.

368. *Id.* at para. 5.

369. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975, paras. 6–7 (2004) (citations and some internal quotation marks omitted) [hereinafter *Golden Globe*].

Applying this approach, the FCC rejected the Bureau's conclusion. While recognizing that "fucking" was used "as an intensifier," it held that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation."[370] Thus, the term fell within the definition of indecency. It added that: "The 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image. The use of the 'F-Word' here, on a nationally telecast awards ceremony, was shocking and gratuitous."[371]

A. CBS's Super Bowl Halftime Show—"Fleeting Nudity"

About six months after the *Golden Globe* decision, the FCC issued an *NAL* against CBS in the amount of $555,000 for the 2002 Super Bowl Halftime show in which Janet Jackson's breast was exposed.[372] CBS contested liability, but under the *Golden Globe* test, the FCC found that exposing a female breast depicted a sexual organ and thus fell within the definition of indecency.[373] Moreover, it found the depiction patently offensive because the

> segment in question did not merely show a fleeting glimpse of a woman's breast, as CBS presents it. Rather, it showed a man tearing off a portion of a woman's clothing to reveal her naked breast during a highly sexualized performance and while he sang "gonna have you naked by the end of this song."[374]

CBS sought review of the FCC's ruling in the Third Circuit.[375]

B. Fox's Billboard Music Awards—"Fleeting Expletives"

On the same day that the FCC fined CBS, it released an *Omnibus Order* addressing multiple complaints about programs aired between 2002 and 2005.[376] The *Omnibus Order* found ten programs indecent, issued

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370. *Id.* at para. 8.

371. *Id.* at para. 9.

372. *See* Complaints Against Various TV Licensees Concerning Their Feb. 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 19230 (2004) [hereinafter *NAL*]. The *NAL* states that the FCC received over 542,000 complaints about this incident from members of the public. *Id.* at 19231 n.6.

373. Complaints Against Various TV Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, *Forfeiture Order*, 21 F.C.C.R. 2760, para. 9 (March 15, 2006), *recon. denied*, 21 F.C.C.R. 6653 (May 31, 2006).

374. *Id.* at para. 13.

375. CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008).

376. Complaints Regarding Various TV Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, *Notices of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664 (2006) [hereinafter *Omnibus Order*]. On the same day, the FCC also issued an *NAL* against CBS and its affiliates for broadcasting scenes of teenagers engaged in simulated sex

*NAL*s for six, and found that seventeen others did not violate § 1464.[377] The FCC stated that "[t]aken both individually and as a whole, we believe that [these rulings] will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard."[378]

The *Omnibus Order* found that two programs broadcast on Fox contained indecent content. One was the 2002 Billboard Music Awards programs during which Cher said in her acceptance speech: "People have been telling me I'm on the way out every year, right? So fuck 'em [sic]."[379] The FCC found the fact that "fuck" was not repeated was not dispositive because use of that word in a "live broadcast of an awards ceremony when children were expected to be in the audience, was shocking and gratuitous."[380] The FCC applied a similar analysis to Fox's 2003 Billboard Music Awards program, in which Nicole Richie used the words *fucking* and *shit*.[381] Fox sought review in the Second Circuit.[382]

Although the networks argued in both *Fox* and *CBS* that the FCC's actions were unconstitutional, the courts of appeals reversed the FCC on a different ground—that the FCC had failed to adequately justify changing its prior policy as required by the Administrative Procedure Act (APA).[383] The FCC sought certiorari in both cases.[384]

In seeking Supreme Court review in *Fox*, the FCC argued that the lower court's decision conflicted with the Court's decision in *Pacifica* because it "criticized the Commission for taking context into account and refusing to treat a single use of an expletive, no matter how graphic or gratuitous, as per se not indecent, even though, in *Pacifica*, this Court emphasized that 'context is all-important' in evaluating indecency."[385] In

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acts during a 9:00 p.m. broadcast of *Without a Trace*. *See* Complaints Against Various TV Licensees Concerning Their Dec. 31, 2004 Broadcast of the Program "Without a Trace," *Notice of Apparent Liability for Forfeiture*, 21 F.C.C.R. 2732, para. 1 (2006).

377. *Omnibus Order*, *supra* note 376, at 2664–65.

378. *Id.* at para. 2.

379. *Id.* at para. 101 (internal quotation marks omitted).

380. *Id.* at paras. 104–05.

381. *Id.* at paras. 114–17.

382. Fox TV Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007). The FCC sought and received a voluntary remand, but on remand sustained its earlier findings as to these two programs. *See* Complaints Regarding Various TV Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, *Order,* 21 F.C.C.R. 13299, para. 22 (2006).

383. *Fox TV Stations*, 489 F.3d at 462; CBS Corp. v. FCC, 535 F.3d 167, 174–75 (3d Cir. 2008).

384. Petition for Writ of Certiorari, FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582), 2007 WL 3231567; Petition for Writ of Certiorari, FCC v. CBS Corp., 129 S.Ct. 2176 (2008) (No. 08-653), 2008 WL 4933630.

385. Petition for Writ of Certiorari at 13–14, FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582), 2007 WL 3231567 (citing FCC v. Pacifica Found., 438 U.S.

opposing review, NBC argued that the FCC's order was distinguishable from and posed no conflict with *Pacifica.*[386] Nonetheless, it urged that if the Court took the case, it should overturn *Pacifica* because "there no longer exists any sound basis for according broadcast speech less protection than obtains in other channels of communication."[387] NBC contended that

> to the extent that *Pacifica* premised its distinction of the broadcast medium from other channels of communication on the "'*unique*' attributes of broadcasting,"—to wit, that broadcasts were, in 1978, "a *uniquely* pervasive presence in the lives of all Americans" and were "*uniquely* accessible to children" as compared to other types of content,—it rests, thirty years later, on a moth-eaten foundation. In the age of cable and satellite television and the Internet, broadcasting is now one of many methods of delivering content to Americans in their homes. Broadcast television, like other content in our media-driven age, may be "pervasive," but in 2008, even the Commission has trouble contending that it is "*uniquely*" so.[388]

The Supreme Court granted certiorari on March 17, 2008.[389]

VII. THE SUPREME COURT DECISION IN *FOX* AND THE DECISION ON REMAND

The FCC's brief argued that its action in *Fox* was justified by *Pacifica*, but that there was no need to reach the constitutional issues to decide this case.[390] Both Fox and NBC argued that the FCC's current indecency regime was unconstitutional, but only NBC's brief focused on the constitutional arguments.[391] NBC argued that the FCC's definition of indecency was virtually identical to language in the Communications Decency Act, which the Court found unconstitutionally vague in *Reno*.[392]

726, 750 (1978)). The FCC asserted that it had acted reasonably in determining that Cher's and Richie's remarks constituted a "first blow" that could be redressed in the context in which they were uttered. *Id.* at 19.

386. *See* Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Co. at 23–26, *Fox TV Stations*, 129 S. Ct. 1800 (No. 07-582) [hereinafter NBC Opp.].

387. *Id.* at 31.

388. *Id.* at 30–31 (citations omitted).

389. FCC v. Fox TV Stations, Inc., 128 S. Ct. 1647 (2008). In its petition for certiorari in CBS, the FCC noted the similarities between the cases and asked the Court to hold the petition for certiorari in *CBS* pending its decision in the *Fox* case. Petition for Writ of Certiorari for FCC at 14, FCC v. CBS, 129 S. Ct. 2176 (2008) (No. 08-653), 2008 WL 4933630.

390. *See* Brief for the Petitioners at 17, 43, FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582) [hereinafter FCC Br.].

391. For example, NBC asserted at the beginning of its brief, "This is a case about the First Amendment." Brief of Respondents NBC Universal, Inc., NBC Telemundo License Co., CBS Brdcst. Inc., and ABC, Inc. at 1, *Fox TV Stations*, 129 S. Ct. 1800 (No. 07-582) [hereinafter NBC Br.].

392. *See id.* at 21–23.

NBC also argued that the FCC's policy should be analyzed under strict scrutiny rather than the lower standard applied in *Pacifica*, because "[w]hatever validity these rationales may have had when this Court articulated them decades ago, they rest today on moth-eaten foundations and can no longer support the 'relaxed' scrutiny on which the Commission's content restrictions have historically depended."[393] Because of the widespread use of cable television, satellite services, and the Internet, NBC argued that "over-the-air" broadcasting was no longer "uniquely pervasive" or "uniquely accessible to children."[394]

A. The Supreme Court Decision

Of the nine Justices deciding *Fox*, only one was on the Court when it decided *Pacifica*. Justice Stevens, then the newest Justice, had written the decision for the Court affirming the FCC in *Pacifica.* Now Justice Stevens was the most senior member of the Court, and he dissented in *Fox.*[395]

Justice Scalia wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.[396] The Court did not address whether *Pacifica* remained good law or whether the FCC's action was constitutional. Instead, it reversed the lower court's conclusion that the FCC had acted arbitrarily and capriciously in violation of the Administrative Procedure Act (APA).[397]

The Second Circuit had reversed the FCC, finding that the APA required a more substantial explanation was required when an agency changed course. The Supreme Court rejected this interpretation of the APA, holding that neither the APA nor *State Farm* required that changes in policy be subjected to more searching review.[398] The Court found that the

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393. *Id.* at 32. *See also* Brief for Respondent Fox TV Stations, Inc. at 43–45, *Fox TV Stations*, 129 S. Ct. 1800 (No. 07-582) (arguing that the evolution of the contemporary media marketplace has eroded *Pacifica*'s premises) [hereinafter Fox Br.].

394. *See* NBC Br., *supra* note 391, at 33–35.

395. *See Fox TV Stations*, 129 S. Ct. at 1824 (Stevens, J., dissenting).

396. Only one section of Justice Scalia's opinion did not receive five votes. Justice Kennedy did not join in Part III-E, which responded to arguments made in the dissents. His separate opinion concurring in part and concurring in the judgment explained that he agreed with Justice Breyer that the agency must explain why it now rejects the considerations that led it to adopt the initial policy. However, because the FCC's *Order* explained that the FCC had changed its reading of *Pacifica*, its explanation was adequate. *See id.* at 1822–24 (Kennedy, J., concurring).

397. *Id.* at 1819.

398. *Id.* at 1810. *State Farm* refers to *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). There, the Court explained that

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice

FCC acknowledged that it was changing its policy and had given sufficient explanation for the change.[399]

Although the Second Circuit reversed the FCC on APA grounds alone, it expressed skepticism that the FCC could "provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster."[400] In the "interest of judicial economy," it offered several pages of "observations."[401] First, the Second Circuit expressed sympathy with the networks' "contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague."[402] It noted that even though the FCC had declared that all variants of *fuck* and *shit* were presumptively indecent, the FCC had found that the repeated use of those words in *Saving Private Ryan* was not indecent.[403]

The Second Circuit court also noted "some tension in the law regarding the appropriate level of First Amendment scrutiny," in that the Supreme Court applied strict scrutiny when evaluating the regulation of indecency on cable television and the Internet, but applied intermediate scrutiny to broadcasting because of "unique considerations."[404] The networks argued that the grounds for treating broadcasting differently had eroded over time. The Second Circuit seemed to agree, noting that "we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television."[405] The Supreme Court, however, declined to address the constitutional claims, noting that the

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> made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."

Id. (citations omitted).

399. *Id.* at 1819.

400. Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 462 (2d Cir. 2007), *rev'd*, FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009).

401. *Id.* at 462–66.

402. *Id.* at 463.

403. *See id.* (citing Complaints Against Various TV Licensees Regarding Their Broadcast on Nov. 11, 2004, of the ABC TV Network's Presentation of the Film "Saving Private Ryan," *Memorandum Opinion and Order*, 20 F.C.C.R. 4507, para. 14 (2005)).

404. *Fox TV Stations*, 489 F.3d at 464.

405. *Id.* at 465.

constitutionality "will be determined soon enough, perhaps in this very case."[406]

Although not deciding constitutionality, the majority opinion did rely on *Pacifica*. For example, it noted that *Pacifica* held that "the First Amendment allowed Carlin's monologue to be banned in light of the 'uniquely pervasive presence' of the medium and the fact that broadcast programming is 'uniquely accessible to children.'"[407] Following *Pacifica*, the FCC had "preserved a distinction between literal and nonliteral (or 'expletive') uses of evocative language."[408] The FCC changed this view in its 2004 decision in the *Golden Globe* case, where it clarified that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[409]

The majority found that the FCC's decision in *Fox* "to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach we sanctioned in *Pacifica*."[410] In response to the lower court's finding that the FCC acted arbitrarily because it lacked evidence of harm from fleeting expletives, the majority observed that *Pacifica* had not required any quantitative measure of harm. It added:

> we have never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden. To the contrary, we explicitly left for another day whether "an occasional expletive" in "a telecast of an Elizabethan comedy" could be prohibited. By using the narrowness of *Pacifica*'s holding to require empirical evidence of harm before the Commission regulates more broadly, the broadcasters attempt to turn the sword of *Pacifica*, which allowed *some* regulation of broadcast indecency, into an administrative-law shield preventing any regulation beyond what *Pacifica* sanctioned.[411]

Justice Thomas concurred, agreeing that the FCC had complied with the APA.[412] But he argued that the precedents cited to support the FCC's

406. FCC v. Fox TV Stations, Inc, 129 S. Ct. 1800, 1819 (2009). The Court was likely referring to the fact that even though the Second Circuit decided the case solely on administrative procedure grounds, it provided an extensive analysis of the constitutional challenges and expressed skepticism that the FCC could "provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." *Fox TV Stations*, 489 F.3d at 462.

407. *Fox TV Stations*, 129 S. Ct. at 1806 (citing FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978)).

408. *Fox TV Stations*, 129 S. Ct. at 1807.

409. *Id.* at 1808 (quoting Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975, para. 12 (2004)) (internal quotation marks omitted).

410. *Fox TV Stations*, 129 S. Ct. at 1812.

411. *Id.* at 1815 (citations omitted).

412. *Id.* at 1820 (Thomas, J., concurring).

constitutional authority—*Red Lion* and *Pacifica*—"were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity."[413] He contended that "*Red Lion* adopted, and *Pacifica* reaffirmed, a legal rule that lacks any textual basis in the Constitution."[414] Moreover, even if these cases could have been justified at the time, "traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were."[415]

Justice Stevens dissented, as did Justice Ginsburg and Justice Breyer, who was joined by Justices Stevens, Souter, and Ginsburg. Justice Stevens argued that the majority "incorrectly assum[ed]" that *Pacifica* endorsed a construction of the term "indecent" that "permits the FCC to punish the broadcast of *any* expletive that has a sexual or excretory origin," when in fact, "*Pacifica* was not so sweeping, and the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time."[416] Stevens described the *Pacifica* decision, which he wrote, as upholding

> the FCC's adjudication that a 12–minute [sic], expletive-filled monologue by satiric humorist George Carlin was indecent "as broadcast." We did not decide whether an *isolated* expletive could qualify as indecent. And we certainly did not hold that any word with a sexual or scatological origin, however used, was indecent.[417]

Stevens noted a "critical distinction between the use of an expletive to describe a sexual or excretory function and . . . to express an emotion."[418] Because the FCC adopted an interpretation of indecency bearing no resemblance to what *Pacifica* contemplated with no "awareness that it has ventured far beyond *Pacifica*'s reading of § 1464," he found the FCC decision arbitrary.[419] Justice Ginsburg agreed that the FCC's "bold stride beyond the bounds" of *Pacifica* was arbitrary and capricious.[420] She noted that *Pacifica* was "tightly cabined, and for good reason," and that Justice Brennan's concerns about suppression were "even more potent today."[421]

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413. *Id.*

414. *Id.* at 1821.

415. *Id.* at 1822. Justice Thomas noted that most consumers received broadcast media via cable or satellite and that it was also available on computers, cell phones, and other wireless devices. *Id.*

416. *Id.* at 1825 (Stevens, J., dissenting). Stevens also dissented on the grounds that the majority treated the FCC's rulemaking authority as a "species of executive power" that need not be explained. *Id.*

417. *Id.* at 1827 (citations omitted).

418. *Id.*

419. *Id.* at 1828 (Stevens, J., dissenting).

420. *Id.* (Ginsburg, J., dissenting).

421. *Id.* at 1829. Justice Breyer also faulted the FCC for failing to acknowledge that an entirely different understanding of *Pacifica* supported its earlier policy. *Id.* at 1834 (Breyer, J., dissenting).

After deciding the *Fox* case, the Supreme Court granted the petition for writ of certiorari in *CBS*, vacated the judgment, and remanded to the Third Circuit for further consideration in light of its decision in *Fox*.[422]

B. The Fox *Decision on Remand*

After further briefing, the same panel of the Second Circuit unanimously found the FCC's indecency policy to be unconstitutionally vague.[423] It rejected the FCC's claim that it needed a flexible standard because broadcasters had found ways to air indecent material without using the "seven dirty words," noting that "[i]f the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so."[424] The court also found there was "little rhyme or reason" to the FCC's cases regarding the use of *fuck* and *shit*, thus leaving broadcasters to guess as to whether an expletive would be subject to an exception or not.[425] It concluded that the FCC's "indiscernible standards" created an unacceptable risk that they would be enforced in a discriminatory manner.[426]

The court rejected the FCC's contention that its context-based approach was consistent with or even required by *Pacifica*:

> While *Pacifica* emphasized the importance of context in regulating indecent broadcasts, it did so in order to emphasize the limited scope of its holding, finding that the particular "context" of the Carlin monologue justified an intrusion on broadcasters rights under the First Amendment. It does not follow that the FCC can justify any decision to sanction indecent speech by citing "context." Of course, context is always relevant, and we do not mean to suggest otherwise in this opinion. But the FCC still must have discernible standards by which individual contexts are judged.[427]

At the same time, the court declined the networks' invitation to overrule *Pacifica*. It agreed with the networks that the "past thirty years ha[ve] seen an explosion of media sources, and broadcast television has become only one voice in the chorus."[428] It also recognized that the technological changes such as the V-Chip had provided parents with greater ability to decide what their children can watch.[429] However, it concluded that "we are bound by Supreme Court precedent, regardless of

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422. FCC v. CBS, 129 S. Ct. 2176 (2009).
423. Fox TV Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).
424. *Id.* at 331.
425. *Id.* at 332.
426. *Id.*
427. *Id.* at 333 (citations omitted).
428. *Id.* at 326.
429. *Id.* 328.

whether it reflects today's realities."[430]

VIII. CONCLUSION: THE IMPLICATIONS OF *PACIFICA* FOR THE CURRENT CONTROVERSY OVER BROADCAST INDECENCY

From today's vantage point, it seems surprising that the Supreme Court took the *Pacifica* case and upheld the FCC's position. The FCC had received only a single complaint about the broadcast of the Carlin monologue. While finding that the broadcast violated § 1468, the FCC merely admonished the station. As one article put it, the "FCC's response was tantamount to the proverbial principal telling the child upon his first offense that 'this will go on your permanent record.'"[431]

The FCC intentionally utilized a *Declaratory Order* to provide guidance to broadcasters as to what language would be tolerated on the public airwaves when children were in the audience. The D.C. Circuit reversed, with Judge Leventhal dissenting. In its attempt to reverse the D.C. Circuit in the Supreme Court, the FCC recast its action as a narrow, fact-based adjudication.

Many observers expected that the FCC would lose in the Supreme Court. The United States, in fact, argued that the FCC's action violated the First Amendment. The position was set forth by an experienced Supreme Court advocate from the Solicitor General's office. In contrast, the FCC counsel had never argued before in the Supreme Court and had difficulty answering the questions at oral argument. When the case was decided, it was harshly criticized by many in the public and in academia.

My review of the available papers from the Justices that heard the case reveal just how close the decision was. Justice Stevens provided the swing vote, stating at the conference that he had flip-flopped and might do so again. He had a difficult time getting five votes for his opinion. Justices Blackmun and Powell both rejected the advice of their law clerks and joined most of Justice Stevens's opinion. The four other Justices dissented, with Justice Brennan writing a particularly blistering dissent on First Amendment grounds.

My review of the Justices' papers suggests that one of the factors leading to the Court's narrow affirmance of the FCC was the dissenting opinion of Judge Leventhal in the decision below. Leventhal was a highly respected jurist. He thought that the only issue before the court was the narrow question of the reasonableness of the FCC's finding with regard to

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430. *Id.* at 327. The FCC filed a Petition for Rehearing and Rehearing En Banc on Aug. 25, 2010. It is "widely expected" that the case will go back to the Supreme Court. Associated Press, *FCC Asks Court to Revisit a Ruling Against an Indecency Policy*, N.Y. TIMES, Aug. 26, 2010, at B2.

431. Demas, *supra* note 347, at 40.

WBAI's broadcast of the Carlin monologue in the afternoon. The repeated references to Leventhal in the notes of Justices Blackmun and Powell and in the post-argument conference suggest that several members of the Supreme Court were swayed by Leventhal's framing of the case.

It is somewhat ironic, then, that the *Declaratory Order* in *Pacifica* came to be understood as a prohibition on the broadcast of the "seven dirty words" prior to 10:00 p.m.[432] However, the fact that it was not an actual rule and the narrowness of the Supreme Court's holding permitted the FCC to change its policy without conducting a rulemaking. That is exactly what the FCC did in *Golden Globe*, *Fox*, and *CBS*. Moreover, it justified its new approach by asserting that under *Pacifica*, it was necessary for the FCC to consider the context of the allegedly indecent broadcast. In reviewing the *Fox* decision, however, the Supreme Court applied the same standard of review it uses for rulemaking.

On remand from the Supreme Court, the Second Circuit has concluded that the FCC's approach to indecency in *Fox* was unconstitutionally vague. It is uncertain whether the FCC will seek certiorari of the Second Circuit's decision on remand in *Fox*, and if so, whether the Court will take the case. If the Court hears the case, it will be decided by a completely different bench than the one that decided *Pacifica*. Justice Stevens retired at the end of the 2009–10 term and has been replaced by Justice Elena Kagan.

Justice Stevens wrote the opinion for the Court in *Pacifica*, but he dissented in *Fox*, arguing that the FCC's actions in *Fox* went well beyond and were not supported by the decision in *Pacifica*. The history of the *Pacifica* decision supports Justice Stevens's position that *Pacifica* did not contemplate—much less mandate—the FCC's findings of indecency in the *Fox* and *CBS* cases. Neither the FCC nor the Court analyzed the content of the WBAI's "Lunchpail" in the manner that the FCC analyzed the Super Bowl Halftime Show or the Billboard Music Awards programs. To the contrary, many at the time criticized the *failure* to take context into account.[433] Had the FCC considered the context of the program in which the language was used in *Pacifica*, it would have been difficult for it to have reached the result it did. WBAI compared Carlin to Mark Twain and argued that the monologue was broadcast as part of a serious discussion on the use of language and that he used "dirty words" to make fun of society's attitudes toward language.[434] And indeed, four days before his death in June 2008, George Carlin was named recipient of the Mark Twain Prize for

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432. *See* Levi, *supra* note 363, at 1.

433. *See, e.g.*, *supra* notes 94, 123, 223 and accompanying text.

434. Brief for FCC at 16–17, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528) (quoting Pacifica's Response to the complaint).

American Humor.[435]

However, there is another, perhaps more important lesson to be drawn from the history of the *Pacifica* case: individual adjudications, such as those in *Fox* and *CBS*, are not good vehicles for setting forth policy with regard to broadcast indecency.

Generally, the FCC announces new policies or changes existing policies after conducting notice and comment rulemaking under section 553 of the Administrative Procedure Act.[436] In contrast, the *Pacifica* case involved the adjudication of a single complaint. The FCC also used complaints about specific programs to announce broad new rules regulating indecency. On review, both the Second and Third Circuits applied rulemaking standards to the FCC's adjudications, finding that the FCC had failed to comply with the APA and *State Farm*, a case that involved a rulemaking proceeding.[437] The Supreme Court also applied the *State Farm* test, but the majority concluded that the FCC was consistent with the APA requirements.[438]

Both the majority and dissents viewed the FCC's ruling against Fox as the equivalent of adopting a new rule. For example, the majority explained that *State Farm*, "which involved the rescission of a prior regulation, said only that such action requires 'a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance.'"[439] Justice Stevens criticized the majority for assuming that the FCC's "*rulemaking authority* is a species of executive power," and that it "need not explain its decision to discard a *longstanding rule* in favor of a dramatically different approach to regulation."[440] Justice Breyer's dissent noted that the "result" of the FCC's action was "a *rule* that may well chill coverage."[441] He acknowledged that the FCC did not use "traditional administrative notice-and-comment procedures," which would have "obligate[d] the FCC to respond to *all* significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[442] But he concluded that

> the same failures here—where the policy is important, the significance

435. The Kennedy Center presents this annual award to recognize lifetime achievement by an outstanding comedian. Jacqueline Trescott, *Bleep! Bleep! George Carlin to Receive Mark Twain Humor Prize*, WASH. POST, June 18, 2008, at C1.

