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Liberal Fictions
The Public–Private Dichotomy in Media Policy

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Introduction

Following the administrations of British Prime Minister Margaret Thatcher (1979–90) and US President Ronald Reagan (1981–9), the belief that there is no alternative to neoliberal political-economic theory and practice became widespread (Harvey 2005). The collapse of the Soviet Union somehow lent credence to that belief, which was reinforced by triumphalist proclamations about the inevitability of a liberal-democratic global order (Fukuyama 1989). Since then, a number of globally significant events have called into question the merits of these beliefs, not least of which have been the uprisings against neoliberal economic policies through mass mobilizations in many parts of the world. Then al Qaeda attacks in 2001 against human and architectural symbols of the global domination of US financial and military interests, as well as the more recent crisis of the US-led global financial industry, have heightened distrust of the values of neoliberalism that have been forcefully championed by US leaders worldwide. These events also have contributed to efforts in many countries to renew social policy principles and priorities that were discredited and discarded through assaults on welfare state policies and the imposition of structural adjustment policies on countries of the global south by the World Bank and the International Monetary Fund. Today there is widespread intellectual and political skepticism about the ability of the market to self-regulate and to respond effectively to the full range of basic human needs, including food, shelter, health care and education.

The current global financial crisis, from which even optimistic forecasts predict it will take several years to recover, has dramatically illustrated liberalism's failure

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to deliver on its promise that markets can effectively self-regulate, let alone be constituted by and reflect moral consciousness. But there is irony in this, because while economic (neo)liberalism has disastrously displayed its limitations, it is less clear that some of the core values of political liberalism can or should be so easily discarded. This, of course, raises the question of which liberalism has presumably triumphed and, more recently, failed. *The Palgrave Dictionary of Economics* cites certain core values that define liberalism, namely, the rule of law, due process, the inviolability of the person, and the rights of free expression (Dahrendorf 1987). As to what priority should be given to ordering these values, this seems a matter for disagreement and debate, and *Palgrave* notes that "A certain tension between liberal thought and the notion of natural rights is unmistakable" (Dahrendorf 1987, 173). In 1690, a time when liberalism was first being shaped as a political and economic project, John Locke argued that, first and foremost, the role of civil government is the protection of property rights: "The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting" (Locke 1924, 180). As others have observed since the time Locke wrote, there are ways in which giving property rights primacy above other rights results in the denial of fundamental rights that historically have been associated with liberal democracy. In Robert Dahl's *A Preface to Economic Democracy*, he defines "economic liberty" as subordinating the right to self-government to the right to private property, whereas under "political liberty" the right to property is subordinated to the right to self-government (Dahl 1985, 162–3).

The dichotomy of "public" and "private" lies at the foundation of liberal political thought. Immanuel Kant invoked it when he argued that human enlightenment depends on the "public use of reason." For Kant, an enlightened society depends on the use of publicity, by which he meant the opportunity for a flow of ideas that is unencumbered by domination and fear. Kant, in 1784, emphasized the importance of disagreement and debate in public, which he acknowledged sometimes requires courage as the alternative to cowering in private, or simply tending to one's private interests (Kant 1991). For Kant, the public sphere is the place in which private interests can be reconciled with a moral view of the world that insists upon treating individuals and relationships as ends in themselves, and not simply as means to other ends (Kant 1991, 45). Such a view imposes a public-mindedness that is missing when we justify our actions strictly according to material self-interest. For Kant, the principle of publicity was the proper foundation of a legal order. And for Kant, the ends we seek should not be determined by moral dogma but rather they should be justified through and judged by *public reason*. Jürgen Habermas embraced this ideal in his historical reconstruction of the idea of "the public sphere" (Habermas 1989). In between and since, many writers have defended the value of "public reason" and "the principle of publicity" as necessary for enabling democratic life to flourish (Rawls 1996, Splichal 2002a, 2002b).

Unfortunately, Kant did not concern himself with the requirements that would make effective participation in the public sphere equally possible for all. His theory of a liberal public sphere fails to adequately account for the role of power, privilege, and competence (which also is largely a function of privilege) in differentiating among those members of society who are more and less likely to be effective in exercising their formal right to reason in public. Unlike Kant, who neglected how material interests might present barriers to effective participation in the public sphere, Karl Marx demonstrated the historical limits of this liberal ideal. In 1843, Marx lamented the failure of the French Revolution to deliver the "rights of man and citizen" to everyone. Instead, Marx noted, the rights of citizenship were in fact conditional upon one's membership in the bourgeoisie. That is, one had to be a property owner, according to the law, in order to enjoy the rights of political participation. Being a human being with basic human needs was not a sufficient precondition to justify political inclusion (Marx 1978b). It took the rise of the post-war modern welfare state to formally justify the provision for basic human requirements as a matter of social right, thus enabling the full exercise of formally guaranteed, but practically inaccessible, political rights (Marshall 1950). Were he alive, Marx no doubt would have viewed the capitalist welfare state as a social advancement beyond the cruel conditions of the industrial capitalism of his day, just as he viewed the social conditions he witnessed as an advancement beyond those of feudal society (Jameson 1996). To be sure, Marx's critique of the French declaration was not a dismissal of liberal rights. Rather, he was lamenting the gap between political liberalism's promise and the limitations placed upon it through its subordination to capitalism. In Marx's early writings, he was concerned explicitly with the rights of the individual in relation to the political community, and with how capitalism thwarts the fulfillment of the promise of liberal citizenship. But what Marx valued, and what he found to be denied when the rights of private property, market exchange, and capital accumulation are given primacy over all other rights, is that the right to participate in the political community is stunted and distorted (Bernstein 1991, Marx 1978a). Similarly, C. B. MacPherson's critique of liberalism, sustained over his life's work, was an attempt to uphold certain core liberal values about political freedom that get lost when economic interests and private property rights serve as the primary means for defining political rights (MacPherson 1973, 1962). But as we have seen with the rise of neoliberal theory and practice, the social rights that were secured by modern welfare states – the rights of social citizenship – have been shown to be reversible (Turner 1992).

Today, claims that neoliberalism has lost its grip on the global economic order are commonplace, the implications of which are that the moral groundwork now exists to again secure social rights (Wallerstein 2008). Again, however, such confidence may be premature, as there is no clear evidence that the many problems related to the outsourcing of vital state functions to the voluntary associations of "civil society" – or the move from a social contract between states and citizens to a dependence on voluntarism, charity, and philanthropy to answer to basic human needs – will be altered or rectified, despite disillusionment with neoliberalism's failures (Fraser and Gordon 1992, Wood 1990). This is not simply a problem for the United States, the bellwether and testing ground for so many of neoliberalism's most radical ideas. Neoliberalism's failures, particularly the *harm* it has brought to so many people throughout the world (Frank 2000, Giroux 2004), illustrate the distortion that unrestrained economic power brings to the fulfillment of the promise of political liberalism. The unwarranted triumphalist proclamation of Fukuyama – that liberal values have prevailed – neglects many things, not least of which is one of liberalism's core values: the belief that individual freedom should know no restraint unless its expression brings *harm to others*. This value, often referred to as "the harm principle," is famously articulated in one of the most famous defenses of liberalism, J.S. Mill's essay "On Liberty":

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control … That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. (Mill 1974, 68–9; see also Feinberg 1984, Smolla 1992)

There is no mistaking that structural decision making that rests in the hands of, or is significantly influenced by, ostensibly "private" interests, can and often does produce widespread harms, as the effects of the recent global financial crisis demonstrates. Likewise, inegalitarian and corrupt controls over the infrastructures of communication are significant means through which the prospects for democracy are threatened.

