

Communications Media and the First Amendment: A Viewpoint-Neutral FCC Is Not Too Much to Ask For

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I. INTRODUCTION

In the “new economy” driven by the telecommunications industry, the Federal Communications Commission (“FCC” or “Commission”) is a busy agency. Given the myriad legal issues faced daily by Commission decisionmakers and the lack of perfect clarity in major communications

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legislation,¹ one might be willing to overlook a few legal missteps here and there by the FCC. In one area of the law, however, the public can and should require a first-rate agency record: regulation of communications media without regard to the viewpoint expressed via that media, as required by basic First Amendment principle.

This Article argues that the FCC should actively avoid viewpoint discrimination in its adjudication and rulemaking where the relevant statute does not require it. Part II describes the constitutional disfavor with which courts regard viewpoint distinctions. Part III explains why regulators reasonably can be expected to avoid viewpoint-discriminatory methods. Part IV studies cases in which the FCC adopted policies that turn on the viewpoints of regulated parties. Part V concludes that the FCC can and should avoid such constitutionally suspect classifications in the future.

II. THE UNIQUELY DISFAVORED STATUS OF VIEWPOINT-BASED LAWS IN FIRST AMENDMENT JURISPRUDENCE

First Amendment jurisprudence is by no means the clearest or least controversial body of law in the land. Some basic tenets, however, are readily ascertainable and generally accepted. Specifically, most courts and commentators consider governmental discrimination on the basis of viewpoint—that is, treating one group differently than another simply because of its particular perspective on a given topic—to be a classic and especially egregious violation of the Free Speech Clause of the First Amendment. As the Supreme Court has explained, “[w]hen the government targets not [just] subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”²

Viewpoint-based rules so offend First Amendment values that

1. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (“It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.”).

2. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 829 (1995); see also *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring) (“A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a ‘law abridging the freedom of speech, or of the press.’”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978) (explaining that “the legislature is constitutionally disqualified from dictating the subjects about which persons may speak” but “especially where . . . the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.”); *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring) (“[Viewpoint-based regulation is] censorship in a most odious form.”); M. Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 101 (1996) (describing Court’s “focused emphasis on viewpoint discrimination as the ultimate First Amendment evil”).

uniquely stringent constitutional standards govern their use. For example, government cannot censor wholly unprotected and otherwise proscribable speech based on its like or dislike of a particular message expressed by such speech;³ government may make certain content-based distinctions within categories of unprotected speech, however.⁴ Similarly, in nonpublic fora, where government decisionmakers have wide latitude to regulate speech, they still may not bar speakers on the basis of their viewpoints.⁵ Finally, although the Court has sanctioned in broad terms governmental judgments on funding when based on content or even a certain philosophy of a given subject,⁶ its more recent cases suggest a contrary trend. These cases clearly establish (to the dismay of some Justices) that the ban on viewpoint discrimination fully applies in the context of funding.⁷ As these various constitutional standards reflect, viewpoint-based rules occupy the

3. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding that government may not regulate otherwise unprotected “fighting words” based on hostility or favoritism towards the underlying message they contain); *New York v. Ferber*, 458 U.S. 747, 763 (1982) (upholding a child pornography statute but noting that there was no “question here of censoring a particular literary theme”).

4. *See R.A.V.*, 505 U.S. at 387-88 (stating that content-based distinctions in classes of unprotected speech are permissible when the distinctions relate to “the very reason the entire class of speech at issue is proscribable” or when a subclass of speech is regulated based on its secondary effects).

5. *See Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 46 (1983) (stating government may restrict access to a nonpublic forum “as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view”). This singular aversion against viewpoint discrimination applies in the context of limited public fora as well, where distinctions based on viewpoint are far harder to defend than ones grounded in content. *See Rosenberger*, 515 U.S. at 829-30 (explaining the “distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purpose of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations”).

6. *See Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (stating government may “make a value judgment . . . and to implement that judgment by the allocation of public funds”); Phillip T. K. Daniel & Vesta A. H. Daniel, *A Legal Portrait of the Artist and Art Educator in Free Expression and Cyberspace*, 140 ED. LAW REP. 431, 454 (describing *Rust* as “ground-breaking because, for the first time, the Court affirmed the constitutionality of viewpoint discrimination within the framework of a federal funding question”).

7. *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 586-87 (1998) (stating that prohibition against “invidious viewpoint discrimination” applies to government subsidies but finding no substantial risk that application of the statute at issue would lead to the suppression of speech); *cf. id.* at 598-600 (Scalia, J., concurring in the judgment) (arguing, contrary to the majority opinion, that viewpoint discrimination in government funding is entirely permissible).

very bottom of the free speech barrel.

This uniquely disfavored legal status stands to reason. It is sufficiently problematic for government to declare that no one can talk about a certain topic—that is, to regulate speech based on content or subject matter. To allow some speakers to express an opinion on that topic, however, while quieting those with any other understanding of the matter—to regulate speech by viewpoint—strikes one as even worse.

In the first case, although the government suppresses speech, it does so roundly. Accordingly, no single view of the subject is being promoted over another. In the latter situation, however, government itself selects and then protects a particular point of view by permitting its expression while simultaneously prohibiting any contrary ones. Thus, government does not just neutralize discussion, but goes the extra step of affirmatively skewing the discussion in a self-selected direction.⁸ As Justice Scalia colorfully put it, the government thereby “license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.”⁹ Under such circumstances, the contest is fundamentally unfair and impairs the competition of ideas on the merits.

Is there any more specific reason, though, that the affirmative promotion of one point of view should be more offensive to the First Amendment than generally enforced silence? After all, more, not less, speech results when only one side of a debate is muted, and many consider more speech to be better than less speech.¹⁰

That argument fails to take account of the practical effects of viewpoint-based rules on the political process. Governmental promotion of a particular idea creates an active force of public persuasion that does not exist in the context of subject-matter bans. By picking a side and prohibiting expression of any other, government thus increases the chances that undecided citizens will adopt the preferred view and that it will become or remain binding policy.¹¹

8. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (“[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”); see also *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (“The Constitution forbids the state to declare one perspective right and silence opponents.”).

9. *R.A.V.*, 505 U.S. at 392.

