How Elevation of Corporate Free Speech Rights Affects Legality of Network Neutrality

Barbara A. Cherry*

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* Professor, Department of Telecommunications, Indiana University; Ph.D., Department of Communication Studies, Northwestern University; J.D., Harvard Law School; M.A. in Economics and Law, Harvard University; B.S. in Economics, University of Michigan; formerly, senior counsel, Office of Strategic Planning and Policy Analysis, FCC. The Author would like to thank Sandra Braman for insightful comments regarding this Article.

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I. INTRODUCTION

"Essentiality of access" is a useful organizing principle for examining future communications policies in order to better enable the adoption of appropriate government interventions. It refers to the historical alignment of different access problems—that is, access to some essential service or facility—and the legal principles in the U.S. that evolved to address them.[1] It clarifies that different access problems led to the evolution of distinctive legal principles.

Applying "essentiality of access" to broadband demonstrates that differing access objectives require reference to distinctive legal principles that affect different types of legal rights—including both economic rights and free speech rights under the First Amendment of the U.S. Constitution—of the access recipients and access providers. Awareness of the differing rights is necessary to address conflicts among them when simultaneously pursuing multiple access objectives, particularly when such conflicts affect constitutional rights of individuals as opposed to corporations.

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1. *See, e.g.*, Barbara A. Cherry, *Utilizing "Essentiality of Access" Analyses to Mitigate Risky, Costly and Untimely Government Interventions in Converging Telecommunications Technologies and Markets*, 11 COMMLAW CONSPECTUS 251, 251 (2003) [hereinafter *Essentiality of Access*].

Technological convergence is posing conflicts among access recipients and access providers that require increasingly complex evaluation of how to balance the parties' respective legal rights. Such conflicts are shifting the tectonic plates of longstanding bodies of law, altering their interrelationships and creating new sources of friction among legal principles that had historically been viewed as independent of each other.

For example, free speech concerns were rarely relevant to common carriers. As providers of only transmission facilities, telecommunications carriers generally possessed no First Amendment rights (other than as to tangential operations, such as billing practices).[2] However, mass media, as providers of information content of their choosing over their own facilities, do possess free speech rights.[3] With technological convergence and the elimination of legal entry barriers, the interrelationship of common carriage and free speech principles is becoming more complex.[4] Furthermore, the free speech rights of broadband providers have been elevated by the FCC's classification of broadband Internet access services as information services not subject to common carriage. [5]

Imposing baseline obligations on broadband Internet access providers may give rise to conflicting economic and free speech rights of access recipients and broadband access providers. Moreover, the nature of these rights varies depending upon whether the access recipient is an end-user customer or a competitor in an ancillary market. Importantly, establishing baseline obligations may give rise to conflicting *constitutional claims*, pitting the economic and free speech rights of individuals against those of corporate interests. Resolving such conflicts further complicates the FCC's task in its pending rulemaking, *Broadband Industry Practices*,[6] where it considers what are often referred to as network neutrality principles.

This Article stresses that, given that policy change is a path-

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2. *See, e.g.*, Pacific Gas & Electric Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 4–9 (1986).

3. *See, e.g.*, MICHAEL BOTEIN, REGULATION OF THE ELECTRONIC MASS MEDIA 292–456 (3d ed. 1998) (discussing different constitutional First Amendment standards in the electronic mass media context).

4. Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483, 505–10 (2006) [hereinafter *Misusing Network Neutrality*].

5. As discussed in *infra* Part V.B.3, the FCC has reclassified the telecommunications component of information services offered by broadband providers from a common carriage service to a non-common carriage information service under the Communications Act of 1934. On the basis of the change in classification, broadband providers of information services can assert that their free speech rights are not limited to those of common carriers.

6. Preserving the Open Internet, Broadband Industry Practices, *Notice of Proposed Rulemaking*, 24 F.C.C.R. 13064 (2009) [hereinafter Broadband Industry Practices].

dependent process, establishment of baseline obligations for broadband Internet access providers must be based on analyses conducted in appropriate *temporal context*. Ripping analyses from appropriate historical context leads to misleading discourse, flawed assumptions, mischaracterizations, and misalignment of legal principles and the purposes they were designed or emerged to solve. Grounding analysis in appropriate temporal context, a critical component of my research has been devoted to correcting misconceptions and mischaracterizations of the law of common carriage that unfortunately misinform debates of telecommunications policies related to broadband.[7] These misconceptions and mischaracterizations have been created by factual and analytical errors arising from analyses that either totally ignore or improperly frame temporal dimensions of the evolution of the law of common carriage and public utilities.

This Article expands upon this prior research to discuss the implications of the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*[8] for the federal government's attempts to define obligations of broadband access providers. In *Citizens United v. Federal Election Commission*, the Court overruled some of its prior cases to hold that corporations must be treated identically to natural persons with regard to political speech.[9] However, as explained at length in the dissenting opinion by Justice Stevens, the Court's majority opinion contains numerous analytical flaws, including the failure to conduct a proper historical analysis of First Amendment jurisprudence and the Framers' views of corporations, to cite any empirical research to support its assertions, and to address differences between corporations and individuals.[10] Moreover, the Court ignores the need to balance the competing First Amendment interests of corporations and individuals.[11] As a result, the Court's holding is a "radical departure from what had been settled First Amendment law."[12]

This Article also describes how the Court's radical departure from history under its flawed analysis in *Citizens United v. Federal Election Commission* mirrors the FCC's flawed analysis in its classification of

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7. *Misusing Network Neutrality*, *supra* note 4; Barbara A. Cherry, *Maintaining Critical Rules to Enable Sustainable Communications Infrastructures*, 24 GA ST. U. L. REV. 947, 948 (2008) [hereinafter *Maintaining Critical Legal Rules*]; Barbara A. Cherry, *Consumer Sovereignty: New Boundaries for Telecommunications and Broadband Access*, 34 TELECOMM. POL'Y 11 (2010) [hereinafter *Consumer Sovereignty*].

8. 130 S. Ct. 876 (2010).

9. *Id.* at 913.

10. *Id.* at 929–79 (Stevens, J., dissenting).

11. *See id.* at 976.

12. *Id.* at 948.

broadband Internet access service as an information service with no separable telecommunications service component subject to common carriage regulation. The recent decision in *Comcast Corp. v. Federal Communications Commission*, in which the D.C. Circuit Court of Appeals recently held that the FCC lacks ancillary jurisdiction under Title I of the Communications Act of 1934 to prohibit certain network management practices of Comcast, does present an opportunity to reverse the FCC's radical policy trajectory with regard to the classification of broadband Internet access services.[13] The jurisdictional defect can be cured either by FCC reclassification of broadband Internet access services as telecommunication services under Title II or by Congress through legislation.[14] However, *Citizens United v. Federal Election Commission*, by elevating the constitutional free speech rights of corporations, diminishes the federal government's ability to protect consumer interests with regard to potential network neutrality principles, as neither the FCC nor Congress can impose obligations suffering from constitutional infirmity. Overall, the combinatorial or interactive effect of *Citizens United v. Federal Election Commission* and the maintenance of the FCC's current classification of broadband Internet access services is to effectively elevate the free speech rights of corporations to wield their economically derived wealth above both the economic and free speech rights of individuals.

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13. 600 F.3d 642, 661 (D.C. Cir. 2010).

14. Since the issuance of the court's opinion in *Comcast v. Federal Communications Commission*, there has been confusion as to what is meant by "reclassifying" broadband Internet access service as a Title II common carriage service. The reference here is to the FCC's prior classification of enhanced or information service, whether provided through narrowband or DSL service, as containing a separable telecommunications component that is a Title II common carriage service. As discussed in *infra* part V.B.3, in the FCC's *Cable Declaratory Ruling*, the FCC found that cable modem access to the Internet service was an information service without a separable telecommunications component subject to Title II common carriage requirements. 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 Declaratory Ruling*]. This classification of cable modem access directly conflicted with the preexisting policy for narrowband and wireline broadband access to information services. After the *Cable Declaratory Ruling* was upheld by the U.S. Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 996–97, 1000–01 (2005), the FCC then also reclassified wireline broadband access over DSL as an information service without a separable telecommunications component subject to Title II common carriage regulation in its *Wireline Broadband Order*. 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 *Wireline Broadband Order*]. Thus, the reference to reclassification here means for the FCC to find, at a minimum, that all broadband access services have a separable telecommunications component classified as a Title II common carriage service.

II. UTILIZING "ESSENTIALITY OF ACCESS" AS AN ORGANIZING PRINCIPLE

My prior research has used "essentiality of access" as an organizing principle for examining future policy objectives in communications in order to better enable adoption of appropriate government interventions. "Essentiality of access" refers to the historical mapping of different problems of access to some essential service or facility to the corresponding legal principles that evolved to address them. Thus, "essentiality of access" is an access problem-to-legal principle typology. The access problems differ depending on

> what services or facilities are deemed to be essential; for whom (access recipient) they are deemed to be essential; the nature of the relationship between the access recipient and the access provider; and what circumstances are impeding the accessibility of the service or facility.[15]

The differing access problems are then mapped to the legal principles that developed, both under the common law and in statutes, to address them. This typology is represented in Table 1 below.

Importantly, this typology reveals that different legal principles affect different types of legal rights—economic rights, welfare-related rights, and free speech rights—of access recipients and access providers. Awareness of these different types of legal rights highlights how differing rights may conflict when pursuing multiple access objectives. As discussed in *Essentiality of Access*, broadband policy issues, reflecting technological convergence, often simultaneously affect multiple access problems and thereby create potentially new conflicts among economic, welfare-related, and free speech rights.[16] The need for government to balance the interests among these conflicting rights is a complex endeavor.

15. *Essentiality of Access*, *supra* note 1, at 252.
16. *Id.*

Table 1: Legal Principles to Address Different Access Problems Regarding Essential Services or Facilities[17]

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

As access to broadband is deemed essential, changes in regulatory policy will be required to prevent adverse effects on intended access recipients. Policies currently under consideration include revising federal universal service support mechanisms to provide funding for access to

17. *Id.* at 255 tbl. 1.

broadband, and codifying Internet policy principles in *Broadband Industry Practices*.[18] Imposing regulatory burdens on broadband access providers will provoke legal challenges. Illustrative is Comcast's appeal of the FCC Order prohibiting certain network management practices, recently decided by the D.C. Circuit Court of Appeals in *Comcast Corp. v. Federal Communications Commission*.

Essentiality of Access also anticipated the emergence of constitutional challenges that will require the courts to consider conflicting constitutional rights of individuals versus corporations. In particular, it examined difficulties—thus far unaddressed in broadband policy debates—posed in those cases where the constitutionality of broadband regulation may depend upon the characteristics of the corporate form of broadband providers.