Knowing well that control of publicity about important and even potentially harmful information can be vital to maintaining social order, Margaret Thatcher declared in 1985 that airplane hijackers who had taken hostages ought to be deprived of the "oxygen of publicity," as publicity was what they sought through their actions.[1] The analogy here is not that average citizens are potential terrorists, against whom governments and complicit media are waging or should wage deliberate informational warfare. Rather, the "oxygen of publicity" of which average citizens are deprived on a daily basis is the basic information and knowledge needed to make effective use of the political institutions that are their right to understand, question, and transform. More mundane than restrictive measures to thwart political violence, government and a complicit media have demonstrated the capacity and the will to contribute to narrowing and shrinking the public's political imagination and effective engagement (Calabrese 2004, 2005). That is the profound social harm that concerns us in this chapter. Our underlying assumption below is that, in the service of the healthiest possible public sphere of a free and democratic society, the promotion of the oxygen of publicity of the widest sort is the highest, and necessary, calling of media and telecommunication services that have been granted the opportunity to serve the public interest.

In this chapter, we examine how a core feature of liberal theory – the distinction between "public" and "private" – actually functions in practice, specifically within the media and telecommunications industries. As the discussion below of specific media policies and practices illustrate, the unraveling of ideological distinctions between public and private – what Norberto Bobbio refers to as "the publicization of the private" and "the privatization of the public" (Bobbio 1989a, 15) – did not happen suddenly, and it is unlikely that the legal (and extralegal) maneuvering that led to this condition will be easily undone or brought under democratic control. What follows is a discussion of some of the lingering causes for concern about this condition.

Privatization of Media

In the late twentieth century, media privatization accelerated worldwide. The term "privatization" refers to the transfer of property and/or operations from state or public ownership and control into private hands. Among the principal reasons given to justify privatization is that private ownership and operation will make a company perform more efficiently because its managers will be financially obligated to make the company accountable to shareholders. By contrast, government operations are often criticized for being inefficient, corrupt, and insufficiently responsive to the interests of the taxpayers who fund them. Advocates of privatization argue that the competitive environment of private industry fosters greater innovation, and that it pressures companies to maintain lower costs of doing business.

Privatizations of vital public services have become a lightning-rod topic in recent decades, most notably in countries where economic and political institutions have undergone radical structural transformations, for example in Central and Eastern Europe, and in Latin America. Following the collapse of the Soviet Union, gas and oil industries were privatized and then became the focus of corruption scandals and civic unrest as former government officials and Communist Party leaders became wealthy "oligarchs" through massive stock acquisitions. Elsewhere, recent attempts to privatize water services have led to public outrage and riots, most notably in Bolivia in 2000. Government efforts to privatize universal health care services, education, and other social services have also led to significant debate and protest in several countries throughout the world. In many poor countries, privatizations have taken place as a form of "structural adjustment" in response to pressures from the International Monetary Fund and the World Bank in exchange for loans.

The government of the United States has been in the global vanguard in promoting a political-economic ideology that favors the privatization of state and public services. In its foreign policy initiatives, in bilateral and multilateral agreements, and as an influential model for other governments, the US government premises its global policy agenda on firm beliefs in the value of market self-regulation, liberalization, and privatization, beliefs which been reproduced, sometimes with disastrous effects, in many countries. In ways that are seen as extreme both within the country and throughout the rest of the world, the US government subcontracts with private companies for the performance of sensitive government functions. Hundreds of prisons, particularly in the southern and western parts of the country, are run by large for-profit corporations, and the US military is supported by many private enterprises, from defense contractors who design and build high-technology weapon systems, to "private military companies" who provide such support services as security forces, interrogation of prisoners, and training. Many of the basic infrastructures and vital services in the United States are built and/or owned by private corporations, including telecommunications. United States domestic policy historically has favored private ownership of media and telecommunications companies, and has tended to subordinate "public interest" regulation to the imperatives of profitable private ownership and control. The global market power of US media and telecommunications companies, combined with the high-level participation of official US representatives at global trade, investment, and policy summits, have made the United States and its media industries a formidable presence, which has been an ongoing cause of tension and controversy.

The nature and extent to which private enterprise can be made to supplant state and public services seems to be unlimited, and the rationales and processes of privatization are especially relevant for understanding the economic and political history of the telecommunications and mass media industries. Of particular significance is the fact that media institutions, technologies, and policies are widely considered vital to sustaining public life. In the case of the United States, the media or, at an earlier period in US history, "the press," have been given the privileged position of being the only industry with explicit constitutional protection (through the First Amendment). On a global basis, there is strong and widespread opposition to treating media and cultural industries as any other industry, such as steel, coffee, or coal. Instead, the governments of most countries in the world view media and culture as exceptional because of the role they play in sustaining public life and culture. The argument in favor of such a "cultural exception" is in part a response to the threats posed by global media giants who dwarf most nationally based media industries, threatening them with extinction in the absence of governmental intervention. Although media privatization is on the rise worldwide, most governments tend to enable such arrangements while also attempting to sustain the viability of their media industries through import quotas and subsidies.

Media industries have been privatized in many countries throughout the world for the past several decades, but the pace has accelerated significantly over the past 20 or so years, particularly in postsocialist Central and Eastern Europe, following the end of military dictatorships in Latin America, and after apartheid in South Africa. Liberal-democratic welfare states in Western Europe and other parts of the world have also embraced media privatization. In the United States, the radio and television broadcasting system as a whole is overwhelmingly commercial, and the US system of public broadcasting, especially television, historically has been small, economically weak, and buffeted by the changing media marketplace and shifts in the political agendas of the legislative and executive branches of the government. Consequently, public broadcasting in the United States generally lacks influence and importance as a vital stage for American culture and politics. Historic resistance to socialism in the United States has provided an ideological framework for denying government support to noncommercial media.

By comparison, in many other countries, public service broadcasting has been articulated through government interventions, with reference to liberal democratic ideals, affirming a role for public leaders to develop and sustain political and cultural discourse through the media. Such systems have been well-funded and insulated from political pressure (for example, through license fees rather than direct government appropriations), and have been much more central to national public life. The United Kingdom's BBC, Germany's ARD, Japan's NHK, Canada's CBC, and Australia's ABC are among the systems that serve as public service models, particularly because of their commitments to innovative quality programming, and to the insulation of programming from direct government and market influence. However, due to pressures from global competition and the rapid increase in the availability of new media sources, even where they are well established and relatively successful, public service broadcasters (PSBs) have found themselves having to compete for audiences in an unfamiliar commercial and multichannel media landscape. One result has been that PSBs have had to adapt at a faster pace to technological change, and they have had to develop business models that enable them to compete with commercial networks. Such changes have led to concerns about the demise of the distinct identity and mission of public service broadcasting. Although not technically privatized, numerous PSBs have taken on more characteristics of private, commercial broadcasters, including paid advertising.

Perhaps even more dramatic than the changes to broadcasting have been the trends in privatizations of telecommunications infrastructures and the convergence of mass media and telecommunications infrastructure ownership. In the past 20 years, many governments around the world have privatized their PTTs (postal, telegraph, and telephone companies), resulting in numerous subsequent mergers with and acquisitions by larger foreign companies. As well, foreign telecommunications firms, particularly from the United States, entered new markets in which privatizations and market liberalization occurred. For example, US cable and telephone companies invested heavily to set up new landline and wireless infrastructures in postsocialist Central and Eastern Europe, in partnership with PTTs and newly privatized companies, and as separate competitors.

In the United States, the telegraph and telephone industries historically have been privately owned, with little exception of note, whereas PTTs throughout most of the world have functioned as government-owned and operated agencies. Despite the fact of private ownership, under heavy government regulation to control prices and ensure quality of service, the US telephone industry functioned in many ways like a PTT. Prior to the break-up of AT&T, the national monopoly controlled all aspects of telephone service, functioning as a single company that provided local and long-distance service, and that designed and manufactured all equipment used throughout the network. Through a nationwide system of cost-averaging, AT&T's revenues from profitable subsidiaries could be used to subsidize its more costly operations.