10. See MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 102 (1984) (arguing that laws that reduce the total quantity of available speech should be the least favored).

11. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983) (“[T]he [F]irst [A]mendment is concerned, not only with the

This might occur in several ways. When the established thinking on an issue is favorably presented to the public and then hangs in the ether, immune from challenge, it is more likely to be perpetuated by sheer force of social osmosis. That is to say, people might simply assume the proposition to be true or otherwise uncontested because no critical views are even apparent. As Justice Jackson explained, “Progress generally begins in skepticism about accepted truths.”¹² Yet, when no skepticism can be expressed, reexamination of established ideas and consideration of new ones will probably not occur.¹³ Moreover, when a point of view bears the official imprimatur of the government, some may take that fact in itself as proof of the idea’s legitimacy.¹⁴

When the entire conversation about a subject is stopped (as objectionable as that is), there is at least no risk that converts will be won by one side or the other. The status quo simply persists. This is because no speech that might persuade can occur, nor is there any question of an authoritative seal of approval for one side that might influence.

In the battle for public opinion, the ability to win over the undecided that is conferred by affirmative promotion could result in victory—whether by winning elections or enacting legislation—in the political process. If that occurs, the government has not only restricted the free exchange of ideas by and among individuals, which to some is itself a First Amendment harm,¹⁵ but its “distort[ion] [of] public debate”¹⁶ has affected the substantive outcome of the political process, which is certainly an

extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts public debate.”).

12. *Am. Comms. Ass’n, C.I.O., v. Douds*, 339 U.S. 382, 442 (1950) (Jackson, J., concurring in part and dissenting in part).

13. *Hudnut*, 771 F.2d at 328-29 (“People often act in accordance with the [speech] they find around them . . . Words . . . act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.”).

14. See Abner S. Greene, *Government of the Good*, 53 *VAND. L. REV.* 1, 44 (2000) (canvassing arguments that “government speech may be improperly persuasive” because “people will grant too much deference to the government”; “governmental invocation of expertise falsely lulls the citizenry into assuming a certain consensus”; and “individuals may defer to the state’s authority, just as we normally wish them to do in the case of general obedience to the law.”) quoting Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 *STAN. L. REV.* 385, 398 (1996) (footnotes omitted).

15. See REDISH, *supra* note 10, at 11-14 (function of First Amendment is to promote “individual self-realization”); see also *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (“The individual’s interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion . . .”).

16. Geoffrey R. Stone, Comment, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 *HARV. J.L. & PUB. POL’Y* 461, 464 (1986).

independent and arguably greater constitutional harm.¹⁷

III. A VIEWPOINT-NEUTRAL FCC IS NOT TOO MUCH TO ASK FOR

In an ideal world, the FCC would carefully adhere to the above-described, core First Amendment admonition against viewpoint regulation. To be sure, ideals are often difficult to uphold in the real world. But even as a practical matter, asking the FCC to observe the ban on viewpoint-based rules is not demanding too much of the agency. Potential violations of the ban on viewpoint discrimination are, for the reasons that follow, relatively easy to identify and avoid. When the agency nonetheless transgresses this constitutional limit, there is good reason to believe that its regulatory action is motivated by the impermissible, usually political, purpose of manipulating public opinion.¹⁸

A. *The Identification and Avoidance of Viewpoint-Based Regulation*

First, it is relatively simple to assess *ex ante* the probable legality of viewpoint-based regulations. The constitutional proscription against such rules is phrased in categorical terms and draws a far brighter line between legal and illegal conduct than do most constitutional standards.¹⁹ Viewpoint-based rules are not subject to any intermediate standard of

17. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT* 26 (1948) (“Just so far as, at any point, the citizens who decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good.”); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55 (1986) (Government efforts to eliminate a “particular point of view from public debate” are harmful because they “mutilate ‘the thinking process of the community. . . .’”) (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960)).

18. Cf. Stone, *supra* note 16, at 464 (arguing that because “[g]overnment will rarely admit . . . that it is attempting to restrict a particular viewpoint because it disagrees with the ideas expressed,” and because “[t]he risk of improper motivation is especially high in the context of viewpoint-based restrictions . . . [where] government officials are especially likely to be affected . . . by their own sympathy or hostility to the particular views sought to be restricted,” courts should “presume improper motivation” but “permit government to negate that presumption.”); see also 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment) (stating that when the “government’s asserted interest is to keep [the public] ignorant in order to manipulate their choices[,] . . . such an ‘interest’ is *per se* illegitimate”).

19. Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (observing that “[a] law ‘respecting’ the . . . establishment of religion[] is not always easily identifiable as one violative of the [Establishment] Clause” and setting forth a three-pronged test under that Clause; the statute first “must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”) (internal citations omitted).

review, the results of which can be difficult to predict; indeed, they are not subject to judicial weighing or balancing of any kind. Rather, courts consider them presumptively unconstitutional²⁰ and thus almost always strike them down upon a finding that they operate according to the viewpoint of the regulated parties.²¹ By contrast, even some content-based restrictions have been sustained under strict scrutiny.²²

Thus, in the universe of constitutional precepts, the prohibition against viewpoint-based regulations is about as unambiguous as one can find. If the FCC has what appears to be a viewpoint-based proposal on its hands, chances are overwhelmingly good that the regulation is an unconstitutional one. In such a case, the unlawfulness of the agency's action is reasonably foreseeable to decisionmakers.²³

Second, the actual classification of a regulation as viewpoint-based is not, as constitutionally founded categories go, overly difficult to make. At this point, it should be acknowledged that, given the flat nature of the ban on viewpoint-based rules, the force of the prohibition on viewpoint discrimination turns largely on the categorization of the rule at issue. Consequently, some might assert that results-oriented lawyers or judges

20. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 828 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional.”) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994)); *see also* *Stone*, *supra* note 16, at 475 (“[A]lthough the Court has never expressly held that [viewpoint-based] restrictions are per se unconstitutional, one might fairly read that lesson into the actual record of the Court’s decisions.”).