436. 5 U.S.C. § 553 (2006).

437. CBS v. FCC, 535 F.3d 167, 174, 182–83, 188–89 (3d Cir. 2008); Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 455, 457 (2d Cir. 2007).

438. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 1823–24 (2009).

439. *Id.* at 1810.

440. *Id.* at 1824–25 (Stevens, J., dissenting) (emphasis added).

441. *Id.* at 1837 (Breyer, J., disssenting) (emphasis added).

442. *Id.*

> of the issues clear, the failures near complete—should lead us to the same conclusion. The agency's failure to discuss these two "important aspect[s] of the problem" means that the resulting decision is "'arbitrary, capricious, an abuse of discretion'" requiring us to remand the matter to the agency."[443]

If the FCC wants to continue enforcing § 1468's prohibition against broadcast indecency, the history of the *Pacifica* case suggests that the FCC would have greater success by initiating a rulemaking proceeding than by seeking certiorari in *Fox*. The benefits of rulemaking over case-by-case adjudication are well known. Rulemakings are said to produce higher quality rules because in an adjudication, only the party or parties to the particular dispute are before the agency. By contrast, in a rulemaking proceeding, all potentially affected members of the public have the opportunity to participate. The comments filed in a rulemaking typically provide diverse perspectives, address the nature and extent of the problem, provide factual information, and identify practical problems with the agency proposals.[444]

Pacifica illustrates the drawbacks of making policy by adjudication. The entire defense fell on the shoulders of the Pacifica Foundation, a nonprofit organization with limited resources. The record in *Pacifica*, which essentially consisted of two short letters, contained few facts even about the specific complaint, and nothing about the impact on other broadcasters, the listening public, or speakers, creators, or producers of the work being broadcast. As a result, the FCC Commissioners, as well as the judges and Justices who heard the case, made factual assumptions that may not have been correct. For example, the FCC assumed without citing any evidence that children would be listening to the radio at 2:00 p.m.[445] Yet, data submitted in amicus briefs suggested that few children listened to the radio at 2:00 p.m., while large numbers listened in the late evening hours.[446] Had the FCC conducted a rulemaking proceeding in which it sought information about the listening habits of children, it might have reached a better decision.[447]

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443. *Id.* at 1838 (citing Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

444. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8 (4th ed. 2002).

445. Pacifica did not submit such information, and in fact, it may not have had access to such data. Although ratings and demographic information are essential to commercial radio stations for purposes of advertising, noncommercial radio stations do not need such data because they do not sell advertising time. Moreover, such data is not publically available and is expensive to purchase.

446. Open Media Br., *supra* note 78, at 12–13; ABC Br., *supra* note 140, at 9. Participating as an amicus after an agency decision has been made is not as effective as being able to present arguments and facts to the agency before it decides.

447. Judge Bazelon's opinion identified several other undocumented assumptions,

Similarly, the adjudication in *Fox* left important gaps in the factual record. For example, Breyer's dissenting opinion faulted the FCC for failing to consider the ruling's impact on small and public broadcasters, who, because they could not afford the cost of "bleeping" technology, would curtail their coverage of local public events.[448] Had the FCC conducted a rulemaking, it could have obtained and submitted evidence on the cost and impact of this technology.

Rules make it easier for entities subject to regulation to ascertain what is or is not allowed and thus reduce the ability of the agency to engage in discretionary enforcement.[449] The FCC's declaratory ruling in *Pacifica* did not put broadcasters on notice as to what they could and could not say on air, but only that they could not repeatedly broadcast the "seven dirty words" at times when children were likely to be in the audience. And it left the FCC free to bring later enforcement actions citing *Pacifica*, such as those in *Fox* and *CBS*, even though those cases were factually distinct.

Although the FCC claimed that the *Omnibus Order* in *Fox* provided guidance to broadcasters, even a broadcaster who read the entire *Order* would not have a clear idea of what the FCC considered indecent. Indeed, the Second Circuit reached the same conclusion on remand when it found the FCC's policy "impermissibly vague."[450] Thus, the FCC's chance of adopting a constitutional indecency policy would be increased by abandoning its case-by-case approach and conducting a rulemaking proceeding.

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including whether parents would find such language unsuitable for children and whether parents had other ways to control the listening habits of their children. Pacifica Found. v. FCC, 556 F.2d 9, 28 (D.C. Cir. 1977) (Bazelon, J., dissenting). Justice Powell thought the language was "'patently offensive' to most people regardless of age." FCC v. Pacifica Found., 438 U.S. 726, 757 (1978) (Powell, J., concurring). Justice Brennan pointed out that "some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words." *Id.* at 770 (Brennan, J., dissenting). Had the FCC conducted a rulemaking proceeding instead of acting on a single complaint, parents or organizations representing parents may have weighed in on these issues.

448. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 1832–38 (2009) (Breyer, J., dissenting). The *CBS* case presented a similar issue involving the cost of video delays.

449. *See, e.g.*, PIERCE, *supra* note 444, at 372–73.

450. The court illustrates how the FCC's indecency policy is impermissibly vague with an example: "[T]he FCC concluded that 'bullshit' in a 'NYPD Blue' episode was patently offensive, [but] it concluded that 'dick' and 'dickhead' were not." Fox TV Stations, Inc. v. FCC, 613 F.3d 317, 330 (2d Cir. 2010) (citing *Omnibus Order*, *supra* note 376, paras. 127–28).

From One [Expletive] Policy to the Next: The FCC's Regulation of "Fleeting Expletives" and the Supreme Court's Response

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I. INTRODUCTION

"[T]his is really, really fucking brilliant. Really, really great," exclaimed U2 front man Bono during his acceptance speech for "Best Original Song" at the 2003 *Golden Globe Awards*, resulting in a deluge of complaints to the FCC.[1] In response, the FCC's Enforcement Bureau issued a *Memorandum Opinion and Order* finding that "[t]he word 'fucking' may be crude and offensive, but, in the context presented here, [it] did not describe sexual or excretory organs or activities."[2] The bureau further mentioned, "when offensive language is used as an adjective to emphasize an exclamation . . . or it is used as an insult . . . , then it falls beyond the scope of the indecency regime."[3]

Upset with the decision, a group of people affiliated with the Parents Television Council (PTC) pressured the FCC until the agency finally agreed to revisit the bureau's prior decision.[4] In a *Memorandum Opinion and Order* released on March 18, 2004, the FCC departed from its prior position and promulgated a new policy concerning the fleeting—or nondeliberate, nonrepetitive, and otherwise isolated—use of expletives on

1. Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 451 (2d Cir. 2007).

2. Complaints Against Various Brdcst. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, 18 F.C.C.R. 19859, para. 5 (2003) [hereinafter *Golden Globe Order*], *rev'd*, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975 (2004).

3. Dave E. Hutchinson, Note, *"Fleeting Expletives" Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation*, 61 FED. COMM. L.J. 229, 245 (2008) (citing *Golden Globe Order*, *supra* note 2, at para. 5) (citation omitted).

4. *See id.*

public airwaves.[5] Although the *Order* indicated that it would be inappropriate to punish NBC in this case since the network did not have adequate notice of the new policy, the FCC was clear that the fleeting or incidental use of expletives would be subject to punishment in the future.[6]

As a result, a number of broadcast networks sought legal reprieve in the Second Circuit, arguing that the new policy was both arbitrary and capricious under the Administrative Procedure Act (APA) and unconstitutional under the First Amendment.[7] In an opinion by Judge Rosemary S. Pooler, writing on behalf of a three-judge panel, the Second Circuit agreed that the new policy was arbitrary and capricious, but opted to bypass the constitutional question for the time being.[8] The FCC subsequently petitioned the Supreme Court for review, and on March 17, 2008, the Supreme Court granted certiorari.[9]

In a somewhat surprising opinion authored by Justice Scalia, the Supreme Court reversed the decision of the Second Circuit. Like the Second Circuit, however, the Supreme Court did not address the First Amendment issue underlying the FCC's policy, and instead based its decision on the premise that the policy was "entirely rational" and therefore neither arbitrary nor capricious.[10]

Despite the Court's opinion, the controversy surrounding the use and regulation of expletives on the public airwaves was not dead. Not too long ago, in fact, the issue made headlines following the September 26, 2009, season debut of *Saturday Night Live*, during which one of the comedians, Jenny Slate, inadvertently said the word "fucking" as opposed to the word "freaking," in a planned skit.[11] Even more recently, on July 13, 2010, the Second Circuit, on remand from the Supreme Court, determined that the FCC's policy concerning fleeting expletives is unconstitutional in violation of the First Amendment.[12]

With national attention again focused on the issue of fleeting expletives, it has become worthwhile to evaluate the Supreme Court's decision in *Federal Communications Commission v. Fox* to determine what

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5. *See* Complaints Against Various Brdcst. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975, para. 12 (2004).

6. *See id.* at paras. 12–15.

7. Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 454–55 (2d Cir. 2007).

8. *See id.*

9. Lyle Denniston, *Court Grants Review of Indecency Law, 7 Other Cases*, SCOTUSBLOG (Mar. 17, 2008, 10:02 AM) http://www.scotusblog.com/2008/03/court-grants-review-of-indecency-law/.

10. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 1812 (2009).

11. *Saturday Night Live* (NBC television broadcast Sept. 26, 2009).

12. Fox TV Stations, Inc. v. FCC, 613 F.3d 317, 335 (2d Cir. 2010).

led to the result in that case. It is also important to consider what might happen now that Sonia Sotomayor has replaced David Souter and Elena Kagan has replaced John Paul Stevens. After considering four prevailing models of judicial decision making, this Note contends that Supreme Court Justices decide cases predominately in accordance with their judicial attitudes and personal ideologies. Consequently, based on the ostensible attitudes of the current Justices, if the Court soon addresses the First Amendment issue, it seems that the outcome will likely favor the broadcasters.

This Note begins in Part II by discussing in more depth the decisions by the Second Circuit as well as the decision by the Supreme Court. Part III of this Note evaluates the four leading models of judicial decision making—the legal model, the attitudinal model, the strategic model, and the historic-institution model—and posits that the attitudinal model has achieved the greatest record of success when it comes to predicting and explaining the outcome of various cases. Part IV applies these four models to the Supreme Court's decision in *Federal Communications Commission v. Fox*, concluding ultimately that the attitudinal model provides the most coherent explanation for the outcome, and thereby leading to the implication that the result of a future fleeting-expletives case hinges mostly on the composition of the Court. Part V then sets up a prediction for how the fleeting expletives issue will ultimately be resolved by considering the judicial attitudes of recent appointee Sonia Sotomayor as well as the apparent attitudes of the remaining Justices, including the recently confirmed Elena Kagan. The Note generally concludes that if a First Amendment challenge surfaces before the Court, the Court will most likely invalidate the FCC's current policy, paving the way for a new era in the regulation of broadcast media.

II. THE CASE: *FEDERAL COMMUNICATIONS COMMISSION V. FOX*

After the FCC came out with its new policy governing the use of fleeting expletives, Fox Television Stations, along with CBS, WLS, KRTK, KMBC, and ABC, appealed to the Second Circuit, asking the court to consider whether the policy was legally justified.[12] A number of other parties, including NBC, FBC, and the Center for the Creative Community, joined as intervenors.[13] Although the impetus for the FCC's policy change was the controversy surrounding the *2003 Golden Globe Awards*, the facts that gave rise to the case involved four particular broadcasts that were allegedly indecent, albeit retroactively, under the *Golden Globe Order*.

The first was Fox's broadcast of the *2002 Billboard Music Awards*.

12. *Fox v. FCC*, 489 F.3d at 452.
13. *Id.* at 454.

Similar to the events of the *Golden Globes*, musician Cher caught Fox off guard during an acceptance speech when she said, "People have been telling me I'm on the way out every year, right? So fuck 'em."[14] The second was at the *2003 Billboard Music Awards*, where one of the show's presenters, Nicole Richie, rhetorically inquired, "[h]ave you ever tried to get cow shit out of a Prada purse?" and then retorted, "[i]t's not so fucking simple."[15] The third involved a series of broadcasts of ABC's *NYPD Blue*, in which one of the characters, Detective Andy Sipowicz, used the words "bullshit," "dick," and "dickhead."[16] The last concerned a broadcast of CBS's *Early Show* in which one of the contestants on the show *Survivor* called another contestant a "bullshitter."[17]

Shortly after the case was filed, the FCC moved for a voluntary remand to give the FCC a chance to address petitioners' arguments.[18] The FCC then issued its *Remand Order*,[19] which replaced the *Golden Globe Order* but reaffirmed the FCC's finding that the *2002* and *2003 Billboard Music Award* broadcasts were indecent and profane, meaning that the broadcasts depicted or described sexual or excretory activities.[20] The *Remand Order* reversed the decision against the *Early Show*, finding it to be a bona fide news program and dismissed the claim against *NYPD Blue* on the basis that the questionable language occurred during the safe harbor time period.[21] Fox then moved for review of the *Remand Order* and filed a motion to consolidate that appeal with the one already before the court.[22]

On appeal, Fox and the other petitioners raised several arguments, but because the court agreed with Fox that the FCC's policy was arbitrary and capricious, it went no further in its analysis. When evaluating an agency decision under the arbitrary and capricious standard, courts typically require the agency to examine the pertinent facts and provide a satisfactory explanation for its action. As the Second Circuit indicated, there must be a "rational connection between the facts found and the choice made."[23] This review is narrow, and it is not the job of the court to substitute its judgment

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14. *Id.* at 452.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 453.

19. *See* Complaints Regarding Various TV Brdcsts. Between Feb. 2, 2002 and Mar. 8, 2005, *Order*, 21 F.C.C.R. 13299, para 1 (2006) [hereinafter *Remand Order*].

20. *Id.*

21. *Fox v. FCC*, 489 F.3d at 453–54; *see also* 47 C.F.R. § 73.3999(b) (2010) (describing the safe-harbor time period as the hours between 10:00 p.m. and 6:00 a.m.).

22. *Fox v. FCC*, 489 F.3d at 454.

23. *Id.* at 455 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (internal quotation marks omitted).

for that of the agency.[24]

Using this framework, the Second Circuit found that the FCC's policy was arbitrary and capricious because it represented a complete shift from previous policy, the reason for which was unclear.[25] Prior to 2003, for example, the "FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime."[26] Recognizing as much, the FCC agreed that it was making a change, saying "[i]n the *Golden Globe Order*, the Commission made clear that it was changing course with respect to the treatment of isolated expletives."[27]

The court then determined that the FCC's justifications for departing from its prior rulings were inadequate. As the court mentioned, "[a]gencies are of course free to revise their rules and policies. Such a change, however, must provide a reasoned analysis for departing from prior precedent."[28] Attempting to provide such a reasoned analysis, the Commission relied primarily on the Supreme Court's opinion in *Federal Communications Commission v. Pacifica Foundation*.[29] In that case, the Court was persuaded that material on public airwaves enters the home without warning, and wrote, "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[30]

The Second Circuit rejected this justification because it failed to explain why fleeting expletives suddenly amounted to a "first blow" when they never did in the past.[31] The court also stated that the policy was not appropriately tailored under the first blow theory because there were certain exceptions that would allow the same words to be used in one context but not another. A broadcaster could, for example, air a taping of the oral argument in this case, during which the same offensive expletives were routinely used, on the basis that in such a context, the airing would have journalistic or artistic importance.[32] Likewise, a broadcaster also could air an unedited version of the movie *Saving Private Ryan* because the expletives are integral to the work and deleting them would have diminished the realism and effect of the movie.[33] Because of such

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24. *Id.* at 455.

25. *Id.*

26. *Id.*

27. Brief of Respondent at 33, Fox TV Stations v. FCC, 489 F.3d 444 (2007) (Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag), 2006 WL 5486967 at *33.

28. *Fox v. FCC*, 489 F.3d at 456 (citations omitted).

29. 438 U.S. 726 (1978).

30. *Id.* at 748–49.

31. *Fox v. FCC*, 489 F.3d at 458.

32. *Id.*

33. *Id.* at 458–59 (citing Complaints Against Various TV Licensees Regarding Their

exceptions, unwilling viewers or listeners would still be subject to the first blow, the court reasoned.[34] As a result, the Second Circuit found the new policy to be arbitrary and capricious.

The Supreme Court reversed the Second Circuit's decision by a five-to-four vote, finding that the policy was neither arbitrary nor capricious.[35] Justice Scalia announced the opinion of the Court, which was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. There were seven opinions altogether, as Justice Scalia lost a majority for Part III-E of his opinion.[36] The majority opinion rejected the Second Circuit's application of what it called a heightened—or more searching—arbitrary and capricious review standard.[37] More importantly, the Court mentioned that the Second Circuit erred by requiring the FCC to provide a more satisfactory justification for the change in policy than that which was required to adopt the original policy in the first place.[38]

Justice Thomas filed a concurring opinion, which was joined by Justice Kennedy, in which he agreed with the result based on the Administrative Procedure Act, but questioned the validity of the Court's precedent concerning the regulation of broadcast media.[39] Justice Kennedy filed a separate concurring opinion that repeated the Second Circuit's legal standard, but found that the FCC had not failed to provide a reasoned explanation for its policy change.[40] By contrast, Justice Stevens's dissenting opinion suggested that the FCC, in fact, did fail to explain its policy change.[41] Justice Ginsburg filed a separate dissenting opinion forecasting the ramifications of the new policy on the First Amendment.[42] The lead dissenting opinion, authored by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, found not only that the FCC had failed to provide a reasoned explanation for its change in policy but also that it had failed to identify the underlying circumstances necessitating

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Broadcast on Nov. 11, 2004, of the ABC TV Network's Presentation of the Film "Saving Private Ryan," *Memorandum Opinion and Order*, 20 F.C.C.R. 4507, para. 14 (2005)).

34. *Id.* at 459.

35. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009).

36. As this case illustrates, the Court has departed from a time in which the consensual norm of the Justices was to issue unanimous opinions. The reason for this departure, some scholars contend, is that dissenting and concurring opinions provide a mechanism for the Court to increase its power and legal control over society in light of the contentious cases the Court now hears. *See* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 286–87 (2007).

37. *See FCC v. Fox*, 129 S. Ct. at 1810.

38. *Id.*

39. *Id*. at 1819–20 (Thomas, J., concurring).

40. *Id.* at 1824 (Kennedy, J., concurring).

41. *See id.* at 1826 (Stevens, J., dissenting).

42. *See id.* at 1829 (Ginsburg, J., dissenting).

change to begin with.[43]

Like the decision from the Second Circuit, the Supreme Court's decision did not address the underlying First Amendment issue. Justice Scalia asserted, "[i]f the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's 'arbitrary [or] capricious' standard; its lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge."[44] Because of the Supreme Court's role as final arbiter and not first reviewer, Scalia unsurprisingly saw no reason to "abandon . . . usual procedures in a rush to judgment without a lower court opinion [addressing the constitutional question]."[45]

Thus, while this case focused solely on whether the FCC's policy was arbitrary and capricious and not on whether the policy was constitutional, it seems likely that the Court will need to decide the First Amendment issue at some point. Indeed, given the Second Circuit's recent remand decision finding the FCC's policy to be unconstitutionally vague in violation of the First Amendment, it has become even more necessary for the Supreme Court to finally resolve the constitutional issue.[46] After evaluating four primary models of judicial decision making, this Note contends that if the Court addresses the First Amendment issue, the attitudes of the justices will lead to a result that favors the broadcasters.

III. FOUR MODELS OF JUDICIAL DECISION MAKING

A. The Legal Model

Probably the most easily identifiable model of judicial decision making is the legal model. The legal model posits that judges base decisions solely in accordance with the law, which is developed primarily by previous cases and the canons of statutory interpretation.[47] As Chief Justice John Roberts famously quipped during his confirmation hearing, "Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role."[48]

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43. *See FCC v. Fox*, 129 S. Ct. at 1829 (Breyer, J., dissenting).

44. *Id.* at 1812.

45. *Id.* at 1819.

46. Fox TV Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).

47. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 32 (1993).

48. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee).

Although the legal model is based upon the notion that judges and Justices are neutral umpires, Harold J. Spaeth identifies four major tools or methods of analysis that legalists often employ. The first looks only at the plain meaning of the text. This method "simply holds that judges rest their decisions on the plain meaning of the pertinent language,"[49] which applies to not only statutes and constitutional provisions, but also to the Justices' own judicially created rules.[50] The problem, though, is that the plain meaning is often indeterminate, which in many cases renders this tool unhelpful to judicial decision makers.

If the text is not readily ascertainable, the second guiding tool available to legalists is the legislative and framers' intent. As Spaeth mentions, "[l]egislative and framers' intent refers to construing statutes and the Constitution according to the preferences of those who originally drafted and supported them."[51] Virtually any information that can be elicited from the historical record preceding the enactment is available for consideration.[52] Thus, this method can sometimes provide more guidance to the Justices when the plain meaning is unclear.[53] Yet, in many cases, it is nearly impossible to determine what motivated a legislator to vote the way he or she did, despite what the legislative history may reveal.

A third method of legalistic analysis focuses heavily on case precedent. This method is perhaps observed most commonly, since nearly every case cites to precedent as a way to help justify the outcome.[54] When statutory or constitutional language is unclear, judges consider how previous judges have interpreted the text, with a goal of guaranteeing some consistency in the application of the law. One unfortunate characteristic of precedent, though, is that ambiguous text, by its nature, can often be interpreted in more than one way, leading to the result that precedent does not always provide clear guidance to judges seeking to apply the law.[55]

The fourth and final method or analytical tool that judges might employ is a form of balancing that weighs the collective interest or public good on one side against the individual interests at stake on the other. Balancing can be either ad hoc (done on a case-by-case basis) or definitional (where the court "employs one or more hard-and-fast rules to

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49. SEGAL & SPAETH, *supra* note 47, at 34.

50. *See id.*

51. *Id.* at 38.

52. *See id.* at 38–40.

53. The most useful elements of legislative intent include, in order of importance, committee reports, bills and their amendments, sponsor remarks, and committee hearings. *See* Peggy Jarrett & Cheryl Nyberg, *Introduction*, FEDERAL LEGISLATIVE HISTORY, http://lib.law.washington.edu/ref/fedlegishist.html (last visited Nov. 12, 2010).

54. SEGAL & SPAETH, *supra* note 47, at 44.

55. *See id*. at 44–45.

rationalize a decision.").[56] Naturally, ad hoc balancing gives judges more leeway to evaluate the facts of a particular case without reference to prior rules or tests.[57] Despite its inherent subjectivity, Spaeth notes, "justices commonly label [balancing] an objective criterion," thereby fitting it nicely within the legal model of judicial decision making.[58]

Probably the greatest appeal of the legal model is that it comports with the perception of the Court as an independent and impartial branch of government that makes black-and-white decisions based purely on the law. In many situations, especially situations in which the statutory language is unequivocal or the case precedent is obviously one-sided, the legal model is an effective tool for explaining the Court's decisions. When the Court experiences new questions of law and changing social attitudes, however, the legal model continually reveals its shortcomings.[59]

B. The Attitudinal Model

The most widely accepted model of judicial decision making by scholars and legal analysts is the attitudinal model. The attitudinal model varies markedly from the legal model. Justices often discredit its validity as a way to explain the outcome of their cases.[60] As Spaeth nevertheless suggests, the attitudinal model presumes that the "justices decide . . . cases on the basis of the interaction of their ideological attitudes and values with the facts of a case. . . . In other words, the justices vote as they do because they want their decisions to reflect their individual personal policy preferences."[61]

There are two basic iterations of the attitudinal model.[62] The first evaluates the behavior of justices in very narrowly defined issues—that is, how justices react to specific issues such as the death penalty, commercial speech, or affirmative action.[63] The second iteration analyzes the behavior of Justices in much broader terms.[64] Under this broader view, one might evaluate how Justices tend to vote on issues generally falling under the

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56. *Id.* at 52.

57. *See id.* at 53.

58. *Id.* at n.82.

59. *See* KENT GREENAWALT, LAW AND OBJECTIVITY 11 (1992) (arguing that "any extreme thesis that 'the law' is always or usually indeterminate is untenable."); *see also* RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION 1 (1998) (suggesting that there are "internally-correct [sic] answers to all legal-rights questions.").

60. Harold J. Spaeth, *The Attitudinal Model*, *in* CONTEMPLATING COURTS 296, 306 (Lee Epstein, ed. 1995).

61. *Id.* at 305.