When a federal court decided in 1982 that the AT&T monopoly should come to an end, the results were very much like a privatization. The subsequent break-up was intended to promote a more competitive, innovative, and open network environment. In 1984, AT&T was divested of its local telephone companies, leaving the parent company in possession of its profitable long distance and manufacturing businesses, and also leaving it less restricted from entering into new lines of business. The break-up contributed to the destabilization of familiar distinctions between telecommunications and the mass media, and US telecommunications policy has moved progressively in the direction of encouraging the "convergence" of previously separate industries and technologies through the promotion of cross-industry "synergies." Also since that time, the US telephone industry has undergone a process of reconsolidation, and there are now fewer regional companies, some of which have also become vertically integrated firms through mergers with and acquisitions of "content" providers such as cable television systems.

As in the case of cable television systems, US telephone companies now have a conflict of interest in that their own content providers compete with other content providers needing access to the same infrastructure. Today, public interest advocates worry about the possibility that the telephone / telecommunications industry in the United States is losing its historic neutrality as a "common carrier" by having a vested interest in the success of its own content subsidiaries, which are in competition with other content providers on the same system, potentially resulting in discriminatory pricing and lower quality of service provided to competitors needing access to the same infrastructure. Whereas an original goal of the break-up of AT&T was to promote a more "open network," subsequent vertical integration of content and infrastructure has introduced a disincentive for telecommunications carriers to keep their networks open and accessible to all content providers.

The break-up of AT&T contributed to the opening up of market opportunities within the United States, both for domestic and foreign competitors, and these developments have stimulated trends in the deregulation, privatization, and liberalization of "media" industries in many other countries. As a watershed both for symbolic and for practical reasons, it signaled a concerted political and economic willingness to break with a relatively stable and arguably less innovative past in favor of transforming property relations and ownership structures in the media industries, theoretically to make them more dynamic, competitive, and of greater value to the public. It would be an exaggeration to attribute to the break-up of AT&T all of the global trends in telecommunications liberalization and privatization, but that moment was a defining one as concerns the approach that was subsequently taken by the US government to pressure foreign governments to open up their telecommunications markets. This was clearly evident in the shift toward privatization, coupled with an emphasis on "open networks," in telecommunications policies in numerous countries in Europe, Asia, and Latin America.

Beyond the question of whether media are privately or publicly owned is the matter of what is the relationship between privately owned media and the state. As telecommunications firms develop increasingly sophisticated capacities for audience surveillance and data mining, they are able to use that information not only to place their content services at a competitive advantage compared with content provided by other firms on their networks. Again in the vanguard, US telecommunications firms now provide surveillance services to the federal government through the use of data gathered about the communication patterns and information-seeking behavior of average citizens. These developments illustrate that media privatization does not necessarily signal an absence of government control or abuse of powers, nor does it ensure greater public accountability.

The Public–Private Dichotomy: A Western Fantasy?

The public–private dichotomy is deeply embedded in European intellectual history and political theory, but it is not as clear how well these concepts are reflected in political theory and practice elsewhere in the world. European views on the proper relationship between government and industry are more uniquely situated when contrasted with other traditions. The case of China, for example, makes for an especially interesting comparison. China's post-Communist modernization process, which began in the 1980s after Mao Zedong's death, was marked by a rapid transition from a state-centered, planned economy to a socialist market economy. The sweeping economic, political, and social changes entailed shifting dynamics between public and private spheres (Lu and Weber 2007). For example, China's media system changed from a state-run party media system, which was heavily censored, to a more plural and privatized system. In general, the changes have included greater formal independence for media workers. For example, in the lead-up to the 2008 Beijing Olympics, the Chinese government passed a series of media reform measures. One of the measures eased travel restrictions and freed journalists from the need to seek authorization from provincial official authorities before conducting interviews (Earp 2009).

However, the more permeable boundaries between public and private spheres allow the government to exert subtler forms of control through regulation than through open censorship or propaganda (Earp 2009). For example, the government allows news outlets to repackage government propaganda so as to increase its commercial value and appeal (Esarey 2005). Another problem is that most Chinese media firms are large conglomerates, which the government promoted in the 1990s (Tong and Sparks 2009). These large conglomerates engage in self-censorship and are not likely to pursue stories critical of the government or political elites (Tong 2007). Government regulation also censors media content through bans on issues perceived to threaten national security, such as the Tiananmen Square protests, Falun Gong, and various independence movements (Tong 2007). China has the highest number of journalists in prison, most serving long prison terms (Reporters Without Borders 2009a).

Iran represents another interesting contrast in practice to western conceptions of the public–private dichotomy. Since the 1990s, liberalization and privatization have increasingly come to define the political and economic policies of the Iranian state, with parliamentary measures revising restrictions on private media ownership (Khiabany 2007, 2006). The Iranian media market is divided between dominating, large state-owned companies and smaller, private companies.

The state-run Islamic Republic of Iran Broadcasting (IRIB) is the largest media organization in Iran. In news, broadcast, and film production, the IRIB has contracted with private and international production companies to produce content for the domestic Iranian market. With the growth of the middle class in Iran, the IRIB and other state-run organizations have expanded their media activities, including an increase in sports and entertainment content. State-run media is a significant profit center for the country (Khiabany 2007, 2006).

Despite increasing ownership diversity and privatization, Iran has the lowest diversity of media ownership of all Muslim countries in the world. The Islamic state exerts ideological control and strictly censors the majority of media content in Iran, including content on the Internet, through a number of official regulating bodies (World Information Access 2008). Since 2005, when President Mahmoud Ahmadinejad came to power, there has been an increase in violence against media workers. Iran consistently ranks at the bottom of the Reporters Without Borders press freedom index (Reporters Without Borders 2009b).

Although much less restrictive than Iran's media system, South Korea's is tightly controlled through a combination of public and private mechanisms. In South Korea, the government exerted control over broadcasting regulations, ownership, and programming from 1963, when Major General Park Chung-hee became South Korea's president, until the 1990s (Kwak 2009). After the 1987 democratization effort, the Korean government began making strides toward media reform, beginning with cable. Korea's government owns three of the top four broadcast television networks, the Yonhap news agency, and a 24-cable news channel (Nam 2008). Three private companies account for 70 percent of readership and dominate the newspaper industry (Ramstad 2009).

Korea's National Assembly passed three bills in 2009 that allow cross-ownership of broadcast and print properties (Simon 2009). The legislation is controversial because the only companies wealthy enough to benefit are ideologically conservative (South Korea's media is openly partisan). Another concern is that the government will sell its broadcast holdings to the large conglomerates that provide little public service programming, focusing instead on economic profit (Simon 2009).

Government pressure on news content is also a concern in South Korea. In 2009, Munhwa Broadcasting Corporation (MBC), the second largest national broadcaster, which was previously government-owned, replaced its prime-time news anchor Shin Kyung-min (Ji-Sook 2009). While MBC cited economic concerns and a desire for more objective reporting as the reasons for replacing Shin, many believe that he was replaced due to his criticism of the government and its policies (Simon 2009). MBC's actions led to a boycott by over 130 media workers associated with MBC (Ji-Sook 2009).

In sum, the nature and normative understanding of the public–private dichotomy varies significantly across national contexts. However, as the title of this chapter suggests, it is not so clear that the self-understanding of what takes place "on the ground" in the application of this dichotomy is what its liberal defenders say it is, even in Western contexts. Lobbying in the European Union reveals that blurred relationships between private wealth and public power is a growing concern that is not easily brought under democratic control, nor is it one that truthfully supports faith in the liberal fiction of a clean separation of the private and the public (Gathmann 2009, Brussels Sunshine 2009). It is a fiction that is even more severely challenged in the United States.