> Constitutional challenges by broadband access providers will require the courts to weigh the competing interests of broadband providers and access recipients. This will pose difficulties for the courts in conducting the necessary constitutional analyses. Some difficulties will arise from the need to address conflicts in the differing legal regimes among now-competing technology platforms. However, this section discusses difficulties that appear to have been previously unraised in broadband policy debates. More specifically, the constitutionality of broadband regulation may depend upon the characteristics of the corporate form of broadband providers.[19]

Such cases include those involving incompatible free speech interests between access recipients and broadband providers.[20]

To resolve conflicting free speech interests, *Essentiality of Access* noted that "[t]here is precedent for restricting the free speech rights of corporations to a greater extent than natural persons for reasons directly related to unique characteristics of the corporate form."[21] In *Austin v. Michigan Chamber of Commerce*, the U.S. Supreme Court upheld a Michigan statute that prohibited certain corporations from using corporate treasury funds to make independent expenditures in support or opposition of candidates in state elections.[22] The Court found that the restriction on corporations' political speech was justified because the State had a compelling interest to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support

18. High-Cost Universal Service Support Federal-State Joint Board on Universal Service, *Recommended Decision*, 22 F.C.C.R. 20477, para. 29 (2007) (Federal-State Joint Board recommends a federal Broadband Fund of $300 million per year).

19. *Id.* at 269–70.

20. *Id.* at 273.

21. *Id.* (footnote omitted).

22. 494 U.S. 652, 652 (1990).

for the corporation's political ideas."[23] The statute in *Austin* did exempt media corporations from the expenditure restriction, which the Court upheld because "[a] valid distinction . . . exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public."[24] However, the Court did imply that placing the same restriction on the press might be constitutional, stating "[a]lthough the press' unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations."[25]

Thus, my previous analysis concluded "*Austin* does support the possibility of allowing the government to place restrictions on broadband access providers' free speech rights for reasons related to characteristics unique to corporations."[26] Given the dual role of the First Amendment in protecting interests of individuals and helping to sustain a democracy, viewpoint diversity[27] could be a compelling government interest for imposing restrictions on broadband providers' free speech rights in order to provide access to speakers and support an informed citizenry.[28]

III. THE COURT'S ANALYSIS IN *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

In *Citizens United v. Federal Election Commission*, a nonprofit corporation, Citizens United, challenged the constitutionality of Section 441(b) of the U.S. Code, as modified by section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), a federal law which prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" within thirty days of a primary election or for speech that expressly advocates the election or defeat of a candidate.[29] Finding that the case cannot be resolved on narrower grounds, the U.S. Supreme Court considered the constitutionality of § 441(b) under the Free Speech Clause of the First Amendment of the U.S. Constitution.[30]

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23. *Id.* at 660.

24. *Id.* at 668.

25. *Id.* (internal quotations omitted).

26. *Essentiality of Access*, *supra* note 1, at 274.

27. Viewpoint diversity refers to a national communications policy in which providing the "widest possible dissemination of information from diverse and antagonistic sources" is deemed essential to the public welfare. Turner Brdcst. Sys., Inc. v. FCC, 512 U.S. 622, 663–64 (1994) (internal quotations omitted).

28. *Id.* at 663.

29. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 880–81 (2010).

30. *Id.* at 896–99. The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging freedom of speech . . . ." U.S. CONST. amend. I.

The Court first found that § 441(b)'s prohibition on corporate independent expenditures is a ban on speech.[31] It then proceeded to review the application of the First Amendment to corporations. The Court started with the recognition that First Amendment protection extends to corporations, and that this protection applies to political speech.[32] Referring to two earlier U.S. Supreme Court cases reviewing the constitutionality of campaign financing laws, the Court then stated, "[l]ess than two years after *Buckley*, *Bellotti* reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity."[33] Quoting in part from Justice Kennedy's dissenting opinion in *Austin v. Michigan Chamber of Commerce*, the Court asserted, "[t]hus the law stood until *Austin*. *Austin* 'uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court's] history.'"[34] In so doing, "the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest."[35] Here the Court was referring to the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form resulting from public support that have little or no correlation to the public's support for the corporation's political ideas."[36]

The Court then claimed it was "confronted with conflicting lines of precedent," pre- and post-*Austin.*[37] The Court observed that, in defense of the restrictions on corporate speech in § 441(b), the Government (defendant) noted the antidistortion interest in *Austin*, but relied instead on two other compelling interests: an anticorruption interest and shareholder-protection interest.[38] Of particular relevance here is the Court's analysis of the antidistortion and anticorruption interests, particularly of the former, which specifically involved political speech of media corporations.

In addressing *Austin*'s antidistortion rationale, the Court first asserted that "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the

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31. *Citizens United*, 130 S. Ct. at 882.

32. *Id.* at 899–900.

33. *Id.* at 902 (citation omitted). *Buckley* and *Bellotti* refer to two earlier U.S. Supreme Court cases. *See infra* notes 121–24.

34. *Citizens United*, 130 S. Ct. at 903.

35. *Id.* For the government antidistortion interest to which the Court is referring, see *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668 (1990), and *supra* text accompanying note 24.

36. *Citizens United*, 130 S. Ct. at 903 (quoting *Austin*, 494 U.S. at 660).

37. *Id.*

38. *Id.*

speaker's identity."[39] The Court then claimed, "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech . . . . *Austin*'s antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations."[40] However, § 441(b) specifically exempted media corporations, as had the Michigan statute at issue in *Austin*.[41] So, in addressing this exemption, the Court stated, "[y]et media corporations accumulate wealth with the help of the corporate form,"[42] and claimed that "[t]he law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale."[43] Thus, viewing the exemption for media corporations as a further, separate reason for invalidating § 441(b),[44] the Court claimed "[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations."[45] Furthermore,

> The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.[46]

The Court then concluded that "*Austin* interferes with the open marketplace of ideas protected by the First Amendment,"[47] and that "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[48]

As for the anticorruption rationale, under which "corporate political speech can be banned in order to prevent corruption or its appearance,"[49] the Court asserted that precedent limits this rationale to situations when direct contributions were made to secure a political *quid pro quo*.[50] However, the Court stated "[l]imits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's

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39. *Id.* at 905.
40. *Id.* (citation omitted).
41. *Id.*
42. *Id.*
43. *Id.* at 906.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* (citation omitted).
48. *Id.* at 907.
49. *Id.* at 908.
50. *See id.*

interest in preventing *quid pro quo* corruption."[51] Claiming "that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption,"[52] the Court found that "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy."[53]

The Court also quickly dispensed with the shareholder-protection rationale, which asserted "that corporate independent expenditures can be limited because of [the Government's] interest in protecting dissenting shareholders from being compelled to fund corporate political speech."[54] It does so on the basis that, "like *Austin*'s antidistortion rationale, [the shareholder-protection interest] would allow the Government to ban the political speech even of media corporations . . . . The First Amendment does not allow that power."[55]

After discussing its reasons for choosing not to adhere to the principle of *stare decisis* to uphold the precedent, the Court concluded,

> *Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.[56]

The Court then held § 441(b)'s restrictions on corporate independent expenditures to be unconstitutional.[57]

IV. IMPLICATIONS OF *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

One might argue that the implications of *Citizens United v. Federal Election Commission* fundamentally lie in recognition of its holding that the government may not suppress political speech on the basis of the speaker's corporate identity. The consequences of this holding are indeed profound. By overruling *Austin*, the Court has removed a legal basis for differentiating the constitutional free speech rights of human individuals versus corporations, at least in the context of restrictions on political speech. Consequently, if future cases should require the courts to balance conflicting interests of human individuals as opposed to corporations in a manner that implicates First Amendment rights affecting political speech,

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51. *Id.*
52. *Id.* at 910.
53. *Id.* at 911.
54. *Id.*
55. *Id.* (citation omitted).
56. *Id.* at 913 (citation omitted).
57. *Id.* at 917.

there are very limited circumstances (e.g., to prevent *quid pro quo* corruption) under which it would be permissible for government regulation to choose the interests of individuals over those of corporations.

Moreover, the courts' reticence to uphold restrictions affecting the political speech of media corporations would be particularly pronounced. As a result, to the extent that broadband access providers can characterize obligations placed on them as restraining their political speech, *Citizens United v. Federal Election Commission* has now effectively elevated the status of corporate broadband access providers' First Amendment rights. The impact of *Citizens United v. Federal Election Commission* on commercial speech, which bears a lower level of constitutional protection than political speech, of corporations has yet to be determined.

It is to be expected that broadband access providers will, in response to the imposition of obligations, raise constitutional challenges under the First Amendment when it is feasible to construct them. Such challenges have previously been raised by communications companies in response to government requirements or prohibitions on their conduct, although the level of judicial scrutiny for considering First Amendment claims of media providers has varied with the underlying technology platform. For example, telecommunications carriers successfully challenged the telephone company-cable TV cross-ownership ban,[58] which ultimately led to its repeal by Congress in the Telecommunications Act of 1996.[59] In another instance, cable companies lost their challenge to the must-carry requirements, albeit in a close case, based on a plurality opinion, in *Turner II*.[60]

In several cases, including *Turner II*, the Court has held that "viewpoint diversity . . . justified government action mandating that owners of channels of mass communication open access to their facilities to certain speakers."[61] However, the traditional justifications for the varying levels of

58. *See, e.g.*, Chesapeake & Potomac Telephone Co. v. Nat'l Cable TV Ass'n, 42 F.3d 181 (4th Cir. 1994) (holding that telecommunications carriers do have free speech rights with regard to the provision of video programming over their own facilities).

59. Telecommunications Act of 1996, § 302(b)(1), Pub. L. No 104-104, 110 Stat. 124 (repealing 47 U.S.C. § 533(b)).

60. Turner Brdcst. Sys., Inc. v. FCC, 520 U.S. 180 (1997). In considering the First Amendment challenge in *Turner II*, the Court applied a lower form of judicial scrutiny, referred to as "intermediate scrutiny." *Id.* at 185. The highest level of scrutiny, referred to as "strict scrutiny," applies in cases affecting political speech, such as those related to campaign financing. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464–65 (2007).

61. *Essentiality of Access*, *supra* note 1, at 261; *see, e.g.*, *Turner Brdcst. Sys., Inc*., 520 U.S. 180 (must-carry requirement imposed on cable companies); Satellite Brdcst. & Comm. Ass'n v. FCC, 275 F. 3d 337 (4th Cir. 2001) (carry-one carry-all rule mandated by the Satellite Home Viewer Improvement Act).

judicial scrutiny among the different technology platforms are not altogether settled. Some consider the lowest level of scrutiny applied to broadcasting to no longer be appropriate, and the First Amendment status of cable television providers still remains ambiguously defined.[62] The elevation of First Amendment rights under *Citizens United v. Federal Election Commission*, particularly in light of its discussion of media corporations, could have a spillover effect on the Court's future review of cases involving the appropriate level of judicial scrutiny to apply among the varying technology platforms in the context of media providers' First Amendment claims.[63] A heightened level of judicial scrutiny would strengthen First Amendment challenges by technology platform providers, thereby diminishing the government's ability to impose access mandates for purposes of viewpoint diversity.