62. *Id.*

63. *Id.*

64. *Id.*

umbrella of civil rights or business regulation.[65]

Although the attitudinal model seems to be widely accepted by many people, there is still some disagreement among scholars on the source of attitudes. The debate generally revolves around "whether an individual acquires [his or her attitudes] genetically or as a result of environmental experience—and whether the justices' personal policy preferences extend to normative considerations, such as judicial restraint and strict construction, or to procedural matters, such as venue and mootness, or operate only substantively."[66] Despite this apparent source of disagreement, however, Spaeth posits that any differences in the origins of attitudes do not affect the underlying assumptions of the attitudinal model and only direct the focus of the analyst.[67]

Spaeth's formulation of the attitudinal model describes the Justices in terms of their political ideology. Justices are therefore categorized as being either liberal, moderate, or conservative as identified first by the Justices' prior voting record, and second, if no such record exists, by newspaper editorials that classify the nominees before their confirmation as liberal or conservative on issues of civil rights and civil liberties.[68] Spaeth then uses *Guttman scaling* to predict the outcome of certain cases. This method is cumulative in nature, meaning it "assumes that persons who respond favorably to a given question will also respond favorably to all less extreme questions."[69]

Using that analysis, Spaeth considered the issue of capital punishment and found a remarkably consistent voting pattern of the Justices, such that the most liberal justice consistently supported the person subject to capital punishment and the most conservative Justice consistently voted to uphold the death sentence.[70] The remaining Justices fell somewhere in the middle along a continuum of ideological preferences. The pattern continued for each of the nine Justices, seemingly demonstrating a clear correlation between the Justices' personal ideologies and their voting patterns.[71] Other scholars have found that, in various appellate courts, liberal panels issue a liberal ruling well over half of the time, while conservative panels reach a liberal result well under half of the time.[72] As a result, it is evident that the attitudinal model is often capable of providing useful insight into the

65. *Id.*
66. *Id.* at 305–06.
67. *Id.*
68. *Id.* at 310.
69. *Id.* at 308.
70. *Id.*
71. *Id.* at 309.
72. *See* Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals*, 90 VA. L. REV. 301, 306 (2004).

outcome of cases.

C. The Strategic Model

There are many similarities between the strategic model and the attitudinal model. Most importantly, both models recognize that "justices, first and foremost, wish to see their policy preferences etched into law. They are, in the opinion of many, 'single-minded seekers of legal policy.'"[73] The strategic account purports to go further, though, claiming that while the Justices are indeed motivated by their own individual policy preferences, they are not unconstrained actors who base decisions exclusively on their own ideological attitudes. "Rather, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."[74]

In *The Choices Justices Make*, Lee Epstein and Jack Knight identify the major components of the strategic model. The first is that Justices are driven by a desire to effectuate their individual goals.[75] Epstein and Knight suggest that the Justices' decisions can be explained by the rational choice paradigm, which assumes that the Justices are rational actors. Rational actors presumptively make rational decisions, based on the belief that such a course of action will most likely advance his or her goals.[76] But even proponents of the strategic model recognize that a Justice's goals often reflect his or her attitudes, raising questions about whether seemingly strategic behavior is more likely just a reflection of the attitudinal model at work.[77]

The second major component of the strategic account is strategic interaction. This component embodies the principle that if Justices want to materialize their policy preferences, they have to act strategically in making their choices.[78] Epstein and Knight describe this phenomenon as *interdependent decision making*. A strategic Justice knows, for example, that the maximization of his or her policy preferences is dependent upon the preferences and expected actions of the other Justices, which are in turn dependent upon their individual preferences.[79]

The last component of the strategic account addresses the role of

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73. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 9–10 (1998) (quoting Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. R. 325 (1992)).

74. *Id.* at 10.

75. *Id.* at 10–11.

76. *Id.* at 11.

77. *See generally id.*

78. *Id.* at 12.

79. *Id.*

institutions as it relates to judicial decision making. Epstein and Knight indicate that institutions can be "formal, such as laws, or informal, such as norms and conventions."[80] To elucidate the role of institutions more clearly, Epstein and Knight discuss the processes governing the creation of precedent. Because the Court must issue a majority opinion—that is, one that is signed by at least five Justices—in order for the opinion to "become law of the land,"[81] the Justices are sometimes forced to pursue their policy goals in somewhat unconventional ways.

In *Craig v. Boren*,[82] a case about gender-based equal protection, the Court adopted an intermediate standard of review that is less stringent than strict scrutiny but more stringent than rational basis review.[83] Epstein and Knight suggest that the Court took this approach because at least five of the Justices wanted gender-based equal protection claims to be subject to heightened review, but because the Court could not command a majority for strict scrutiny, it had to develop an intermediate test.[84] Epstein and Knight also highlight how the "good behavior" provision in Article III of the Constitution[85] affects or influences the Justices' actions. For example, since many people believe that Justices are accorded life tenure barring any egregious ethical or criminal violations, Epstein and Knight contend that the Justices are, by virtue of the institution in which they work, relatively free to focus their energy on satisfying their policy preferences.[86]

Altogether, it is evident that the strategic account of judicial decision making can sometimes explain the Justices' behavior. But because the strategic model works only on the assumption that Justices are motivated by individual goals, which often implicate their individual ideologies or personal attitudes, it is, in many cases, difficult to divorce strategic behavior from the attitudes that actually inform that behavior in the first place.

D. The Historic-Institution Model

Historic institutionalists agree with proponents of the strategic model to the extent that the model holds that Justices are somewhat motivated by the institutional norms and customs of the political branch in which they work.[87] But institutionalists suggest that the strategic account does not go

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80. *Id.* at 17.

81. *Id*.

82. 429 U.S. 190 (1976).

83. *See id.*

84. *See* EPSTEIN & KNIGHT, *supra* note 73, at 17.

85. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.").

86. *See* EPSTEIN & KNIGHT, *supra* note 73, at 17.

87. Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive*

far enough. To put it simply, institutionalists contend that the Justices are influenced predominately by their role in deciding actual cases and the mission of the Court as a separate branch of government.[88]

Historic institutionalists begin their analysis by uncovering the so-called mission of the Court.[89] As Howard Gillman indicates, the first step toward uncovering the Court's mission is to review the foundational documents, such as Article III of the Constitution, which identify the Court's job description.[90] In line with Article III, Gillman says that there is "evidence that most justices act in accordance with the Court's formal responsibility to decide actual legal disputes based on their best understanding of law."[91] Yet, historic institutionalists understand that the foundational documents do not paint the entire picture, as Justices often are motivated by different goals, such as preserving the political system as a whole or preserving the Court's institutional legitimacy.[92]

In fact, there are a number of organizational or contextual factors that influence judicial decision making including:

> the Court's relationship to a central government in a federal system, the fact that decisions are made by a majority of a small group of people, the elaborate (and changing) norms governing justiciability and the authority of *stare decisis*, the creation of intermediate courts of appeals, the expansion of the Court's constitutional and statutory jurisdiction, the elimination of mandatory appeals, the Rule of Four, the hiring of law clerks, the secrecy of the conference, the ability to print and circulate drafts of opinions, even the move to the so-called Marble Temple in 1935.[93]

It is within the context of these various factors that the Justices make their decisions. As Gillman notes, it is unlikely that the institutional characteristics of the Court influence the judges' and Justices' behavior only so far as those characteristics channel or constrain the judges' and Justices' individual policy interests.[94] "While it is true that life tenure might make it easier to promote policy preferences, it may also be central to a judge's sense of duty to resist political pressure and decide a case in accordance with the law."[95] If one understands the institutional characteristics of the Court as stemming from "a concern about the

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Institutionalism and the Analysis of Supreme Court Decision-Making, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65–67 (Cornell W. Clayton & Howard Gillman eds., 1999).

88. *See id.*
89. *See id.* at 78–80.
90. *Id.* at 80.
91. *Id.*
92. *Id.* at 81.
93. Gillman, *supra* note 87, at 82.
94. *Id.* at 83.
95. *Id.*

accomplishment of substantive concerns and functions" (i.e., the Court's mission), and also understands that preserving those functions is central to the identity of the Court as an institution, the Court's ability to accomplish goals beyond the Justices' individual policy interests becomes clear.[96]

Historic institutionalists argue that the Justices of the Court "should be expected to deliberate about protecting their institution's legitimacy and (relatedly) adapting their institution's mission to changing contexts and the actions of other institutions."[97] Gillman explains that the Justices consciously avoid self-inflicted wounds that can discredit the Court's supposed role as an independent and impartial branch of government as opposed to a policymaking body.[98] According to Gillman, it is this conscious attempt to avoid undermining the Court's reputation as an independent branch of government that informs the Justices' behavior in many cases. For example, Gillman suggests that the Justices' recognition of the importance of maintaining the Court's institutional legitimacy led the Court to develop a unanimous front in *Brown v. Board of Education*.[99] Observing that proponents of the strategic model would label such actions as clear examples of strategic behavior, Gillman contends that the difference is that the Court was motivated by an altruistic desire to preserve the legitimacy of the Court as an institution rather than the Justices' desire to maximize their individual policy preferences.[100]

IV. EXPLAINING *FEDERAL COMMUNICATIONS COMMISSION V. FOX* IN TERMS OF THE FOUR DOMINANT MODELS OF JUDICIAL DECISION MAKING

Although it is clear that each of the four models of judicial decision making has useful tenets that can sometimes assist one's understanding of the outcome of certain cases, the attitudinal model boasts the greatest record of success and overall capability for explaining how Justices act and predicting how they will decide cases. Not surprisingly, the attitudinal model best explains the Justices' actions leading to the outcome of *Federal Communications Commission v. Fox*. The other models, for one reason or another, succumbed to their inherent weaknesses and failed to provide necessary insight into the Justices' behavior.

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97. *Id.*
98. *Id.* at 81.
99. *Id.*
99. *Id.* (discussing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
100. *Id.*

A. The Shortcomings of the Legal Model and Historic-Institutional Model

This section begins by considering the legal model and the historic-institutional model and demonstrating ways in which these two models were unable to explain the Supreme Court's decision. Since this section argues that the legal model and historic-institutional model cannot explain the decision in hindsight, it seems to follow that these models cannot satisfactorily predict the outcome of a future fleeting expletives case.

1. The Legal Model—A Beacon of Unsophistication

The difficulty with the legal model is that it fails to explain how the Second Circuit and the Supreme Court reached diametrically opposite results. The arbitrary and capricious standard is by its nature subject to differing applications. Pursuant to *Motor Vehicle Manufacturers'. Association v. State Farm Mutual Automobile. Insurance Co.*,[101] for example, the Court could have found that because the FCC failed to provide an adequate factual basis for its finding that fleeting expletives are indecent, it likewise failed to demonstrate a rational connection between the policy change and the reasons supporting that policy change.[102] Relying on the same precedent, the Court also could have found (as it ultimately did) that the FCC's action was neither arbitrary nor capricious on the basis that the Court should not substitute its judgment for that of the agency.[103] Since it seems that the Court could have found either way based on its own precedent, the inquiry then becomes one of determining what underlying motivations actually influenced the Justices in their decision. The legal model does not satisfactorily address that inquiry.

Furthermore, despite the Supreme Court's opinion, some scholars suggest that the Second Circuit's decision was the right one. As Justin Winquist notes, "[c]onsidering the variability with which arbitrary and capricious review has been applied . . . the [Second Circuit's] decision was not blatantly erroneous."[104] That the standard has been applied differently in the first place suggests the legal model is ill-equipped to explain the differences in opinion regarding arbitrary and capricious review. Moreover, the Supreme Court's reversal of the Second Circuit decision when the decision was not "blatantly erroneous" indicates that something more than pure legal analysis guided the Supreme Court's decision. Hutchinson says,

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101. 463 U.S. at 46.

102. *See* Hutchinson, *supra* note 3, at 240.

103. *Id.* at 241.

104. Justin Winquist, Note, *Arbitrary and F^@#$*! Capricious: An Analysis of the Second Circuit's Rejection of the FCC's Fleeting Expletive Regulation in* Fox Television Stations, Inc. v. FCC *(2007)*, 57 AM. U. L. REV. 723, 736–37 (2007) (citations omitted).

"[o]f course, the manner in which the arbitrary and capricious review is employed depends not only on the composition of the Court, but also on the facts of the particular case."[105] One would not expect pure legal analysis to vary regardless of who occupies the seats on the bench, and as a result, the legal model fails to explain the outcome of *Federal Communications Commission v. Fox*.

2. The Historic-Institutional Model—Unrealistic and Fatally Flawed?

The historic-institutional model similarly fails to explain the outcome of the case. Although it is perhaps true that institutional characteristics define the contours of the Justices' decisions, it seems implausible that the Court in *Federal Communications Commission v. Fox* would not have reached the same decision were it not for those institutional characteristics. It is difficult to comprehend the Court's decision if one assumes that it was primarily informed by the Court's role within the United States' political system. While one might argue that the Court, given the ground swell of public opinion against fleeting expletives, was trying to maintain its institutional prestige as a socially responsive organization, the vast majority of complaints directed to the FCC stemmed from only one organization: the PTC.[106] The Court has always held that the tendency of speech to offend does not determine its permissibility, especially when the offense is confined to a limited segment of society.[107] Because nearly all of the complaints here were tied to one organization, it seems unlikely that the Court was concerned with its reputation as a socially responsive institution. Thus, when one considers the competing claims that Justices make decisions in an effort to maximize their policy preferences, as opposed to the claim that Justices are altruistic actors seeking to preserve the legitimacy of the Court as an institution, the former seems more tenable.

That is not to say that some of the organizational attributes that Gillman identified could not have contributed to the outcome of *Federal Communications Commission v. Fox*. For example, the Justices' pre-decision conference or the ability of the Justices to print and circulate drafts of opinions might have led to a decision focusing exclusively on the arbitrary and capricious question rather than the underlying First Amendment question.[108] Where the institutional model falls short, however, is that it cannot explain how the Justices' actions, which were seemingly influenced by the institutional characteristics of the Court, do not more

105. Hutchinson, *supra* note 3, at 239.
106. Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 451 (2d Cir. 2007).
107. *See, e.g.*, Cohen v. California, 403 U.S. 15, 21 (1971).
108. *See* Gillman, *supra* note 87, at 82.

accurately reflect strategic or attitudinal motivations. Unlike Gillman's discussion of *Brown v. Board*, the Justices here did not seem at all concerned with preserving the legitimacy of the Court as an institution.

Another problem with the institutional model is that it seems to derive much of its force from many of the same principles that underlie the legal model.[109] It is one thing to say, for example, that the Court is concerned with preserving its legitimacy. If one believes this to be true, the question that naturally arises is, "what gives the Court its legitimacy in the first place?" For many people, it is the belief that the Court decides cases purely in accordance with the law that accomplishes this task. In other words, it is those same principles that make up the legal model that lay the foundation for the institutional model as well. But it is already clear that the legal model cannot sufficiently explain the outcome of *Federal Communications Commission v. Fox* because the arbitrary and capricious review standard is subject to a variety of applications. Since there is no one clear way to apply arbitrary and capricious review, the Justices must have relied upon something more than pure legal analysis. The institutional model, unfortunately, does not explain what the Court relied upon when it rendered its five-to-four decision.

B. Getting There? The Strategic Model as a Possible Explanation for the Outcome of Federal Communications Commission v. Fox

The strategic model comes closer to providing a satisfactory explanation for the Court's decision in *Federal Communications Commission v. Fox* because the decision reflects a conscious choice by the majority to pursue the procedural arbitrary and capricious question even though the substantive constitutional question was equally viable. One possible explanation for this choice is that Chief Justice Roberts was aware that if the Court tried to answer the First Amendment question, the outcome would not have been what he wanted. Thus, in an effort to prevent a decision that would invalidate the FCC's policy, Roberts assigned the opinion to Justice Scalia, who agreed that the appropriate way to address the case was to focus exclusively on the arbitrary and capricious question, despite indicating at oral argument that he did not believe the speech here deserved constitutional protection.[110] In order to garner the necessary fourth and fifth votes to render a binding majority opinion, though, Chief Justice Roberts and Justices Scalia and Alito knew they had to frame the issue in part as being the appropriate role of the judiciary when reviewing agency

109. *See id.* at 80 (suggesting that most judges decide actual legal disputes in accordance with their best understanding of the law).

110. *See* Transcript of Oral Argument at 48–52, FCC v. Fox TV Stations, 129 S. Ct. 1800 (2009).

policies. Otherwise, it appears that Justices Thomas and Kennedy would have reached a different conclusion even though they were quick to agree that, while the FCC's policy was perhaps misguided, it was not arbitrary or capricious.[111]

Consistent with Epstein and Knight's account of the strategic model, *Federal Communications Commission v. Fox* can be interpreted as an example of interdependent judicial decision making. The outcome was contingent upon not only Chief Justice Roberts's or Justices Scalia's or Alito's individual attitudes and actions; it also depended upon the attitudes and actions of the remaining six Justices. If one assumes, then, that Chief Justice Roberts and Justices Scalia and Alito wanted to uphold the FCC's policy, the inquiry those Justices had to undertake was how to do so while remaining within the institutional contours of the Court. Through initial conference discussions and the initial predecision vote, it probably occurred to them that the way to preserve the FCC's policy was to avoid the constitutional issue altogether and to focus on the question of whether the Second Circuit erred in finding the policy arbitrary and capricious. One of Fox's principal arguments before both the Second Circuit and the Supreme Court was that the FCC's policy was unconstitutional.[112] That the majority of the Court entirely failed to address that question reflects strategic decision making on behalf of some of the Justices.

The strategic model also might explain how a minority of the Court was able to reach the outcome it wanted when it appears that a majority of the Court believed the policy to be unduly intrusive on broadcasters' First Amendment freedoms. As some scholars have argued, "at the heart of the decision-making process are policy-oriented justices who employ a 'mixture of appeals, threats, and offers to compromise' to encourage their colleagues to support legal rulings that reflect their policy preferences."[113] This apparent bargaining could explain how a minority of the Court was able to persuade a majority to support its view.

The limit of the strategic model, although not necessarily invalidating, is that the model can be understood only if one assumes that Justices seek to implement legal policies that reflect their individual goals. Since goal-oriented Justices are influenced most by their individual or personal attitudes, it is difficult to explain the Justices' strategic behavior without

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111. *See* FCC v. Fox TV Stations, 129 S. Ct. 1800, 1819–21 (2009) (Thomas, J., concurring).

112. Brief for Respondent Fox TV Stations, Inc. at 42, FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582).

113. James F. Spriggs, II, Forrest Maltzman & Paul J. Wahlbeck, *Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts*, 61 J. POLITICS 485, 486 (1999) (citation omitted) (quoting WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 42 (1973)).

first understanding the Justices' individual attitudes. Thus, while the strategic model might indeed provide some insight into the outcome of *Federal Communications Commission v. Fox*, it seems that any strategic behavior ultimately cannot be separated from the individual attitudes that motivated the Justices' strategic behavior in the first place.

C. Attitudinalism—The Proven Model Proves Itself Again

That being said, the attitudinal model of judicial decision making provides the best explanation for the Justices' behavior. If one considers simply the outcome of the case and not the alleged justification—that is, that the Court upheld the FCC's policy—the Justices reached a seemingly conservative result to the extent that the outcome favored the government. Not only that, but the actual opinion was split by a five-to-four vote, almost perfectly along ideological lines. As Alexander Tahk and Stephen Jessee indicate, along the ideological spectrum, Justice Thomas is far to the right, Justice Scalia is far to the right, Justice Kennedy is slightly to the right, Chief Justice Roberts is to the right, and Justice Alito is to the right.[114] Together, those five Justices make up the conservative block on the Court.[115] On the other side of the spectrum are Justices Ginsburg, Breyer, Stevens, and Souter, who represent the liberal block.[116] It is, therefore, no coincidence that the majority opinion reflects the views of the conservative Justices who comprise the majority of the Court.

Given Justice Thomas's and Justice Kennedy's concurring opinions, along with the dissenting opinions, it seems that if the Court had addressed the First Amendment issue, the outcome of the case might have come out in favor of the broadcasters.[117] But it is curious as to how the Court could reach two separate outcomes regarding the same case. In other words, if the attitudinal model is truly capable of explaining the outcome of the case, then the Justices' attitudes cannot be limited to only substantive issues.

As Harold Spaeth intimated, many scholars believe that attitudes extend not only to substantive issues, but to other issues such as judicial restraint and strict construction.[118] It is entirely possible, then, that the outcome of *Federal Communications Commission v. Fox* represents the Justices' attitudes on the appropriate role of the Court when reviewing administrative agencies' policy determinations and not the Justices' views

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114. *See* Alexander Tahk & Stephen Jessee, *Current Beliefs*, SUPREME COURT IDEOLOGY PROJECT, http://sct.tahk.us/current.html (last visited Nov. 12, 2010).

115. *See id.*

116. *See id.*

117. *See* FCC v. Fox TV Stations, 129 S. Ct. 1800, 1819–22 (2009) (Thomas, J., concurring); *id.* at 1822–24 (Kennedy, J., concurring); *id.* at 1824–28 (Stevens, J., dissenting); *id.* at 1828–29 (Ginsburg, J., dissenting); *id.* at 1829–41 (Breyer, J., dissenting).

118. *See* Spaeth, *supra* note 60, at 305.

on the First Amendment. Such a distinction nicely explains Justice Thomas's concurring opinion in which he said, "I join the Court's opinion, which, *as a matter of administrative law*, correctly upholds the Federal Communications Commission's (FCC) policy with respect to indecent broadcast speech under the Administrative Procedure Act."[119] Thomas's opinion indicates that his attitude toward the Court's role in reviewing agency decisions is one of deference, which required him to find for the FCC unless the decision was so untenable as to render it arbitrary and capricious. Yet, while it appears Justice Thomas was motivated by his attitude toward judicial review of agency determinations, the other Justices might have been motivated by their attitudes toward the arbitrary and capricious review standard or toward the underlying First Amendment issue. Since judicial attitudes are not confined to either substantive or procedural matters, the attitudinal model best explains the outcome of *Federal Communications Commission v. Fox*.

D. Why It All Matters—Implications of the Finding that Attitudinalism Predominates Judicial Decision Making

What follows from this result is that the outcome of a given case often depends on who is occupying the seats on the bench. When the Court experiences a change in personnel, the potential outcome of various cases can change, especially cases that would otherwise be closely split. Since the Court recently experienced a personnel change, with Justice Sotomayor replacing Justice Souter and Justice Kagan replacing Justice Stevens, it is important to consider how the fleeting expletives issue might be affected. On one hand, it is entirely possible that with Sotomayor and Kagan replacing two of the dissenting Justices, there will be no resulting shift in doctrine on the issue of fleeting expletives. Because the Court is more likely to see a constitutional challenge the next time it hears a fleeting expletives case, though, it is at least worthwhile to consider how the addition of Justices Sotomayor and Kagan to the Court might affect the outcome with respect to the First Amendment issue, especially in light of Thomas's concurring opinion and the dissenting opinions.

V. JUSTICE SONIA SOTOMAYOR'S FIRST AMENDMENT RECORD ON THE COURT OF APPEALS AND OTHER SIGNS OF HER ATTITUDE TOWARD THE FIRST AMENDMENT

More often than not, a Supreme Court Justice's attitudes will reflect to some extent the attitudes of the President who appointed him or her.[120]

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119. *FCC v. Fox*, 129 S. Ct. at 1819 (Thomas J., concurring) (emphasis added).

120. DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL 31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 8–9

Consequently, because Justice Sonia Sotomayor was appointed by a liberal president, Barack Obama, one might reasonably expect her (and possibly Kagan[121]) to take a liberal stance on issues of great concern such as the First Amendment. "In issues pertaining to . . . [the] First Amendment, . . . a case is classified as liberal if the outcome favored . . . the civil liberties or civil rights claimant . . . ."[122] A close review of the decisions then-Judge Sotomayor issued while on the Second Circuit reveals that her First Amendment record is somewhat mixed.[123] Many times, she upheld First Amendment challenges to government regulations.[124] Yet, on other occasions, she authored opinions that many First Amendment advocates found alarming.[125]

A. Sotomayor's Judicial Record on First Amendment Issues

Probably her most high-profile First Amendment decision came in *United States v. Quattrone*.[126] In that case, Judge Sotomayor invalidated the decision of the lower court, which had issued a gag order to prevent the press from revealing the names of any prospective or selected jurors in the trial of Credit Suisse First Boston executive Frank Quattrone.[127] In her decision, Judge Sotomayor wrote:

> A judicial order forbidding the publication of information disclosed in a public judicial proceeding collides with two basic First Amendment protections: the right against prior restraints on speech and the right to report freely on events that transpire in an open courtroom. Because nothing in this case justified the district court's infringement of these two central freedoms, we hold that the court's order violated the Free Speech and Free Press clauses of the First Amendment.[128]

She further explained, "though the district court considered and rejected the possibility of an anonymous jury, the record does not demonstrate sufficient consideration of measures other than a prior restraint that could

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(2010).