Media–Government Symbiosis in the United States

Ben Bagdikian's book, *The Media Monopoly*, originally published in 1983, examines abuses of power characteristic of a highly concentrated, advertiser-supported, corporate mass media system (Bagdikian 2004). He addresses the power nexuses between government and media in a case study analyzing the 1970 passage of the Newspaper Preservation Act (NPA). According to Bagdikian, the passage of the NPA rested on the ability of Richard Berlin, CEO and President of Hearst Corporation, to exert pressure on the Nixon administration. While the NPA only directly impacted one of the newspapers owned by Hearst, when Berlin pressured the Nixon administration, he did so with the full power of his entire media empire. The events surrounding the passage of the NPA reveal how the mutual dependence of government and media can contribute to unethical and undemocratic behavior.

In 1969, the Supreme Court found 44 newspapers in violation of antitrust law for price rigging, profit pooling, and market control. The Court's decision led to the NPA, which sought to legitimize joint operating agreements and to exempt failing newspapers from the antitrust violations cited in the 1969 case. Initially, the Nixon administration testified against the NPA, but weeks later they reversed their position and supported the bill. The administration's reversal can be traced, according to Bagdikian, to two letters sent by Berlin, one to President Nixon and one to Nixon's assistant attorney general, who was in charge of antitrust issues. Berlin's letters outlined his concern over the failure of the Nixon Administration to support the NPA. Berlin wrote:

> Those of us who strongly supported the present administration in the last election are the ones most seriously concerned and endangered by failure to adopt the Newspaper Preservation Act … the fact remains that there was almost unanimous support of the Administration by the newspapers who are proponents of the Newspaper Preservation Act. It therefore seems to me that those newspapers should, at the very least, receive a most friendly consideration. (Bagdikian 2004, 212)

In this excerpt, Berlin implied that if the administration failed to endorse proindustry regulation, the administration might no longer enjoy unanimous support from the press.

In Bagdikian's case study, he reveals how the symbiotic relationship between elected officials and the media industry can lead to a situation in which government officials deliver proindustry legislation in return for positive, or at least uncritical, press coverage. While the exchange of political pressure between government and media industry is rarely as direct or well documented as the events in Bagdikian's case study, the continuous exchange of money, in the form of various types of campaign donations, and bonuses, such as travel provisions and expensive speaker fees, between the media industries, media lobbying firms, special interest groups, and politicians creates a climate in which potential conflicts of interest abound (Calabrese 2005).

Government pressure

As the media industries and their lobbying arms pressure politicians for proindustry regulation, the government tries to pressure the media industries for favorable coverage. For example, following the September 11 attacks in New York, Condoleezza Rice, Bush's national security advisor, asked CBS, NBC, FOX, CNN, and other broadcast and cable networks to "exercise caution" in replaying video and audio from Osama Bin Laden or the al-Qaeda network

(MacDonald 2001). The stated purpose of the censorship, coming from Rice and the Bush Administration, was to prevent Bin Laden from sending secret messages to his followers. In the following days, the networks issued statements agreeing to Rice's request, claiming they would screen materials first and rely on editorial judgment before airing (MacDonald 2001). After the first release of an al-Qaeda tape following the agreement, CNN, Fox, MSNBC, and CBS waited longer and aired significantly less material than they previously had (Smith 2001).

In 2004, CBS aired a report on *60 Minutes* that criticized the legitimacy of George W. Bush's Air National Guard service by relying on documents whose authenticity was later disputed. A White House correspondent, Jeff Gannon of Talon News, was one of the first journalists who raised questions about the legitimacy of the documents used in the *60 Minutes* story (Gannon 2004). The mainstream media quickly followed suit in questioning their authenticity. In response to the controversy, CBS dismissed four executives and relieved Dan Rather from his duties as evening news anchor (Murphy 2005). Just weeks after the controversial *60 Minutes* story, the CEO and chairman of Viacom, CBS's parent organization, who was previously a major contributor to Democratic candidates, publicly endorsed George W. Bush for president in 2004, stating, "I vote for Viacom. Viacom is my life" (Redstone 2004). Media Matters later revealed Talon News, the source that spearheaded investigation of the National Guard memos, to be identical to GOPUSA.com, a Republican activist website (Media Matters for America 2005). Media Matters also noted questions raised by journalists about Gannon's links to the Bush Administration, including the matter of how Gannon was able to obtain a White House press pass.

The revolving door

The "revolving door" is another practice that contributes to the power nexus between government and the private media industry and raises ethical concerns. The revolving door practice describes the career rotation of individuals through a variety of government, industry, advocacy, lobbyist, and consultant jobs. This practice creates a situation in which former government employees are able to use their public sector experience and contacts to influence public policy from private sector positions. Such private sector jobs might include positions as lobbyists, consultants, industry executives, think tank members, public affairs strategists, or influential members of organizations (Center for Responsive Politics 2010c). The result is a network of individuals, influence, power, and money that bears on matters of public policy.

The Federal Communication Commission (FCC) was created by the Federal Communications Act of 1934 and is charged with regulating communications and the communications industry. According to John Dunbar, Director of the

Center for Public Integrity's telecommunication project, "While every government agency suffers from the 'revolving door' syndrome, the traffic of top FCC officials working in the industry is extraordinary" (Dunbar 2005, 127). The FCC, according to the Center for Responsive Politics, ranks as the third top revolving door agency, with a total of 127 employees who were either lobbyists or industry workers, and who now work within the FCC, or who were FCC employees who now work for lobbying firms or special interest groups (Center for Responsive Politics 2010c).

A good example of revolving door personnel is Michael K. Powell, who served as a FCC commissioner from 1997 to 2001 and as FCC chairman, appointed by George W. Bush, from 2001 to 2005 (FCC 2005). Before entering the FCC, Powell worked from 1994 to 1996 for the Washington, DC branch of O'Melveny & Myers LLP law firm (Forbes 2002). One of the top clients for the firm is Verizon Communications, formed out of 2000 merger between GTE Corp. and Bell Atlantic (O'Melveny and Meyers 2010). Powell's personal financial disclosures confirm that GTE Corp., a former telephone phone company with international and national interests, was one of his major clients while employed by the firm (Heller 2008).

Within 11 months of serving as an attorney for GTE Corp., Powell accepted the nomination as an FCC commissioner in 1997 (Heller 2008). Then, on June 17, 2000, during Powell's tenure as chairman, the FCC approved the merger of GTE Corp. and Bell Atlantic, creating the nation's largest telephone company, Verizon (Labaton 2000). In 2007, CNN's Fortune 500 listed Verizon Communications as the 13th largest corporation in America, with over $93 billion in revenues and $6 billion in profits (CNN Money 2007). Powell failed to recuse himself or to seek guidance from an ethics officer on potential conflicts of interest in policy matters related to Powell's former clients, such as the GTE–Bell Atlantic merger (Heller 2008).