In *Broadband Industry Practices*, the FCC has proposed imposing rules on all broadband Internet access service providers, regardless of the technology over which such service is delivered, that reflect six principles.[64] Four of the rules are based on the general Internet policy principles stated in the FCC's *Internet Policy Statement*.[65] These four rules each begin with the prefatory language, "[su]bject to reasonable network management, a provider of broadband Internet access service may not," and continue:

> 1. [P]revent any of its users from sending or receiving the lawful content of the user's choice over the Internet.
>
> 2. [P]revent any of its users from running the lawful applications or using the lawful services of the user's choice.
>
> 3. [P]revent any of its users from connecting to and using on its network the user's choice of lawful devices that do not harm the network.
>
> 4. [D]eprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and

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62. For a brief discussion and references, see *Essentiality of Access*, *supra* note 1, at 272.

63. In fact, the U.S. Supreme Court is currently considering whether to hear an appeal by Cablevision, which is challenging the constitutionality of the must-carry provision in the 1992 Cable Act as applied by an FCC order requiring it to carry programming of a broadcast station in an area in which the station lacks an over-the-air audience. Cablevision is appealing the lower court order upholding the must-carry provision in *Cablevision Systems Corps. v. Federal Communications Commission*, 570 F.3d 83 (2d Cir. 2009), claiming that the rationale in *Turner II* (and its predecessor *Turner I*) no longer applies because cable monopolies have been replaced by competition. *See also* John Eggerton, *Supreme Court Conferences on Must-Carry Challenge: High Court Discussing Whether to Hear Cablevision's Challenge to Must-Carry Rules*, BRDCST. & CABLE, Apr. 30, 2010.

64. Broadband Industry Practices, *supra* note 6.

65. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, 20 F.C.C.R. 14986, para. 4 (2005) [hereinafter *Internet Policy Statement*].

> content providers.[66]

The other two rules are based on principles of nondiscrimination and transparency. These rules begin with the prefatory language, "Subject to reasonable network management, a provider of broadband Internet access service must," and continue:

> 1. [T]reat lawful content, applications, and services in a nondiscriminatory manner.[67]
>
> 2. [D]isclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.[68]

Thus, these proposed rules impose obligations on broadband Internet access service providers in both negative and positive terms, outlining prohibited conduct as well as affirmative duties.

Should these rules be adopted, legal challenges by broadband Internet access service providers are likely to follow. Given that the FCC's rules are designed to be neutrally applied across technology platforms of the broadband access providers, the question arises as to whether the courts will require the rules to apply equally to all providers even if the level of judicial scrutiny to constitutional challenges varies among the underlying technology platforms. If the answer were "yes," then rights of the technology platform bearing the highest level of judicial scrutiny would thereby be imputed to all technology platforms. As a result, the elevation of First Amendment rights could even further diminish the government's ability to enforce the rules as to all broadband access providers.

V. FURTHER IMPLICATIONS OF *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

The implications of *Citizens United v. Federal Election Commission* also need to be understood in a broader context, which this Section explores based on the following analyses. Part V.A explains the radical nature of the Court's holding as revealed by the historical analysis in Justice Stevens's opinion. Part V.B asserts that the Court's radical departure from history under its flawed analysis in *Citizens United v. Federal Election Commission* mirrors that by the FCC in its classification of broadband Internet access service—as an information service with no separable telecommunications service component. Section 6 then examines the combinatorial effect of the holding in *Citizens United v. Federal Election Commission* with the FCC's current classification of broadband Internet access service on the government's ability to impose obligations

66. Broadband Industry Practices, *supra* note 6, at para. 92.
67. *Id.* at para. 104.
68. *Id.* at para. 119.

on broadband Internet access service providers. It concludes that continuing along and combining the trajectories of both the Court and FCC decisions will seriously weaken the economic and free speech rights of individuals relative to those of corporate broadband access service providers.

A. The Court's Radical Departure from the History of First Amendment Law

Justice Stevens's opinion is of uncommon length and depth for a dissenting opinion.[69] It is difficult to appreciate the thoroughness and convincing nature of Justice Stevens's analysis unless one reads his opinion in its entirety. Nonetheless, this Section attempts to summarize, and to capture key aspects of, Justice Stevens's critique of the majority opinion.

1. Overview

In providing an overview of his dissent, Justice Stevens states that "[t]he real issue in this case concerns how, not if, the appellant may finance its electioneering. . . . All that the parties dispute is whether Citizens United [a wealthy nonprofit corporation] had a right to use the funds in its general treasury to pay for broadcasts [of *Hillary: The Movie*] during the 30-day period [before the primary election]."[70] He asserts that

> The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation. . . . The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.[71]

He stresses that "[i]n the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office."[72] Yet, "[t]he majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in

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69. The opinion is ninety pages in length (as compared to fifty-seven pages for the majority opinion). Although titularly Justice Stevens's opinion is concurring in part and dissenting in part—Justices Stevens, Ginsburg, Breyer, and Sotomayor join in Part IV of the majority opinion that upholds disclaimer and disclosure requirements imposed on Citizens United—the entirety of its text is devoted to dissent.

70. Citizens United v. FEC, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting).

71. *Id.* at 930.

72. *Id.*

1907."[73] Instead, Justice Stevens asserts that, in reality, in subsequent cases the Court has accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."[74] Therefore, "[t]he Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin*."[75] Justice Stevens then "regret[s] the length of what follows, but the importance and novelty of the Court's opinion require[s] a full response."[76]

2. The Court's Motivation for Failing to Exercise Judicial Restraint and for Conducting an Ahistorical Analysis

Justice Stevens proceeds to critique the Court's majority opinion both procedurally and on the merits. As to procedure, he asserts that the question of overruling *Austin* and part of *McConnell*[77] was not properly before the Court,[78] and that the Court failed to exercise longstanding principles of judicial restraint because it did not decide the case either on the basis of an as-applied rather than facial constitutional challenge to § 441(b) or on narrower grounds.[79] On the merits, he asserts that the Court's ahistorical, nonempirical analysis renders each of the Court's claims underlying its holding simply wrong. For purposes of discussion here, the procedural defects are important in terms of eliciting the Court's motivation; however, the primary focus will be on Justice Stevens's critique on the merits.

Justice Stevens frames his critique based on historical analysis, which he emphasizes the majority opinion fails to provide. Moreover, he asserts that historical analysis reveals the radical nature of the Court's opinion: First, the Court rejected the historical distinction between corporate and individual campaign spending.[80] Second, this rejection is based in part on the Court's "claims that *Austin* and *McConnell* are radical outliers, 'aberration[s],' in our First Amendment tradition and our campaign finance jurisprudence."[81] But Justice Stevens asserts that "[t]he Court has it exactly

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73. *Id.*

74. *Id.* (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 209 (1982)).

75. *Id.* (citation omitted).

76. *Id.* at 931. I, too, regret the length of Part V.A of this Article; but to appreciate how *Citizens United* is a radical departure from history, a fair representation of Justice Stevens's analysis is required.

77. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

78. *Citizens United*, 130 S. Ct. at 931–32 (Stevens, J., dissenting).

79. *Id.* at 932–38. For the distinction between as-applied and facial constitutional challenges, see *infra* note 84.

80. *Citizens United*, 130 S. Ct. at 930 (Stevens, J., dissenting) (citation omitted).

81. *Id.* at 948 (quotations omitted). In *McConnell*, 540 U.S. 93, the Court upheld the provisions of the BCRA that plugged the soft-money loophole under the Federal Election

backwards. It is today's holding that is the radical departure from what had been settled First Amendment law. To see why, it is useful to take a long view."[82] Rather, Justice Stevens concludes, "this history helps illuminate just how extraordinarily dissonant the decision is."[83]

Reflective of the majority's ahistorical analysis, Justice Stevens asserts that the Court's decision is not based on empirical reality. Criticizing the Court for acting contrary to the fundamental principle of judicial restraint, he further states "[t]he problem goes still deeper, for the Court [declares § 441(b) facially unconstitutional] on the basis of pure speculation."[84] "In this case, the record is not simply incomplete or unsatisfactory; it is nonexistent."[85] Moreover, Justice Stevens asserts that "the Court supplements its merits case with a smattering of assertions."[86]

To explain the reason for the Court's lack of judicial restraint and its ahistorical and nonempirical analysis, Justice Stevens claims that the majority's motivation for its decision is simply that it disagrees with the precedent set forth in *Austin*. "The only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain *Austin*, is its disdain for *Austin*."[87] Stressing that no one has asked the Court to overrule *Austin* but rather numerous groups have urged the Court to preserve *Austin*, Justice Stevens asserts that "[i]n the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. . . . The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court."[88] Fueled by its disdain for *Austin* as precedent, "[a]ll of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, that there is no such thing as too much speech."[89] As a result, Justice Stevens argues that the Court's analysis lacks any valid basis for ignoring the distinctive features of

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Campaign Act of 1971 and imposed regulation of electioneering communications.

82. *Citizens United*, 130 S. Ct. at 948.

83. *Id.* at 952.

84. *Id.* at 933. To declare a statute unconstitutional on its face is a more extreme remedy than to find a statute unconstitutional as applied to a specific set of circumstances. The former is a remedy for a facial challenge, which means that the statute is so flawed that it is unconstitutional regardless of the circumstances of the case at hand. The latter is a remedy for an as-applied challenge, in which a statute is found to be unconstitutional as to the circumstances of the specific case but may be constitutional under other factual circumstances. Given the severity of holding that a statute is facially unconstitutional, courts usually prefer to exercise judicial restraint and rule instead on an as-applied basis, where possible.

85. *Id.*

86. *Id.* at 939.

87. *Id.* at 938.

88. *Id.* at 941–42.

89. *Id.* at 975 (quotation omitted).

corporations and may thereby promote corporate power over individuals.

> [T]he majority . . . simply stipulates that 'enlightened self-government' can arise only in the absence of regulation. . . . . In light of the distinctive features of corporations identified in *Austin,* there is no valid basis for this assumption. . . . The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve.[90]

3. Each of the Court's Basic Premises is Wrong

After dispensing with his procedural critique, Justice Stevens then observes that the Court's ruling on the merits rests on three basic premises:

> First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence.[91]

He unequivocally states, "[e]ach of these claims is wrong,"[92] and then he proceeds to explain why.