21. *See, e.g., Rosenberger*, 515 U.S. at 831-37 (finding that state policy was viewpoint discriminatory and concluding on that ground that the policy violated the Free Speech Clause); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (holding that the city council’s denial of a permit for use of a park by Jehovah’s Witnesses was based on “dislike for or disagreement with the Witnesses or their views” and thus violated the Equal Protection Clause); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (finding that denial to a church of access to school premises discriminated on the basis of viewpoint and therefore contravened the First Amendment); *Schacht v. United States*, 398 U.S. 58, 63 (1970) (finding that a statute prohibiting the wearing of an armed forces uniform in a theatrical production when work “discredit[s]” those forces was viewpoint-discriminatory and therefore an unconstitutional abridgement of speech); *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (concluding that an antipornography ordinance barring depiction of women as “submissive” amounts to viewpoint discrimination and thus violates the Free Speech Clause); *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1105 (D. Md. 1997) (finding state policy to be viewpoint-based and thus prohibited by the First Amendment).

22. *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding under strict scrutiny facially content-based electioneering law).

23. *Cf. Boos v. Barry*, 485 U.S. 312, 335 (1988) (Brennan, J., concurring in part and concurring in the judgment) (noting that “bright-line rule” requiring content neutrality “provides clear guidance” and thus allows “[g]overnments . . . [to] ascertain the scope of impermissible regulation” and “[i]ndividuals . . . [to] ascertain the scope of their constitutional protection”).

can argue themselves into or out of the viewpoint-based category and, thus, into or out of a violation of the First Amendment.²⁴ On this view, then, trying to classify rules as viewpoint-discriminatory is a pointless endeavor.

That might well be true, but a principled, neutral basis for evaluating these rules can be articulated and applied.²⁵ Even a regulator who favors a particular rule for political reasons should want a disinterested assessment of the First Amendment risks of the rule. After all, no policy likely to be overturned by the courts (assuming they will neutrally review cases at least some of the time) is a rational bet for even the most ardent supporter of its ends. Agencies should have the incentive to try to objectively and correctly identify potentially viewpoint-based rules.

To do so, one might ask whether the regulations make material distinctions among regulated entities based on their particular substantive perspectives on a subject. In other words, viewpoint-based laws “regulate[] speech according to whether one supports or opposes a certain action.”²⁶ More broadly, as the Supreme Court has put it with respect to the search for general content neutrality, the inquiry would be “whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government’s purpose is the controlling consideration.”²⁷

As a general illustration, “a law prohibiting all picketing near a hospital except that involving labor disputes would be a subject matter restriction, whereas a law allowing picketing in favor of a strike but prohibiting picketing against a strike would be viewpoint-based.”²⁸ As a communications-specific example, a regulation prohibiting editorializing by broadcast stations would materially distinguish regulatees on the ground

24. See, e.g., STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO* 110 (1994) (“[D]ecisions about what is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard and the regulation of speech that they want silenced.”).

25. See H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (“[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 112 (1980) (“One does not have to be a lawyer to recognize that even the clearest legal formula can be manipulated. But it’s a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing.”).

26. Carolyn Wiggin, Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 YALE L.J. 2009, 2032 n.115 (1994).

27. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted).

28. Wiggin, *supra* note 26, at 2032.

of the subject matter (opinions on matters of public importance) that they air.²⁹ A regulation prohibiting not just editorializing but editorializing against free broadcast time for political candidates would turn on a regulatee's point of view in the context of that subject matter—namely, the opinion, on this matter of public policy, that the proposal is a bad idea.

This analytical exercise of identifying viewpoint-discriminatory rules employs more readily ascertainable concepts (whether one side of a debate is being advanced over another) and less complicated standards (a unitary definitional test) than most constitutional inquiries. Compare, by way of example, the identification of a regulatory taking under the Fifth Amendment. Such an assessment requires evaluation of the “character” of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations³⁰—all this, in light of the lack of any “set formula” for identifying a taking and the fact that the answer will depend mostly “upon the particular circumstances [in that] case.”³¹

Of course, this is not to say that identification of a viewpoint-based rule is always an easy task.³² One can adduce examples of hard cases that produce reasonable disagreement.³³ The point is simply that the definition and classification of a viewpoint-based rule is a fairly straightforward legal enterprise, as compared to the application of other constitutional standards. In the broad main of agency business, an objective, competent attorney ought to be able to apply the definition of “viewpoint discrimination” to proposed regulations and reach reasonably certain conclusions as to whether they appear to be viewpoint-based. Again, some degree of agency error in making this determination is inevitable, as with all legal judgments, but it is fair to demand less error here than in other constitutional contexts.

Third, the agency seeking to achieve a regulatory goal normally has a

29. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (involving a federal statute banning noncommercial broadcast stations from engaging in editorial activities).

30. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

31. *Id.*; See also *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (stating that the test for regulation of commercial speech asks whether speech is not misleading and concerns lawful activity; if so, whether the regulation “directly advances the governmental interest asserted; and whether it is more extensive than necessary to serve that interest”).

32. See Greene, *supra* note 14, at 32 (“Identifying viewpoint discrimination is notoriously difficult. There are easy cases, of course—it is clearly viewpoint discrimination to prohibit speech opposed to the Mayor but to permit speech supporting him—the Court’s treatment of this area has been unsatisfactory.”); Heins, *supra* note 2, at 103 (“The concept of viewpoint neutrality in First Amendment jurisprudence has . . . been confusing in both definition and application. . .”).

33. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 191-200 (stating that regulations barring abortion counseling in federally funded facilities are not viewpoint-discriminatory); *id.* at 207-12 (Blackmun, J., dissenting) (regulations are clearly viewpoint-based).

wide range of less speech-restrictive alternatives to viewpoint-based regulations. So long as the agency is really not seeking to muffle certain ideas, it usually should be unnecessary to pursue a viewpoint-based scheme.

In the event that neutral review discloses a potentially viewpoint-based rule, decisionmakers should consider these alternative means of achieving their regulatory ends, thereby minimizing and perhaps avoiding the constitutional issue altogether. For instance, they could opt for regulation of the instrumentalities of communications at issue.³⁴ Alternatively, they might take aim at the underlying conduct, instead of regulating speech about the conduct itself.³⁵

Regulators might also look for some reasonable proxy for the actual target of the regulation. For example, instead of reviewing programming to see whether it is educational, one might check to see whether the entity that created the programming is officially accredited as an educational institution or plans to serve such an institution.³⁶ Instead of reviewing programming to see whether it presents a “local” perspective on an issue, another proxy approach would ask where the programming was produced in relation to its place of broadcast.³⁷ Although such “proxy” approaches are not themselves free from constitutional doubt,³⁸ they are less suspect than direct review of the substance of a message and therefore better advised.