In January of 2005, Powell announced that he was resigning from the FCC. Two years later, Powell took a position on Cisco Systems, Incorporated's Board of Directors (Forbes 2002). Cisco provides communication hardware, software, and services worldwide, specializing in network routing and switching technologies (Cisco 2009). Cisco Systems is opposed to regulations protecting network neutrality, a principle that holds that all content, platforms, and hardware should be treated equally (Cisco 2006). During his term as FCC Chairman, Powell shared Cisco's opposition to regulation enforcing network neutrality (Powell 2004).[2] From 1998 to 2004, Cisco has spent over $3.7 million on lobbying efforts related to communications policy, with $1.38 million spent in 2004 alone. While Powell's position with Cisco does not violate the minimal restrictions set by the United States Office of Government Ethics, the fact that a former FCC chairman occupies a top position in a corporation that invests heavily in lobbying the government and regulatory agencies on issues directly related to his former responsibility raises significant ethical concerns.[3]

Lobbyists

Telecommunications lobbies refer to groups and organizations that form in order to pressure government on issues and polices related to the telecommunications and media. As mentioned above, a job as an industry lobbyist is one of the career positions within the revolving door practice. Frequently, government officials are offered high-paying positions with lobbying firms when they leave office. Telecommunications lobbyists work for industry, industry organizations, and special interest groups to pressure or "lobby" politicians and elected government officials, such as those holding positions in key committees, and members of regulatory bodies, like the FCC, to support legislation and regulation favorable to their clients. The telecommunications industry's heavy investment in lobbying campaigns increases their power and tips the scale in favor of industry-friendly legislation. In 2008, total lobbying spending reached an all-time high of $3.27 billion, with the lobbying industry employing close to 15,000 employees (Center for Responsive Politics 2010b). In that same year, General Electric, a company with extensive media holdings, Verizon Communications, AT&T Inc., and the National Cable & Telecommunications Association (NCTA) were among the top 20 companies in all industries in terms of money spent on lobbying efforts (Center for Responsive Politics 2010b).

Questions about ethical governance arise not only from the power these lobbying firms and their clients exert on elected officials, but also from the rotation of lobbyists through the revolving door. The close relationships and career rotation between legislators and lobbyists can pose additional problems. Take for example, the ties of John McCain, former presidential candidate and a current US Senator, to telecom lobbies and political action committees (PACs). From 1997 to 2001 and from 2003 to 2005, John McCain served as chairman of the US Senate Committee on Commerce, Science, & Transportation (Commerce Committee), a position with considerable power over the fate of telecommunications policies as the committee is in charge of all proposed legislation related to communication issues and policies. As such, he was in frequent contact and relationship with representatives of telecom lobbies and PACs. Political action committees, or PACs, are political committees, many of the most powerful of which represent the interests of business, industry, or labor, formed in order to raise money to elect or defeat particular candidates (Center for Responsive Politics 2010d). For the 2000 election cycle, McCain, as a presidential candidate running for the Republican Party nomination, raised $32,000 from major telecom PACs, over three times what George W. Bush, the other major Republican presidential candidate, raised from these same sources (Hirschman 2000).

During John McCain's 2008 presidential campaign, in which he received the Republican Party nomination, 23 of the campaign's 66 lobbyists had lobbied on behalf of the telecom industry within the previous 10 years (Kelly 2008). Key positions occupied by the previous telecom lobbyists included the campaign manager, deputy campaign manager, unpaid chief adviser, Senate chief of staff, campaign cochairman, and campaign finance manager. Previous clients of the McCain lobbyists include telecom moguls such as AT&T, SBC Communications, Verizon, Qwest, BellSouth, Qualcomm, Sprint Nextel, and MCI (Kelly 2008). Of course, conflicts of interest arise when a candidate, such as McCain, hires lobbyists who previously lobbied the candidate on behalf of industry or business interests, to raise money for his campaign.

Soft money and PACs

Telecommunications firms also use political campaign contributions to influence policy decisions and gain access to key politicians. These funds are funneled primarily through PACs and soft money donations. A common practice is for an organization to commonly manage both a regulated PAC and a relatively unregulated soft money organization (Weissman and Sazawai 2009).

PACs, described above, contribute to political campaigns through what are considered "hard money" donations, meaning their contributions are limited to $5,000 per candidate per election and are monitored by the Federal Elections Commission (Center for Responsive Politics 2010d). Alternatively, soft money refers to contributions without a financial limit. Soft money can be given to political parties for activities unrelated to supporting or attacking specific candidates for federal office and to host committees for party conventions. Soft money also describes finances spent by organizations on issue advocacy, which entails advertising or publicity campaigns that use an issue or event in attempt to persuade voters to vote a particular way without openly endorsing a particular candidate. While the Bipartisan Campaign Act Reform Act of 2002 (BCRA) placed greater restrictions on soft money contributions, soft money continues to be a source of relatively unregulated and unreported political funding (Center for Responsive Politics 2010e).[4]

Telecommunications and media firms funnel large sums to support political candidates, political parties, and national party conventions through hard and soft money donations. For example, the telephone utility PACs, representing companies such as AT&T and Verizon Communications, spent close to $5.9 million dollars on federal candidates in 2008, contributing roughly the same percentage to both parties (Center for Responsive Politics 2010a). Television and movie PACs, representing companies like Comcast, Walt Disney, Clear Channel, and Time Warner, spent close to $6.7 million on federal candidates (Center for Responsive Politics 2010a). Despite the 2002 BCRA reforms, soft money contributions continue to flow into party conventions through 527s (tax-exempt organizations), with 2008 contributions totaling around $118 million for both parties (Center for Responsive Politics 2010e). During the 2008 election cycle, Cisco, a communications firm, was the top contributor to the Democratic convention with $1.7 million in donations, and Qwest was the second top contributor to the Republican convention with $2.9 million (Campaign Finance Institute 2008).

PACs and soft money contributions help enable telecommunications firms to have access to federal candidates and politicians. Additionally, campaign contributions frequently correlate with industry-friendly legislation. For example, in 2008 the House of Representatives voted on two bills that dealt with providing retroactive immunity to telecommunications firms that participated in an illegal government wiretapping program. Retroactive immunity would protect telecommunications firms from around 40 lawsuits seeking billions in potential liability payments. Ninety-four members of the House Democrats who had initially rejected retroactive immunity changed their vote to support immunity on the second bill (MapLight.org 2008). Of those House Democrats who changed their vote, 88 percent of those had received PAC contributions from Verizon, AT&T, and Sprint, averaging $9,659 per representative, over the previous three years (MapLight.org 2008).

Case Study: The Rights of the Corporate Person

The blurring of the liberal distinction between public and private is insidious in the United States. It is evident in many forms of "corporate welfare," through which ostensibly private corporations are financially supported by government largesse, either directly through subsidies, or indirectly, for example, through tax breaks. In the case of monopoly regulation (or deregulation), the US government historically has played a very big part in protecting large telecommunication service providers from competition and made it possible for them to have undue control over pricing and quality of service, and to engage in predatory practices against competitors. The case study that follows illustrates the distortion of the liberal ideal of the rights-bearing individual as it examines how such rights are conferred upon corporate monopolies. This distortion exists because a quasi-public (but ostensibly private) monopoly is given the ability (the right) to censor as a private entity, but with the full backing of the state.