> As to the first premise, Justice Stevens states that the Court's characterization [that Austin and McConnell have 'banned' corporate speech] is highly misleading, and needs to be corrected. In fact it already has been. Our cases have repeatedly pointed out that . . . the statutes upheld in Austin and McConnell do 'not impose an absolute ban on all forms of corporate political spending.'[93]

Rather, "[t]he laws upheld in *Austin* and *McConnell* leave open many additional avenues for corporations' political speech,"[94] including issue advertising and exemptions for media companies as well as corporations' ability to raise funds through political action committees.[95] "So let us be clear: Neither *Austin* nor *McConnell* held or implied that corporations may be silenced."[96]

As to the second premise—that the First Amendment precludes regulatory distinctions based on speaker identity, including identity as a corporation—Justice Stevens asserts "the holding in [*Bellotti*, upon which the Court relies,] was far narrower than the Court implies."[97] Reviewing prior cases upholding special restrictions on speech rights imposed on

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90. *Id.* at 977 (citation omitted).
91. *Id.* at 942.
92. *Id.*
93. *Id.* (citing Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990)).
94. *Id.* at 943.
95. *See id.* at 942–44.
96. *Id.* at 944.
97. *Id.*at 945.

specific classes of speakers, he asserts that "it is simply incorrect to suggest that we have prohibited all legislative distinctions based on identity or content. Not even close."[98] Furthermore, "[a]s we have unanimously observed, legislatures are entitled to decide that the special characteristics of the corporate structure require particularly careful regulation in an electoral context."[99] Expanding on the importance of special characteristics of corporations, Justice Stevens states:

> Campaign finance distinctions based on corporate identity tend to be less worrisome . . . because the "speakers" are not natural persons, much less members of our political community, and the governmental interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from noncorporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism.[100]

As for media corporations in particular, "[legislatures] are likewise entitled to regulate media corporations differently from other corporations to ensure that the law does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events."[101] He concludes "[i]n short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw."[102]

As to the third premise, that *Austin* and *McConnell* are radical outliers in First Amendment tradition and campaign finance jurisprudence, Justice Stevens counters that it is the majority that has radically departed from settled First Amendment law.[103]

4. Understanding Our First Amendment Tradition Based on Historical Analysis

It is at this juncture that Justice Stevens embarks on an historical analysis of the First Amendment. The historical analysis is labeled *Our First Amendment Tradition*, which is then divided into three parts: (1) *Original Understandings*, (2) *Legislative and Judicial Interpretation*, and (3) *Buckley and Bellotti*.[104] The discussion here will continue in terms of the analysis in these three parts.

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98. *Id.* at 946.
99. *Id.* at 947 (citation omitted).
100. *Id.*
101. *Id.*at 947 n.50 (quotations omitted).
102. *Id.* at 948.
103. *Id.*
104. *Id.* at 948–61.

In *Original Understandings*, the Court is faulted for

> mak[ing] only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the [First] Amendment. Perhaps this is because there is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form.[105]

The analysis in this part continues to explain that "the Framers and their contemporaries . . . held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter."[106] More specifically, during that time, "[c]orporations were created, supervised, and conceptualized as quasi-public entities, designed to serve a social function for the state. . . . [and] [t]he individualized charter mode of incorporation reflected the cloud of disfavor under which corporations labored in the early years of this Nation."[107]

For these reasons, Justice Stevens concludes,

> The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.[108]

Thus, "[g]iven that corporations were conceived of as artificial entities and do not have the technical capacity to 'speak,' the burden of establishing that the Framers and ratifiers understood 'the freedom of speech' to encompass corporate speech is . . . far heavier than the majority acknowledges."[109] Upon review of "background practices and understandings, it seems to me implausible that the Framers believed 'the freedom of speech' would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections."[110] In summary, Justice Stevens asserts, "[a]s a matter of original expectations, then, it seems absurd to think that the First Amendment prohibits legislatures from taking into account the corporate identity of a sponsor of electoral advocacy."[111]

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105. *Id.* at 948.

106. *Id.* at 948–49 (citations omitted).

107. *Id.* at 949 (quotations omitted). "General incorporation statutes, and widespread acceptance of business corporations as socially useful actors, did not emerge until the 1800's." *Id.* (citation omitted).

108. *Id.* at 949–50 (citation omitted).

109. *Id.* at 950 n.55.

110. *Id.*at 950.

111. *Id.* at 951.

As for media corporations, the Free Press Clause "suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status, and therefore why some kinds of 'identity'-based distinctions might be permissible after all."[112] Therefore, "nothing in our constitutional history dictates today's outcome. To the contrary, this history helps illuminate just how extraordinarily dissonant the decision is."[113]

In *Legislative and Judicial Interpretation*, Justice Stevens states that,

> A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act banning all corporate contributions to candidates.[114]

> [T]he Act was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed.[115]

In the Taft-Hartley Act of 1947, "Congress extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well."[116]

> By the time Congress passed FECA [Federal Election Campaign Act] in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that when a large number of plaintiffs, including several nonprofit corporations, challenged virtually every aspect of the Act in *Buckley*, no one even bothered to argue that the bar as such was unconstitutional.[117]

In *Austin,* the Court

> noted that corporations have special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that allow them to spend prodigious general treasury sums on campaign messages that have "little or no correlation" with the beliefs held by actual persons.[118]

"In the 20 years since *Austin,* [the Court has] reaffirmed its holding and rationale a number of times."[119] Finally, in *McConnell* "[the Court has] repeatedly sustained legislation aimed at 'the corrosive and distorting

112. *Id. at* 952 n.57.
113. *Id.* at 952.
114. *Id.* (citation omitted).
115. *Id.* at 953 (citation omitted).
116. *Id.*
117. *Id.* at 954 (citation omitted).
118. *Id.* at 956 (quotations omitted).
119. *Id.* (citations omitted).

effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[120]

In the part of his opinion subtitled *Buckley and Bellotti*, Justice Stevens argues that the majority uses selected passages from two cases, *Buckley v. Valeo*[121] and *First National Bank of Boston v. Bellotti*,[122] to dismiss *Austin* as "a significant departure from ancient First Amendment principles."[123] He discusses how the Court takes a phrase in *Buckley* that "cannot bear the weight that our colleagues have placed on it"[124] in order to create the false impression of conflict with *Austin*.[125] Furthermore, he asserts that the Court misrepresents the ruling in *Austin*:

> The majority suggests that *Austin* rests on the foreign concept of speech equalization, but we made it clear in *Austin* (as in several cases before and since) that a restriction on the way corporations spend their money is no mere exercise in disfavoring the voice of some elements of society in preference to others. Indeed, we *expressly* ruled that the compelling interest supporting Michigan's statute was not one of " 'equaliz[ing] the relative influence of speakers on elections,'" [sic] but rather the need to confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars.[126]

Justice Stevens also explains why "[t]he Court's reliance [on *Bellotti*] is odd. The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority's position."[127] In this regard, Justice Stevens is referring to the Court's assertion "that *Bellotti*'s holding forbade distinctions between corporate and individual expenditures like the one at issue here."[128] On the contrary, "*Bellotti* . . . did not touch the question presented in *Austin* and *McConnell*, and the opinion squarely disavowed the proposition for which the majority cites it."[129] Justice Stevens concludes "*Austin* and *McConnell*, then, sit perfectly well with *Bellotti*."[130] "In sum, over the course of the past century Congress has demonstrated a recurrent

120. *Id.* at 957 (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 205 (2003) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990))).

121. 424 U.S. 1 (1976).

122. 435 U.S. 765 (1978).

123. *Citizens United*, 130 S. Ct. at 957 (quoting majority opinion) (citation omitted).

124. *Id.* at 958. The phrase is: "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48–49.

125. *See Citizens United*, 130 S. Ct. at 958.

126. *Id.* (citations omitted).

127. *Id.*

128. *Id.* (citation omitted).

129. *Id.*

130. *Id.* at 960.

need to regulate corporate participation in candidate elections."[131]

5. The Court's Failure to Appreciate Special Concerns Raised by Corporations

In the next section of his opinion, Justice Stevens "come[s] at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales."[132] He concludes that the Court "badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand."[133] For purposes of this Article, Justice Stevens's discussion of important differences between corporations and human beings that underlie these rationales for justifying government regulation is most relevant and will be outlined here.

With regard to the anticorruption interest, the majority claims that "the only sufficiently important governmental interest in preventing corruption or the appearance of corruption is one that is limited to *quid pro quo* corruption."[134] Justice Stevens argues, "the majority cannot be right . . . . It disregards our constitutional history and the fundamental demands of a democratic society."[135] Justice Stevens contends that "[c]orruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics."[136] After reviewing factual findings in earlier cases, Justice Stevens concludes that "[u]nlike the majority's myopic focus on *quid pro quo* scenarios, . . . [a] broader understanding of corruption has deep roots in the Nation's history."[137] Moreover, "[e]ven in the cases that have construed the anticorruption interest most narrowly, [the Court has] never suggested that such *quid pro quo* [political] debts must take the form of outright vote buying or bribes. . . . Congress may 'legitimately conclude that the avoidance of the appearance of improper influence is also critical.'"[138] Thus, Justice Stevens concludes that the Court "misreads the facts and draws the wrong conclusions" in dismissing the evidence in the record in *Buckley*.[139] Furthermore,

131. *Id.*
132. *Id.* at 961.
133. *Id.*
134. *Id.* (quotations omitted).
135. *Id.*
136. *Id.*
137. *Id.* at 963 (citation omitted).
138. *Id.* at 964 (citation omitted).
139. *Id.* at 966.

"prophylactic measures [may be] required to guard against corruption."[140]

With regard to the antidistortion rationale, Justice Stevens states "[t]he majority fails to appreciate that *Austin*'s antidistortion rationale is itself an anticorruption rationale . . . tied to the special concerns raised by corporations."[141] "The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it."[142] The resources in the general treasury of a business corporation do not indicate the popular support for the corporation's political ideas, but "reflect the economically motivated decisions of investors and customers."[143] "It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]hey are not themselves members of 'We the People' by whom and for whom our Constitution was established."[144] Justice Stevens also stresses that "[c]orporate speech . . . is derivative speech, speech by proxy;"[145] and that "[i]t is an interesting question 'who' is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate."[146]

Justice Stevens then discusses the significance of corporations' unique structure for amassing wealth relative to human beings.

> *Austin* recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations 'unfai[r] influence' in the electoral process, . . . [as] [t]he legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match.[147]

"The majority's unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations' 'war chests' and their special 'advantages' in the legal realm . . . may translate into special advantages in the market for legislation."[148] Consequently, "[c]orporations . . . are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure."[149]

> All of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, 'that there is no such thing as too much speech.'. . . In the

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140. *Id.* at 968 (quotations omitted).
141. *Id.* at 970 (citation omitted).
142. *Id.* at 971.
143. *Id.* (quotations omitted).
144. *Id.* at 972.
145. *Id.*
146. *Id.*
147. *Id.* at 974.
148. *Id.* at 975 (citation omitted).
149. *Id.*

> real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.[150]

Justice Stevens also emphasizes the Court's failure to acknowledge that competing First Amendment interests are involved between corporations and human beings:

> The majority seems oblivious to the simple truth that laws such as [§ 441(b)] do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other. There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to "First Amendment principles" depends almost entirely on the listeners' perspective . . . it becomes necessary to consider how listeners will actually be affected.[151]

Therefore, although difficult, a balancing of interests is required.