121. At the time of publication, Elena Kagan's Segal-Cover score was not available. As this Note focuses on judicial decision making, the discussion of Kagan's potential liberal lean based on her appointment by a liberal president is beyond the scope of this discussion. *See infra* note 150, and accompanying text.

122. Lee Epstein et. al, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 44 (2005).

123. *See* David L. Hudson, Jr., *Sotomayor on the First Amendment*, FIRST AMENDMENT CENTER (May 28, 2009), http://www.firstamendmentcenter.org/analysis.aspx?21629.

124. *See id.*

125. *See* Ronald K. L. Collins, *Sotomayor and Free Expression*, FIRST AMENDMENT CENTER (May 28, 2009), http://www.firstamendmentcenter.org/commentary.aspx?id=21637.

126. 402 F.3d 304 (2d Cir. 2005).

127. *See id.*

128. *Id.* at 308.

have mitigated the effects of the perceived harm."[129] Thus, because of the court's special disdain for prior restraints, and because the district court failed to consider alternative mechanisms for reducing the alleged harm, Judge Sotomayor invalidated the gag order.

In another case involving a different type of gag order, Judge Sotomayor authored an opinion that rejected a number of constitutional challenges to a rule prohibiting overseas organizations that receive U.S. funds from providing abortion services.[130] Relying upon Second Circuit and Supreme Court precedent, Judge Sotomayor reiterated, "the government is within its constitutional authority in imposing restrictions or conditions on the receipt of USAID funding by [foreign NGOs]."[131] Because domestic NGOs were free to use their own funds to pursue their endeavors, no First Amendment violation had occurred.[132]

In the context of protest demonstrations, Judge Sotomayor, in *Papineau v. Parmley*, determined that people have a right to express their views through protest, and "the police may not interfere with demonstrations unless there is a 'clear and present danger' of riot, imminent violence, interference with traffic or other immediate threat to public safety."[133] Sotomayor continued, "on the facts alleged, we cannot say as a matter of law that the police had an objectively reasonable basis to conclude that the plaintiffs presented a clear and present danger of imminent harm or other threat to the public at the time of the arrests."[134] By forcefully arresting the protestors in the absence of any reasonable belief that their actions would result in some sort of public harm, the police officers violated the First Amendment.

As a federal district judge in *Campos v. Coughlin*, Judge Sotomayor addressed the question of whether a prison could, consistently with the First Amendment, prevent prisoners from wearing particular religious artifacts such as religious beads.[135] She declared:

> While I defer to defendants' assessment of the gang situation . . . and I accept defendants' assertions that beads are gang identifiers . . . [d]efendants have not shown how the directive, which prohibits the wearing of beads even under clothing, furthers the state's compelling interest in the least restrictive manner."[136]

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129. *Id.* at 311.

130. Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183 (2d Cir. 2002).

131. *Id.* at 192 (quoting Ctr. For Reprod. Law & Policy v. Bush, No. 01 CIV. 4986(LAP), 2001 WL 868007, at *10 (S.D.N.Y. 2001)) (internal quotation marks omitted).

132. *Id.* at 190.

133. Papineau v. Parmley, 465 F.3d 46, 57 (2d. Cir. 2006) (quoting Cantwell v. Connecticut, 310 U.S. 296, 308–09 (1940)).

134. *Id.* at 60.

135. 854 F. Supp. 194 (S.D.N.Y. 1994).

136. *Id.* at 207–08.

Finding in favor of the prisoners, Judge Sotomayor went on to say that allowing the prisoners to wear their beads under clothing would indeed address the defendants' concerns while still preserving the free exercise of religion.

One of Judge Sotomayor's most troubling votes, according to First Amendment scholar Ronald K. L. Collins,[137] occurred in *Doninger v. Niehoff*.[138] In that case, which involved a student's online blog entry criticizing the principal, the Second Circuit decided that students' First Amendment freedoms are limited, even if the speech occurs off school grounds, to the extent that such speech could substantially disrupt the school environment.[139] Purporting to rely upon the Supreme Court's precedent in *Tinker*,[140] and the Second Circuit's precedent in *Wisniewski v. Board of Education*,[141] the court in *Doninger* found that it was reasonably foreseeable that the student's blog could cause a substantial disruption because of the particularly offensive language she used in the blog, the misleading information contained therein, and the blogger's unique position as a leader in the student government.[142] The result of the decision, as Collins suggests, was a ratcheting down of First Amendment freedoms any time it is "reasonably foreseeable" that their expression could result in "*any* disruption, however insubstantial or however caused."[143]

The foregoing decisions reflect only a small subset of the cases implicating the First Amendment with which now-Justice Sotomayor has been involved. They do nevertheless demonstrate Justice Sotomayor's seemingly inconsistent views on the First Amendment. Yet to conclude, based on these opinions, that Justice Sotomayor actually holds inconsistent views on the First Amendment would be overly simplistic.

Drawing on Spaeth's observations regarding the attitudinal model, a Justice's attitudes can encompass normative issues such as judicial restraint and strict construction.[144] Consistent with that idea, Collins summarizes Justice Sotomayor's record nicely:

> What her *Quattrone, Papineau* and *Campos* opinions [in particular] reveal is a judge disposed to deciding cases on the narrowest grounds with careful scrutiny of the facts. There is nothing bold in her opinions, no "big picture" *dicta* about the jurisprudence of prior restraints or freedom of assembly or prisoner rights and the First Amendment.

137. Collins, *supra* note 125.
138. 527 F.3d 41 (2d. Cir. 2008).
139. *See id.* at 48.
140. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
141. 494 F.3d 34 (2d. Cir. 2007).
142. *See Doninger*, 527 F.3d at 48–53.
143. Collins, *supra* note 125 (emphasis in original).
144. *See* SEGAL & SPAETH, *supra* note 47, and accompanying text.

> *Quattrone, Papineau* and *Campos* show the guarded mind of a jurist more in line with incremental context-based thinking than with, say the broad sweep jurisprudence of a Hugo Black or William Brennan. Nonetheless, they also reveal the mind of someone who seems to take First Amendment tests seriously enough to apply them rigorously.[145]

What emerges, then, is a clear picture of Justice Sotomayor's attitude regarding normative, rather than substantive, issues. One might conclude that her decision making follows a straightforward formula. Precedent and established doctrine control to the extent possible, but when a case does not fit within the preexisting framework, she will draw upon her attitudes toward substantive issues.

In the fleeting expletives context, prior precedent and general First Amendment jurisprudence would seemingly have led Justice Sotomayor to agree with the dissenters. In other words, it appears that Justice Sotomayor would agree with the initial FCC determination that because the use of fleeting expletives does not satisfy any categorical or First Amendment balancing analysis already established by Supreme Court doctrine, the use of fleeting expletives is beyond the scope of First Amendment indecency regulation.

Some scholars might contend, however, that any predictive quality of a judge's record on the court of appeals is somewhat skewed.[146] Judges at the court of appeals operate in a different context than the Supreme Court because they must be mindful that a wrongly decided case will be overturned.[147] Thus, while Justice Sotomayor's record might provide a glimpse into her judicial attitudes, her record is not necessarily dispositive of how she would decide a First Amendment case on the Supreme Court.[148]

B. Additional Indications of Sotomayor's View of the First Amendment

Even if one discards Justice Sotomayor's record as a court of appeals judge as incapable of predicting her judicial attitudes toward the First Amendment, there are other indications that she would be sympathetic to First Amendment challenges to government regulations. First, as previously mentioned, a Supreme Court Justice's attitudes often reflect the

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145. Collins, *supra* note 125.

146. Spaeth, *supra* note 60, at 313.

147. *Id.*

148. Yet, some scholars suggest that judicial attitudes about important issues emerge even at the court of appeals level. *See* Sunstein et al., *supra* note 72, at 302–06. Thus, one could infer that if judicial attitudes toward ideological issues can indeed affect the outcome of court of appeals cases, then the lack of expression of such attitudes might suggest a judicial attitude encompassing normative issues such as judicial restraint and strict construction.

attitudes of his or her appointing president.[149] Since Justice Sotomayor's appointer, President Barack Obama, is known as a reliable liberal, one could reasonably expect Justice Sotomayor to take a similar stance on First Amendment cases, meaning she would most likely favor the party contending that speech has been constrained.

Additional evidence that Sotomayor might hold liberal attitudes can be elicited from the endorsements she received from major newspapers. This analysis, named the Segal-Cover score after its creators, Jeffrey Segal and Albert Cover,[150] evaluates newspaper editorials from four of the most prominent newspapers in America: the *New York Times*, the *Wall Street Journal*, the *Chicago Tribune*, and the *Los Angeles Times*.[151] The Segal-Cover score characterizes the nominees prior to their confirmation as liberal or conservative on civil rights and liberties issues.[152] Although this analysis is somewhat premature at this point, Jeffrey Segal predicts that Sotomayor's score will define her as a moderate liberal,[153] again suggesting that she would be more inclined to favor the party bringing the First Amendment challenge.

C. The Remaining Justices' Attitudes on the Fleeting Expletives Issue

Since Justice Stevens's retirement, the composition of the Court is again in flux, leading to additional questions about the Court's future ideological leaning. Stevens's replacement, Elena Kagan, adds to the mystique because she is difficult to categorize. Although it is true that as Solicitor General, she argued in favor of seemingly broad laws curbing the freedom of expression, it is important to remember that her role as an advocate was very different than her future role as a Justice on the Supreme Court.[154] As a result, some scholars suggest that to better understand Justice Kagan's ideological attitudes, it is best to consider the articles she authored

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149. *See* RUTKUS, *supra* note 120, at 8–9.

150. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

151. *See id.* at 557–59.

152. *Id.*

153. Amy Harder, *Keeping Score on Sotomayor*, NATIONALJOURNAL.COM (June 12, 2009, 4:15 PM), http://ninthjustice.nationaljournal.com/2009/06/if-confirmed-sonia-sotomayor-w.php.

154. *See* David L. Hudson, Jr., *Kagan's First Amendment Record Causes Concern*, FIRST AMENDMENT CENTER (MAY 10, 2010), http://www.firstamendmentcenter.org/commentary.aspx?id=22934&printer-friendly=y. *See also* David L. Hudson, Jr., *Solicitor-General Nominee: Impressive First Amendment Resume*, FIRST AMENDMENT CENTER (Jan. 8, 2009), http://www.firstamendmentcenter.org/analysis.aspz?id=21093 [hereinafter *Solicitor-General Nominee*].

as an academic.[155] A cursory review of her work reveals a very illuminated mind and a very thorough understanding of the First Amendment, but no clear ideological preferences.[156] One is, therefore, left to speculate about how Justice Kagan might vote in a case involving a First Amendment challenge to the FCC's new policy.

Nevertheless, it appears that if Justice Sotomayor votes the same way as her predecessor, the Court will be able to command a majority for overturning the policy on First Amendment grounds. Justice Ginsburg's dissenting opinion chiding the effect of the FCC's policy on the First Amendment indicates that she most likely believes the policy is unconstitutional.[157] Justice Breyer, revealing his own recognition of a First Amendment problem, added, "[o]f course, nothing in the Court's decision today prevents the Commission from reconsidering its current policy in light of potential constitutional considerations . . . ."[158] Even Justice Thomas's concurring opinion suggests that the Court needs to reevaluate its precedent concerning the use of expletives on the public airwaves.[159] Primarily, Justice Thomas asserted that the facts underlying the Court's leading precedent in *Red Lion*[160] and *Pacifica*[161]—that is, that the broadcast spectrum was limited, that broadcast media was uniquely intrusive, and that it was easily accessible to children—have changed to such a degree that broadcast media no longer deserve the unique disfavor it once suffered.[162]

As a result, it seems that based on Justice Sotomayor's First Amendment jurisprudence and other indications of her judicial attitude toward the First Amendment, in addition to the apparent attitudes of the remaining Justices, the Court should be able to command a majority for overturning the FCC's current policy on fleeting expletives. But the implications of this finding extend beyond the issue of fleeting expletives. With the recent addition of Justice Kagan, the Court's eased approach toward indecency regulation in the context of television broadcasts might very well extend to other forms of media regulation as well.

VI. CONCLUSION: THE FUTURE OF FLEETING EXPLETIVES BASED ON THE CURRENT COMPOSITION OF THE COURT

In the Supreme Court's recent decision in *Federal Communications*

155. *Solicitor-General Nominee*, *supra* note 154.

156. *See id.*

157. *See* FCC v. Fox TV Stations, 129 S.Ct. 1800, 1828–29 (2009) (Ginsburg, J., dissenting).

158. *Id.* at 1840 (Breyer, J., dissenting).

159. *See id.* at 1820–22 (Thomas, J., concurring).

160. Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969).

161. FCC v. Pacifica Found., 438 U.S. 726 (1978).

162. *See, e.g.*, *FCC v. Fox*, 129 S.Ct. at 1821–22 (Thomas, J., concurring).

Commission v. Fox, the Court approved a new FCC policy that now allows fines and other sorts of punishment for fleeting or isolated use of expletives on public television broadcasts. In its brief, Fox made two primary arguments: first, the FCC's new policy was arbitrary and capricious under the APA, and second, the policy was unconstitutional under the First Amendment. Like the Second Circuit, the Supreme Court opted to bypass the constitutional question, and instead determined on the basis of the APA that the new policy was entirely rational and therefore legally justified. Because of the lingering First Amendment issue, however, it appears this saga has not yet seen its end.

Thus, with the hope of predicting what might happen if the Court addresses the First Amendment question, this Note considered four dominant models of judicial decision making—the legal model, the attitudinal model, the strategic model, and the historic-institutional model—and analyzed *Federal Communications Commission v. Fox* in light of those models to help understand how the Justices reached their decisions. What emerged was a clear example of attitudinal decision making. In other words, it appears that the Justices were mostly influenced by their individual attitudes or personal ideologies when they cast their votes. The implication of this finding is that the outcome of a constitutional inquiry regarding the fleeting expletives issue will depend upon the individual Justices who occupy the seats on the bench.

With Justice Sotomayor recently replacing Justice Souter, this Note evaluated not only Justice Sotomayor's ostensible attitude toward the First Amendment, but also the ostensible attitudes of the remaining Justices in order to try to determine how the current composition of the Court might influence the outcome of this issue. In short, it appears that in the event a First Amendment challenge is brought before the Supreme Court, a clear majority, including Justice Sotomayor, will likely rule in favor of the broadcasters, thereby invalidating the FCC's new policy. It is important to note that the ramifications of this case could well extend to other areas of media regulation. Thus, the Court may be on the brink of an entirely new approach toward the First Amendment in the field of communications law generally.

Examining the FCC's Indecency Regulations in Light of Today's Technology

Elizabeth H. Steele*

I. INTRODUCTION

"A babe in a house is a well-spring of pleasure, a messenger of peace

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and love: A resting place for innocence on earth; a link between angels and men."[1] With a prevalent attitude in this country that children are innocent beings, it is not surprising that the FCC used the protection of children as a reason to regulate indecency in the broadcast media through legislation such as the Communications Act of 1934.[2] By keeping the airwaves free from indecent material, children would, in theory, be able to retain the innocence that they are seen to possess.

While these FCC regulations have evolved over time, the recent advances in technology have made these regulations infeasible and illogical. If the goal is still to protect children from indecent material that is broadcast over the airwaves, something in the system needs to change, because children have multiple avenues through which they can access material that is broadcast at all hours of the day. Deregulating appears to be the most practical and effective option that is currently available, and is an effort that the FCC should consider undertaking.

Along with providing a different proposition for the future of these ineffective broadcast regulations, this Note will examine how the perception of children as innocent beings led to the regulation of indecent broadcast material. It will also look at the evolution of the definition of indecency, including a look specifically at the Supreme Court decisions in the 1978 case of *Federal Communications Commission v. Pacifica Foundation*,[3] the 2009 decision remanding *Federal Communications Commission v. Fox Television Stations*[4] to the Second Circuit, and that 2010 decision by the Second Circuit.[5] Finally, the current advances in technology, including television's availability on the Internet and digital video recorders (DVR), will be discussed. These advances have made children's access to broadcast media much easier, thus making the indecency regulations no longer feasible in today's increasingly technological world.

A recommendation for the future of indecency regulations will also be suggested, so that the law more realistically aligns with the technology available today. This proposal is a move toward complete deregulation of broadcast television in regard to indecent material. The regulations are no longer effective, and have the potential to be costly to both the networks—if they keep being the subject of litigation and fines—and to the public as a violation of the First Amendment. By deregulating, the networks would

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1. MARTIN F. TUPPER, PROVERBIAL PHILOSOPHY 167–68 (25th ed. 1856).

2. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.); *see also* 18 U.S.C.A. § 1464 (West 2010); 47 U.S.C.A. § 303 (West 1997).

3. FCC v. Pacifica Found., 438 U.S. 726 (1978).

4. FCC v. Fox TV Stations, 129 S. Ct. 1800 (2009).

5. Fox TV Stations, Inc. v. FCC, 613 F.3d 317(2d Cir. 2010).

have greater freedom to broadcast according to the public's interests and what they deem to be appropriate without fear of penalties.

Further, giving the networks more freedom will benefit the networks themselves and the public that wants access to this type of material; but it will not cause any great harm to anyone. The material that is made available on television is not likely to change in a drastic way, since the networks would lose many viewers if their broadcasts became too indecent for the public as a whole. Further, children would not be any more harmed by the material that is broadcast, because, in addition to it likely being very similar in nature to what is currently being broadcast by the networks—children are going to gain access to this material through DVR and television on the Internet anyway. It would therefore be in all parties' best interest to deregulate this aspect of broadcast television.

II. BACKGROUND

While others have addressed the issues that are present with the FCC indecency regulations, the suggestion of deregulation has rarely been seriously considered.[6] The problems that are inherent in indecency regulations have been the subject of past scholarship, however, with many people recognizing the ideas on which this Note relies in making its proposal for a change of the indecency regulations: the ineffectiveness of the regulations, the advances in television technology, and the potential First Amendment complications.

Adam Candeub, for one, recognizes that broadcast indecency regulations simply no longer work because they are not feasible in today's environment.[7] He points out that the courts use the rationale of protecting children in upholding indecency regulations, but that the true motives are more political than anything else. He suggests that the regulations have been "proven [to be] unstable and highly politicized standards that do not represent a thoughtful policy to protect children or encourage a child-friendly broadcast medium."[8]

If the regulations are present for the purpose of protecting children and they are not achieving that goal, then something needs to be done to make the current system more effective. Candeub also points out particular regulatory procedures that are intended to protect children, and he describes

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6. *Cf.* Brian J. Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown Too Big for Its Britches?*, 74 FORDHAM L. REV. 871, 905 (2005) (arguing that the FCC's new indecency standard is too exhaustive and that market forces should regulate instead).

7. *See* Adam Candeub, *Creating a More Child-Friendly Broadcast Media*, 2005 MICH. ST. L. REV. 911.

8. *Id.* at 919.

how they do not serve their intended purpose.[9] Further, Candeub addresses indecency regulations, which, in addition to being politicized, are not able to appropriately respond to community standards on what type of material is appropriate for children.[10] If the FCC cannot effectively reflect community standards, then, as this Note argues, it is time to let the community members themselves set the standards for what is appropriate through their power as consumers of the broadcast material.

Matthew Schneider also criticizes the current FCC regulations. He points out the problems with the indecency regulations' application to only a small minority of stations—broadcast network stations—and suggests a proposition that would make the regulations more consistent.[11] His suggestion is to apply the regulations to all channels so that the rationale of protecting children could possibly become a reality.[12] If all a child has to do is change the channel to access indecent material, then the FCC's policy and attempts to shield children from indecent material is not meritorious.[13] With disingenuous motives and ineffective solutions, there seems to be an agreement that now is the time for a change in indecency regulations.

Another issue that has been the subject of past scholarship and discussion is the advance in television technology. While this Note will focus on television on the Internet and DVR, others have noted that V-chip technology or satellite television have changed the face of television broadcast regulations.[14] While some technology has allowed parents to better monitor the content of the television their children watch, other technology has made indecent material more accessible to children. The technologies on which this Note focuses have also made broadcast material more easily available to children, requiring that the FCC do something to change its current policies. While some suggest stricter and more pervasive regulations,[15] this Note comes to a starkly different conclusion in suggesting a more hands-off approach.

Finally, others have also considered the First Amendment implications of these broadcast indecency regulations. Schneider suggests that the indecency regulations have a negative First Amendment effect on

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9. *Id.* at 915.

10. *Id.*

11. *See* Matthew S. Schneider, *Silenced: The Search for a Legally Accountable Censor and Why Sanitization of the Broadcast Airwaves Is Monopolization*, 29 CARDOZO L. REV. 891 (2007).

12. *Id.* at 902.

13. *Id.*

14. *See, e.g.*, Candeub, *supra* note 7, at 925; Matthew S. Schwartz, *A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services*, 13 RICH. J.L. & TECH., no. 4 (2007).

15. *See* Candeub, *supra* note 7, at 914; Schwartz, *supra* note 14, at 3–4.

the American public.[16] He discusses the fact that if viewers have to turn to "niche channels" in order to see the television content that they wish to see, then that is going to deprive the public of shared experiences, since not everyone will have access to those channels.[17]

The difficulty of creating a regulation that is in compliance with the First Amendment has also been brought up as an issue. Brian Rooder, one of the few to recommend deregulation, suggests that the indecency regulations are both vague and overly broad, and that the FCC is going to have a hard time coming up with a solution that will pass constitutional muster.[18] This Note agrees with this proposition and uses it in support of the argument against implementing stricter FCC indecency regulations.

Although others have discussed these issues and made suggestions for ways in which to change indecency regulations, there has still been no effective solution created. Based on this previous scholarship, along with the recent Second Circuit decision, this Note will argue that it is time to consider a new factor for a new solution to the problem of indecency regulations. With a consensus that the regulations are not effective and pose constitutional concerns, this Note adds to the discussion of the effect of advances in technology on the rationale that regulations protect children, and suggests that the most logical and effective course of action is for the FCC to take a step back and let the market take care of the content that is broadcast over the airwaves.

III. HISTORICAL PERSPECTIVE

A. The Perception of Children

Historically, children have not been assumed to be innocent and in need of protection. In ancient Greece, for example, children were associated with "grossness and lewdness, not innocence,"[19] and in ancient Christian societies, the common fates of children included abandonment, infanticide, and sale into brothels.[20] It was not until the seventeenth century that the notion of children as innocent beings was invented.[21]

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16. *See* Schneider, *supra* note 11.

17. *Id.* at 895–96.

18. Rooder, *supra* note 6, at 904–05.

19. MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN 15 (Rutgers Univ. Press 2d ed. 2007) (2001).

20. *Id.* at 16.

21. *Id.* at 18–19 ("In the 1500s, '[e]verything was permitted in their presence: coarse language, scabrous actions and situations.' 'The idea did not yet exist that references to sexual matters . . . could soil childish innocence' because 'nobody thought that this innocence really existed.' It was only toward the end of the 16th century that 'certain pedagogues . . . refused to allow children to be given indecent books any longer.'").

In U.S. history, the first obscenity and indecency law was enacted in Massachusetts in 1711.[22] This law banned "any filthy, obscene, or profane song, pamphlet, libel, or mock sermon."[23] However, this law was mostly used for the protection of religious sermons.[24] It was not until 1835 that indecency was criminalized in Massachusetts in an effort to protect the children.[25] The law was modified from its 1711 version to criminalize indecent or obscene speech if "it 'manifestly' tended 'to the corruption of the morals of youth.'"[26]

This trend of protecting children from indecent and obscene material that began in the eighteenth century continued to evolve as the country matured. In 1842, during the height of the industrialization and urbanization of the United States, Congress passed the first federal ban on indecent and obscene material.[27] This ban allowed the United States Customs Service to "confiscate 'obscene or immoral' pictures or prints and bring judicial proceedings for their destruction."[28]

In 1934, the FCC took an active role in this area and began to regulate indecency in the broadcast media.[29] This 1934 Act stated, "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[30] The language of this Act is still in effect today and governs the FCC regulations in this area.[31]

In today's contemporary society, the Supreme Court has also spoken on this issue, deeming the protection of children to be a compelling government interest on many different occasions.[32] The FCC has continued to try to shield minors from material that may be deemed obscene and indecent, and the Supreme Court has upheld these regulations, even going so far as to strengthen the regulations to punish broadcasters for even fleeting expletives.[33]

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22. *Id.* at 24–25.
23. *Id.* at 24 (internal quotation marks omitted).
24. *Id.* at 24–25.
25. *Id.* at 25.
26. *Id.*
27. *Id.*
28. *Id.*
29. *See* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.).
30. 18 U.S.C.A. § 1464 (West 2010).
31. *Id.*
32. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000); FCC v. Pacifica Found., 438 U.S. 726 (1978).
33. *See* FCC v. Fox TV Stations, 129 S. Ct. 1800 (2009).