Participants in today's "net neutrality" debates over telecommunications system development in the United States can learn much from the evolution of the industry over the past 30 years. The history of cable and telephone regulation, although quite distinct in many ways during that period of time, is instructive insofar as being able to explain why the two industries have been treated differently, why some of the differences are only superficial (both have enjoyed monopoly positions through high barriers to entry that were government-induced), and how attempts are being made by both industries to eliminate their more significant differences, to the detriment of citizens and consumers. This case illustrates the value in grounding discussions about access to digital broadband infrastructures in knowledge of key concerns that emerged in the period immediately preceding and following the breakup of AT&T. Chief among the persistently relevant questions is under what conditions, if any, would it be appropriate to permit a rate-regulated common carrier to enter into the business of electronic publishing (of text, voice, data, and video). Although the train of completely blurred boundaries between infrastructure "carrier" and content provider has already left the station, the dubious rationale and conditions for indulging this scenario is a subject about which the public unfortunately knows very little. At the same time that regulators and the courts were puzzling over this question, newly emerging cable television services were finding their feet in a regulatory context that favored a different model than what had been used to govern telephony. Instead of being treated as a "common carrier," like the telephone industry, cable system operators managed to establish their closer affinity to broadcasters. That historical difference between the regulation of two industries, cable and telephony, is in part what explains the recent Supreme Court victory of the cable companies in being able to refuse to carry any Internet Service Provider (ISP) besides their own. But the telephone industry is also not interested in being a common carrier for all ISPs who wish to connect to their infrastructure. Instead, like the cable companies, the telephone companies are lobbying for an exclusive form of control over their infrastructure that many fear will not only make independent ISPs who don't own their own wires a thing of the past. Another fear is that broadband access to the telephone system by independent information providers – ones in which phone companies have no financial interest – will become prohibitively expensive. Commercial information providers like Amazon.com, MapQuest, Google, and Yahoo have been strange bedfellows with public interest advocates, the latter of whom fear that independent and community media will find no place in a new telecommunications marketplace in which access to bandwidth will be based on the principle of "pay to play." Resisting the move by telephone companies to develop costlier pricing models for high-bandwidth information providers to have access to their infrastructure, this coalition's arguments may buy some delays. But it seems likely that in the end, the big users among information providers are going to part company with small-scale public service organizations needing to reach clientele for purposes of social, political, and cultural association and exchange, but whose enterprises are not designed to draw a profit.

In considering the prospects for renewal and future success for "public service media" in a digital broadband environment, it seems that the providers who fall under this (admittedly nebulous) category face a presumption against communication policy as a means of ensuring social welfare. The argument against "positive rights" or "positive liberty" has been a powerful one in recent decades, as evidenced by the progressive and successful assault on the theory and practice of welfare states (Berlin 1969). That being the case, the advocates for such rights should more closely examine what it means to enjoy positive rights. The large telecommunications monopolists – the national cable and telephone companies – are among the greatest beneficiaries of positive rights in the twenty-first century.

The sanctity of private property

Classical liberal political economy historically supported the treatment of infrastructures (roads, harbors, canals, etc.) as "public goods," designed to "facilitate commerce" (Gaus 1983, 192–3). Today, that sentiment seems, well, sentimental, especially in terms of telecommunications infrastructures. The sanctity of private property has been the pre-eminent value underlying broadcast and telecommunication policy in the United States since its inception. Although significant public interest standards have been applied along the way, such accommodations have been implemented through a pattern that does not significantly impede the central and defining feature of US media policy.[5] Notwithstanding brief periods of exception, the US telephone industry grew up as a system nurtured by the core belief that the system would run better – more efficiently and effectively – if it were privately owned and operated. Likewise, despite resistance, radio and television broadcasting emerged in the United States as a system designed to serve the public interest in such a way as to impose minimal interference upon the editorial control of the private owner/publisher/broadcaster.

Arguably, from the start, broadcasting and telephony in the United States had the relationship to government that would aptly illustrate the principles of the twentieth-century welfare state within the means of communication. As two prominent theorists of the welfare state have observed, the primary historical role of the state in such regimes has not been to impede capital accumulation, but rather to facilitate its smooth flow, while at the same time lending legitimacy to the process by extracting a modicum of concessions in the name (if not the fulfillment) of the public interest. According to Jürgen Habermas, one of the key imperatives for legitimating advanced capitalist institutions is through their depoliticization, which is accomplished by attempting to establish their "naturalness" (Habermas 1989, 37). Likewise, Claus Offe notes the necessity for the state to intervene on behalf of capital, while simultaneously needing to conceal and deny the fact that it is doing so (Offe 1975, 144). As Offe has observed, the welfare state historically has not only played a vital role in sustaining capital accumulation, but it depends for its legitimacy on the success of that function (Offe 1975, 144, 1984). More recently, Habermas has noted the degree to which states have been migrating away from the "welfare state constellation" and toward a "postnational constellation," in which states play markedly different roles in the fulfillment of accumulation imperatives.

The financial strength and global dominance of the US media industries would not have been possible without the historic largesse of the American taxpayer, consumer, and cable and telephone ratepayer who has involuntarily bankrolled the US media and telecommunications industries. To attribute the vast wealth of the US media industries to a historical process that did not involve myriad forms of government intervention at public expense would be absurd. The only "natural" feature of markets is that they are products of *human construction*. US media markets did not emerge spontaneously, but rather they generally have arisen through the heavy hand of a federal government that has made particular arrangements of property rights (intellectual and infrastructural) its foremost concern. There are many individuals and organizations who have forcefully asserted the primacy of property rights in digital media policy, among them the visionaries who crafted a "Magna Carta for the Knowledge Age," which states:

> Defining property rights in cyberspace is perhaps the single most urgent and important task for government information policy. Doing so will be a complex task, and each key area – the electromagnetic spectrum, intellectual property, cyberspace itself (including the right to privacy) – involves unique challenges. The important points here are:
>
> - First, this is a "central" task of government. A Third Wave government will understand the importance and urgency of this undertaking and begin seriously to address it; to fail to do so is to perpetuate the politics and policy of the Second Wave.
> - Secondly, the key principle of ownership by the people – private ownership – should govern every deliberation. Government does not own cyberspace, the people do.
> - Thirdly, clarity is essential. Ambiguous property rights are an invitation to litigation, channeling energy into courtrooms that serve no customers and create no wealth. From patent and copyright systems for software, to challenges over the ownership and use of spectrum, the present system is failing in this simple regard. (Dyson et al. 1994)

This "Magna Carta," with its emphasis on the private property of "the people," is featured prominently among the "Classic Publications" of the Progress and Freedom Foundation (PFF), a Washington, DC-based "market-oriented think tank that studies the digital revolution and its implications for public policy" (Progress and Freedom Foundation 2010). The PFF counts among its powerful "supporters" the leading media and entertainment conglomerates, telephone companies, digital equipment manufacturers, Internet Service Providers, and industry lobbies of the United States, including Apple, Disney, AT&T, Clear Channel, Comcast, the National Cable and Telecommunications Association, Time Warner, Sprint, T-Mobile, Verizon, EMI Group, Sony Music Entertainment, NBC Universal, and News Corp. The PFF regularly supplies testimony to receptive Congressional committees and the Federal Communications Commission. Its understanding of who "the people" are is, not surprisingly, large corporations. By the force of its principles and the vast wealth of its clients, the rights-bearer who matters to the Progress and Freedom Foundation is the *corporate person* who, by some lights, is a legal fiction who only enjoys provisional status, but who, by a much wider consensus, is the only citizen who consistently matters in the world of US communication policy.

Tom Streeter aptly characterizes the history of the regulation of commercial broadcasting in the United States as a ritual through which market behavior is made to seem as though it were devoid of the artifices of government regulation that in fact make it possible: "The problem with the claim that commercial broadcasting in the United States operates according to the dictates of the natural marketplace, then, is not that there is no marketplace but that the marketplaces that do exist are neither natural nor apolitical" (Streeter 1996, 203). In essence, Streeter's analysis demonstrates how the property relations that define the profitable realities of commercial broadcasting in the United States are themselves the products of government intervention, not spontaneous and uncontrolled markets. Consistent with Offe's observations about the need for states to conceal and deny playing the role of being preoccupied with the health of capital, the federal government and the media must work closely together as coauthors of the fiction of media markets and property relations as constitutive elements of a natural environment. A more accurate term for the "invisible hand" that governs media markets in the United States would perhaps be the "well-hidden hand."