As for media corporations, Justice Stevens observes

> In critiquing *Austin*'s antidistortion rationale and campaign finance regulation more generally, our colleagues place tremendous weight on the example of media corporations. . . . Our colleagues have raised some interesting and difficult questions about Congress's authority to regulate electioneering by the press, and about how to define what constitutes the press. *But that is not the case before us*.[152]

Finally, Justice Stevens considers it "perfectly understandable if [the majority] feared that a campaign finance regulation such as [§ 441(b)] may be counterproductive or self-interested, and therefore attended carefully to the choices the Legislature has made."[153] However, he emphasizes that:

> [T]he majority does not bother to consider such practical matters, or even to consult a record; it simply stipulates that "enlightened self-government" can arise only in the absence of regulation. . . . In light of the distinctive features of corporations identified in *Austi*n, there is no valid basis for this assumption. The marketplace of ideas is not actually a place where items—or laws—are meant to be bought and sold, and when we move from the realm of economics to the realm of corporate electioneering, there may be no "reason to think the market ordering is intrinsically good at all." . . . The Court's approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve.[154]

Thus, the Court's approach is not only nonempirical and impractical, but

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150. *Id.* at 975–76 (citations omitted).
151. *Id.* at 976 (citation omitted).
152. *Id.* (citations omitted).
153. *Id.* at 976–77.
154. *Id.* at 977 (citations omitted).

also invalid because it fails to address the distinctive features of corporations.

As to the third rationale, shareholder protection, Justice Stevens emphasizes that the protection of dissenting shareholders and union members has a long history in campaign finance reform, and "[i]t provided a central motivation for the Tillman Act in 1907."[155] Furthermore, "[t]he shareholder protection rationale . . . bolsters the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as the anticorruption interest."[156]

6. Summary of the Court's Radical Departure from History

Justice Stevens concludes his opinion, summarizing the various ways in which the Court's opinion is a radical departure from history. The precision of Justice Stevens's articulation deserves quotation at length:

> Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that [§ 441(b)] is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades. . . . At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense.[157]

B. Mirroring the FCC's Radical Departure from the History of Common Carriage

The flawed analysis in *Citizens United v. Federal Election Commission* and its implications for establishing baseline obligations on broadband Internet access service providers mirrors that of the FCC's reclassification of broadband Internet access service as an information

155. *Id.*
156. *Id.* at 979.
157. *Id.*

service with no separable telecommunications service component. Both constitute radical departures from historical jurisprudence and eliminate policy choices that could be invoked to protect the interests of individuals from corporate power, thus, in effect, favoring the rights of corporations over individuals. This Section provides an overview of prior research explaining how the elimination of common carriage obligations to the provision of the telecommunications component of information services is the result of inappropriate ahistorical analysis and is a radical departure of deregulatory policies from those of transportation common carriers.

1. Historical Roots of Misunderstanding the Law of Common Carriage for Telecommunications

A critical component of my research has been devoted to correcting misconceptions and mischaracterizations of the law of common carriage that unfortunately misinform debates of important telecommunications policies. This research began with analysis of the limited liability practices of telecommunications carriers in my Ph.D. dissertation, which was later revised and published in my book, *The Crisis in Telecommunications Carrier Liability*.[158] During the course of this research, I discovered that many judicial and regulatory decisions (both state and federal) as well as the secondary academic literature related to telephony contained factual errors related to the history of the law of common carriage. These errors had formed the basis for analytical errors in the analyses and conclusions of judicial and regulatory agency decisions concerning the liability regime of telecommunications carriers, and in the associated academic literature discussing them. My book was devoted to revealing and correcting these errors, explaining how the errors likely arose and persisted, and applying a factually accurate understanding of the law of common carriage to an economic analysis of what liability rules should apply in a detariffed telecommunications environment.

As I expanded the scope of my research, I discovered that the factual and analytical errors related to common carriage had continued to diffuse and were now misinforming debates of other deregulatory telecommunications policies, particularly those related to broadband. In order to apply a historically accurate understanding of common carriage and its relationship to other bodies of law—such as public utilities and antitrust—to issues of broadband access, I developed the organizing principle "essentiality of access." As discussed in Section II, this typology clarifies that different access problems led to the evolution of distinctive

158. BARBARA A. CHERRY, THE CRISIS IN TELECOMMUNICATIONS CARRIER LIABILITY: HISTORICAL REGULATORY FLAWS AND RECOMMENDED REFORM (1999) [hereinafter THE CRISIS IN LIABILITY].

legal principles; furthermore, the different legal principles affect different types of legal rights, such as economic rights and free speech rights, of the access recipients and access providers. Awareness of the types of rights that are affected by government intervention is necessary for determining how to address conflicts among them when simultaneously pursuing multiple access objectives, particularly when such conflicts affect constitutional rights of individuals as opposed to corporations.

Applying an "essentiality of access" analysis to the network neutrality debate shows that a diversity of alleged goals, problems, and remedies affecting multiple types of access problems are involved.[159] These, in turn, lead to juxtaposition of differing legal principles—one of which is common carriage—and affect differing types of rights of access recipients and access providers. Unfortunately, different access problems and associated legal principles have become conflated in the discourse affecting broadband access services, driven in large part from mischaracterizations of common carriage. Importantly, these misconceptions and mischaracterizations are created by factual and analytical errors arising from analyses that *either totally ignore or improperly frame temporal dimensions of the evolution of the law of common carriage*. Because the law of common carriage—as well as its relationship to other legal principles that evolved to address different types of access problems—has been mischaracterized, factual and analytical errors have infiltrated and misguided the FCC's consideration of appropriate obligations for broadband Internet access service providers and is continuing to mislead debate regarding issues falling under the rubric of network neutrality.

2. The Real History of the Law of Common Carriage

With its origins under the English common law, "[c]ommon carriers, merely by virtue of their *status* as public employments, or public callings, bore unique obligations under *tort law* to serve upon reasonable request without discrimination, to charge just and reasonable prices, and to exercise their calling with adequate care, skill and honesty."[160] *A common carrier bore its obligations merely on the basis of its status as a public employment, independent of any requirement or finding of monopoly or market power*.

The independence of tort obligations from market structure is best appreciated by understanding that tort obligations are relational norms:

> Tort law is first and foremost a law of responsibilities and redress. It identifies what we will call "loci of responsibility." These loci consist

159. For application of "essentiality of access" to network neutrality, see *Misusing Network Neutrality*, *supra* note 4, at 44.

160. *Maintaining Critical Legal Rules*, *supra* note 7, at 962.

> of spheres of interaction that come with, and are defined (in part) by relational duties: obligations that are owed by one person to others when interacting with those others in certain contexts and in certain ways. Beneficiaries of this special class of duties enjoy a concomitant privilege or power; they are entitled to seek legal redress if injured by the breach of one of these duties.[161]

"The duty-imposing norms of tort law are *relational norms*: they enjoin persons from acting toward certain other persons in certain ways."[162] "Torts are legal wrongs for which courts provide victims a *right of civil recourse*—a right to sue for a remedy."[163]

Thus, the tort obligations of common carriers are legally enforceable, relational norms. Importantly, common carriers bear these obligations merely based on the existence of their economic relationship with customers, *independent of any requirement or finding of monopoly or market power*. Moreover, these duties require common carriers not to interfere with customers' interests, "notwithstanding the liberty restriction inherent in such a duty imposition."[164]

Some confuse common carriers with public utilities.[165] They are not synonymous, although some entities—such as telecommunications carriers—are both common carriers and public utilities:

> The common law of public utilities subsequently evolved in the United States during the nineteenth century, incorporating the tort obligations of common carriers to which was added an affirmative duty to extend facilities to provide service with a corresponding barrier to exit. To enable public utilities to remain financially viable while satisfying these additional obligations, they were protected from competitive entry typically through monopoly franchises.[166]

Historically, public utilities received certain privileges pursuant to a contractual relationship with government in exchange for which they bore certain obligations. These privileges included protection from market entry, often through monopoly franchises.[167] It is at this juncture that the existence of monopoly became relevant to the regulatory obligations

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161. John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 368 (2005).

162. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 960 (2010) (emphasis added).

163. *Id.* at 985 (emphasis added).

164. *Id.* at 937 (footnote omitted).

165. For a discussion of the distinction between common carriers and public utilities, see THE CRISIS IN LIABILITY, *supra* note 158, at 55–56.

166. *Maintaining Critical Legal Rules*, *supra* note 7, at 962 (footnote omitted).

167. Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies: Part II*, 11 COLUM. L. REV. 616, 616–17; Sallyanne Payton, *The Duty of a Public Utility to Serve in the Presence of New Competition*, *in* APPLICATIONS OF ECONOMIC PRINCIPLES IN PUBLIC UTILITY INDUSTRIES 121, 138 (Werner Sichel & Thomas G. Gies eds., 1981).

imposed on public utilities, some of which were also common carriers.

Unfortunately, the dual classification of telephone companies, now telecommunications carriers, as both common carriers and public utilities has led to factually inaccurate and inappropriate association between common carriage obligations and monopoly or market power. This analytical error has resulted in policy recommendations, such as the assertion that common carriage obligations are no longer necessary in a competitive market and that any problems can be adequately addressed under antitrust law, which have infiltrated the network neutrality debate.[168]

It was the rise of corporate power that led to the enactment of two important federal statutory regimes: an industry-specific regime for common carriers and a general business regime of antitrust law.[169] By the late nineteenth century, corporations were more easily established given the passage of state general incorporation statutes, and their economic corporate power had risen dramatically during the Industrial Revolution.[170] Given that "[r]ailroads are the arteries through which flows the life-blood of the world's commerce,"[171] Congress's attention was directed first to railroad corporations.

A Senate Select Committee on Interstate Commerce, often referred to as the Cullom Committee (named after Senator Cullom), was established to address the "railroad problem."[172] The important question of how to address the growth and influence of corporate power, both as a general matter and to railroads in particular, was the primary concern of this committee, as stated in the *Cullom Report* of 1886.[173]

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

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168. *Misusing Network Neutrality*, *supra* note 4, at 500–03.

169. *See infra* notes 188–97 and accompanying text.

170. General incorporation statutes were enacted as early as 1811 and became more widespread after 1820. *See* Andrew L. Creighton, The Emergence of Incorporation as a Legal Form for Organizations 52 (July 1990) (unpublished Ph.D. dissertation, Stanford University) (on file with Author). For a discussion of the rise of large-scale businesses as corporations during the nineteenth century, see Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387; James Willard Hurst, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970 (1970).

171. S. REP. NO. 49-46, at 4 (1886) [hereinafter CULLOM REPORT].

172. *Id.* at 1.