34. See, e.g., 47 U.S.C. § 533(f)(1)(A) (1994) (limiting number of subscribers that persons owning cable systems may reach); *Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1318 (D.C. Cir. 1999) (upholding subscriber limit as content-neutral regulation of cable industry).

35. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (explaining that, instead of imposing an unconstitutional ban on advertising of liquor prices, the state could have adopted less speech-restrictive measures to promote temperance, such as capping per capita purchases of the product).

36. See, e.g., *In re Applications of North Am. Catholic Educ. Programming Found., Inc., Henderson, Nevada*, *Memorandum Opinion and Order*, 12 F.C.C.R. 21,552, para. 2 (1997) (certifying, pursuant to 47 C.F.R. §§ 74.932(a)(1)-(5), Catholic organization is eligible for instructional television fixed-service license on the grounds that it “submitted a statement of its educational purpose and proposes to serve students enrolled at accredited institutions”).

37. See 47 U.S.C.A. § 336(f)(2)(A)(i)(II) (West 2000) (requiring low-power television stations eligible for primary status to “broadcast an average of at least three hours per week of programming that was produced within the market area served by such station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group”).

38. See, e.g., *Rice v. Cayetano*, 120 S.Ct. 1044, 1055 (2000) (invalidating a state statute classifying voters on the basis of “ancestry” because the category was “a proxy for [the constitutionally suspect category of] race”).

B. An Agency Policy Against Discretionary Viewpoint Discrimination

The surest way to prevent viewpoint discrimination, however, is to avoid content-based regulation in the first place. Viewpoint regulation is, at bottom, simply a species of content regulation.³⁹ Scrubbing the *Code of Federal Regulations* of all content-based rules would be the safest method of minimizing tension with the First Amendment, including its proscription on viewpoint regulations. Admittedly, this is not a practical solution, as some amount of content-based regulation is statutorily required and the Commission thus must promulgate it.⁴⁰

What the FCC can and should do, however, is eschew venturing into issues that involve the supposed validity of certain messages or beliefs when it is under no statutory obligation to do so. Specifically, the FCC should formally adopt an internal regulatory policy of constitutional avoidance, analogous to the judicial canon of statutory construction in favor of constitutional avoidance.⁴¹ The policy would hold that unless Congress has clearly mandated that the Commission regulate on the basis of either content or views, the FCC will decline to exercise any discretion that it might arguably have to fashion rules that do so. Such a policy would promote administrative restraint with respect to viewpoint-based rules and thereby a viewpoint-neutral, truly First Amendment-friendly Commission.

39. See *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 830-31 (1995) (“[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination.”).

40. 47 U.S.C. § 303b(a)(2) (1994) (“[t]he Commission shall, in its review of any application for renewal of a commercial or noncommercial television broadcast license, consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs.”).

41. Cf. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). Indeed, the theory behind this judicial canon of construction applies with even greater force to independent administrative agencies. The canon is premised in part on the respect of the federal judiciary for a co-equal, coordinate branch of government; courts will not presume that Congress intended to act in an unconstitutional fashion and thus read its statutes to avoid that conclusion. See *id.* (“This approach . . . recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”). Independent agencies—whatever their proper rank in the constitutional hierarchy of federal government, see *Morrison v. Olson*, 487 U.S. 654 (1988)—certainly are not on an equal constitutional footing with Congress. Thus, agencies such as the FCC should show Congress at least as much and probably more regard in interpreting federal laws than do Article III courts.

IV. CASE STUDIES OF A VIEWPOINT-BASED COMMISSION

Notwithstanding a good amount of rhetoric extolling the virtues of the First Amendment,⁴² the current Commission has not taken a viewpoint-neutral approach to regulation, as described above. To the contrary, in two particularly notable cases, the FCC directly involved itself in the regulation of points of view absent any express congressional directive to do so. These cases illustrate the serious constitutional problems that the Commission manufactures when it regulates not just on the basis of content at the express behest of Congress, but goes even further into the area of viewpoint regulation based on discretionary or ambiguous statutory authority.

A. WQED Order

On December 29, 1999, the FCC released a decision approving the transfer of a radio license from television station WQED in Pittsburgh, Pennsylvania, to Cornerstone TeleVision, Inc.⁴³ The Commission found that Cornerstone—a religious broadcasting entity—met the legal standard for operating on the noncommercial, educational (“NCE”) band. That standard requires that the “station[] . . . be used primarily to serve the educational needs of the community” and “for the advancement of educational programs.”⁴⁴ In applying this standard, the Commission deferred, as it traditionally had done, to the good faith judgment of the broadcaster that its station would serve educational purposes.⁴⁵

The Commission did not stop there, however. In a further statement designed to provide broadcasters with “additional guidance,” the Commission elaborated on the situations in which religious programming would be deemed “primarily educational” for purposes of licensing on the NCE band. The Commission said:

First, with respect to the overall weekly program schedule, more than half of the hours of programming aired on a reserved channel must primarily serve an educational, instructional or cultural purpose in the station’s community of license. Second, in order to qualify as a

42. See, e.g., Separate Statement of Commissioner Gloria Tristani, In the Matter of Creation of Low Power Radio Serv., *Report and Order*, 15 F.C.C.R. 2205, 2327 (2000) (“Under the First Amendment, . . . the answer is more speech not less.”); In the Matter of Review of the Comm’n’s Regulations Governing Television Broad., *Report and Order*, 14 F.C.C.R. 12,903, para. 17, 17 Comm. Reg. (P & F) 1 (1999) (The “[g]oal” of “the First Amendment” is to “foster [] the marketplace of ideas and encourag[e] uninhibited, robust, and wide-open debate.” (internal quotations and citations omitted)).

43. In re Applications of WQED Pittsburgh, Assignor, and Cornerstone TeleVision, Inc., Assignee, *Order*, 15 F.C.C.R. 202, 19 Comm. Reg. (P & F) 214 (1999) [hereinafter WQED, *Order*].