Two paths in US public interest reasoning

Prior to the advent and wide diffusion of wireless telecommunications, the "landline" telephone system and cable television were the two primary infrastructures serving US residences. However, historically they were viewed quite distinctly according to the law. The telephone system was defined by the Federal Communications Act of 1934 as a "common carrier":

> The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Among the principal defining characteristics that defined a telephone common carrier for many decades was that there was only one company operating in a given geographic area, and thus it held a monopoly for that area. Consumers had no option to decide among competing service providers. Secondly, in the era when AT&T was the dominant carrier nationwide, it controlled service from end to end. AT&T not only controlled transmission services, it also controlled equipment, so that not long before the breakup of the company (in 1982), AT&T could prevent any other equipment manufacturer from attaching its products to

AT&T lines, and it long succeeded in preventing interconnection from companies wanting to sell long-distance services to its customers.[6] Thirdly, as a monopoly that controlled most of the business and residential service in the country, AT&T was able to average its high and low costs of providing service (between business and residential customers, urban and rural customers, and local and long-distance service users). In other words, through a complex system of cross-subsidization, costs were averaged, and therefore rates were not necessarily accurate reflections of the cost of providing service to particular individuals or groups. Such were the advantages and disadvantages of doing business with a national monopoly.

Based on the Congressional definition of a common carrier, telephone companies were obligated to do business with any company or individual who was willing to pay for service. In principle, the phone company could not discriminate between customers on the basis of price or quality of service. As a monopoly, the primary protections for price and quality that were afforded consumers were provided through regulation. But over a period of many years, starting with the antitrust case filed against AT&T's equipment manufacturing subsidiary, Western Electric, the problem of distinguishing "data processing" and regulated telephone service became a central issue. In the case of US v. Western Electric, AT&T was required to restrict its business operations to the regulated telephone business and prohibited from engaging in "data processing."

Predictably, over time, the 1956 distinction between data processing and telecommunications service became less sustainable, despite the FCC's 1972 attempt to clarify and reinforce it in a "computer inquiry." As data processing became increasingly integral to the provision of even basic telecommunications services, the FCC was forced to reconsider its rules, and in 1980 it launched a second inquiry, this time in response to AT&T's attempt to market computer communications equipment and service. Opponents argued that AT&T should sell a data communications terminal through a separate, unregulated subsidiary, rather than through its regulated services. The chief concern was that AT&T had an unfair advantage over other competitors in computer communications, because AT&T would be able to use the guaranteed stream of its rate-regulated telephone service revenues to cross-subsidize the computer communication venture. As a result, the FCC drew a distinction between "basic" and "enhanced" services, the former being defined as rate-regulated (tariffed) monopoly services that were the historical bread-and-butter of the telephone system, and the latter being unregulated, competitive services. To the extent that data processing services were essential for providing its "basic" transmission services under monopoly conditions, AT&T could use them. But "enhanced" services had to be "unbundled," and marketed separately, the idea being that these services would be in competition with other companies who should not be unfairly disadvantaged by not having access to the "deep pockets" of a monopolist parent company. The hard-line divisions between basic and enhanced services were referred to as "structural safeguards," aimed at ensuring that no illegal cross-subsidization would occur between monopoly services and competitive services.

In the meantime, another major antitrust case against AT&T had been mounted, this time resulting in the divestiture of all of the regional Bell Operating Companies (BOCs), of which there were seven at the time; AT&T kept its long-distance, manufacturing, and R&D companies. Among the key restrictions of the decision (referred to as the "Modified Final Judgment," or MFJ) that were applied to the BOCs was that they initially were prohibited from entering a variety of lines of business. Essentially, the federal district court that decided the case applied the "basic" and "enhanced" distinction from the second computer inquiry, thereby requiring that the regional companies establish separate, unsubsidized subsidiaries if they wished to enter into competitive (unregulated) enhanced service markets. Under the terms of the MFJ, both AT&T and the BOCs were prohibited from engaging in "electronic publishing," which it defined as "the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in which he has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means." Although this definition does not refer to specific types of services, elsewhere the court indicated its intention to keep the phone companies from providing cable television service as well. Not surprisingly, newspaper lobbyists at the time were fearful that their local advertising revenues would be siphoned by online directories ("electronic yellow pages") that could incorporate advertising. Anticipating the possible movement by phone companies into broadband markets, the cable industry lobbied against this as well.

While the breakup of AT&T was underway, the FCC continued to struggle with how to distinguish between regulated common carrier ("basic") services and unregulated competitive ("enhanced") services, and in 1986 announced its third computer inquiry. This inquiry, like the MFJ, addressed many important issues, perhaps the most important of which were the claims made by AT&T and the BOCs that they could not effectively compete in enhanced service businesses because of the hard-line distinction ("structural safeguards") they were forced to observe between basic and enhanced services. Sympathetic toward this complaint, the FCC decided to take a new approach by eliminating the separate subsidiary requirement and replacing it with "nonstructural safeguards," which meant that AT&T and the BOCs had to maintain public accounting records that made it clear that no cross-subsidization was taking place between basic and enhanced services. Along with this provision, the FCC also stated its support of "open network architecture," designed to enable and facilitate an "à la carte" concept of national telecommunications system development. The FCC also imposed on the common carriers that they offer "comparably efficient interconnection" to any competitor who wanted to offer enhanced services on the system, regardless of whether such services were in direct competition with enhanced service offerings from the phone company. A clear concern raised by this decision was that, in the absence of structural separations, ratepayers of regulated services would involuntarily be subsidizing BOC entry into competitive, enhanced service business ventures. Another concern was that, despite the language and expectations of "comparably efficient interconnection," the BOCs would discriminate against enhanced service competitors on their systems, providing them with a quality of service that would be inferior to what they would provide in delivering their own enhanced services. Not long afterwards, in 1991, Harold Greene, the District Court judge who presided over the breakup of AT&T, lifted the ban prohibiting BOCs from offering electronic information services. Soon after, a federal appeals court granted BOCs permission to offer information services, a decision that was later upheld by the Supreme Court. Since that time, BOCs have entered into new ventures involving partnerships with other information providers, including cable television service.

When Congress passed the Telecommunications Act of 1996, much of the patchwork of FCC and court decision making was streamlined and consolidated, with the aim of promoting competition in the provision of basic telephone service as well as a variety of "enhanced" information services, including cable television. Unlike basic telephone service, cable television service has not been regulated as a common carrier. From its humble origins as a means for retransmitting broadcast signals, cable service has moved in a much different direction than telephony in regulatory terms. In a sense, cable became an unlikely stepchild of broadcasting, which was established when the Supreme Court declared that the FCC's jurisdiction over cable was justified as an extension of cable's relationship to broadcasting. In the 1968 case of US vs. Southwestern Cable, the Court reasoned that, because cable companies carry broadcast signals, the FCC's authority over cable was "reasonably ancillary" to its authority over broadcasting. Although it would be inaccurate to say that cable has been regulated as a broadcaster, the relationship between the two industries helps explain why the cable industry has succeeded in avoiding being regulated as a common carrier. To begin, it is helpful to note how "broadcasting" has been defined by statute. According to the Federal Communications Act of 1934, as amended, "broadcasting" is defined as follows: "The term 'broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." And the term "radio communication" is defined in the 1934 Act as follows: "The term 'radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Although the television industry came later, this definition has been applied not only to radio, but also to television broadcasting.