B. The Transformation of the Definition of Indecency

While Massachusetts was a trendsetter in indecency and obscenity law in the eighteenth century, the early definition of indecency was borrowed from common law in England.[34] This definition evolved from the definition of obscenity, and transformed over time from one that dealt with immoral and obscene material[35] to the present one that deals with patently offensive material that concerns "sexual or excretory activities or organs."[36]

In the 1957 Supreme Court case of *Roth v. United States*, the Court announced that obscene language was outside of First Amendment protection.[37] The Court adopted the test for obscene language as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[38] Nine years later, in 1966, this test was expanded in the case of *Memoirs v. Massachusetts*. In that opinion, the Supreme Court set out a three-part test for determining whether or not language is obscene: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."[39]

While obscenity was defined, although in a very vague manner, there was yet to be an articulated definition of indecency, even though it was banned from broadcast over the airwaves by the FCC.[40] By 1970, the FCC had a definition of indecency, which was borrowed from the *Roth* and *Memoirs* definitions of obscenity. That year, a radio station in Philadelphia interviewed Jerry Garcia, lead guitarist of the Grateful Dead, during which he used profane language that the FCC deemed to be indecent.[41] The definition in place at that time described indecent language as that which is "patently offensive by contemporary community standards; and . . . utterly without redeeming social value."[42] This definition, however, would be dramatically changed just five years later when a New York radio station aired George Carlin's monologue, "Filthy Words," which led to the infamous *Federal Communications Commission v. Pacifica Foundation*

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34. HEINS, *supra* note 19, at 25.
35. *Id.*
36. Action for Children's TV v. FCC, 58 F.3d 654, 657 (D.C. Cir. 1995).
37. *See* Roth v. United States, 354 U.S. 476 (1957).
38. *Id.* at 489.
39. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).
40. HEINS, *supra* note 19, at 92.
41. *Id.* at 94.
42. WUHY-FM, Eastern Educational Radio, *Notice of Apparent Liability*, 24 F.C.C.2d 408, para. 10 (1970); *see also* HEINS, *supra* note 19, at 94.

Supreme Court case.[43]

IV. JURISPRUDENCE

A. Federal Communications Commission v. Pacifica

In 1973, George Carlin's monologue would change the face of the FCC's indecency regulation. Broadcast on the afternoon of October 30, 1973, on Pacifica's New York WBAI radio station, this monologue was used to address "contemporary society's attitude toward language."[44] For twelve minutes, Carlin commented on the words that were acceptable to use over the airwaves, and those seven words that he had decided could never be spoken over the air.[45] After listing all of those words, he continued to discuss each of the seven words in graphic detail.[46]

Hearing this monologue in the car while driving with his son, John Douglas filed a complaint with the FCC six weeks later.[47] Douglas was "a member of the national planning board of the procensorship watchdog group Morality in Media,"[48] and his complaint was filed at a time when the FCC was "under severe pressure to 'do something'" about regulating the airwaves and ridding them of indecent material.[49] However, the FCC sat on the complaint and did not take any action until 1975.[50]

When the FCC ruled on Douglas's complaint in February 1975, it felt it had the judicial support it would need to resolve Douglas's complaint in a way that would allow it to continue with its stricter regulation of the content that could be broadcast over the airwaves.[51] It decided to rule on the monologue under the category of indecency, which was broader than and no longer a part of the obscenity category. All that was required for the material to be indecent was that it be patently offensive, which the FCC determined Carlin's monologue to be.[52] There was no longer a need for the speech to appeal to the "prurient interest" or be devoid of any redeeming social value.[53] This gave the FCC more power to ban certain language from the airwaves that did not meet with FCC approval, but did not reach the

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43. HEINS, *supra* note 19, at 95.
44. *Id.* at 97 (quoting FCC v. Pacifica Found., 438 U.S. 726, 729 (1978)).
45. *Id.*
46. *See id.*
47. *Id.* at 97.
48. *Id.* at 97.
49. *Id.* at 98.
50. *Id.* at 99.
51. *Id.*
52. *Id.*
53. *Id.* (quoting Citizen's Complaint Against Pacifica Found., Station WBAI (FM), *Memorandum Opinion and Order*, 56 F.C.C.2d 94, para. 11 (1975)).

level of legal obscenity, either.

In addition to the ruling on the Douglas complaint, other significant events in the regulation of indecency took place later in 1975. A week after the *Pacifica* decision, the broader definition of indecency was officially adopted by the FCC and used in its *Report on the Broadcast of Violent, Indecent, and Obscene Material*.[54] This new definition defined indecent language as that which "describes, in terms patently offensive as measured by contemporary community standards for broadcast media, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[55] Two months later, in April, the National Association of Broadcasters had modified its 1952 Television Code to "create a 'family viewing hour.' Under this scheme, the first hour of TV prime time and the preceding hour 'would not consist of programming unsuitable for viewing by the entire family.'"[56]

Fearing that the *Pacifica* ruling and subsequent related events would lead to "a deleterious impact on accurate and insightful reporting," the Radio-Television News Directors Association filed a petition for the FCC to reconsider its ruling in the *Pacifica* complaint.[57] The FCC replied that its decision was for a fact-specific situation and that it would not harm the broadcast journalism industry.[58] The FCC also did not sanction Pacifica; it merely put the decision in the station's license file in case it broadcast indecent material again.[59]

Pacifica chose to appeal the decision, however, and in 1977, the D.C. Circuit ruled that the FCC had gone too far with its regulations.[60] Judge Edward Tamm's opinion stated, "the FCC had practiced censorship in violation of its own governing statute . . . ."[61] He also borrowed language from Justice Frankfurter's opinion in the 1957 case of *Butler v. Michigan*, stating:

> In its effort to shield children from language which is not too rugged for many adults the Commission has taken a step toward reducing the adult population to hearing or viewing only that which is fit for

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54. *Id. See* Report on Brdcst. of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975) [hereinafter Broadcast Report].

55. Broadcast Report, *supra* note 54, at 425.

56. HEINS, *supra* note 19, at 98 (quoting Primary Jurisdiction Referral of Claims Against Gov't Defendant Arising from the Inclusion in the NAB TV Code of "Family Viewing Policy," *Report*, 95 F.C.C.2d 700, 700 n.1 (1983)).

57. *Id.* at 101 (citing Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Found., *Memorandum Opinion and Order*, 59 F.C.C.2d 892, para. 3 (1976)).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

> children. The Commission's Order is a classic case of burning the house to roast the pig.[62]

The FCC appealed the ruling, and the Supreme Court heard the case on April 18, 1975.[63] The makeup of the Court at that time had been recently changed by President Nixon, and the five Justices making up the plurality were all appointed by either President Nixon or President Ford.[64] This majority was just what the FCC needed to have the decision of the D.C. Circuit overturned, and to have the new definition of indecency adopted.

The opinion, handed down on July 3, 1978, and written by Justice Stevens, outlined the rationale for regulating the broadcast airwaves:

> Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.[65]

The opinion also noted the facts that broadcast media was uniquely pervasive in the lives of Americans and that it was uniquely accessible to children, even those who are too young to read.[66]

The Court found authority for the FCC to regulate this type of broadcast in two different statutes: "18 U.S.C. § 1464 . . . , which forbids the use of 'any obscene, indecent, or profane language by means of radio communications,' and 47 U.S.C. § 303(g), which requires the Commission to 'encourage the larger and more effective use of radio in the public interest.'"[67] After finding the authority for the FCC to act as it did, the Court addressed the possibility of this ruling leading to greater censorship, the same concern expressed by the Radio-Television News Directors Association when the FCC first made its decision.[68] In trying to alleviate this concern, the Court articulated:

> It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of

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62. Pacifica Found. v. FCC, 556 F.2d 9, 17 (D.C. Cir. 1977) (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).

63. HEINS, *supra* note 19, at 103.

64. *Id.* at 104.

65. FCC v. Pacifica Found., 438 U.S. 726, 731 n.2 (1978) (citations omitted).

66. *Id.* at 748–49.

67. *Id.* at 731.

68. *See supra* note 57 and accompanying text.

> these references may be protected, they surely lie at the periphery of First Amendment concern.[69]

The decision also did not ban this type of language in its entirety—it only modified the times during which it was able to be broadcast. It analogized the indecent language to "'a pig in the parlor instead of the barnyard.' We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[70]

Finally, the Court adopted the FCC's position that this was a narrow holding that was based on the particular fact pattern at issue. While the opinion gave no reason why children needed to be protected from indecent language, that was its desired effect. Indecent material could no longer be broadcast in times during which there were likely to be children in the audience—deemed to be before 10:00 p.m.[71] This opinion would be used in later cases to establish "safe harbors," times in which indecent material could be safely broadcast,[72] which no longer make sense in today's society.

B. The Creation of "Safe Harbors"

The Supreme Court's plurality decision in the *Pacifica* case over thirty years ago is still the basis for the current indecency regulations of the FCC. In the *Action for Children's Television* (*ACT*) line of cases, following the *Pacifica* decision, the idea of safe harbors was created and the specific times for them were determined. In the first case in 1988, the D.C. Circuit held that the FCC's definition of indecency was constitutionally sound, although its vagueness was inherent.[73] The court also found that the FCC's decision about the hours of the safe harbors was not made in a reasonable manner.[74] The matter was therefore returned to the FCC for "redetermination, after a full and fair hearing, of the times at which indecent material may be broadcast."[75]

Four years later, in 1992, Congress addressed the idea of safe harbors in legislation, stating:

> The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight;

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69. *Pacifica*, 438 U.S. at 743 (citations omitted).
70. *Id.* at 750–51.
71. HEINS, *supra* note 19, at 104.
72. *See* Action for Children's TV v. FCC, 852 F.2d 1332, 1335 (D.C. Cir. 1988).
73. *See id.* at 1344.
74. *Id.* at 1335.
75. *Id.* at 1344.

> and (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).[76]

In the second *ACT* case, decided in 1995, the D.C. Circuit upheld the FCC safe harbor regulations that were articulated pursuant to Congress's directive, although it did not agree with the distinction that was drawn between television and radio stations that go off the air at or before midnight and those that continue to be broadcast after midnight.[77] In its holding, relying on the compelling government interest of protecting children, the court articulated:

> We find that the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts. We are also satisfied that, standing alone, the "channeling" of indecent broadcasts to the hours between midnight and 6:00 a.m. would not unduly burden the First Amendment. Because the distinction drawn by Congress between the two categories of broadcasters bears no apparent relationship to the compelling Government interests that section 16(a) is intended to serve, however, we find the more restrictive limitation unconstitutional. Accordingly, we grant the petitions for review and remand the cases to the Federal Communications Commission with instructions to revise its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m.[78]

In addition to ruling on the safe harbor hours for broadcasters, the court also rearticulated and reaffirmed the definition of indecency that had been established almost twenty years previously and still remains in effect today:

> In enforcing section 1464 of the Radio Act, the Federal Communications Commission defines "broadcast indecency" as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." This definition has remained substantially unchanged since it was first enunciated in *In re Pacifica Foundation*.[79]

The case was remanded back to the FCC to adjust the safe harbor hours so that they were consistent for all broadcasters. The Supreme Court denied certiorari in the case,[80] so the safe harbor hours of 10:00 p.m. to 6:00 a.m. were effectuated and still remain in effect today.

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76. 47 U.S.C. § 303 note (2006) (Broadcasting of Indecent Programming; FCC Regulations).

77. Action for Children's TV v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995).

78. *Id.*

79. *Id.* at 657–58 (quoting Enforcement of Prohibitions Against Brdcst. Indecency in 18 U.S.C. § 1464, *Report and Order*, 8 F.C.C.R. 704, n.10 (1993)) (citations omitted).

80. Action for Children's TV v. FCC, 516 U.S. 1043 (1996).

C. Federal Communications Commission v. Fox

More than a decade after the safe harbors were established, in 2001, the FCC, in explaining its indecency guidelines, said that "[n]o single factor generally provides the basis for an indecency finding."[81] The three different factors that it suggested be examined when determining whether or not broadcast material was indecent, at least at that particular point in time, were:

> (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*.[82]

At this time, "fleeting expletives" were not generally subject to sanctions from the FCC. In the 2001 report, the FCC stated:

> Repetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts. In contrast, where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency.[83]

It was not until 2004 that the FCC banned "fleeting expletives" by stating that "a nonliteral (expletive) use of the F- and S-Words could be actionably indecent, even when the word is used only once."[84] The events giving rise to this decision occurred at the *2002* and *2003 Billboard Music Awards*, both airing on affiliates of Fox Television Stations, Inc.[85]

At the *2002 Awards*, Cher exclaimed during a live broadcast after winning an award, "'I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f* * * 'em.'"[86] At the *2003 Awards*, Paris Hilton and Nicole Richie were presenting an award when Hilton reminded Richie to "watch the bad language."[87] Nicole Richie proceeded to comment on the reality television show that she and Paris Hilton starred in, *The Simple Life*, saying, "'[w]hy do they even call it 'The Simple Life?' Have you ever tried to get cow s* * * out of a Prada purse?

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81. Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, *Policy Statement*, 11 F.C.C.R. 7999, para. 10 (2001).

82. *Id.* (emphasis in the original).

83. *Id.* at para. 17.

84. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 1807 (2009).

85. *Id.* at 1808.

86. *Id.*

87. *Id.*

It's not so f* * *ing simple.'"[88] The FCC received many complaints from parents whose children were watching the *Billboard Music Awards* at the time the language was used.[89] On March 15, 2006, the FCC released notices of apparent liability for the broadcasts.[90]

In determining that both incidents were indecent, the FCC pointed to the fact that "Cher used the F-Word not as a mere intensifier, but as a description of the sexual act to express hostility to her critics,"[91] and that Nicole Richie's language was indecent because "it involved a literal description of excrement, rather than a mere expletive, because it used more than one offensive word, and because it was planned."[92]

This ruling by the FCC was important because it changed the course of indecency regulations:

> The order stated, however, that the pre-*Golden Globes* regime of immunity for isolated indecent expletives rested only upon staff rulings and Commission dicta, and that the Commission itself had never held "that the isolated use of an expletive . . . was not indecent or could not be indecent." In any event, the order made clear, the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionably indecent, and the Commission disavowed the bureau-level decisions and its own dicta that had said otherwise. Under the new policy, a lack of repetition "weigh[s] against a finding of indecency," but is not a safe harbor.[93]

The rationale behind this decision was that if this regulation was not changed, then broadcasters could get around the safe harbor regulations by broadcasting indecent language one expletive at a time.[94]

Fox challenged this decision by the FCC, and the Second Circuit overturned the decision, "finding the Commission's reasoning inadequate under the Administrative Procedure Act. The majority was 'skeptical that the Commission [could] provide a reasoned explanation for its "fleeting expletive" regime that would pass constitutional muster,' but it declined to reach the constitutional question."[95]

In 2008, the Supreme Court granted certiorari in the *Federal Communications Commission v. Fox* case, and in 2009, the Court handed down its ruling. It upheld the FCC's decision to punish fleeting expletives, using the rationale from the 2002 and 2003 decisions and the *Pacifica*

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88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 1809.
92. *Id.*
93. *Id.* (citations omitted).
94. *Id.*
95. *Id.* at 1810 (citations omitted).

case.[96] The Court determined that the FCC's decision was not arbitrary or capricious, and that the advances in technology that allowed broadcasters to bleep out offending language more easily lent support to the stepped-up regulations.[97] The Court also deemed certain words inherently offensive and therefore punishable for even a single use, such as the language used in the *Billboard Music Award* broadcasts.[98]

Articulating the Court's opinion, Justice Scalia wrote:

> The Second Circuit believed that children today "likely hear this language far more often from other sources than they did in the 1970's when the Commission first began sanctioning indecent speech," and that this cuts against more stringent regulation of broadcasts. Assuming the premise is true (for this point the Second Circuit did not demand empirical evidence) the conclusion does not necessarily follow. The Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children. In the end, the Second Circuit and the broadcasters quibble with the Commission's policy choices and not with the explanation it has given. We decline to "substitute [our] judgment for that of the agency," and we find the Commission's orders neither arbitrary nor capricious.[99]

Although the Supreme Court found the regulation to not be arbitrary or capricious, the case was remanded back to the Second Circuit to determine if the regulation was in violation of the First Amendment. The decision that would be made on that issue would alter the landscape of indecency regulations and open the door a crack for a path toward deregulation.

D. Federal Communications Commission v. Fox*, Remanded*

After being upheld under the arbitrary and capricious standard by the Supreme Court, the Second Circuit struck down the regulation as being in violation of the First Amendment. The regulation was deemed to be impermissibly vague, as it did not give the networks clear notice of what would be considered indecent and subsequently subject to fines.[100] The court noted that there were inconsistencies in how the same word was classified in two different circumstances, and that that was not sufficient clarity for the networks.[101] Because a large amount of money and First

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96. *Id.* at 1812.
97. *Id.* at 1813.
98. *Id.* at 1812–13.
99. *Id.* at 1819 (citations omitted).
100. *See* Fox TV Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).
101. *See id.* at 332.

Amendment protections were at stake, a vague standard that is subject to interpretation was not acceptable to the court:[102]

> With the FCC's indiscernible standards come the risk that such standards will be enforced in a discriminatory manner. The vagueness doctrine is intended, in part, to avoid that risk. If government officials are permitted to make decisions on an 'ad hoc' basis, there is a risk that those decisions will reflect the officials' subjective biases.[103]

In addition to finding the regulations impermissibly vague, the Second Circuit also warned of the potentially chilling effect that the regulations would have on speech.[104] As this Note suggests, if a network is afraid of being the subject of fines and sanctions, it is not going to broadcast material that may be valuable if there is any question that it may be considered indecent. Episodes of *House*, *That 70s Show*, political debates in Vermont, and even coverage of Pat Tillman's funeral have already fallen victim to this chilling effect.[105] With this regulation in place, there was no telling what other "important and universal themes in art and literature"[106] would be kept off of the airwaves.

The language in this opinion also supports the idea that the media landscape has changed drastically recently and that the regulations that were in place during the time of *Pacifica* may not be practical today. For example, the court noted, "[t]he past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. . . . The [I]nternet, too, has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs."[107] In acknowledging these advances in technology, this opinion lends support to the argument that this Note makes: deregulation is the most practical solution in light of the ever-present nature of broadcast television in today's world.

III. THE CURRENT LANDSCAPE

A. Advances in Technology

In recent years, technology has enhanced consumers' enjoyment of broadcast media. With the invention and development of the digital video recorder (DVR) and networks making many of their television shows available on the Internet, people can access their favorite shows at any time, day or night.

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102. *Id.*
103. *Id.*
104. *Id.* at 334.
105. *Id.* at 334–35.
106. *Id.* at 335.
107. *Id.* at 326 (citations omitted).

The earliest mode of digital recording, TiVo, was launched in 1999 at the Las Vegas Consumer Electronics Show.[108] It was touted as a "breakthrough new personal television service that is poised to change forever the way consumers watch television."[109] In 2008, "consumer research, from Leichtman Research Group, report[ed] that 27% of TV households in the United States have at least one Digital Video Recorder (DVR), and 30% of those households have more than one DVR, and that 87% of DVR owners would recommend their DVR service to a friend."[110]

The same study found that thirty-five percent of people with DVR spent more time watching programs recorded on their DVR than regularly scheduled programs, and that fifty-five percent of DVR owners record more than five programs per week:[111]

> The report says that the number of US households with DVRs has essentially doubled in the past two years and, with a continued push from cable, DBS, and Telco TV providers, will likely double again over the next four years. LRG forecasts that DVRs and on-Demand's share of total TV viewing time in the US will increase from about 6% today to 16% at the end of 2012.[112]

While there are many people who use DVRs to watch their favorite shows, many people also turn to shows that are available on the Internet. The numbers have been increasing in recent years, as well. "About 43 percent of the U.S. online population—nearly 80 million people—have watched a television show on the Internet, according to a Solutions Research Group tracking study. Just one year ago, that figure was only 25 percent, marking a 72 percent increase year-over-year."[113]

In addition to the networks providing access to their television shows on their own websites, in 2007, the idea of Hulu was conceived, described as "the largest Internet video distribution network ever assembled with the most sought-after content from television and film."[114] At its inception, the

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108. Press Release, TiVo to Unveil 1999's Hottest Consumer Electronics Breakthrough at CES with First Public Demo of Personal Television, BUSINESS WIRE (Jan. 7, 1999), http://www.highbeam.com/doc/1G1-53526147.html.

109. *Id.*

110. Jack Loechner, *DVR Ownership Increases, but Recordings Not Priority Viewing*, RESEARCH BRIEF (Oct. 1, 2008, 8:15 AM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=91553.

111. *See id.*

112. *Id.*

113. Traci Patterson, *U.S. Internet TV Viewers on the Rise*, CEDMAGAZINE.COM (Feb. 5, 2008), http://www.cedmagazine.com/US-Internet-TV-viewers-on-the-rise.aspx.

114. Press Release, NBC Universal and News Corp. Announce Deal with Internet Leaders AOL, MSN, MySpace and Yahoo! to Create a Premium Online Video Site with Unprecedented Reach, HULU.COM (Mar. 22, 2007), http://www.hulu.com/press/new_video_venture.html [hereinafter NBC Universal Press Release].

site promised to provide "thousands of hours of full-length programming, movies and clips, representing premium content from at least a dozen networks and two major film studios."[115]

Hulu was released to the public on March 12, 2008, and has grown considerably from what had originally been contemplated. Instead of a dozen networks participating in the site, there were over fifty networks that were providing free video access to the public.[116] Peter Chernin, president and chief operating officer of News Corporation described Hulu as a "game changer for Internet video."[117] He also described Hulu as a service that

> helps fans find great content wherever they are online . . . . With tools that make sharing easy, Hulu encourages viral distribution. At the same time, Hulu's distribution partners are some of the most visited on the Web, engaging consumers where they are already spending their time. This is a powerful combination.[118]

Similarly, Jason Kilar, chief executive officer of Hulu, commented, "[w]ith full-length episodes of current and archived television shows, feature films, sports and news, we believe the Hulu service is a step forward in giving consumers entertainment on their terms."[119] After such an advancement in technology as Hulu, individuals have access to shows at any time, day or night, from the privacy of their own home, and their own computer screens. These technological advancements, in making television more easily accessible to the public—including children—cast serious doubt on the rationale behind safe harbors. If the time of the broadcast no longer makes a difference in terms of access to the material, then regulating the material that is broadcast on the basis of the time of the program is no longer a logical course of action.

B. Why Safe Harbors No Longer Make Sense

With so many Americans viewing television shows at times other than their regularly scheduled timeslots, the time at which a show is broadcast is no longer an important aspect of that show. The rationale that the Supreme Court and the FCC used for creating safe harbors for broadcasting indecent material, therefore, is no longer sound in this respect.

If a child wants to watch a television program that is on after he goes to bed, he can simply program the family DVR to record the show with a

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115. *Id.*

116. Press Release, Hulu.com Opens to Public, Offers Free Streams of Hit TV Shows, Movies and Clips from More than 50 Providers Including FOX, NBC Universal, Metro-Goldwyn-Mayer Studios Inc. and Sony Pictures Television, HULU.COM (March 12, 2008), http://www.hulu.com/press/launch_press_release.html [hereinafter Hulu Opening Press Release].

117. NBC Universal Press Release, *supra* note 114.

118. Hulu Opening Press Release, *supra* note 116 (internal quotation marks omitted).

119. *Id.* (internal quotation marks omitted).

touch of a button, find the show on the network's website, or on another television website (such as Hulu), and watch it at his convenience. If he is one of the many children who has access to his own computer and laptop today, his parents may not necessarily be aware that he is watching such a program when he accesses the material.

Further, a recent study by the Kaiser Family Foundation looked at the media habits of children between the ages of eight and eighteen. The study found that those children spend more than seven and a half hours each day using various electronic devices, including computers and the Internet.[120] The amount of time that children spend on the computer has more than tripled since 1999, and the amount of television that they watch has also continued to steadily increase.[121] Additionally, twenty-nine percent of children own a laptop, as opposed to only twelve percent who did in 2004.[122] This means that the ability of a child to access television programming in general, including those programs that his parents might not find appropriate for him, is much easier than it was just six years ago.