44. 47 C.F.R. § 73.621 (1999).

45. WQED, *Order*, *supra* note 43, para 42.

program which is educational, instructional or cultural in character, and thus counted in determining compliance with the overall benchmark standard, a program must have as its primary purpose service to the educational, instructional or cultural needs of the community.⁴⁶

On this second point, the Commission elaborated that:

[n]ot all programming, including programming about religious matters, qualifies as “general educational” programming. For example, *programming primarily devoted to religious exhortation, proselytizing, or statements of personally-held religious views and beliefs generally would not qualify as “general educational” programming.* . . . [T]he reserved television channels are intended “to serve the educational and cultural broadcast needs of the entire community to which they are assigned,” and to be responsive to the overall public as opposed to the sway of particular political, economic, social or religious interests.⁴⁷

This “additional guidance” purported to regulate not just the subject matter of religion in making the determination of NCE status. Rather, it purported to regulate on the basis of the speaker’s point of view *about* religion. Specifically, the FCC would examine whether a “statement of religious views” was “personally held” or not. As among statements on religion, those that expressed personal belief in the truth of a religious message would not qualify as “educational,” while those that did not would so qualify.⁴⁸

46. *Id.* para 43.

47. *Id.* para. 44 *quoting* Fostering Expanded Use of UHF Television Channels, *Fifth Report and Memorandum Opinion and Order*, 2 F.C.C.2d 527, para. 41, 6 Rad. Reg.2d (P & F) 1643 (1966).

48. Following legislative and public criticism of its “additional guidance,” the Commission quickly repealed that portion of the *WQED Order*. *See* In re Applications of WQED Pittsburgh, Assignor, and Cornerstone TeleVision, Inc., Assignee, *Order on Reconsideration*, 15 F.C.C.R. 2534, 19 Comm. Reg. (P & F) 241 (2000) [hereinafter *Reconsideration Order*]. The *Reconsideration Order*, however, did not disturb either the “educational” requirement of section 73.621 or the Commission’s general principle that religious programming may be educational but it is not always so. *See* WQED, *Order, supra* note 43, paras. 18, 21. Moreover, the *Reconsideration Order* did not confess error in repealing the “further guidance,” but relied instead on the “[un]certainty” created by that language. *Reconsideration Order*, para 2. Furthermore, the *Reconsideration Order* was silent on the continuing validity of the agency precedent on which the Commission purportedly based the guidance. *See* WQED, *Order, supra* note 43, para 23. Finally, the *Reconsideration Order* was also mute on the related question whether the Commission will continue what it claimed was an established de facto practice of engaging in direct review of religious programming. *See* Letter from Chairman William E. Kennard to Rep. Michael G. Oxley, Jan. 12, 2000, at www.fcc.gov/Speeches/Kennard/Statemetns/2000/stwek003.doc (“[t]he Commission’s decision in [the WQED] case . . . does not establish new rules but simply clarifies long-standing FCC policy.”).

As members of Congress concluded in introducing the Noncommercial Broadcasting Freedom of Expression Act of 2000, the current state of the law in this area, therefore, is highly ambiguous. *See The Religious Broad. Freedom Act and the*

The *WQED Order* would seem to be a textbook example of viewpoint discrimination.⁴⁹ On its face, the *Order* materially distinguished among regulatees on the basis of their positions, pro or con, on an identifiable subject. Specifically, “I believe (and you should too)” was a viewpoint on religion that disqualified a program from being deemed “educational,” whereas “I do not believe (and you need not either)” was a permissible “educational” message.

In this regulatory model, the Commission “[did] not exclude religion as a subject matter but select[ed] for disfavored treatment those [regulatees] . . . with . . . [a certain] viewpoint[]”—that of personal belief—on religion.⁵⁰ By the terms of the *Order*, it was “[t]he prohibited perspective, not the general subject matter” that would have “resulted in the refusal to” grant NCE status.⁵¹ In view of the virtually *per se* prohibition on viewpoint-discriminatory rules, the Commission’s “personal belief” test for designating those speakers on religion who could operate on the reserved band appears to be a clear infringement of speech freedom.⁵²

Faced with Cornerstone’s proposal to air religious programming on the NCE band, the Commission could have taken either of two less restrictive approaches than that described above. First, the Commission

Noncommercial Broad. Freedom of Expression Act of 2000: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce, 106th Cong. 2 (2000) (statement of Rep. W. J. “Billy” Tauzin) (noting vacature of additional guidance but stating “there is still cause for concern”); *Id.* at 4 (“[I]t is my strong opinion that the FCC *Order on Reconsideration* does not put this matter to rest.”) (statement of Rep. Oxley); *see also id.* at 19 (“[T]he Commission’s action [on reconsideration] still leaves religious broadcasters who seek to operate on noncommercial educational channels in a quandary.”) (statement of Mark Dreistadt, Vice President, Cornerstone TeleVision). H.R. 4201 passed the House on June 20, 2000, but never came to a vote in the Senate. The ambiguity of the Commission’s position on the educational nature of religious programming that “proselytizes” persists, and the issue is of continuing relevance for religious broadcasters.

49. Although it is true that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection,” *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978), no Supreme Court case has suggested that the government may regulate that industry in a viewpoint-discriminatory way. Indeed, *FCC v. League of Women Voters*, 468 U.S. 364 (1984), which struck down a statute barring NCE stations from engaging in editorializing, held that content-based restrictions on core speech of broadcasters are invalid, notwithstanding a generally reduced First Amendment scrutiny. Moreover, under *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which barred content- and viewpoint-discrimination in the context of wholly unprotected speech, broadcast speech, which enjoys some protection, ought to be similarly immune from viewpoint-based regulation.

50. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 831 (1995).

51. *Id.*

52. *See supra* note 21 (citing cases establishing bar against viewpoint discrimination); *see also FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down statute barring NCE stations receiving federal grants from engaging in editorializing).

might have reconsidered the elements of licensing on the reserved band to eliminate the root problem: the content-based requirement that the station be used for “educational” purposes. This option has its logistical difficulties, given the settled expectations of those already on the band, but it certainly represents a legal possibility for avoiding direct FCC inspection of religious programming for educational worth. Second, the Commission could have adhered to its policy of deferring to the good faith judgment of the broadcaster that the station will serve educational ends.⁵³ That policy had the constitutionally significant advantage of taking the Commission out of the business of first-order review of religious programming.