173. *Id.*

> they naturally receive the most consideration in this connection.[174]

In the *Cullom Report*, the Cullom Committee then describes initial U.S. policy towards the railroads and why it must change. "It was a matter of necessity in a new country with undeveloped resources and struggling with other burdens which fully taxed its capacity that the work of railroad construction should be left to private enterprise."[175] "It by no means follows, however, that regulation is not now needed, or that the policy which was adopted in the beginning as a matter of necessity, and has served a useful purpose, is still the one best adapted to the present requirements of the country and should be permanently continued."[176]

Based on hearings and evidence presented to the Cullom Committee, the *Cullom Report* then discusses the results of railroad building. It describes the first railroads as "modest ventures" serving local constituencies, the subsequent construction of through lines and long distance travel, continuous consolidations of railroads, and their expansion throughout the nation.[177] "The policy which has been pursued has given us the most efficient railway service and the lowest rates known in the world; but its recognized benefits have been attained at the cost of the most unwarranted discriminations."[178]

The *Cullom Report* acknowledges that

> upon no public question are the people so nearly unanimous as upon the proposition that Congress should undertake in some way the regulation of interstate commerce. . . . This demand is occasioned by the existence of acknowledged evils incident to and growing out of the complicated business of transportation as now conducted."[179] "The public interest demands regulation of the business of transportation because, in the absence of such regulation, the carrier is practically and actually the sole and final arbiter upon all disputed questions that arise between [customer] and carrier as to whether rates are reasonable or unjust discrimination has been practiced.[180]

The railroads' arguments against regulation are then discussed. Railroads argued

> that arbitrary or oppressive rates cannot be maintained; that they are adjusted and sufficiently regulated by competition . . . ; that such discriminations as exist are for the most part unavoidable; that the owners and managers of the property are the best judges of the conditions and circumstances that affect the cost of transportation and should determine the compensation they are entitled to receive; and

174. *Id.* at 2–3.
175. *Id.* at 5.
176. *Id.* at 6.
177. *Id.* at 6–7.
178. *Id.* at 7.
179. *Id.* at 175.
180. *Id.* at 176.

> that, in any event, the common law affords the shipper [i.e. customer] an adequate remedy and protection against abuse or any infringement of his rights.[181]

The *Cullom Report* then discusses its conclusions, which reject the railroads' arguments, and are briefly quoted here. "[T]he facts [do not] warrant the claim that competition and self-interest can be relied upon to secure the shipper against abuse and unjust discrimination, or that he has an available and satisfactory remedy at common law."[182] "National legislation is necessary to remedy the evils complained of, because the operations of the transportation system are, for the most part, beyond the jurisdiction of the States . . . . National supervision would supplement, give direction to, and render effective State supervision."[183] "National legislation is also necessary, because the business of transportation is essentially of a nature which requires that uniform system and method of regulation which the national authority can alone prescribe."[184] "The failure of Congress to act is an excuse for the attempts made by the railroads to regulate the commerce of the country in their own way and in their own interests by whatever combinations and methods they are able to put into operation."[185] "In the absence of national legislation, . . . [t]he final outcome of continued consolidations would be the creation of an organization more powerful than the Government itself and perhaps beyond its control."[186] Finally, "[t]hat a satisfactory solution of the problem can ever be secured without the aid of wise legislation the committee does not believe."[187]

Based on the recommendations in the *Cullom Report*, Congress enacted the Interstate Commerce Act (ICA) of 1887.[188] The ICA codified the relational norms of common law common carriage, but significantly altered the means of their enforcement.[189] It created a federal regulatory agency, the Interstate Commerce Commission (ICC), with authority to oversee enforcement of the provisions of the ICA.[190] The railroad carriers were required to file publicly available tariffs with the ICC in order to provide greater uniformity of rates, terms and conditions of service, and to mitigate the scope of permissible discrimination.[191] It was unlawful for

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181. *Id.*
182. *Id.*
183. *Id.* at 178.
184. *Id.* at 179.
185. *Id.*
186. *Id.*
187. *Id.* at 180.
188. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).
189. *Id.* §§ 1–3.
190. *Id.* § 11.
191. *Id.* § 6.

railroad carriers to deviate from their tariffs, which effectively relieved customers of the burden of proof they had borne under the common law regarding carriers' alleged violations of their common carrier obligations.[192] The ICC had complaint jurisdiction, rulemaking powers, and the authority to initiate investigations.[193] The ICA institutionalized a regulatory framework that inserted a new type of governmental entity to mediate the economic relationship between a corporate, critical infrastructure provider and the public. The ICA was later amended in 1910 by the Mann-Elkins Act to place telegraph and telephone companies under ICC jurisdiction, and it provided the basis for the statutory framework of Title II (common carriage) of the Communications Act of 1934 when federal jurisdiction over telegraph and telephone companies was transferred to the newly created FCC.[194]

The first federal antitrust statute, the Sherman Act, was enacted three years after the ICA in 1890.[195] The Sherman Act applied to general businesses, including common carriers. Over time, the essential facilities doctrine—prohibiting a monopolist from refusing to deal with competitors with regard to an essential facility—evolved through judicial interpretation of the Sherman Act.[196] The purpose of the essential facilities doctrine is to address the problem of access to an essential facility among competitors; this is different from the purpose of common carriage, which addresses the economic relationship between a carrier and enduser customer in the retail market.

3. The FCC's Radical Departure from Both the Ancient History of Common Carriage and the Recent Historical Classification of the Telecommunications Component of Information Services

The accessibility of the Internet to the general public began with dial-up access to the facilities of the public switched telecommunications

192. *Id.*

193. *Id.* §§ 13, 17.

194. *See* Kenneth A. Cox & William J. Byrnes, *Title II: The Common Carrier Provisions—A Product of Evolutionary Development*, *in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 25, 25 (Max D. Paglin ed., 1989) (citation omitted) ("Title II is principally an adaptation to the communications industry of a statutory scheme initially developed for railroads in the Interstate Commerce Act of 1887, or Cullom Act, and its subsequent legislative refinements and judicial interpretation.").

195. Sherman Act, 15 U.S.C. §§ 1–7 (2006).

196. The essential facilities doctrine is considered to have originated in *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912). Other cases seen as supporting the essential facilities doctrine include *Associated Press v. United States*, 326 U.S. 1 (1945), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). However, the U.S. Supreme Court has not explicitly invoked the essential facilities doctrine and found "no need either to recognize it or to repudiate it" in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410–11 (2004).

network (PSTN).[197] The PSTN itself is subject to common carriage regulation under Title II of the Communications Act of 1934. Thus, the evolution of the Internet we experience today is dependent, in part, on its historical interconnection and interoperability with a preexisting common carriage PSTN.

Enhanced services to customers require provision via telecommunications, as the FCC has long recognized. Pursuant to the *Computer Inquiry* proceedings, the FCC determined that enhanced services provided via narrowband telecommunications had a separable telecommunications service component.[198] In these proceedings, the FCC imposed Title II common carriage obligations on the telecommunications service component, referred to as basic service, to address potential anticompetitive conduct by telecommunications carriers with regard to competitors in an ancillary market, consisting of unaffiliated enhanced service providers (ESPs) or Internet service providers (ISPs), for whom access to the carrier's underlying telecommunications facilities was deemed essential.[199] In this way, there was a convergence of concerns with discriminatory and anticompetitive conduct, to which application of common carrier obligations by FCC rule was deemed a solution; however, the application of common carriage relational norms on telecommunications carriers in serving unaffiliated ESPs arose from a different economic relationship than that between carriers and (end user) customers under the common law. Thus, for the provision of information (or enhanced) services via narrowband telecommunications, both the enduser customer and unaffiliated ISPs obtained the telecommunications service component through a common carriage relationship with the underlying common carrier.

After enactment of the Telecommunications Act of 1996, this framework was subsequently applied to carriers' provision of DSL (broadband) services. Although, under the 1996 Act, the relevant

197. The PSTN is the public telephone network providing circuit switching between public users. This system is based on carrying analog voice data over dedicated circuits for the duration of the call. In contrast to PSTN, newer Internet telephony networks based on digital technology use packet switching. Under packet switching, the information travels in individual network packets that are reassembled at the destination.

198. In the *Computer Inquiry* proceedings, the FCC created a dichotomy between basic services and enhanced services. Basic service is the offering of transmission capability over a communications path and is required to be provided as a common carriage service. Enhanced service is offered over common carrier transmission facilities and employs computer processing applications that act on the subscriber's transmitted information, but is not required to be offered as a common carriage service. For a discussion of the *Computer Inquiry* proceedings, see Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167 (2003).

199. *See id.* at 177–81, 183–89.

terminology is information service rather than enhanced service.[200] DSL service was classified as a Title II common carriage service available to end users, and the telecommunications component was available on a common carriage basis to unaffiliated information service providers per FCC rule to prevent anticompetitive conduct by the carrier.[201]

The existence of an alternative network platform, the cable system—which historically has not been common carriage—to provide Internet access to the general public triggered the issue as to what obligations the cable system providers may have both to end users and to ISPs. Beginning with cable modem access in its *Cable Declaratory Ruling*[202] and then following with DSL access in its *Wireline Broadband Order*,[203] the FCC reversed course and classified broadband Internet access service as an information service *without a separable telecommunications component.* In so doing, *the FCC placed broadband access service on a different legal trajectory by eliminating provision of telecommunications on a common carriage basis to both end user customers and ISPs*. With regard to end user customers, the entity providing the underlying telecommunications is no longer subject to the longstanding legally enforceable norms of common law common carriage that had been codified in the Communications Act of 1934.[204] To the extent that the FCC had extended these norms to unaffiliated ISPs under the *Computer Inquiry* cases, the entity providing the underlying telecommunications is also now permitted to violate those norms in its relationship with competitors in the wholesale market. This is why norms are being established under the rubric of network neutrality, as exemplified by the FCC's *Internet Policy Statement* and further revisions proposed in *Broadband Industry Practices*. To reinstate the recognition of information service as containing a separable telecommunications component provided under common carriage is at the core of assertions by advocates that the FCC should reclassify broadband Internet access services as Title II common carriage in light of the court's decision in *Comcast Corp. v. Federal Communications Commission*.[205]

In the context of the recent financial crisis, Paul Krugman, a Nobel

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200. *Id.* at 191–92.

201. Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 F.C.C.R. 24011, paras. 36–37 (1998) (classifying DSL as a telecommunications service).

202. *Cable Declaratory Ruling*, *supra* note 14, at para. 7.

203. *Wireline Broadband Order*, *supra* note 14, at para 5.

204. The common law obligations of common carriers to provide service upon reasonable request, without unreasonable discrimination and at a just and reasonable price, are expressed in Communications Act of 1934, ch. 652, §§ 201–02, 48 Stat. 1064 (codified at 47 U.S.C. §§ 201–02 (1994)).

205. 600 F.3d 642, 661 (D.C. Cir. 2010).