Combining the unprecedented availability of broadcast television programming with the ease with which children can access the Internet and the family DVR, the safe harbor rationale just does not make sense any longer. There are no longer any hours where it is significantly less likely that children will have access to the programs. Indecency that is broadcast at midnight now seems just as likely to be viewed by children all over the country with access to these technologies as that which is broadcast at 9:00 p.m. As a result, deregulation is the most logical next step to take in this matter. If regulations are no longer effective, it no longer makes sense to penalize networks for violating them.

VI. PROPOSAL FOR THE FUTURE

Since the current regulations do not make sense in their present form, something needs to be done to bring them in line with today's technology. Children will find a way to access indecent broadcast material if they really want to, so the restrictions on the networks should either be strengthened so that there is less indecent material out there for children to access, or they should be relaxed so that the networks have more freedom, since children will see and hear the material anyway.

While it may be tempting for parents to advocate for stricter indecency laws so that their children are protected, the complete ban of indecent material would be subject to First Amendment challenges and

120. Tamar Lewin, *If Your Kids Are Awake, They're Probably Online*, N.Y. TIMES, Jan. 20, 2010, at A1.

121. *Id.*

122. *Id.*

would likely suffer the same fate as the recent FCC regulation that was recently struck down. Since this would be a content-based regulation of the media, any regulation would have to survive strict scrutiny. Since protecting children has been viewed as a compelling government interest,[123] strict scrutiny would apply to any ban. Any regulation would therefore have to be narrowly tailored to the compelling interest and a least restrictive means of protecting it; a complete ban would not pass this test, as was made apparent by the recent Second Circuit decision.[124]

Furthermore, any restriction cannot prevent adults from legally having access to the indecent material. As the Supreme Court stated in *Bolger v. Youngs Drug Products Corporation*, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."[125] This rationale demonstrates the importance of careful drafting of additional regulation in order for it to not be deemed unconstitutional and struck down.

In addition to these First Amendment concerns, such restrictions would also exacerbate the problem of depriving viewers of shared experiences and of creating a less-informed public, which Schneider discusses in his article.[126] Further, by eliminating an entire type of broadcast media, this will inhibit viewers from receiving information to which they might have had access with more relaxed regulations. While it may seem trivial on the surface, if certain programs, such as the *Billboard Music Awards* and *Golden Globes*, were not broadcast for fear that the networks would be sanctioned for indecent material, this would actually eliminate access to significant popular culture events. If this prohibition of broadcast of certain events were expanded even further, other important programs could theoretically be eliminated from the airwaves as well.[127] There is really no way to know how far the networks would go in order to save themselves from FCC sanctions.

Another option for the future of regulations is a more moderate approach that the regulations should be relaxed, but not eliminated. This would require the networks to continue to monitor what they are broadcasting over the airwaves to keep children protected from highly offensive material, but it would also give the networks more flexibility in their programming choices. The FCC would no longer be able to sanction a network for choosing to air a program that may contain some indecent

123. *See* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978); Action for Children's TV v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995).

124. *See* Fox TV Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).

125. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983).

126. *See* Schneider, *supra* note 11, at 896.

127. *See Fox TV Stations*, 613 F.3d at 334.

material at 9:00 p.m. instead of 10:00 p.m., when viewership may be higher and the number of children who would eventually have access to the program would be exactly the same.

If the safe harbors were minimized to only between the hours of 1:00 a.m. and 6:00 a.m., this could possibly provide a workable compromise. The programming that is on between those hours is not likely to be anything in which children are really going to be interested, so indecent material could be broadcast then. While children could still theoretically have access to the programs broadcast during these hours, they are likely going to be less interested in those programs than other ones that may air at times that are within the current safe harbor, such as *Saturday Night Live* that airs at 11:30 p.m.

Decreasing the regulations without eliminating them would allow the FCC to continue to regulate indecency without putting an unfair burden on the networks. The FCC would retain control over the airwaves, but at the same time, the networks would have more freedom in their program lineups. In this increasingly technologically advanced world, regulations of the media need to keep up with the times, and relaxing the safe harbor regulations would be a logical first step.

While the option of decreasing the safe harbors may seem like it would be an effective change, however, it is likely only going to be the second-best option that is available. In addition to making sure that the regulations are not running afoul of the First Amendment, maintaining any indecency ban means the networks are still going to have to bear the costs of sanctions and the costs of excluding some programming in an effort to avoid those sanctions.

The ideal solution in this situation, therefore, would be to eliminate this control that the FCC has over the networks by deregulating. If children are going to have access to the material anyway, why should the networks be punished simply because they broadcast the indecent material one hour too early? Broadcasting that material one hour later is not going to make a difference in whether the child with his own laptop is going to watch the broadcast on Hulu, so it does not make sense that networks should pay the price.

This option may be controversial, because networks could then conceivably start broadcasting indecent material at 3:00 p.m., for example, when children are coming home from school. However, networks would likely lose many viewers by engaging in this type of behavior, so the market would keep the especially offensive material off the airwaves, thus keeping network broadcast material acceptable to the majority of people. Additionally, after all these years of regulations and the broadcasts that have become commonplace on television, it is unlikely that the networks

would drastically change their programming to that which would contain large amounts of indecent material. Ignoring timing considerations entirely would result in a complete change in what networks currently air at peak times, which would not likely be a wise business decision. The networks would probably not change their lineups; they would just have more freedom with the time slots and less fear of running afoul of the FCC regulations for material that one person may find indecent, like John Douglas during George Carlin's monologue.

This solution would also be a logical extension of the recent Second Circuit decision striking down the FCC indecency regulation. With the court's recognition that the landscapes of the media and technological worlds have changed drastically since the days of *Pacifica*, updating the FCC regulations to be more in line with the times would be a realistic and ideal goal. The groundwork has already been laid for a path toward deregulation, and it would be in the best interest of everyone involved if the FCC decided to take that path.

VII. CONCLUSION

With the relatively recent advances in technology and the ability of children to access broadcast material from almost anywhere at almost any time, it is time for the FCC to change its indecency regulation policy to something that reflects the realities of today. Safe harbors are no longer safe with the invention of Hulu and the DVR, so the rationale behind that regulation is no longer sound. If the FCC is really looking to protect children, the indecency regulations are in need of a facelift. The most logical solution is to let the market handle the content of broadcasts; any move strengthening regulations would likely run afoul of the First Amendment. Especially after the recent Second Circuit opinion striking down a regulation that punished even fleeting expletives, deregulation is the most realistic option.

While deregulation would likely be initially seen as a drastic change, this is the option that would lead to the most effective and realistic long term change. Technology is going to continue to advance, and children will likely be able to access broadcast material even more easily in the future. By maintaining the regulations, the FCC is not going to effectuate its intent of protecting children from indecent broadcast material. Rather, they are just going to make it harder on the networks to broadcast material that might be in public demand. Since children are not going to be able to be completely protected by any regulation that passes constitutional muster, the networks should not have to pay the price. The most logical course of action, therefore, is to move toward deregulation and let the market keep the indecent material off of network broadcasts.

Combating Cyberbullying: Emphasizing Education over Criminalization

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I. INTRODUCTION

A new form of cyberbullying, or bullying that takes place on the Internet,[1] emerged in 2006 when Lori Drew used the online social networking tool MySpace to harass Megan Meier, a resident of Dardenne Prairie in suburban St. Louis.[2] Thirteen-year-old Megan's story is unique because Drew was an adult—the mother of another preteen girl.[3] The cyberbullying began when Drew used MySpace to create a fictitious profile for a sixteen-year-old named "Josh Evans" on September 20, 2006.[4] It ended a few weeks later when Megan hanged herself in her closet in response to Josh's suggestion that the world would be a better place without her.[5]

In addition to the fact that Drew's example involved an adult bullying a minor, this situation is unique because Drew's actions were criminally prosecuted in federal court.[6] Since Drew's use of MySpace to create a fake profile and harass another member violated the MySpace Terms of Service, she was prosecuted for violating the Computer Fraud and Abuse Act (CFAA).[7]

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1. For more definitions and effects of cyberbullying, see *What Is Cyberbullying?*, NATIONAL CRIME PREVENTION COUNCIL, http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying (last visited Nov. 13, 2010) ("Some examples of ways kids bully online are [s]ending someone mean or threatening emails, instant messages, or text messages . . . [and t]ricking someone into revealing personal or embarrassing information and sending it to others . . . . Often kids say things online that they wouldn't say in person, mainly because they can't see the other person's reaction.").

2. Steven Pokin, *'My Space' Hoax Ends with Suicide of Dardenne Prairie Teen*, STLTODAY.COM, (Nov. 11, 2007, 11:00 AM), http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.ii1.txt. At the time of Pokin's reporting, "[t]he single mother . . . requested that her name not be used." *Id.* Her identity was later revealed to be Lori Drew. *See* David Frey, *Better Laws Are Needed to Prosecute Cyberbullies*, N.Y.L.J., Oct. 13, 2009.

3. Frey, *supra* note 2.

4. *See* Pokin, *supra* note 2; Frey, *supra* note 2.

5. Pokin, *supra* note 2.

6. United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (ruling on Drew's Fed. R. Crim. P. 29(c) motion).

7. 18 U.S.C. § 1030 (2006). *See also Drew*, 259 F.R.D. at 451-53 (discussing the procedural posture of the case).

Though Lori Drew was the adult perpetrator of one of the most extreme examples of cyberbullying, the fact that no criminal law specifically prohibited her behavior does not justify stretching the CFAA or passing new legislation that defines cyberbullying as a new crime. However, federal legislation that combats cyberbullying through educational initiatives would have a positive impact. This Note will define and introduce extreme examples of cyberbullying in Part II. In Part III, this Note will focus on the criminal prosecution and acquittal of Lori Drew in response to her extreme cyberbullying actions. Part IV will examine how public outcry in response to extreme cyberbullying incidents has prompted both state and federal legislators to take action, including proposals to impose criminal sanctions against cyberbullying. Considering the positive and negative effects of the efforts to combat cyberbullying so far, this Note will argue in Part V that prevention through education will be the most effective solution. Since educational efforts do not include the possible negative consequences of imposing criminal anticyberbullying sanctions, increased Internet safety educational efforts address cyberbullying positively, by empowering educators with the necessary tools to inform students and parents about how to use ever-changing technology wisely and safely.

II. DEFINING CYBERBULLYING

Minors' general innocent and naïve nature, when combined with the environment of the Internet, creates a fertile atmosphere for bullying, especially since parents can be ignorant of their children's behavior and the dangers involved.[8] In describing the practical effects of these dangers, David Frey, Staten Island assistant district attorney and chief of the computer and technology investigations unit, noted, "[u]nfortunately, many people have trouble living by [the Golden] rule, and when being unkind is taken to the Internet, police and prosecutors are often called on to step in. Welcome to the world of cyberbullying."[9]

In a seemingly positive way, the Internet has increased the available forms of communication to include email, instant messaging, and similar forms of messaging through social networking sites.[10] These communication avenues allow instant connection to friends and

8. Frey, *supra* note 2 ("[B]ullies are underage and likely too immature to have thought about the results of their actions, and often their parents have no idea the behavior is occurring.").

9. *Id.*

10. *See generally* Perry Gattegno, *Nearly One in Ten Children Say they Have Been Bullied Through Electronic Means Such as Computers and Cell Phones*, MONTANA'S HEALTHY LIVING (July 22, 2010), http://www.montanashealthyliving.com/health_20090722_briefcyberbully.html.

acquaintances, but as a result, "[s]ocial networking sites like MySpace, Facebook, and Twitter have gone from Internet destinations to personal essentials."[11] While the benefits of this increased technology include increased speed of communication, a particularly unique and potentially dangerous aspect of this technology is its tolerance (and even encouragement) of anonymity.[12] Another danger is that online communication is particularly accessible to children, and even more tailored toward younger users than adults in some cases.[13]

While more research is necessary on children's motivations for cyberbullying,[14] studies have found that between eight percent of teenagers[15] and eighteen percent of middle school students have been victimized by this behavior.[16] Cyberbullying seems to be most prevalent among girls (both in roles as bullies and victims), beginning in the sixth and seventh grades.[17] Though a relatively modern phenomenon, its effects among victims include "higher rates of absenteeism, low self-esteem, suicidal thoughts, drug and alcohol use and illness."[18] More so than schoolyard bullying, cyberbullying has a particularly pervasive presence so, "[f]or some kids who are targeted at school and out of school, it can be a nightmare. They don't feel like they have a break," said Patricia Agatston, the coauthor of *Cyber Bullying: Bullying in the Digital Age*.[19]

In one of the earliest publicized examples of the dangerous results of cyberbullying, Ryan Halligan committed suicide on October 7, 2003, at age

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11. *Id.*

12. *See, e.g.*, *id.*; Associated Press, *Lawyer Claims Parodies, Pranks at Risk in Dead Sea Scrolls Case*, FIRST AMENDMENT CENTER (Nov. 6, 2009), http://www.firstamendmentcenter.org/news.aspx?id=22283.

13. *See* Gattegno, *supra* note 10; Richard Vivian, *Internet Safety Book Distributed to Parents*, ORANGEVILLE BANNER, June 2, 2009 ("With more kids being online, they know more about the Internet than we do. We have to make sure parents have a very good knowledge about the Internet on how to protect their children.") (internal quotation marks omitted).

14. Gattegno, *supra* note 10 ("Stephen Russell, director of the Frances McClelland Institute for Children, Youth & Families at the University of Arizona, Tucson, . . . said more research is needed on what lies beneath the bullying.").

15. *Id.*

16. Donna Winchester, *Cyberbullying on the Rise*, ST. PETERSBURG TIMES, Mar. 3, 2009, at 1B ("18 percent of students in Grades 6-8 said they've been cyberbullied at least once in the past two months. 11 percent of students . . . said they had cyberbullied another person at least once.").

17. *Id.*

18. Emily Anderson, *School, Police Keep Tabs on Cyber Bullying*, THE DAILY SENTINEL, September 30, 2009 ("The Centers for Disease Control and Prevention has recognized cyber bullying as an emerging risk to youth health because it can be so hard on kids emotionally and mentally that it sometimes leads to depression, anxiety and even physical ailments.").

19. *Id.* (internal quotation marks omitted).

thirteen,[20] the same age at which Megan Meier took her own life. Ryan did so in part because some of his schoolmates committed a prank against him in a form of online bullying.[21] Ryan's father, John Halligan, recalls that Ryan "loved being on-line," but that he followed the house rules John set about Internet safety.[22] Leading up to his suicide, Ryan had been teased at school and the summer before he entered eighth grade when "a classmate pretended to be interested in him romantically [and] then forwarded his instant message responses to all of her friends."[23] When the school year began and he approached her in person, "she told him he was just a loser and that she did not want anything to do with him."[24]

Similar to John Halligan's rules for his son's Internet access, Megan Meier's mother, Tina, monitored Megan's Internet use.[25] Though hesitant because Megan admitted not knowing "Josh Evans," Tina allowed her to accept his MySpace friend request at Megan's continuous pleas such as, "but look at him! He's hot! Please, please, can I add him?"[26] Both Meiers were unaware the account had actually been created by Lori Drew, the mother of one of Megan's former friends, whose intent was to discover what Megan was posting about her daughter.[27] Once accepted as a "friend," Drew used the fake account to take advantage of Megan's vulnerabilities and make her believe Josh had a crush on her.[28] Megan did fall for the crush, but less than a month after it began, Josh told her, "[t]he world would be a better place without [her in it]."[29] After receiving that message on October 16, 2006, Megan hanged herself in her closet.[30] While Megan had received counseling for depression before the cyberbullying began, her mother Tina blames the cyberbullying for pushing her over the edge.[31]

More recently, in January 2009, California student Hail Ketchum

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20. RYAN'S STORY, http://www.ryanpatrickhalligan.org/ (last visited Nov. 13, 2010) [hereinafter Ryanpatrickhalligan.org].

21. *Id.*

22. *Id.* ("No IMing/chatting with strangers[;] [n]o giving any personal information (name/address/phone) to strangers[;] [n]o sending pictures to strangers[;] [n]o secret passwords").

23. Anderson, *supra* note 18; *see also* Ryanpatrickhalligan.org, *supra* note 20 ("She said she was only joking on-line. He found out that her friends and her thought it would be funny to make him think she liked him and to get him to say a lot of personal, embarrassing stuff. She copied and pasted there [sic] private IM exchanges into ones with her friends. They all had a good laugh at Ryan's expense.").

24. Ryanpatrickhalligan.org, *supra* note 20.

25. Pokin, *supra* note 2.

26. *Id.* (internal quotation marks omitted).

27. *Id. See also* Frey, *supra* note 2.

28. Pokin, *supra* note 2.

29. *Id.*

30. *Id.*

31. *Id.*

settled a lawsuit with Corona del Mar High School and the Newport-Mesa Unified School District over a video posted on Facebook, the social networking website.[32] The video was posted by three other students who "graphically described raping [Ketchum] in the back of a pickup truck."[33] More than 600 students viewed the video before it was removed.[34] While Ketchum found the video itself disturbing even though no actual rape occurred, the lawsuit arose out of the fact that when notified of the online harassment, the school "administrators did little to deal with [the video posters]."[35] As part of the settlement, the school district is required to institute harassment- and discrimination-prevention training for students and faculty as administered by the Anti-Defamation League.[36] The district was also required to apologize to Ketchum, who was represented by the ACLU in the lawsuit because the Facebook video stirred up issues of sexism and homophobia surrounding the school's production of the musical, *Rent*.[37]

The experiences of Hail Ketchum, Ryan Halligan, and Megan Meier show varied, though similarly severe examples of bullying that was, arguably, more extreme because it occurred via the Internet. The fact that more than 600 students were quickly able to view the video harassing Ketchum, just as countless friends of Ryan Halligan's bully were able to read the embarrassing messages she forwarded, represents the speed and reach of Internet communications. That unique, but significant factor clearly distinguishes cyberbullying from other forms.

While factors distinguishing cyberbullying from other types of bullying do exist, the 2008 Internet Safety Technical Task Force was unable to determine with certainty that bullying is generally on the rise as a result of cyberbullying.[38] It is difficult to establish whether cyberbullying is actually creating an opportunity for entirely new bullies, or whether

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32. Brianna Bailey, *The Political Landscape: Rep. Cites CdM Incident in Talk on Cyber-Bullying*, THE DAILY PILOT, Oct. 13, 2009, http://articles.dailypilot.com/2009-10-13/news/dpt-landscape100109_1_cyber-bullying-corona-del-democrat-boxer; Seema Mehta, *O.C. School District, ACLU Settle Suit over 'Rent*,*'* L.A. TIMES, Sept. 10, 2009, at 3.

33. Bailey, *supra* note 32.

34. Mehta, *supra* note 32.

35. Patricia Cohen, *Settlement Reached in California High School 'Rent' Case*, N.Y. TIMES ARTSBEAT (Sept. 10, 2009), http://artsbeat.blogs.nytimes.com/2009/09/10/settlement-reached-in-california-high-school-rent-case/#more-35857.

36. Mehta, *supra* note 32.

37. Cohen, *supra* note 35.

38. Larry Margasak, *House Members Seek Ways to Stop Internet Bullying*, ASSOCIATED PRESS, Sept. 30, 2009. Led by John Palfrey of Harvard Law School, the Internet Safety Technical Task Force brought together twenty-nine companies, child advocacy groups, and academics. *Id.*

bullying is "just shifting venues" from the schoolyard to the Internet.[39]

Whether or not bullying is simply shifting venues, these extreme examples of a new kind of bullying have brought the issue to the forefront of the public's attention. In response, state laws have been amended to address cyberbullying through varying methods,[40] and federal legislation is currently pending.[41] While this type of bullying ranges from inappropriate to morally reprehensible, the challenge of drafting a law that would foresee and include all future cyberbullying crimes, without infringing upon the guarantees of the First Amendment,[42] seems unlikely to be overcome. It is also important to consider factors such as federal versus state regulation and cyberbullying done by minors as compared to that done by adults. To most effectively combat cyberbullying, community efforts and legislation need to focus on educating children and parents on Internet safety.

III. *UNITED STATES V. DREW*

Lori Drew, the aforementioned cyberbully of Megan Meier, was atypical not only because she was an adult bullying a minor, but also because Drew's actions were criminally prosecuted in federal court.[43] In response to the public outcry that followed the story of Drew and Meier, a federal prosecutor indicted Drew in May 2008 for a felony violation of the CFAA.[44]

A. Legal Cause of Action

Since Drew's use of MySpace to create a fake profile and harass another member violated the MySpace Terms of Service (TOS), she was prosecuted for a felony violation of the CFAA.[45] The CFAA prohibits exceeding authorization of a computer and "obtaining information from a protected computer where the conduct involves an interstate or foreign communication and the offense is committed in furtherance of a crime or tortious act."[46] The cause of action in the case relied on the theory that Drew exceeded her authorization when she violated the TOS with the intent

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39. *Id.* (internal quotations omitted).

40. *See, e.g.*, ARK. CODE ANN. § 6-18-514 (LexisNexis 2010); MO. REV. STAT. § 565.090 (2010).

41. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009); Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. (2009); Student Internet Safety Act of 2009, H.R. 780, 111th Cong. (2009); SAFE Internet Act, S. 1047, 111th Cong. (2009).

42. U.S. CONST. amend. I.

43. United States v. Drew, 259 F.R.D. 449, 449 (C.D. Cal. 2009).

44. United States v. Drew, 2008 WL 2078622 (C.D. Cal. May 15, 2008).

45. *Drew*, 259 F.R.D. at 451.

46. *Id.* at 456 (citing 18 U.S.C. § 1030(a)).

to cause emotional distress to Megan Meier—a tortious act.

1. The Computer Fraud and Abuse Act

Congress passed the Computer Fraud and Abuse Act of 1986[47] (CFAA) to establish "additional penalties for fraud and related activities in connection with access devices and computers."[48] The theory behind the prosecution of Lori Drew hinged on the fact that the CFAA prohibits exceeding authorization of a computer to commit an offense in furtherance of a tortious act.[49]

In order to prove a felony violation of the CFAA in a case such as Drew's, the prosecution must first prove that the defendant committed a tortious act. Drew was charged with using MySpace to commit the tort of intentional infliction of emotional distress in violation of state law.[50] The elements of the tort are the same in both California (the home state of MySpace) and Missouri (the home state of Drew and Megan Meier). The conduct at issue must be "extreme or outrageous," and cause "extreme emotional distress."[51] At trial, the jury acquitted Drew of felony CFAA violations, but found her guilty of a misdemeanor CFAA violation.[52]

In overturning the jury's decision that Drew was guilty of a misdemeanor under the CFAA, Judge Wu focused on the other prong of a CFAA violation—computer use exceeding that for which a user is authorized. As a result of his analysis, Wu found that "there is nothing in the legislative history of the CFAA which suggests that Congress ever envisioned such an application of the statute" as to include a cause of action for cyberbullying.[53] Judge Wu postulated that, had he upheld the conviction, criminal CFAA violations would include a "lonely-heart" misrepresenting his or her physical characteristics on a dating website or an "exasperated parent" messaging friends about purchasing Girl Scout cookies because both are examples of seemingly innocent actors whose conduct is technically barred by the TOS.[54] In this case, that concern over possible misuses of the CFAA overrode the threat to children posed by the

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47. 18 U.S.C. § 1030 (2006).

48. 132 CONG. REC. D710 (1986).

49. 18 U.S.C. § 1030 (prohibiting accessing a computer without authorization or in excess of authorization and obtaining information from a protected computer where the conduct involves an interstate or foreign communication and the offense is committed in furtherance of a crime or tortious act).

50. *Drew*, 259 F.R.D. at 451.

51. *Id.* at 452 n.3.

52. *Id.* at 452–53; *see also* 18 U.S.C. § 1030(a)(2)(C), (c)(2)(A) (setting forth that if "the offense was committed in furtherance of any criminal or tortious act" it could qualify for felony charges punishable by imprisonment of up to five years).

53. *Drew*, 259 F.R.D. at 451 n.2.

54. *Id.* at 466.

cyberbullying.

2. The MySpace Terms of Service

Institutional terms of service represent a common form of regulation applicable to Internet users.[55] In terms of cyberbullying, the theory that the MySpace Terms of Service (TOS) established the first line of safety for its users set the stage for the criminal prosecution of Lori Drew.[56] The fact that TOS provide standards and that those standards have repercussions for users who violate them serves as an example of a type of institutional safeguard that currently exists online.