Finally, the Commission was under no statutory obligation to draw the problematic lines that it did in order to allocate the license at issue. The Communications Act of 1934 (“1934 Act”) does not specifically call for partial reservation of the spectrum for “noncommercial educational” television programming; rather, the Commission made that designation on the basis of its general discretionary management power.⁵⁴ As the “educational” element of the NCE licensing standard is not statutorily required, the Commission’s additional review of religious programming for “educational” status is likewise not compelled by the 1934 Act.

The constitutional problem in the *WQED Order* was of the Commission’s own making.⁵⁵ As described above, it could easily have been

53. See 47 C.F.R. § 73.621 (1999).

54. See Amendment of Section 3.606 of the Comm’n’s Rules and Regulations; Amendment of the Comm’n’s Rules, Regulations and Engineering Standards Concerning the Television Broad. Serv.; Utilization of Frequencies in the Band 470 to 890 MCS. For Television Broad., *Sixth Report and Order*, 41 F.C.C. 148 (1952) (reserving 242 channels for NCE television service, an exercise of general licensing power); see also *WQED, Order*, *supra* note 43, at 211 n.21 (citing 47 U.S.C. § 303, which gives the Commission power to “[c]lassify radio stations” and “prescribe the nature of the services to be rendered by each class” of stations, as a source of authority for NCE television allocations); but see 47 C.F.R. § 73.606 (citing 47 U.S.C. § 155, governing “[o]rganization and [f]unctioning of the Commission,” as authority for table of channel allotments designating channels for exclusive NCE use).

55. Nor was the Commission under a constitutional obligation to exclude “statements of personally held beliefs” from NCE programming, as it suggested. See *Reconsideration Order*, *supra* note 48, at 2540 (Dissenting Statement of Commissioner Gloria Tristani) (arguing that “a government policy that endorses certain sectarian programming as ‘educational,’ and awards exclusive use of a scarce resource to permit those views to be expressed, would run afoul of the Establishment Clause”). *Rosenberger* squarely held that government does not violate the Establishment Clause when it acts to avoid viewpoint discrimination against religious speakers:

[Viewpoint discrimination that] require[s] public officials to scan and interpret [material] to discern [its] underlying philosophic assumptions respecting religious theory and belief [is a] denial of the right to free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in

avoided. The fact that the Commission issued the *Order* in the form that it did suggests that it was motivated by an inappropriate, philosophical hostility toward those who believe and advocate belief in—i.e. those who evangelize about—their religious views.⁵⁶ While such beliefs may be controversial and even abhorrent to some, the “bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁵⁷

B. Truth-in-Billing Regulations

In the May 1999 *Order* entitled “Truth-in-Billing,” the Commission decided to require telephone companies to use standardized labels on customer bills to describe certain charges.⁵⁸ These labels apply to, among

the [government’s] honoring its duties under the Free Speech Clause.

Rosenberger, 515 U.S. at 845-46; *see also* *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (denying church access to school premises to exhibit film series violates the Freedom of Speech Clause).

56. This suggestion is reflected in the record, which bubbles hotly beneath the surface of the proceeding. The parties in opposition to the license transfer focused their criticism of Cornerstone’s “educational” status on the particular “fundamentalist Christian,” Comments of Alvin Rosensweet (June 6, 1997), and “politically conservative,” Comments of Nancy Lapp (July 18, 1999), messages in its programming. *See* Pet. to Den., Alliance for Progressive Action and QED Accountability Project (filed July 7, 1997), app. A, Decl. of Linda Flower at 2 (June 23, 1997) (objecting to program entitled “Crisis in the Classroom” because it “criticize[s] whole language learning”); Decl. of Mark Ginsburg at 2 (June 30, 1997) (“Crisis in the Classroom” is not educational because it contains anti-federal government rhetoric” and “argues that values and knowledge are ‘absolutes’ and not relativistic”); Decl. of Anthony S. Silvestre at 3 (June 29, 1997) (“Coral Ridge Ministries Hour” does not educate because it “dr[aws] the conclusion that people can change their sexual orientation”); Decl. of Michael Schneider at 1-2 (June 30, 1997) (“Behind the Green Curtain” is not NCE programming because it “argues single-mindedly that the environmental movement is a conspiracy of wealthy elites to curtail property rights” and “proclaims . . . that global warming is a myth”); *id.* at 2 (“Origins” is unqualified programming because it “promotes ‘Creation Science’ and attacks evolution”); Consol. Rep. to Opp’ns to Pet. to Den., Alliance for Progressive Action and QED Accountability Project (filed Aug. 7, 1997), Attachment C, Declaration of Monsignor Charles Rice (“Father Manning” program should not be deemed educational because it “was “concerned . . . with the abortion issue and presented an uncompromising stand”). Parties also opposed the transfer based on the identity of the messengers. *See* Pet. in Opp’n, app. C, Decl. of Mark Ginsburg at 1 (June 30, 1997) (“That [‘Crisis in the Classroom’] was produced by Phyllis Schlafly’s Eagle Forum . . . reinforces my conclusion that the program “has limited or no educational value.”); *id.* app. I, Comments of Ann Sutherland Harris at 2 (Aug. 20, 1996) (arguing against station sale because “the Christian Coalition” would replace current management and Pittsburgh’s “television and radio are being taken over by anti-labor-conservative-Republicans”); Comments of Stuart Hastings (Aug. 8, 1999) (“I fear the increased prominence of Pat Robertson and his ilk on the local TV scene.”).

57. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

58. Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of*

other things, the cost associated with the Commission's "schools and libraries" program. That program requires telephone companies to "contribute" over \$2 billion to a federal fund to pay for the connection of school classrooms and libraries to the Internet.⁵⁹

The standardized labeling requirement was adopted in the wake of public criticism of the charge, dubbed "the Gore tax" by its opponents based on the Vice President's strong support of the program.⁶⁰ That controversy was generated by the decision of some telephone companies to break the charge out as a separate line-item on customer bills, making it noticeable to the consumer, and to tie responsibility for the charge to the FCC.⁶¹ Previously, the charges had been rolled into rates. One Commissioner, reflecting the Commission's widely noted displeasure,⁶² remarked, "Carriers better sharpen their pencils and think twice about what they're putting on customer's bills and attributing to government action."⁶³ Industry countered: "They don't want us to call it a tax . . . but that's what it is."⁶⁴

Thereafter, the Commission issued the *Truth-in-Billing Order*, which provides that "carriers [must] identify line item charges associated with federal regulatory action through a standard industry-wide label and provide full, clear and non-misleading descriptions of the nature of the charges."⁶⁵ Although required to use the prescribed labels, carriers were still permitted "to include additional language further describing the charges."⁶⁶ Significantly, only "line-item charges associated with federal regulatory actions [were required to] be identified through standard and

Proposed Rulemaking, 14 F.C.C.R. 7492, 15 Comm. Reg. (P & F) 912 (1999) [hereinafter *Truth-in-Billing Order*].

59. In the Matter of Fed.-State Joint Bd. on Universal Serv., *Report and Order*, 12 F.C.C.R. 8776, 7 Comm. Reg. (P & F) 109 (1997).

60. John F. Dickerson & Karen Tumulty, *Gore's Costly High Wire Act*, TIME, May 25, 1998, at 52 ("[The Vice President's] biggest high-tech achievement to date is a program to wire every classroom and library in the country. . . . But right now, the program is under assault from Congress as an out-of-control entitlement engineered by an out-of-control bureaucracy. . . . Critics are already calling it the Gore Tax.").

61. *Id.* ("[S]tarting this summer, phone companies that were ordered to pay for the program are threatening to add a new charge to the long-distance bills of residential consumers.").

62. See Steve Rosenbush, *AT&T Adding Surcharges; FCC Furious*, USA TODAY, May 29, 1998 at 2B ("The FCC is livid.").

63. Mike Mills, *Some MCI Customers Seeing Surge in Phone Bills*, WASH. POST, Jan. 31, 1998, at H3.

64. James K. Glassman, *A New Tax For The New Year*, WASH. POST, Dec. 2, 1997, at A27. See *Truth-in-Billing Order*, *supra* note 58, at 7569 (full description of regulation history given in Commissioner Harold W. Furchtgott-Roth's Dissenting Statement).

65. *Truth-in-Billing Order*, *supra* note 58, para. 50.

66. *Id.* para. 56.

uniform labels across the country.”⁶⁷ The Commission expressly declined to require standardized labels for any other sort of billing description.⁶⁸

The Commission tentatively concluded that the following label should be used on bills “to refer to” the schools and libraries fee: “Federal Universal Service.”⁶⁹ Any additional language describing the charge must be “factually accurate and non-misleading” with regard to “the nature and origin of [the] universal service charge.”⁷⁰ Specifically, the Commission made clear that it “would not consider a description of that charge as being ‘mandated’ by the Commission or the federal government to be accurate.”⁷¹ This was so, the Commission said, because carriers passed the costs of their contribution through to customers as a matter of choice—the program did not regulate recovery of the costs imposed on carriers.⁷²

Standardized labels and agency oversight of additional descriptions were necessary, the Commission said, to prevent “consumer confusion” over charges assessed “ostensibly to recover costs incurred as a result of specific government action.”⁷³ Uniform labels would also help consumers comparison shop among carriers on the basis of the amount of the charge because “[s]uch comparisons are very difficult when carriers choose different names for the same charge.”⁷⁴

Like the *WQED* decision, the *Truth-in-Billing Order* exemplifies viewpoint-based regulation. The Commission did not ban separate line-items for this “charge associated with federal regulatory action,” as it might have done by requiring the charge to be included in rates or in a unitary federal line item, thus preventing any speech about the charge. In other words, the FCC did not effect a subject-matter prohibition. Instead, the Commission picked out a particular description of the charge—one indicating that it was ordered by the Commission or the federal government—and prohibited the expression of that point of view on the origin of the charge. Conversely, the Commission permitted descriptions suggesting that carriers are responsible for the charge.

67. *Id.* para. 54.

68. *Id.* para. 41-43 (“[With respect to charges for services], [w]e do not prescribe any particular method of presentation, organization, or language, but rather encourage carriers to be innovative in designing bills that provide clear descriptions of services rendered. . . . We believe the industry is better equipped than the Commission to develop, in conjunction with consumer focus groups, standardized descriptions. . . .”).

69. *Id.* para. 71.

70. *Id.* para. 56.

71. *Id.* para. 56.

72. *Id.*

73. *Id.* para. 49.

74. *Id.* para. 54; *see also id.* para. 49 (advocating the use of standardized labels on monthly service bills).

In short, the regulations operate to enjoin the articulation of one side of an issue, while permitting the opposite. By choosing the very words that may be used to label federal charges, these regulations “attempt to give one side of a debatable public question”—here, the government’s own view about who should be held responsible for these charges—“an advantage in expressing its view to the people.”⁷⁵

Although the Commission acted on the basis of its authority over “unjust or unreasonable” carrier practices⁷⁶ and suggested that carriers were untruthful in their characterizations of the charge, the proscribed speech concerns opinions on matters of public interest more than it does objectively unreasonable or unfair behavior. As Commissioner Furchtgott-Roth noted in dissent:

the assignment of responsibility for these consumer charges seems less a question of pure fact or “truth” than opinion. As with most questions of opinion, it is one about which reasonable people can disagree. Some carriers possess a reasonable belief that the Commission, by levying a fee on carriers, was the “but-for” cause of the appearance of these charges on consumers’ bills. In a competitive market, they say, costs are by definition passed through to consumers, and so the imposition of new regulatory charges on carriers is tantamount to a charge on consumers. As long as the carriers are subject to the Commission’s understanding of “misleading” statements with respect to the charges, however, they will presumably be forbidden by this agency from expressing to consumers their view that the fees imposed in connection with the universal service fund are the result of government action and that ultimate responsibility for these charges rests with the government.⁷⁷

Thus, contrary to the argument of the Commission,⁷⁸ this is not like regulating the accuracy of certain aspects of advertising or the disclosure of interest rates. Rather, this is regulation of views on matters of public interest: social policy, taxation, and ultimate accountability for federally based fees. If a telephone company believes that the schools and libraries fee exists because of the actions of the FCC and that the charge should thus be described as “FCC-mandated,” that verbiage is not a demonstrably untrue statement of fact, but rather the expression of an opinion on a public

75. *Ladue v. Gilleo*, 512 U.S. 43, 50 (1994). See also *Truth-in-Billing, Order, supra* note 58, at 7581-88 (Comm’r. Furchtgott-Roth, dissenting) (arguing that the regulations are also invalid under commercial speech doctrine).