Laureate in Economics, asserts that the era of U.S. stability ended with "the rise of 'shadow banking': institutions that carried out banking functions but operated without a safety net and with minimal regulation."[206] Due in part to banking deregulation since 1980, "institutions and practices [of shadow banks] . . . recreated the risks of old-fashioned banking but weren't covered either by guarantees or by regulation. The result, by 2007, was a financial system as vulnerable to severe crisis as the system of 1930. And the crisis came."[207]

The FCC's elimination of common carriage access to telecommunications for both end user customers and unaffiliated ISPs has created broadband "shadow common carriers." The entities (telecommunications carriers and cable companies) providing the underlying telecommunications by which information services are conveyed are performing the common carrier functions, but with minimal regulation. They do not bear responsibility for violating the longstanding relational norms of common carriers.

In order to grasp the significance of eliminating these relational norms of common carriage to telecommunications provided over broadband networks, and thereby creating shadow common carriers, one is required to understand "the importance of common law principles of common carriage and public utility law—which include imposition of ex ante requirements on providers in the retail market—in generating the desired emergent properties of widely available, affordable and reliable transportation and telecommunications infrastructures."[208] It is also necessary to recognize the temporal sequencing of the industry-specific, common carriage regime and the general business regime of antitrust and consumer protection law to appreciate the inadequacy of relying solely on the latter to develop and sustain the desired broadband infrastructures.[209]

Two of my recent publications are dedicated to these tasks: *Maintaining Critical Legal Rules* and *Consumer Sovereignty*.[210] Some parties mistakenly assert that network neutrality rules are not necessary because competition is sufficient to protect against abuses of discrimination and that any remaining problems should be addressed under antitrust law.[211] As explained in both of these publications, a fundamental error embedded in such claims is a failure to appreciate that the industry-specific

206. Paul Krugman, *Financial Reform 101*, N. Y. TIMES, April 2, 2010, at A23.

207. Dealbook, *Krugman: Punks and Plutocrats*, N. Y. TIMES (Mar. 29, 2010), *available at* http://dealbook.blogs.nytimes.com/2010/03/29/krugman-punks-and-plutocrats (last visited Apr. 15, 2011).

208. *Maintaining Critical Legal Rules*, *supra* note 7, at 950.

209. *See, e.g.*, *id.* at 956–967.

210. *Id.*; *Consumer Sovereignty*, *supra* note 7.

211. *See, e.g.*, *Consumer Sovereignty*, *supra* note 7, at 11.

legal regimes of common carriage and public utilities largely *predate* the legal regime for general businesses, consisting of antitrust and consumer protection laws.

> Recognition of this temporal sequence is critical, as the statutory general business regime evolved as an adjunct to the industry-specific statutory regimes. As a result, in numerous cases and circumstances the general business regime has been preempted or superseded by the industry-specific regimes, and, for such situations, further evolution of the general business regime thereby addressed issues *not* covered by the traditional industry-specific regimes. . . [U]nder deregulatory policies . . . it is unclear whether the general business regime will adequately address the situations or circumstances that had previously been addressed by the traditional industry-specific regimes.[212]

The radical nature of the FCC's elimination of the relational norms of common carriage to telecommunications provided over broadband networks is also evident from a historical comparison with transportation common carriers. "In the United States, the evolution of the legal regulatory regimes for the telecommunications sector is in many ways following a trajectory breathtakingly similar to that already traversed by the transportation sector."[213] As previously discussed, both telecommunications and transportation carriers made the same transition from a common law to federal statutory regime of common carriage. More recently, the statutory regimes have been further evolving under federal deregulatory policies—first for transportation carriers and later for telecommunications carriers. In many ways, the deregulatory policy trajectories for both transportation and telecommunications carriers have had similar characteristics: variance in the manner of enforcing common carriage obligations; redesign of, and sustainability problems with, universal service (public utility-type) programs; conflicting court opinions as to the applicability of the filed rate doctrine after detariffing; and confusion regarding the scope of federal preemption of state causes of action, particularly related to consumer protection laws.[214]

"There is, however, a major divergence in the evolutionary trajectories of the legal regimes for the transportation and telecommunications sectors. Recent FCC policy decisions affecting broadband access services have eliminated common carriage in both the wholesale or retail markets, also rendering public utility obligations inapplicable."[215] On the other hand, the deregulatory transportation statutes have *not* removed such carriers (e.g. railroads, airlines) from their common

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212. *Maintaining Critical Legal Rules*, *supra* note 7, at 961.

213. Barbara A. Cherry, *Back to the Future: How Transportation Deregulatory Policies Foreshadow Evolution of Communications Policies*, 24 INFO. SOC'Y 273, 274 (2008).

214. *See id.* at 285–87.

215. *Id.* at 288 (citations omitted).

carriage status.[216] They are still common carriers, but the methods of enforcing the relational norms of common carriage obligations have been further modified—this time to embrace policies that prefer to place greater reliance on competitive market forces.[217] Thus, "[e]xperience under deregulatory transportation policies . . . reveals the radical nature of this broadband policy. . . . [F]or this very reason, we must look beyond experience under deregulatory transportation policies to consider the consequences of this unique policy trajectory for broadband."[218]

4. Extending or Reversing the FCC's Radical Policy Trajectory Under Network Neutrality

The decision in *Comcast Corp. v. Federal Communications Commission* presents an opportunity for the FCC to reconsider its radical policy trajectory. However, through continual misrepresentation of common carriage, opponents of network neutrality are encouraging the FCC to not reclassify the telecommunications component of information services, much less information services overall, as a common carriage service. The failure to understand that common carriage obligations are legally enforceable, relational norms independent of industry market structure has led to misframing of inquiry by many parties in *Broadband Industry Practices* as to how the FCC should embark in determining what obligations should be borne by providers of broadband access.[219]

Some opponents of network neutrality assert that antitrust principles are sufficient to substitute for the functions that common carriage and public utility obligations have served in providing access to enduser customers. For example, a filing by 22 economists asserts that the FCC should not adopt rules but follow a case-by-case approach to assess the lawfulness of specific conduct by "apply[ing] existing, generally agreed-upon standards … such as … the pro-competition, proconsumer doctrines that have developed under the Sherman Act and other antitrust statutes."[220] As previously discussed, such assertions are inconsistent with historical reasons for creating the federal statutory regime of common carriage in order to more effectively enforce the relational norms of common carriage, and they also fail to appreciate the significance of the temporal sequencing of the common carriage and antitrust laws as discussed in *Consumer Sovereignty*.

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216. *See id.* at 279–81.

217. *Id*. at 279.

218. *Id.* at 288.

219. *See*, *e.g.*, Reply Comment, Net Neutrality Regulation: The Economic Evidence, Preserving the Open Internet Broadband Industry Practices, FCC WC Docket No. 07-52 (rel. Apr. 9, 2010) (filing of 22 economists) [hereinafter *Economists' Letter*].

220. *Id*. at 27.

Even more problematic is opponents' argument that common carriage obligations should be imposed only upon a finding of monopoly or market failure. This argument both ignores and misunderstands the long-recognized "[r]elational directives . . . [to] enjoin . . . [common carriers] to treat or to refrain from treating *other persons* in a particular way."[221] The tort obligations of common carriage, which include the relational norm of no unreasonable discrimination, are imposed independent of the carrier's market power or the industry's market structure. Unfortunately, as a general matter, the law and economics perspective "fails to capture the notion of right"[222] or to understand that "[t]ort law is not just a system for the selective imposition of liability in ways that will maximize wealth or other social welfare goals."[223] Opponents' argument also ignores the reality that the federal statutory regime of common carriage was enacted not because common carriage obligations were not needed, but because the common law remedies relying on judicial litigation by customers were considered inadequate; states lacked jurisdiction over interstate commerce; and reliance on competition was deemed insufficient to protect customers from unreasonable discriminatory practices in interstate commerce.[224] Therefore, to state that pursuit of a deregulatory policy that shifts reliance on monopoly to competition means that common carriage obligations are no longer appropriate is simply wrong. Rather, such an assertion is a radical one, particularly when viewed in light of deregulatory policies adopted for transportation common carriers.

In responding to implications of *Comcast Corp. v. Federal Communications Commission*, it is unclear which framing of inquiry the FCC will accept in considering what baseline obligations should be imposed on broadband Internet access service providers. Thus far, comments filed in *Broadband Industry Practices* represent a conflict in framing—the perspective of network neutrality supporters focuses on historical precedent and empirical realities of corporate economic power of broadband access service providers relative to their customers or competitors, whereas the perspective of network neutrality opponents is based on theoretical analysis ripped from historical context and dismissal of the reasons underlying the lineage of legal precedent. The framing that the FCC, or Congress, accepts will determine whether the FCC's recent radical policy trajectory will be extended or reversed.[225] The differential

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221. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 59 (1998).

222. *Id.* at 82 (internal quotation omitted).

223. *Id.* at 4.

224. CULLOM REPORT, *supra* note 171, at 176–78.

225. Illustrative analyses of network neutrality opponents are found in the *Economists'*

impacts between such potential future trajectories are dramatic, and further complicated by the new trajectory initiated by *Citizens United v. Federal Election Commission.*

VI. THE COMBINATORIAL EFFECT OF THE COURT'S AND FCC'S DECISIONS

Two vital interests of individuals converge in a broadband network, reflecting both economic and free speech rights of individuals, which arise from individuals' dual roles as citizens of a representative democracy and participants in a capitalist economy. Distinctive legal principles have evolved to protect individuals' interests in both the political and economic systems of the U.S. To enforce these principles and to effectuate their enforcement as society evolves with technological innovation, government regulation itself evolves.

An important evolution of government regulation has been its adaptation to the realities of the rise of corporate power. Corporations are legal entities, deriving their very existence from government, and have unique characteristics that distinguish them from human beings. Although these characteristics enable amassing of capital and wealth that provide many benefits to society, they also increase the capacity to exercise corporate power with potentially great destructive consequences in both the political and economic systems. For this reason, government regulation has evolved to enable the beneficial as well as the harmful impacts of corporations on both individual and collective interests. Such evolution is reflected in the campaign financing laws at issue in *Citizens United v. Federal Election Commission* and the statutory regime of common carriage at issue in the FCC's classification of broadband Internet access services.

Unfortunately, in the more recent era of deregulatory policies, the reasons and purposes of underlying legal principles and attendant development of government regulation have often been ignored. The failure to conduct analysis in appropriate temporal context has led to radical departures from historical legal precedent in recent cases, such as the U.S. Supreme Court's decision in *Citizens United v. Federal Election*

Letter, *supra* note 219, and Letter from Kyle McSlarrow (NCTA), Steve Largent (CTIA), Walter B. McCormick (USTA), Grant Seiffert (TIA), Curt Stamp (ITTA), Thomas J. Tauke (Verizon), James W. Cicconi (AT&T), Gail MacKinnon (Time Warner Cable), and Steve Davis (Qwest) to Julius Genachowski, FCC Chairman at 1, Preserving the Open Internet; Broadband Industry Practices; A National Broadband Plan for Our Future, FCC GN Docket No. 09-191 (rel. Feb. 22, 2010) [hereinafter *Letter*]. My own analysis is provided in Comments of Prof. Barbara A. Cherry, Preserving the Open Internet; Broadband Internet Practices, FCC GN Docket No. 09-191 (rel. Jan. 14, 2010), and Reply Comments of Prof. Barbara A. Cherry, Preserving the Open Internet; Broadband Internet Practices, FCC GN Docket No. 09-191 (rel. Apr. 27, 2010).