MySpace is a social networking website that can be accessed by anyone with an Internet connection, who then has access to individual users' profiles, varying with each user and age group.[57] As distinguished from the general public of Internet users, MySpace allows any users older than fourteen to become members of its site once they register.[58] Registration requires users to submit personal information, choose a password, and "agree to the MySpace Terms of Service and Privacy Policy" by checking a box.[59] As Judge Wu noted in *United States v. Drew*, "[a] person could become a MySpace member without ever reading or otherwise becoming aware of the provisions and conditions of the MySpace terms of service by merely clicking on the 'check box' and then the 'Sign Up' button without first accessing the 'Terms' section."[60] The actual text of the TOS is located on a different page, access to which requires the optional and affirmative step of clicking a hyperlink.[61] This practice varies among websites, as others "compel visitors to read their terms of service by requiring them to scroll down through such terms before being allowed to click on the sign-on box or by placing the box at the end of the 'terms' section of the site."[62]

Becoming a member of MySpace allows members to create a profile on which they can post photographs and communicate with other

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55. *See, e.g.*, *id.* at 453 n.8.
56. *See id.* at 451.
57. *Id.* at 455.
58. *Id.* at 454.
59. *Id.* at 453 (internal quotations omitted). *But see* Pokin, *supra* note 2 ("MySpace has rules. A lot of them. There are nine pages of terms and conditions. The long list of prohibited content includes sexual material. And users must be at least 14. 'Are you joking?' Tina asks. '*There are fifth-grade girls who have MySpace accounts*.' As for sexual content, Tina says, most parents have no clue how much there is. And Megan wasn't 14 when she opened her account. To join, you are asked your age but there is no check.") (emphasis added).
60. *Drew*, 259 F.R.D. at 453.
61. *Id.*
62. *Id.* at 453 n.8.

members.[63] For adults over the age of eighteen, the default setting allows any Internet user to view their profile, although they can adjust the privacy setting to limit access to allow only members or "friends," a smaller, more exclusive group.[64] Once a profile has been limited to the "private" setting, other users must send that user a friend request for approval and access to profile information.[65] The private setting is the default for users who are under the age of eighteen.[66] Although the only means for verifying users' ages is their acceptance of the TOS, it is noteworthy that MySpace had stricter privacy settings for minors than for its adult members.[67] MySpace even went a step further for its youngest users, as friend requests to members between ages fourteen and sixteen require users to enter that friend's email address.[68] If one does not agree with the TOS, the only option is to leave the website and discontinue service.[69]

In 2006, acceptance of the MySpace TOS required users to warrant: "(a) all registration information you submit is truthful and accurate; (b) you will maintain the accuracy of such information; (c) you are 14 years of age or older; and (d) your use of the Services does not violate any applicable law or regulation."[70] Among other material, the TOS also prohibited posting anything that "harasses or advocates harassment of another person[,] . . . promotes illegal activities[,] . . . [or] includes a photograph of another person that you have posted without that person's consent."[71] MySpace reserved the right to change the TOS at any time and take legal action against any member who engaged in a prohibited activity.[72] This provision likely decreases the value of the TOS as a contract with users, since it would require users to review the TOS every time they log into the site.[73]

At trial, the vice president of customer care at MySpace testified that the sheer volume of 400 million MySpace accounts made it nearly impossible to determine which accounts were in violation of the TOS.[74] That is not to say MySpace takes a completely hands-off approach to

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63. *Id.* at 453.
64. *Id.* at 455.
65. *Id.*
66. *Id.*
67. *See id.* at 454–55.
68. *Id.* at 455.
69. *Id.* at 454.
70. *Id.* (citing MySpace's Terms of Service).
71. *Id.* (internal quotation marks omitted).
72. *Id.* at 454.
73. *Id.*; *see also* Harris v. Blockbuster, Inc., 622 F. Supp. 2d 396, 398 (N.D. Tex. 2009) (holding clause in the "Terms and Conditions" of Blockbuster Online was unenforceable because it could be modified "at any time").
74. *Drew*, 259 F.R.D. at 454–55.

regulating its users' activities. In addition to the privacy settings in place, MySpace also established specialized departments, such as "parent care," to handle cyberbullying and underage users.[75] Another safety feature of the MySpace site was its warning to users that "information provided by other MySpace.com Members (for instance, in their Profile) may contain inaccurate, inappropriate, offensive . . . material."[76] Such a warning conceivably raises questions about the type of activity that may be common on MySpace and similar sites, as well as MySpace's corporate responsibility to make this warning clear and obvious.

Practically speaking, the repercussions for violating the MySpace TOS involve MySpace contacting law enforcement directly only in rare circumstances.[77] More likely, MySpace would simply warn the violative users that their actions might warrant involvement of law enforcement or the removal of the offensive profile from the MySpace site.[78]

B. Lori Drew's Prosecution and Acquittal

Likely considering children's innocence and reliance on adults,[79] proponents of cyberbullying regulation argue that actions such as Lori Drew's require "[m]ore formal interdiction" than simply school discipline because "an adult is the bully."[80] It was in response to such arguments, that the federal prosecutor indicted Drew for violating the CFAA,[81] which prohibits "obtaining information from a protected computer where the conduct involves an interstate or foreign communication and the offense is committed in furtherance of a crime or tortious act."[82] At trial, the jury was instructed:

> if they unanimously decided that they were not convinced beyond a reasonable doubt as to the Defendant's guilt as to the felony CFAA violations of 18 U.S.C. §§ 1030(a)(2)(C) and 1030(c)(2)(B)(ii), they could then consider whether the Defendant was guilty of the "lesser included" misdemeanor CFAA violation of 18 U.S.C. §§ 1030(a)(2)(C) and 1030(c)(2)(A).[83]

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75. *Id.* at 455.

76. *Id.* at 454.

77. *Id.* at 455.

78. *Id.*

79. *See* DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 78 (2d ed. 2004) ("Children are thought to merit paternalism both because they have not yet developed the cognitive capacity to make intelligent decisions in the light of relevant information about themselves and the world, and because they are prone to emotional inconstancy . . . .").

80. Frey, *supra* note 2.

81. United States v. Drew, 2008 WL 2078622 (C.D. Cal. May 15, 2008).

82. *Drew*, 259 F.R.D. at 452.

83. *Id.* at 452–53 (citations omitted).

The jury's finding suggests it agreed with the general public's reaction[84] that Drew deserved to be punished for her actions, but could not agree unanimously that she was guilty of felony charges beyond a reasonable doubt.[85] It acquitted Drew of felony CFAA counts, but found her guilty of misdemeanor CFAA violations.[86]

Although federal prosecutors in Los Angeles filed a notice to appeal Wu's dismissal,[87] they effectively closed the case when they announced they would not seek appeal as of November 20, 2009.[88] Orin Kerr, a leading advocate and scholar on computer crime law,[89] had planned to contribute to Drew's defense at the appellate level,[90] and he believed that recent Ninth Circuit decisions rejecting a broad interpretation of the CFAA would make the government's success on appeal highly unlikely.[91] Similarly, Drew's lead counsel, Dean Seward, emphasized that since an appellate decision would have a broad, national effect, he was confident that the Ninth Circuit would have affirmed Wu's decision given the opportunity.[92] Tina Meier, Megan's mother, was not surprised by the prosecutors' decision, but she stressed, "[j]ust because nothing happened legally doesn't mean [Drew] didn't do anything wrong."[93]

It seems clear that Drew's actions were morally reprehensible, but the fact that no law at the time specifically prohibited her behavior does not justify stretching the intentions and language of the CFAA to convict her of a crime. As will be explained further, expanding the law to criminalize Drew's behavior would open the gates to imposing punitive sanctions excessively, and serve as an example of overcriminalization.[94] Conversely,

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84. *See generally* Pokin, *supra* note 2, at comments.

85. *Drew*, 259 F.R.D. at 453.

86. *Id.* at 451, 452–53 (finding Drew guilty of misdemeanor charges of accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information in violation of 18 U.S.C. §§ 1030(a)(2)(C), 1030(c)(2)(A)).

87. Kim Zetter, *Prosecutors Set Stage to Appeal Lori Drew Ruling*, WIRED.COM (Sept. 28, 2009), http://www.wired.com/threatlevel/2009/09/drew-appeal-notice/.

88. Nicholas J.C. Pistor, *U.S. Drops Its Case Against Lori Drew*, ST. LOUIS POST-DISPATCH, Nov. 22, 2009, at A2.

89. *Faculty Profile of Orin S. Kerr*, THE GEORGE WASHINGTON UNIV. LAW SCH., http://www.law.gwu.edu/Faculty/profile.aspx?id=3568 (last visited Nov. 13, 2010).

90. Zetter, *supra* note 87.

91. *Id.*

92. Wendy Davis, *Drew Case May Go to Higher Court*, ONLINE MEDIA DAILY (Sept. 28, 2009), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=114431.

93. Pistor, *supra* note 88.

94. *See, e.g.*, *Cyberbullying and Other Online Safety Issues for Children: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Harvey A. Silverglate, Attorney) [hereinafter Silverglate Statement]; Zetter, *supra* note 87.

noncriminal, educational solutions to the issue are much less problematic approaches to protecting children from cyberbullying.

IV. CRIMINALIZING CYBERBULLYING THROUGH LEGISLATION

In another form of response to public outcry, legislators have introduced, and in some cases passed, laws that attempt to directly prohibit cyberbullying. If drafted as intended and passed, these laws would prevent behavior such as Lori Drew's and criminalize it in some instances. Bills have been proposed at both the state and federal level, and they vary greatly by their intent and scope.

For example, within seven months of Ryan Halligan's suicide, Vermont Governor Jim Douglas signed the Vermont Bully Prevention Act. While the Act amended Vermont laws to emphasize the seriousness of bullying, it makes no mention of cyberbullying specifically.[95]

Similarly, in September 2009, Linda Sanchez, representative from California, referred to Hail Ketchum's experience as an example of the reason for her proposed federal anticyberbullying law:[96]

> If Bobby posts a video . . . on his Facebook page that harasses and threatens to rape and kill Ashley, that video isn't private. It is not buried on Bobby's profile page somewhere. It is public. It appears when any of Bobby's Facebook friends log in, right up there in front of their home page so they can't miss it. And this story isn't just hypothetical. It happened to a brave young woman named Hail Ketchum Wiggins, who lives in southern California near my congressional district. Similar bullying incidents are happening everyday to young people across our Nation.[97]

A. State Cyberbullying Laws

The states' approaches to legislating to prevent cyberbullying have varied greatly. As of July, 2010, five states have adopted legislation against cyberbullying specifically, and thirty have adopted legislation prohibiting electronic harassment.[98] Soon after the details of Megan Meier's story broke, her home state legislature amended the Missouri statutes to criminalize cyberbullying in 2008.[99] Previously, the Missouri law against

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95. *See* 16 VT. STAT. ANN. § 11 (2010).

96. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

97. *Cyberbullying and Online Safety for Children: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 22 (2009) (statement of Rep. Linda T. Sanchez, Member, H. Comm. on the Judiciary) [hereinafter Statement of Rep. Sanchez].

98. Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER (July 2010), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws_20100701.pdf; *see, e.g.*, ARK. CODE ANN. § 6-18-514 (2009); MO. REV. STAT. § 565.090 (2009).

99. *See* MO. REV. STAT. § 565.090 (2009).

harassment required the offensive communication to be in writing or to have occurred over the telephone.[100] Since the amendment of the law, anyone who does the following is guilty of harassment, a class A misdemeanor, which is punishable by up to one year of imprisonment:[101]

> (3) Knowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or *any electronic communication*; or (4) *Knowingly communicates* with another person who is, or who purports to be, *seventeen years of age or younger* and in so doing and without good cause recklessly frightens, intimidates, or causes emotional distress to such other person.[102]

Notably, the amended Missouri statute upgrades the crime of harassment to a class D felony, which is punishable by up to four years of imprisonment,[103] if the perpetrator is at least twenty-one years of age and the victim is seventeen or younger, or if the perpetrator is a repeat offender of this section.[104]

When analyzing a similar proposed law in Idaho, the *Idaho Press-Tribune* described the Missouri amendment as "a simple, reasonable way to deal with the issue."[105] In an effort to prevent online harassment, Stephen Hartgen, Idaho state representative, initially proposed a requirement for Idaho Internet posters to sign online comments and blogs with their real names.[106] The suggestion was "roundly criticized" though, in part because "it would have been a legal nightmare to enforce."[107] Hartgen proposed new legislation in September 2009, modeled after the Missouri law because it targets cyberbullies by penalizing Internet harassment rather than anonymity alone.[108] "The general concept is a good one," as noted by the *Idaho Press-Tribune*, "[b]ut there are some questions that should be asked about the specifics."[109] An analysis of whether the regulation is enforceable and will criminalize only the targeted offensive conduct is necessary not only for the proposed Idaho legislation but also all similar legislation intended to target Internet speech.

In 2007, the Arkansas Legislature placed the main burden of

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100. MO. REV. STAT. § 563.910 (1999). *See also* Editorial Bd., *Online Harassment Bill Has Potential*, IDAHO PRESS-TRIB. (Sept. 17, 2009), http://idahoptv.org/idreports/showEditorial.cfm?StoryID=42468.

101. MO. REV. STAT. § 558.011 (2009).

102. *Id.* § 565.090 (emphasis added).

103. *Id.* § 558.011.

104. *Id.* § 565.090.

105. IDAHO PRESS-TRIB., *supra* note 100.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

preventing cyberbullying on public schools.[110] It addressed cyberbullying by amending its requirement for schools to establish antibullying policies to specifically prohibit bullying committed through "an electronic act that results in the substantial disruption of the orderly operation of the school or educational environment."[111] The law defines bullying in relevant part as "the intentional harassment, intimidation, humiliation, ridicule, defamation, or threat or incitement of violence by a student against another student . . . that causes or creates a clear and present danger of: (i) [p]hysical harm. . . ."[112] The policies required by the law can also apply to bullying that occurs among students away from school as long as it can be proven that the bullying is "intended for the purpose of disrupting school."[113]

The debate that has followed the amended Arkansas law represents some of the most compelling viewpoints and relevant considerations legislatures should consider when crafting proposals to discourage online harassment. "Each state has their own laws, and some are trying to adopt and adapt different things to them," said Tina Meier, Megan's mother. "You hope it's enough, but sometimes when you get that case in, if it's not strong enough, that's where there's issues."[114] Meier described the amended Arkansas law as "wonderful," but she said it does not go far enough to address the problem of cyberbullying.[115] While Meier suggested there might be extreme cyberbullying situations that would not be covered by this law, it is difficult to conceive a cyberbullying law that would be able to foresee all future cyberbullying crimes.

The sponsor of the Arkansas law, Shirley Walters, former state representative, told the *Arkansas News* that she "agrees that an outright ban on cyberbullying would help protect children, but crafting a law that did not infringe on First Amendment rights would be difficult."[116] She also said that her bill faced challenges from a freedom of speech perspective, so the legislatures worked with the ACLU and constitutional law experts to carefully craft a bill that would withstand constitutional scrutiny.[117]

Despite the shortcomings of state cyberbullying laws, state legislators have responded more successfully to the issue of cyberbullying than those at the federal level.

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110. *See generally* John Lyon, *State's Cyberbullying Law Too Limited, Advocate Says*, ARKANSAS NEWS (Oct. 13, 2009), http://arkansasnews.com/2009/10/13/state's-cyberbullying-law-too-limited-advocate-says/; ARK. CODE ANN. § 6-18-514 (2009).

111. ARK. CODE ANN. § 6-18-514(b)(2)(B)(i) (2009).

112. *Id.* § 6-18-514(a)(3)(A).

113. *Id.* § 6-18-514(b)(2)(b)(ii).

114. Lyon, *supra* note 110 (internal quotation marks omitted).

115. *Id.*

116. *Id.*

117. *Id.*

B. The Megan Meier Cyberbullying Prevention Act

Although children's rights are traditionally considered a state issue,[118] the Internet poses an enforcement challenge for cyberbullying laws. Even though states have passed anticyberbullying laws,[119] it seems unreasonable for every Internet user to be aware of each locality's rule. Since all Internet activity involves interstate commerce,[120] the cyberbullying issue is prime for federal legislation. A federal law would also fit the trend that children's rights have become increasingly federalized over the course of the twentieth century.[121] Thus, if any law can prove to be effective, it should be a federal law.

In an effort to take action on the national front, Rep. Linda Sanchez sponsored H.R. 1966: The Megan Meier Cyberbullying Prevention Act (Cyberbullying Prevention Act).[122] Sanchez named the bill in honor of Megan Meier, whose bully would "never be punished for her outrageous behavior."[123] The bill proposes to amend Chapter 41 of title 18 of the United States Code to include a section on cyberbullying.[124] This section would make it a crime to "cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior."[125] The criminal punishment could include a fine, imprisonment of up to two years, or both.[126] The bill defines *electronic means* to cover a variety of communication via emerging technologies "including email, instant messaging, blogs, websites, telephones, and text messages."[127]

In her testimony on the bill before the Subcommittee on Crime, Terrorism, and Homeland Security, Sanchez focused on how Missouri statutes at the time did not provide prosecutors with a law under which they could charge Lori Drew for her actions against Megan Meier.[128] In explaining the need for a federal cyberbullying law, Sanchez emphasized that "[c]yberbullying is always mean, ill-mannered, and cruel, but some

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118. *See* Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 11 (2004) ("One barrier to the constitutionalization of children's rights lies in federalism concerns. Federal courts are reluctant to interfere with state regulation, deeming children's interests both local and private. Children's rights are perceived as part of family law, the paradigmatic turf of the states.").

119. *See, e.g.*, ARK. CODE ANN. § 6-18-514 (2009); MO. REV. STAT. § 565.090 (2009); 16 VT. STAT. ANN. § 11 (2009).

120. United States v. Trotter, 478 F.3d 918, 921 (8th Cir. 2007) (per curiam).

121. *See, e.g.*, Ezer, *supra* note 118, at 11.

122. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

123. Statement of Rep. Sanchez, *supra* note 97, at 23.

124. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

125. *Id.*

126. *Id.*

127. *Id.*

128. Statement of Rep. Sanchez, *supra* note 97, at 22–23.

cyberbullying is so harmful that it rises to the level of criminal behavior."[129] Sanchez also pointed to the pervasiveness of cyberbullying as a distinguishing factor from other forms of harassment,[130] although it has not been empirically proven that bullying is generally on the rise as a result of cyberbullying.[131]

1. Avoiding Overcriminalization: Carefully Criminalizing Only Criminal Acts

Harvey A. Silverglate, an attorney with experience in criminal defense and civil liberties, also testified before the Subcommittee.[132] He spoke on behalf of the libertarian Cato Institute and focused mainly on the risks associated with the proposed bill,[133] raising the same issues of overbroadness and vagueness that Judge Wu considered when he dismissed Drew's criminal CFAA conviction.[134] According to Silverglate's testimony, bills that attempt to address "socially unhealthy curtailments," such as cyberbullying, are "often born of good intentions," but tend to produce "unintended consequences, including excessive and unfair prosecutions as well as the inhibition of the sometimes unruly verbal interactions that are, and should be, the product of a free society."[135]

These delicate issues require Congress to balance the competing interests of free speech against the interest in preventing cyberbullying against children.[136] It also raises the question of whether some conduct, such as Drew's very specific (and hopefully unique) actions towards Megan Meier, can be precisely prevented by law. "[T]he 'Cyberbullying' bill creates more problems than it could possibly solve," Silverglate argued, "especially in view of the fact that existing law is already more than adequate to deal with truly outrageous or dangerous harassment."[137] Acknowledging the challenges involved, Sanchez's focus is "to craft a prohibition on cyberbullying that is consistent with the Constitution," she said.[138] "But I also believe that working together for our children, *we can and must do so*."[139]

The failure to distinguish between cyberbullying done by minors and

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129. *Id.* at 22.
130. *Id.*
131. *See* Margasak, *supra* note 38.
132. Silverglate Statement, *supra* note 94, at 56.
133. *See id.* at 59.
134. United States v. Drew, 259 F.R.D. 449, 465 (C.D. Cal. 2009).
135. Silverglate Statement, *supra* note 94, at 61.
136. Margasak, *supra* note 38.
137. Silverglate Statement, *supra* note 94, at 69.
138. Margasak, *supra* note 38.
139. *Id.*

that caused by adult perpetrators is one noteworthy distinction between this proposed federal bill and the Missouri law. Silverglate noted that while the claimed purpose of this bill is to "stop 'cyber bullies' from causing distress to minors[,] [n]owhere in the language of this proposed legislation, however, can any such assurance be found."[140] Whether bullying is just part of growing up is debatable, but the Missouri law's harsher penalties for cyberbullying done by adults against children than cyberbullying among peers is significant.[141] Similarly, the Arkansas legislature considered cyberbullying to be a juvenile issue and thus required the schools to create policy to prevent it.[142]

The speed at which technology changes stands as another challenge in regulating cyberbullying.[143] This consideration plays an important and clarifying role in how laws such as the Cyberbullying Prevention Act should be evaluated; however, it also suggests "there is more need than ever for clear rules of the road."[144] For instance, it is obvious that "the authors of the First Amendment could not envision Facebook"[145] or MySpace.

2. Safeguarding First Amendment Freedoms

Silverglate also focused much of his opposition of the bill on the fact that criminalization of speech of this kind breaches the constitutional guarantees of the First Amendment.[146] As a result of its broad-sweeping potential, the proposed Cyberbullying Prevention Act has been called "a serious assault on first amendment rights."[147] In describing the values of free speech, Justice Louis Brandeis argued the founders "believed that

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140. Silverglate Statement, *supra* note 94, at 67.

141. *See* MO. REV. STAT. § 565.090 (2009).

142. Lyon, *supra* note 110.

143. *See* L. Gordon Crovitz, *You Commit Three Felonies a Day*, WALL ST. J., Sept. 28, 2009, at A21 ("Technology moves so quickly we can barely keep up, and our legal system moves so slowly it can't keep up with itself.").

144. *Id.*

145. Travis Crabtree, *Don't Let Abuses Stifle Innovation on Web*, HOUSTON CHRON., Oct. 4, 2009, at B10.

146. Silverglate Statement, *supra* note 94, at 60–61, 65 ("In a free society, people will be offended, *feelings will be hurt*. Yet separating unsavory speech – even quite clearly disagreeable and offensive speech – from *criminal* conduct is absolutely imperative in a democratic system that celebrates the freedom of expression.") (emphasis added).

147. Jason Lomberg, *Proposed Bill Targets "Cyberbullying,"* ECNMAG.COM (Oct. 1, 2009, 3:51 PM), http://www.ecnmag.com/Blogs/ECN-Blog/Proposed-bill-targets-"Cyberbullying". *See generally Cyberbullying Bill on the March*, THINK TANK WEST, http://thinktankwest.com/american-foreign-policy/cyberbullying-bill-on-the-march (last visited Nov. 13, 2010) ("The scope of this law is breathtaking. Had a rough breakup with your significant other? Engaged in a flame war on a website's comment section? We've got a law against that, you know.").

freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[148] In defense of those values, the First Amendment guarantees the right to discuss and debate "hot-button" political issues, which often involve particularly unpleasant speech.[149] Taken to the extreme, "the [Cyberbullying Prevention Act] would prevent about 99% of political discourse—anyone feeling offended could claim 'emotional distress.'"[150]

Politically motivated speech, both supportive and antagonistic, is one example of expression that plays an accepted and even necessary role in a free and democratic society.[151] As support for his argument that this bill appears to be "another chapter of over-criminalization," Louie Gohmert, representative from Texas, noted that the proposed law could inappropriately criminalize the blogosphere attacks that "mean-spirited liberals" send him and his family regularly.[152]

Similarly, the ACLU has concerns about the bill's First Amendment implications.[153] According to Rita Sklar, the executive director of the ACLU of Arkansas, "[w]e think that these kinds of laws can be dangerous in that they seek to limit speech that doesn't rise to the level of a true threat, in which case (they) would be unconstitutional."[154] From the other perspective, Tina Meier argues that cyberbullying laws do not violate the First Amendment because these laws target harassing speech that crosses the line of protected speech.[155]

Meier is correct that certain categories of speech can cross the proverbial line of social acceptance, beyond which the First Amendment can no longer protect it.[156] However, these categories are narrowly tailored to include only the most extreme and intolerable types of speech.[157] While

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148. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

149. Crabtree, *supra* note 145.

150. Lomberg, *supra* note 147.

151. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 269–71(1964).

152. David Kravets, *Cyberbullying Bill Gets Chilly Reception*, WIRED.COM (Sept. 30, 2009, 6:37 PM), http://www.wired.com/threatlevel/2009/09/cyberbullyingbill ("[C]ommittee members from the left and the right said they thought the measure was an unconstitutional breach of free speech. 'We need to be extremely careful before heading down this path,' Bobby Scott, a Democrat from Virginia and the committee's chairman, said during the hearing's opening moment.").

153. Lyon, *supra* note 110.

154. *Id.* (internal quotation marks omitted).