76. 47 U.S.C. § 201(b) (1994).

77. *Truth-in-Billing, Order, supra* note 58, at 7580.

78. *Id.* para. 63 (analogizing truth-in-billing rules to the Truth in Lending Act, which requires creditors to accurately disclose financed amounts and interest rates).

issue.⁷⁹

The Commission had obvious alternatives to prescribing the actual words used to describe the charge to accomplish its asserted goals. Again, as Commissioner Furchtgott-Roth in dissent observed:

[I]f ensuring that consumers can compare universal service charges across bills is the goal here, that aim could be fully achieved by a rule requiring standardization and nothing more. For instance, industry could agree to a certain phrase, and the Commission could simply require or encourage uniform usage of that phrase. Indeed, the Commission takes just that sort of non-interventionist approach to speech with respect to charges for services rendered. ... Given the stated goal of price comparison, there is no ostensible reason—other than suppression of the point of view that the charge is a federal fee or even tax for which the government should be held accountable—that the Commission itself would need to select or approve the words that can be used to describe universal service charges. That extra step is simply not necessary to serve the putative goal of uniformity.

To the extent that the Commission is concerned that certain characterizations of the charges (specifically, those suggesting the charges are required by the government) will in fact “mislead” consumers into the decision not to price shop, the regulations are more burdensome than necessary to serve that goal as well. Instead of forbidding all speech except that which appears on its final list, the Commission could have allowed carriers to speak but prohibited misleading statements; that is, the presumption could have been in favor of speech, not against it. Case-by-case adjudication of the “truthfulness” of specific phrases used to describe the charges would be vastly less intrusive than the expansive, prophylactic rules adopted in today. [For] the Commission’s selection of a particular label or labels necessarily excludes a vast category of entirely truthful, nonmisleading ways of describing the charges on line items. ...

Moreover, the direct approach of regulating the underlying conduct—as opposed to the indirect approach of regulating speech about the conduct—is also presumably available to the Commission. If the Commission believes that the cost of the universal service program should be borne by carriers alone, or that any charges that are passed on should be allocated equitably, then it could (assuming statutory authority) have regulated carriers’ recovery of the cost of these charges.

Finally, the Commission could have issued public notices or bulletins to increase public awareness of [its view of] the nature of the charges.

79. *Cf. Gertz v. Welch*, 418 U.S. 323, 339-40 (1974) (distinguishing “an opinion,” the correction of which “depends not on the conscience of judges and juries, but on the competition of other ideas,” from “the intentional lie” or “careless error,” which has “no constitutional value”); *Greenbelt Coop. Publ’g. Ass’n v. Bresler*, 398 U.S. 6, 14 (1970) (holding that “rhetorical hyperbole” in political debate, as opposed to knowing misstatement of fact, is fully protected under the First Amendment).

It could have explained publicly its view that universal service charges are imposed directly on carriers, that transfer of the costs to consumers is a “business choice” for carriers, and that consumers should use this information in evaluating carriers.⁸⁰

The Commission never considered any of these viewpoint-neutral options, however.

As in the context of the *WQED Order*, the Commission adopted these constitutionally suspect rules in the absence of an express congressional command to do so. Section 201(b) of the 1934 Act, which the Commission relied upon as authority to issue the requirements, grants the agency power to regulate “unjust and unreasonable . . . charges, practices, classifications . . . for and in connection with [interstate or foreign communication by wire or radio] service.”⁸¹ That language does not compel the Commission to choose the names of charges on line-items and control the text of additional descriptions. As noted above, there were many ways for the Commission to achieve its purported ends short of mandating government-selected labels. While section 201(b) can be read to confer statutory authority over billing practices, the particular means adopted by the Commission were certainly not dictated by section 201. Once more, the Commission unnecessarily and unfortunately engendered a direct conflict with the principle of viewpoint-neutrality.

In light of the array of viewpoint-neutral approaches to standardization of the schools and libraries charge and the statutory latitude to take those approaches, the fact that the Commission nonetheless imposed a direct restraint on words used to identify the charge is strong evidence that its motives related not to consumer confusion⁸² but to dampening speech about a politically controversial program for which it has been heavily criticized.⁸³

80. Truth-in-Billing, *Order*, *supra* note 58, at 7586-88.

81. 47 U.S.C. § 201(b) (1994).

82. Indeed, as Commissioner Furchtgott-Roth’s dissent pointed out, there was no recorded evidence of public confusion about labels used for the schools and libraries fee, because no such labels had even been employed. *See Truth-in-Billing Order*, *supra* note 58, at 7585 (Comm’r. Furchtgott-Roth, dissenting). At the time that the *Order* was adopted, telephone companies had only announced their intention to break out the charge on bills. *Id.* at 7576.

83. Relatedly, the fact that the Commission required uniform government-approved terminology only for this federal charge, and not for state charges or any services, substantially undermines its claim that such labels are necessary to achieve its goals. With the same aims in mind, and without explaining the different result, the Commission thought it sufficient in these other contexts to allow for flexibility in nomenclature. *See supra* note 67.

V. CONCLUSION

While some legal violations are perhaps difficult to avoid because of the murkiness of the relevant standard and thus excusable on the part of agency administrators, that is not, as this Article has argued, the case with respect to viewpoint discrimination. Because the rule against viewpoint discrimination is relatively uncomplicated to understand and apply, as compared to constitutional rules generally, FCC violations can and should be minimized—especially where there is no statutory duty to regulate with an eye toward viewpoint. The *WQED* and *Truth-in-Billing* Orders serve as prime examples of the sort of viewpoint-based regulation that the current Commission could and should have averted. If we can fairly expect anything from the FCC, which possesses primary regulatory jurisdiction over so many modes of communication, it is that this agency steer clear of the First Amendment's core ban on viewpoint discrimination.