Commission and the FCC's reclassification of broadband Internet access service as an information service without a separable telecommunications service component.

The approaches of both the U.S. Supreme Court and the FCC bear similar flaws. They are both based on ahistorical and nonempirical analyses, and they appear motivated simply by disagreement with precedent and a preference for the absence of regulation. They both mischaracterize legal precedent and ignore the public function of corporations that has long subjected them to comprehensive regulation in the service of the public welfare. In particular, the U.S. Supreme Court ignores the historical reality that the nation's founders had the protection of individuals in mind under the First Amendment; and the FCC ignores the origins of common carriage as embodying fundamental relational norms in economic transactions. Critically, they both ignore the rise of corporate power and the historical attendant need for federal government regulation to protect interests of individuals from the exercise of such power—from the corruptive influence in elections and from oppressive and unreasonable economic discrimination in common carriage services. In this regard, they fail to consider the distinctive features of corporations as compared to human beings, and therefore they ignore the underlying reasons for, and historically permissive scope of, regulation to distinguish between them.

The consequences of the U.S. Supreme Court and FCC decisions are indeed profound. Continuing along and combining the trajectories of these decisions will seriously weaken the economic and free speech rights of individuals as compared to those of corporations with regard to access to broadband infrastructure.

As previously discussed in Section IV, a heightened level of judicial scrutiny as a result of *Citizens United v. Federal Election Commission* would strengthen First Amendment challenges by broadband Internet access service providers, thereby diminishing the government's ability to impose access mandates for purposes of viewpoint diversity. Furthermore, in order to preserve neutrality of regulation among technology platforms of broadband access service providers, *Citizens United v. Federal Election Commission* may even further elevate First Amendment rights of corporations as an obstacle to imposition of broadband obligations, such as those being considered by the FCC in *Broadband Industry Practices.*

As discussed in Part V.B.2, common carriage obligations are based on legal norms that constitute an early form of consumer protection to enduser customers. Due to the existence of such obligations prior to development of general business laws, the elimination of these obligations by the FCC's classification of broadband Internet access services as information services without a separable telecommunications component has left enduser

customers without civil recourse for violation of the underlying relational norms. Furthermore, given the uncertain validity of the essential facilities doctrine under antitrust law under *Verizon v. Trinko*,[226] the elimination of the common carriage provision of the underlying telecommunications for use by unaffiliated ISPs has also jeopardized the availability of a legal remedy to such ISPs. It is these legal gaps that created the necessity for the *Broadband Industry Practices*; and *Citizens United v. Federal Election Commission* now provides the legal basis for blocking imposition of baseline obligations on broadband access providers in that proceeding.

Important differences between corporations and individuals that are ignored by the U.S. Supreme Court and the FCC bear further emphasis, as adverse consequences arise from viewing the dangers of corporate power too narrowly. As Justice Stevens observes, "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]hey are not themselves members of 'We the People' by whom and for whom our Constitution was established."[227] "Corporate speech . . . is derivative speech, a speech by proxy."[228] Moreover, "[t]he legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match,"[229] and "[c]orporations . . . are uniquely equipped . . . not simply because they have a lot of money but because of their legal and organizational structure."[230] Consequently, "corporations' 'war chests' and their special 'advantages' in the legal realm . . . may translate into special advantages in the market for legislation."[231] Such legal and organizational structure of corporations may translate into special advantages over human beings in the markets of a capitalist economy as well, as seen from the history of common carriers.

These special advantages of corporations have now been further enhanced by the radical departures from historical legal precedent in *Citizens United v. Federal Election Commission* and the FCC's reclassification of information services. The Court's failure in *Citizens United v. Federal Election Commission* to acknowledge competing First Amendment interests between corporations and human beings is particularly problematic when media corporations are involved. As Justice Stevens notes, although difficult, a balancing of interests is required. However, given the power imbalance between media corporations and the

226. *See* Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410–411 (2004).

227. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting).

228. *Id.*

229. *Id.* at 974.

230. *Id.* at 975.

231. *Id.* (citation omitted).

individuals they serve, *Citizens United v. Federal Election Commission* foreshadows the effective enabling of such corporations' interests to supersede those of individuals. Yet the direct role played by media corporations in the nation's communications infrastructure, in which citizens not only conduct commerce but also become informed and participate in a representative democracy, requires heightened attention to the dangers of these particular corporations' ability to exercise their economic power to the detriment of individuals and the collective interest of the nation. Unfortunately, the recent loss of historical legal remedies and reduced scope of constitutionally permissible governmental interventions impedes the necessary caution. Overall, the combinatorial or interactive effect of *Citizens United v. Federal Election Commission* and the FCC's reclassification of broadband access (as an information service without a separable telecommunications service component) is the effective elevation of the free speech rights of corporations to wield their economically derived wealth above both the economic and free speech rights of individuals.

VII. NEW FCC RULES REINFORCE THE COMBINATORIAL EFFECT WITH *CITIZENS UNITED*

After this Article was first written, the FCC issued a *Report and Order*[232] in *Broadband Industry Practices*. In its *Report and Order*, the FCC adopted three basic rules for preserving the open Internet.[233] The first rule is based on the principle of transparency, requiring fixed and mobile broadband providers to disclose network management practices, performance characteristics, and terms and conditions of broadband services.[234] The second rule prohibits fixed broadband providers from blocking lawful content, applications, services, or non-harmful devices, subject to reasonable network management; it also prohibits mobile broadband from blocking lawful websites or applications that compete with their voice or video telephony services, subject to reasonable network management.[235] The third rule provides that fixed broadband providers may not "unreasonably discriminate in transmitting lawful network traffic," and "[r]easonable network management shall not constitute unreasonable discrimination."[236]

Importantly, the FCC adopted these rules based on Title I ancillary

232. Preserving the Open Internet, *Report and Order*, 52 Comm. Reg. (P & F) 1 (2010) [hereinafter FCC 10-201].

233. *Id*. at para. 1.

234. *Id.* at para. 54.

235. *Id.* at paras. 63, 99.

236. *Id.* at para. 68.

jurisdiction, deciding to retain classification of broadband Internet access service as an information service. By declining to reclassify broadband Internet access service (more specifically, the transmission component) as a Title II telecommunications service, the FCC continues along its radical policy trajectory and potentially strengthens likely First Amendment constitutional challenges to these rules.

Anticipating First Amendment arguments, the FCC asserts that "broadband providers typically are best described not as 'speakers,' but rather as conduits for speech."[237] Furthermore, the FCC asserts that broadband Internet access service does not involve an exercise of editorial discretion comparable to that of cable companies.[238] For these reasons, the FCC finds that the underlying transmission service is not speech, stating "[t]elephone common carriers, for instance, transmit users' speech for hire, but no court has ever suggested that regulation of common carriage arrangements triggers First Amendment scrutiny."[239] In this regard, the FCC disagrees with the reasoning in two cases in which federal district courts concluded that the provision of broadband service is speech protected under the First Amendment.[240] The FCC's ability to rely on its characterization of broadband as merely a conduit of speech is problematic at best, given its previous classification of the service as noncommon carriage and on the basis of the lack of a separable transmission component.

Even if their rules do affect speech of broadband providers, the FCC asserts that the rules do not violate the First Amendment. In this respect, the rules would be subject to intermediate First Amendment scrutiny, and this standard would be met by the government interests underlying the *Report and Order* to protect the speech interests of all Internet speakers.[241] Finally, the FCC states that speaker-based distinctions are permitted when justified by some special characteristic of the medium being regulated—"here the ability of broadband providers to favor or disfavor Internet traffic to the detriment of innovation, investment, competition, public discourse, and end users."[242]

In his dissenting statement, Commissioner McDowell claims that the FCC ruling too lightly dismisses likely constitutional challenges by broadband Internet service providers under the First Amendment. First, he faults the *Report and Order* for ostensibly avoiding classification of

237. *Id.* at para.141.
238. *Id.*
239. *Id.* at para.144 (footnote omitted).
240. *Id*. at para. 143 n.458 (citations omitted).
241. *Id*. at paras. 145–46.
242. *Id*. at para. 145.

broadband providers as Title II common carriers, but then dismissing broadband ISPs as mere conduits of speech undeserving of First Amendment protection.[243] Second, he questions the *Report and Order*'s assertion that broadband ISPs perform no editorial function with First Amendment protection.[244] Third, he asserts "it is undisputed that broadband ISPs merit First Amendment protection when using their own platforms to provide multichannel video programming services and similar offerings"[245] and, furthermore, the *Report and Order* fails to address the second prong of the intermediate scrutiny test, which requires the regulatory means to not burden substantially more speech than is necessary.[246]

The contrasting positions of the majority and Commissioner McDowell are competing arguments related to First Amendment constitutional challenges likely to be raised upon appeal of the *Report and Order*. In this respect, a further assertion by Commissioner Copps foreshadows the importance of broadband providers as corporations and the need to balance interests of corporations and human beings.

> Allowing gigantic corporations—in many cases, monopoly or duopoly, broadband Internet access service providers—to exercise unfettered control over Americans' access to the Internet not only creates risks to technological innovation and economic growth, but it poses a real threat to freedom of speech and the future of our democracy. . . . Our future town square will be paved with broadband bricks. It must be accessible to all—not handed over to a handful of gatekeepers who can control our access.[247]

To the extent that broadband Internet service providers are speakers under the First Amendment, Commissioner Copps's statement emphasizes a speaker-based distinction between broadband providers as corporations and the human individuals to whom they are to provide access. Framed in this way, clearly there are competing First Amendment interests between corporations and human beings—as expressly recognized by Justice Stevens in dissent, but avoided by the Court in *Citizens United v. Federal Election Commission* Applying the analysis in *Citizens United v. Federal Election Commission*, which fails to acknowledge such competing interests, to consideration of constitutional challenges to the FCC network

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243. Preserving the Open Internet, Dissenting Statement of Commissioner Robert M. McDowell, *Report and Order*, 52 Comm. Reg. (P & F) 1 (2010) [hereinafter McDowell Dissenting Statement]. In this regard, he also disagrees with the assertion in the *Report and Order* that common carriage arrangements do not trigger First Amendment scrutiny. *See* FCC 10-201, *supra* note 232, at para. 140.

244. McDowell Dissenting Statement, *supra* note 243, at 26.

245. *Id.* at 27.

246. *Id.*

247. Preserving the Open Internet, Concurring Statement of Commissioner Michael J. Copps, *Report and Order*, 52 Comm. Reg. (P & F) 1 (2010).

neutrality rules will effectively elevate the free speech rights of corporations to wield their economically derived wealth above the economic and free speech rights of individuals.