155. *Id.*

156. *See, e.g.*, Watts v. United States, 394 U.S. 705 (1969) (holding that true threats against the life of the President are not protected); Brandenburg v. Ohio, 395 U.S. 444 (1969) (stating that incitement speech is not protected).

157. *See* Planned Parenthood of the Columbia/Williamette Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1071–72 (9th Cir. 2002) (en banc) (holding antiabortionist group's website listing names and addresses of doctors who perform abortions for a reward was

this federal law does not make any true threat application clear, the Missouri cyberbullying law makes it more transparent that the type of speech it is intended to punish must reach the threshold level of a "true threat."[158] In other arenas of cyberlaw, for example, it is notable that "[c]ivil courts require Web sites to reveal the identities of anonymous posters *only after showing the speech goes beyond* what is protected by the First Amendment."[159]

Taking those considerations into account, Sanchez clarified: "I want the law to be able to distinguish between an annoying chain email, a righteously angry political blog post, or a miffed text to an ex-boyfriend—all of which are and should remain legal; and serious, repeated, and hostile communications made with the intent to harm."[160] While that spectrum seems to comport with constitutional requirements, whether the proposed text of the bill makes that sufficiently clear inevitably will be up to the courts to decide if the bill is passed into law.

3. Relying on Prosecutorial Discretion

Foreseeability of criminal liability is also an issue worthy of consideration. Through his experience as a defense lawyer, Silverglate noted that overcriminalization (as he classifies this proposed bill) has led many defendants to wonder how they could even be charged "for engaging in conduct that *a reasonable person* would not have believed to lie within the ambit of the criminal law."[161] Exemplifying that danger, under this proposed law, Judge Wu's previously mentioned examples of the "lonely-heart" and "exasperated parent" would be classified as criminals for fairly common and reasonable activities.

The practical success of the bill, if passed, would depend heavily on how prosecutors apply it when deciding which types of cyber activities to prosecute criminally.[162] Even though the Cyberbullying Prevention Act is intended to provide prosecutors with a tool to criminalize "serious, repeated hostile communications made with the intent to harm,"[163] it also provides prosecutors with a tool to criminalize hostile speech that takes place in a wide array of online venues,[164] leaving a lot of tailoring to prosecutorial discretion. While Sanchez emphasized that "[p]rosecutors should have a

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cyberstalking and thus did constitute a true threat).

158. *Id.* at 1075.

159. Crabtree, *supra* note 145 (emphasis added).

160. Statement of Rep. Sanchez, *supra* note 97, at 31.

161. Silverglate Statement, *supra* note 94, at 59 (emphasis added).

162. *See generally* Kravets, *supra* note 152.

163. Statement of Rep. Sanchez, *supra* note 97, at 23.

164. Kravets, *supra* note 152 ("The methods of communication where hostile speech is banned include e-mail, instant messaging, blogs, websites, telephones and text messages.").

tool at their disposal" to combat cyberbullying, it has also been argued that "[a] good prosecutor could indict a ham sandwich."[165]

C. Enforcing Cyberbullying Law

Just as the legislative debate behind the Cyberbullying Prevention Act involves balancing society's interest in protecting children against First Amendment guarantees, the public's response has similarly emphasized the importance of these competing interests.[166]

In response to one of the first news articles about Megan Meier's story, Internet readers posted 948 comments on the *St. Louis Post-Dispatch* website.[167] These posters represented one facet of the community's outrage that such a tragedy could occur at the hands of an adult. One such poster said in part,

> The immaturity of this other "parent" is indescribable. There must be something that can be done to change the law and make this a CRIME! Also the [strength] Megan's parents have shown by not harming these other parents should be applauded. They are amazing for staying strong and continuing the fight to get JUSTICE FOR MEGAN![168]

David Frey echoed the local community's outrage as he articulated, "few would disagree that an adult who uses her time to emotionally abuse a 13-yearold [sic] deserves a special place in hell."[169]

Considering our society's image of children as innocent and in need of adults' protection,[170] the victimization of a preteen girl elicits sensitive responses and makes the balancing issue even more complex. Travis Crabtree, a lawyer who specializes in online media, noted these conflicting interests: "As the father of a young daughter, I know Web safety is a new area of grave concern for parents and the like. But as a lawyer, I also know

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165. *Id.* (internal quotation marks omitted).

166. *See generally* MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH (Rutgers U. Press 2007) (2001).

167. Pokin, *supra* note 2.

168. Ashlee Kiefer, Comment to *'My Space' Hoax Ends with Suicide of Dardenne Prairie Teen*, STLTODAY.COM (Nov. 11, 2007, 2:06 PM), http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.ii1.txt. *See also*, Concerned Citizen, Comment to *'My Space' Hoax Ends with Suicide of Dardenne Prairie Teen*, STLTODAY.COM (Nov. 11, 2007, 6:11 PM), http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.ii1.txt ("Why are people so mean? What kind of parent makes a phony myspace [sic] page to see what someone might be saying about their kid? It's easy to do and say terrible things to someone when you are hiding behind a computer screen. This should be a lesson to all people who harass others online. People should have to take responsibility for what they do online. I hope some kind of charges are filed.").

169. Frey, *supra* note 2.

170. *See, e.g.*, ARCHARD, *supra* note 79, at 46; MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 191 (2005).

legislation or heavy-handed regulation is not the answer."[171] Though it is clear that the likelihood of actually preventing cyberbullying through criminalization needs to be balanced against First Amendment limits, it is incredibly difficult to predict either outcome, especially since both technology and the way in which people use it are constantly evolving.[172]

1. Prosecuting the Practical Joke: Elizabeth Thrasher

As one of the first people charged under the revised Missouri cyberbullying law, forty-year-old Elizabeth Thrasher plans to challenge the it on constitutional grounds.[173] In August 2009, she was accused of posting photos and personal information about a seventeen-year-old girl on the "Casual Encounters" section of Craigslist after an Internet argument.[174] As a result of Thrasher's online activity, the teenage girl alerted the local police that she had received harassing phone calls, emails, and text messages from men seeking sexual encounters.[175] Since Thrasher is over the age of twenty-one and her alleged victim was seventeen years or younger, the outcome of her case is pivotal since she could be found guilty of a class D felony,[176] which is punishable by up to four years of imprisonment.[177]

Thrasher's defense attorney, Michael Kielty, called the Missouri cyberbullying law "a terribly crafted statute."[178] He also emphasized, "I think ultimately it's going to be found *unconstitutionally overly broad* and vague."[179] Kielty described the statute as local politicians' "knee-jerk reaction" to the Megan Meier tragedy, which also occurred in Saint Charles County.[180] Focusing particularly on slippery slope freedom of speech concerns, Kielty contends the law is problematic because his client's

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171. Crabtree, *supra* note 145; *see also* Lomberg, *supra* note 147 ("Let's make this clear: what Lori Drew did was beyond despicable. Mothers should be the reasonable ones; not hatching elaborate revenge schemes. Drew should be condemned and MySpace should participate in a public relations campaign to raise awareness of cyberbullying. Every effort should be made to punish those responsible. But I'd stop short of overreaching with an ambiguous piece of legislation.").

172. *See* Crovitz, *supra* note 143.

173. Angela Riley, *Felony Cyberbullying Charge in Missouri Tests New Law*, MO. LAWYERS WEEKLY, Aug. 18, 2009.

174. *Id.*

175. *Id.*

176. MO. REV. STAT. § 565.090.2 (2009). *See also* Lance Whitney, *Cyberbullying Case to Test Megan's Law*, CNET NEWS (Aug. 28, 2009, 10:00 AM), http://news.cnet.com/8301-13578_3-10320274-38.html ("Is posting a phony, sexually suggestive ad online about another person free speech, an inappropriate prank, or a felony?").

177. MO. REV. STAT. § 558.011 (West Supp. 2010).

178. Whitney, *supra* note 176.

179. *Id.* (emphasis added).

180. *Id.*

behavior (while admittedly inappropriate) could only qualify as a felony since it occurred in cyberspace.[181] Kielty described Thrasher's actions as a "practical joke gone awry," and he plans to fight the prosecution until the statute is ultimately overturned as unconstitutional.[182]

In the opinion of Saint Charles County prosecutor Jack Banas, the Missouri cyberbullying law is not overbroad because it is "drawn narrowly enough to punish people only when they've done something intentional."[183] He plans to enforce the law as written and defends it on the basis that the amended law does not single out the Internet as a vehicle, but rather expands upon and modernizes the earlier Missouri harassment law that was limited to intimidation by writing or by phone.[184] As to the issue of notice, Banas emphasized, "[w]hether or not the law was common knowledge, I think it was common knowledge that what [Thrasher] did was wrong."[185] Banas also expressed his confidence that if it reaches the appellate court, the statute would withstand constitutional scrutiny because "[f]ree speech does not involve speech directed at someone to intimidate, frighten, or otherwise harass them."[186] A jury trial was set for February 15, 2011.[187]

2. Shifting From the Principal's Office to Juvenile Court

Another example of the enforcement of the Missouri law involved a ninth-grade girl in Troy, Missouri, who created a website that included photos, comments, and polls about another girl for the purpose of bullying.[188] She was initially disciplined by the school district, which did not disclose the girl's punishment, but its policy in cases such as this ranges from loss of privileges to expulsion.[189]

Although the Missouri law's felony classification would not apply in this case because both parties involved are juveniles, the school district did alert the Lincoln County Sheriff's Department after the victim alerted the

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181. *Id.* ("She was arrested and had to post bond for words. No actions, no threats. For words. There's something wrong with that. If it was a newspaper ad, it would not have been criminal. It certainly wouldn't have been a felony. If it was on a street corner or a bathroom wall, it wouldn't have been a felony.").

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* (internal quotation marks omitted).

186. *Id.* (internal quotation marks omitted).

187. Case No. 0911-CR04760-01, MISSOURI CASE.NET, www.courts.mo.gov/casenet (last visited Oct. 27, 2010).

188. *Troy, Missouri Girl Allegedly Bullied Another Over Internet*, FOX2 NOW (Oct. 15, 2009), http://www.fox2now.com/news/ktvi-troy-high-school-internet-bully-101509,0,4805020.story ("[T]he girl created a Web site with a name that included the other girl's name and explicit language.").

189. *Id.*

principal about the website.[190] Since she could be charged with a class A misdemeanor,[191] the suspect was arrested on October 8, 2009, but the juvenile investigators would not disclose whether she was still in custody or if charges would be filed.[192]

V. PREVENTION THROUGH EDUCATION

As introduced earlier, the jurisdictional limitations of state laws make them a weak solution to the problem of cyberbullying. Cyberbullying is not limited to certain states or regions, just as Internet users are not limited by state lines. Federal legislation is more likely to positively affect and combat cyberbullying. However, for the reasons highlighted above, criminalization is not the answer as its likely negative consequences outweigh the possible positive effects.

Contrary to criminalization, increased Internet safety education efforts address cyberbullying in a manner that has proven effective and unlikely to include the negative consequences, such as imposing punitive sanctions too broadly. Empowering educators with the tools to inform students and parents about how to use ever-changing technology wisely is key. Providing information that increases awareness of the risks that lurk online and teaching students to avoid common mistakes—for example, posting too much personal information or not informing a teacher or parent when they come across something dangerous—will better prepare them to utilize the positive aspects of the Internet without becoming victims of the dangers.

A. Student Internet Safety Act of 2009

In comparing the Cyberbullying Prevention Act and other bills before Congress, Rita Sklar said the ACLU was in support of educational measures as opposed to an approach that focuses only on punishing bad online behavior.[193] On June 16, 2009, the House of Representatives unanimously passed H.R. 780, the Student Internet Safety Act, which approaches cyberbullying with education rather than criminal prosecution.[194] As it was described by the Senate, the purpose of the act is "[t]o promote the safe use of the Internet by students, and for other purposes."[195] If passed, this act would allow local educational agencies to use federal funding to: "(1) educate students about appropriate online

190. *Id.*
191. MO. REV. STAT. § 565.090 (West Supp. 2010).
192. FOX2 NOW, *supra* note 188.
193. Lyon, *supra* note 110.
194. Student Internet Safety Act of 2009, H.R. 780, 111th Cong. (2009).
195. *Id.*

behavior, including interacting with individuals on *social networking* Web sites and in chat rooms; (2) protect students against online predators, *cyberbullying*, or unwanted exposure to inappropriate material; or (3) promote involvement by parents in the use of the Internet by their children."[196]

Since this bill emphasizes education on the possible impacts of negative speech and Internet use, it seems to address the issue of cyberbullying in a practical, positive way, without broaching First Amendment guarantees. In testifying about his support for the bill, Gregario Sablan, delegate from the Northern Mariana Islands, focused his statement on the extent to which the Internet is occupying a larger role in children's lives.[197] He argued, "it is our responsibility to make sure children are protected from and educated about the numerous online threats in order to maximize the priceless opportunities to advance learning that the digital world provides."[198] He based his support for the Student Internet Safety Act on its educational programming for both students and parents.[199]

B. Funding Educational Efforts: AWARE and SAFE Internet Acts

In the same vein, Rep. Debbie Wasserman Schultz filed H.R. 3630, the Adolescent Web Awareness Requires Education Act (AWARE Act) on September 23, 2009.[200] Compared to the Student Internet Safety Act, the AWARE Act appropriates specific funding of $125 million in grants per year[201] in federal assistance to local educational agencies to support "an age-appropriate, research-based [Internet safety education] program that prevents children from becoming the victims of Internet crime by encouraging safe and responsible use of the Internet."[202] The bill has been referred to the House Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security.[203]

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196. *Id.* § 2 (emphasis added).

197. *See* 155 CONG. REC. H6766-01 (daily ed. June 15, 2009) (statement of Del. Gregario Sablan).

198. *Id.*

199. *See id*; *see also* 155 CONG. REC. E1521 (daily ed. June 23, 2009) (statement of Rep. Dan Burton) ("[T]he National Center for Missing & Exploited Children recommends that: Parents choose search engines carefully. . . . Parents help kids find information online. . . . Parents talk with their Internet service providers (ISPs) as many offer filters to prevent kids from accessing inappropriate sites.").

200. Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. (2009).

201. Lyon, *supra* note 110.

202. H.R. 3630 § 3(3).

203. *H.R. 3630: Adolescent Web Awareness Requires Education Act*, GOVTRACK.US, http://www.govtrack.us/ (follow "Bills & Resolutions" hyperlink; then search "HR 3630") (last updated July 1, 2010, 6:36 AM).

As a companion bill to the AWARE Act, the Senate introduced the School And Family Education about the Internet Act of 2009 (SAFE Internet Act).[204] It was referred to the Committee on the Judiciary on May 14, 2009.[205] Its specified purpose is "[t]o promote Internet safety education and cybercrime prevention initiatives."[206] It varies slightly from the similar proposed bills in that it focuses more on background research by requiring the Director of the Bureau of Justice Assistance, with the concurrence of the Secretary of Education and the Secretary of Health and Human Services to complete a study on Internet safety through government grants.[207]

If passed, these bills would bring attention to cyberbullying as an issue worthy of consideration and research. As discussed earlier, studies on cyberbullying currently conflict,[208] so more empirical background research is necessary to fully understand and eliminate this problem facing youth.

Since these two bills focus on educational, preventative measures, they represent a positive legislative step for the same reasons as the Student Internet Safety Act. These proposed measures also illustrate the federal government's more recent tendency to establish policies local schools must follow in order to receive federal funding.[209] However, its funding appropriation represents a double-edged sword in that it makes the bill more likely to be effective, but also more likely to face opposition as the legislature balances its budgetary priorities.

Web Wise Kids is a nonprofit online safety group that favors educational programs due to the constitutional challenges laws criminalizing cyberbullying will likely face.[210] The organization's president, Judi Westberg Warren, testified in support of both bills as carefully crafted efforts to combat cyberbullying.[211] After reviewing these measures and the Cyberbullying Prevention Act, she described the AWARE Act as "not overly-prescriptive."[212] While she agreed that bullying through harmful speech is wrong, she acknowledged that children

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204. SAFE Internet Act, S. 1047, 111th Cong. (2009).

205. *S. 1047: SAFE Internet Act*, GOVTRACK.US, http://www.govtrack.us/ (follow "Bills & Resolutions" hyperlink; then search "S 1047") (last updated June 27, 2010, 9:54 PM).

206. S. 1047.

207. *Id.*

208. *See, e.g.*, Gattegno, *supra* note 10; Margasak, *supra* note 38; Winchester, *supra* note 16.

209. *See, e.g.*, Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 888–89 (2006).

210. Margasak, *supra* note 38.

211. *Cyberbullying and Other Online Safety Issues for Children: Hearing on H.R. 1966 and H.R. 3630 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 47–55 (2009) (statement of Judi Westberg Warren, President of Web Wise Kids) [hereinafter Warren Statement].

212. *Id.* at 52.

have used speech to hurt each other throughout history.[213] Keeping that in mind, she wholly endorsed the grant and research elements of the AWARE and SAFE Internet acts because "[p]revention of cyber bullying and educating kids on how to respond to online harassment is paramount."[214]

Further distinguishing the AWARE and SAFE Internet acts from the Cyberbullying Prevention Act, Warren argued that children should be educated on how to respond to online harassment. She warned against imposing punitive sanctions against children, however, for bullying and youth-to-youth communications.[215] However, "[e]ducation builds lessons for a lifetime," so it is important to invest in education and provide educators with the necessary information and tools to teach children to "safely, securely, ethically and effectively use the Internet and a variety of other technologies, especially as it relates to the impact of these technologies on our youth."[216]

In 2009, Web Wise Kids held meetings with industry leaders and the Obama administration and emphasized the importance of education on Internet safety and increasing parents' awareness of Internet safety risks.[217] While increased awareness among parents is important, funding educational efforts in schools is more likely to be effective and thus absolutely indispensable.[218]

C. Post-Legislative Education Efforts

Since Megan Meier's suicide, her mother, Tina, has been traveling as a keynote speaker for the Megan Meier Foundation.[219] In her speeches, Meier not only urges children to be more wary of cyberbullying, but that they can help to prevent its dangers by treating each other with more kindness."[220] Although her speeches go beyond cyberbullying, she does

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213. *See id.* at 54.

214. *Id.*

215. *Id.*

216. *Id.* at 48, 50.

217. *Id.* at 52.

218. *Id.* (noting challenges in focusing educational efforts on parents: "First, parents are simply very busy with work and other priorities. Second, children tend to be more advanced users of technology than parents, making it difficult for the parent to have effective conversations about Internet safety. Third, ensuring outreach and awareness efforts actually reach parents with the most effective messages.").

219. *Biography of Tina Meier*, THE MEGAN MEIER FOUNDATION, http://meganmeierfoundation.org/bio/ (last visited Nov. 13, 2010) ("The foundation's mission . . . is to bring awareness, education and promote positive change to children, parents, and educators in response to the ongoing bullying and cyberbullying in our children's daily environment.") (internal quotation marks omitted).

220. Steve Pokin, *Pokin Around: Not the Path She Chose, but the One She's Determined to Follow*, STLTODAY.COM (Oct. 24, 2009, 3:12 AM), http://suburbanjournals.stltoday.com/articles/2009/10/26/stcharles/news/1025stc-pokin0.txt.

encourage parents to monitor their children's Internet activity and to educate themselves about the Internet and modernisms such as text-speak.[221]

Further shifting the focus from criminalization, Ronald Iannetti of the National Institutes of Health suggests that parental support is the best way to prevent bullying of any kind.[222] A familial support system improves children's self esteem and thus makes them less inclined to degrade others.[223] In order to increase parental support and understanding of children and the Internet, Meier makes specific recommendations for parents such as visiting netnanny.com and installing Internet monitoring and filtering software to track their children's computer use.[224] Meier's recommendations to students and parents comport with the ACLU's suggestion that education is the key to combating cyberbullying.[225] This approach is also consistent with media literacy programs, which have been heralded by Marjorie Heins,[226] a scholar on censorship who represented the ACLU in *Reno v. ACLU*, in which the Supreme Court held the Communications Decency Act to be an unconstitutional violation of the First Amendment.[227] "An established component of public education in Canada," media literacy programs face challenging content head on by teaching "critical thinking and viewing skills: understanding how TV and movies create their effects, evaluating ideas and images in both fiction and advertising."[228] After evaluating how the law has been applied to protect children from potentially damaging things on the Internet and through other media, Heins argues that a media literacy focus on individual skills, not censorship, is the best resolution.[229]

Education was also agreed upon as a positive way to move forward in Corona del Mar High School's settlement with Hail Ketchum.[230] Under the

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221. *Id.* (noting that Meier refers parents to netlingo.com, which provides definitions for text-speak). For more information, see NETLINGO: THE INTERNET DICTIONARY, http://netlingo.com/ (last visited Oct. 27, 2010).

222. Gattegno, *supra* note 10.

223. *Id.*

224. Pokin, *Pokin Around*, *supra* note 220. Net Nanny is a software program that filters content at varying levels determined by parents. *Net Nanny 6.5 New Features*, NET NANNY, www.netnanny.com/products/netnanny (last visited Nov. 13, 2010) ("Net Nanny can block not only pornography, but hate sites, questionable chat rooms and other dangers of the Internet. [Parents] can configure Net Nanny to block online game and gambling sites, and even make it so . . . children can only install and play computer games with parental ratings that [parents] deem appropriate.").

225. Lyon, *supra* note 110.

226. HEINS, *supra* note 166, at 260.

227. 521 U.S. 844 (1997).

228. HEINS, *supra* note 166, at 260.

229. *Id.*

230. Mehta, *supra* note 32.

settlement agreement, the Anti-Defamation League will lead training that will include such topics as what constitutes discrimination and harassment and how students can be harmed.[231] Looking ahead, school district spokeswoman Laura Boss hoped "this training program will raise awareness for staff and students and will contribute to an overall positive environment at Corona del Mar High School."[232]

Web Wise Kids' Judi Westberg Warren also warned that "[a]ny legislation considered must be careful to avoid criminalizing youth-to-youth communications."[233] This noteworthy distinction further suggests that school-imposed disciplinary and educational measures might be most appropriate for preventing and monitoring cyberbullying.

VI. CONCLUSION

As the examples in this Note have shown, cyberbullying is indeed a problem in our society. To varying degrees of severity, it affects the well-being of our children. However, bullying is a social problem that has seemingly always existed throughout history in one form or another. As the extreme examples of Megan Meier, Ryan Halligan, and Hail Ketchum demonstrate, cyberbullying is uniquely dangerous because of the far-reaching capabilities of Internet communications. While cyberbullying can be distinguished on that ground from other forms of bullying and harassment, it is unclear whether there has actually been a measurable increase in the amount of bullying in our society, or if the advents of new technology just make it more visible or traceable.

After the undeniably tragic suicides of Megan Meier and Ryan Halligan, their parents were able to access a clear record of what bullies had said to their children because those hurtful statements had been recorded online. Similarly, that online record and distinction from other forms of harassment led to the indictment and pending prosecution under Missouri law of Elizabeth Thrasher because of statements she intended to be part of a practical joke at the expense of a seventeen-year-old. The pending Thrasher trial serves as an example of how these bills, intended to criminalize cyberbullying, can reach too far and criminalize speech that falls within the protection of the First Amendment.

The methods of harassment and bullying are constantly evolving across venues. In this continuously changing context, it seems nearly impossible for legislatures to continually update criminal codes to serve an effective deterrent role. As this Note has shown, the efforts to criminalize cyberbullying have largely been motivated by the extreme examples such

231. *Id.*
232. *Id.*
233. Margasak, *supra* note 38.

as the Megan Meier story and the public outcry that no law criminalized the hopefully unique behavior of an adult mother harassing a teenage girl anonymously through MySpace. This motive, while altruistic and just in itself, led to proposed state and federal legislation with varying success.

Legislation imposing criminal sanctions for cyberbullying has met criticism that it would lead to overcriminalization, jeopardize First Amendment freedoms, and rely too heavily on prosecutorial discretion. However, the government interest in protecting children from the dangers of cyberbullying would be more realistically served by legislation that increases education and awareness of the risks associated with the Internet among children and parents.

Unlike criminal statutes, educational programming is easily adaptable, and thus is more capable of adjusting to and incorporating changing technology and any associated dangers. Also, the risk of extending too broadly in an educational plan is much lower than enforcing an overbroad criminal law.

Educational efforts do not include the likely negative consequences of imposing criminal anticyberbullying sanctions. On the contrary, the benefits of education on cyberbullying and related issues seem clear. Rather than focusing on where to draw lines in criminalizing behavior of this kind, legislators need to focus on increasing awareness of cyberbullying dangers in order to best prepare children to avoid and deal with cyberbullying and its related technological hazards.

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