Importantly, despite efforts in the early days of radio to make broadcasting a common carrier service "for hire," this did not happen. Instead, the broadcaster was treated as a publisher, and not just a carrier. In comparing the two models – common carriers and commercial broadcasters – the former historically has had no control over the content it delivers, whereas the latter has had nearly complete control, notwithstanding some minor public service obligations. The last truly significant attempt to extract common carrier obligations from a broadcaster came in 1973, when the Supreme Court stated unequivocally (in the case of Columbia Broadcasting System, Inc. v. Democratic National Committee) that no group has the right to demand access to airtime. By most accounts, the high-water mark of public service obligations receded at the time in which the Reagan FCC reviewed its "Fairness Doctrine" rules and determined that they were not only unnecessary (because of the emergence of new means of communication, e.g., cable and direct broadcast satellites), but that they had a "chilling effect" on the speech of broadcasters.[7]

As these decisions have illustrated, the model of broadcasting in the United States has treated station operators not simply as carriers of the messages of others, but as publisher/author/speakers in their own right. Curiously, cable system operators have managed to enjoy a similar sort of treatment. In US cable history, attempts were also made to impose public service obligations that tested where cable stood with respect to the boundaries between broadcasters and common carriers. In 1972, a case decided by the Supreme Court (United States vs. Midwest Video Corp) expanded FCC jurisdiction over cable by enabling it to require cable system operators to originate local programming, consistent with local programming obligations imposed on broadcasters. Then, in 1979, the FCC pushed further toward common carriage by creating rules requiring cable companies to carry channels for public, educational, governmental (PEG) and leased commercial access. With respect to this requirement, the Supreme Court determined that the FCC was now trying to regulate cable as a common carrier, and that it was violating the statutory distinction between broadcasters (to which cable was seen as somehow joined) and common carriers. Although the Court did not allow the FCC to impose these access requirements, in 1984 Congress passed legislation (the Cable Communications Act) that, while not imposing such requirements, did authorize cities to extract such obligations of cable companies in fulfillment of their municipal franchise agreements.

This obligation remains a matter of agreement between cable companies and municipalities. But a new twist has come about in recent years, as the cable industry has moved into the business of providing Internet service. Once again, the waters have been tested to see if cable companies should be required to act as a common carrier and provide access to their wires by third-party Internet Service Providers (ISPs). In the case of National Cable & Telecommunications Association v. Brand X, the Supreme Court upheld the FCC determination that it is the right of a cable company to *not* provide broadband cable modem connections for third parties. The reasoning of the Court was that ISPs are offering "information service," which is not subject to common carrier regulations, unlike "telecommunications services."[8]

Since Brand X did not own its own infrastructure ("telecommunications service"), and since cable companies had already established their free speech rights to determine what content is purveyed on their systems, Brand X was not seen as having any justified claim to access on the cable operator's infrastructure. Cable's history of being "reasonably ancillary" to broadcasting came in handy once again, as the industry has established that cable operators can be the exclusive providers of Internet service on their own wires. This case followed on the heels of a 2002 declaratory ruling by the FCC, stating that cable modem service is an "information service," not a "telecommunications service." To be a provider of the former, one acts in essence as a broadcaster does, the role of content provider being of the foremost significance, whereas to be a provider simply of the latter, one acts in essence as a common carrier. Never wanting to be cast as the latter, despite being the operator of an infrastructure bearing some resemblance to a telephone system (wires to residences, relying on the use of a city's "rights of way," etc.), the cable industry association successfully tipped the emphasis on the importance of "information" in its cable modem service.

The case was a watershed, and one that has been seen as having dealt a serious blow to public interest groups wanting to secure Internet access to the nation's telecommunications infrastructure. Writing an amicus brief when the case was before the Appeals Court, the American Civil Liberties Union argued:

> Without regulations treating cable modem service as a common carrier telecommunications service, cable companies can leverage ownership of the physical infrastructure into control of citizens' access to and use of the Internet. … This threatens free speech and privacy. A cable company that has complete control over its customers' access to the Internet could censor their ability to speak, block their access to disfavored information services, monitor their online activity, and subtly manipulate the information services they rely on. Customers may have no choice but to submit to this surveillance. (Brief Amicus Curiae 2005)

This is the essence of concern today about what role the local telecommunications monopolies – cable and telephone – are able to play with respect to citizens and the conditions under which the latter are able to participate in the public sphere. Because cable companies are private entities, their ability to censor is not a matter of First Amendment concern. And if telephone companies manage to secure a comparable degree of control over the use of the Internet over their wires, they would appear poised to enjoy similar powers of "market censorship." Furthermore, given their concentrated power, telecommunications companies can serve as convenient "one-stop-shopping" outlets for the National Security Agency's fishing expeditions in surveillance of US citizens (Cauley and Diamond 2006). While these two problems – market censorship and surveillance – are not directly connected, both stem from the concentration of market power that telecommunications companies have been granted by the federal government. The illusion that both the government and the telecommunications companies aim to perpetuate is that this concentration of power is somehow the result of the vicissitudes of a healthy marketplace, rather than one of corporate welfare.

Corporate welfare and the corporate legal person

At the federal level, little momentum has ever been sustained around the idea of government ownership, or even of substantial direct government financing, of the means of electronic communication. That is not to deny the substantial indirect forms of government financing, which exist to this day, and which today are properly understood as "corporate welfare." Most notable in recent years was the spectrum giveaway to broadcasters that resulted from the Telecommunications Act of 1996, which had an estimated value of $70 billion (Nader 2000, Aufderheide 1999, 63–4). Ironically, the idea and reality of the welfare state has been anathema to the postdepression values of government that prevailed in the United States since the era of the Johnson administration's "Great Society" programs. Perhaps more accurately, it would be Richard Nixon, a Republican who called himself a Keynesian in 1971 when he introduced wage and price controls and a budget of deficit spending aimed at "full employment," who presided over "the last liberal administration" (Yergin and Stanislaw 2002, 42–6). But it was William Jefferson Clinton who presided over the first fully fledged neoliberal administration, and it was Clinton who most effectively led the charge to "end welfare as we know it," demonstrating just how reversible welfare rights were (Turner 1992)[9] by introducing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, a moralistic policy that made good on the rhetorical assault Ronald Reagan launched on "welfare queens," the mythical black urban women on welfare driving around town in pink Cadillacs. The Welfare Reform Act of 1996, as it is more commonly known, had as its highest profile symbolic target the dismantling of a program called "Aid to Families with Dependent Children" (AFDC). AFDC's undoing was a moral victory for those who adhere to the "welfare-as-semen theory," as Barbara Ehrenreich refers to the belief that making public money available for single mothers encourages unmarried women to have children. But more significantly, Ehrenreich detailed how the efforts to end "welfare as we know it" produced a new clientele on the dole: corporate welfare scam artists who became the targets of federal spending for privatized social services (Ehrenreich 1997, Brodkin 1995). The era of Clinton's assault on welfare was a significant one, as it was a phase in the "creative destruction" of an old economy – the welfare state – which was followed by initiatives to foster a new one: the information society (Calabrese 1997).

For a brief time after Clinton's welfare legislation was passed, corporate welfare became the focus of public outrage, and even dominant media outlets found the topic difficult to ignore. In 1998, *Time* magazine did a cover story on the topic, following an 18-month investigation that revealed "how hundreds of companies get on the dole – and why it costs every working American the equivalent of two weeks' pay every year" (Barlett and Steele 1998). The Cato Institute, the Washington, DC-based libertarian think tank, is a harsh critic of federal corporate welfare programs. According to the 2005 edition of the *Cato Handbook for Congress*, in 2002, "the federal government spent about $93 billion on programs that subsidize businesses" (Crane and Boaz 2005, 337). The *Cato Handbook* defines "corporate welfare" as: "government programs that provide unique benefits or advantages to specific companies or industries" (Crane and Boaz 2005, 338). In Ralph Nader's treatment of the subject, corporate welfare comes in many forms, including giveaways, as in the case of the 1996 spectrum bonanza for broadcasters, research and development, bailouts, tax expenditures ("special exclusions, exemptions, deductions, credits, deferrals, or tax rates"), government-sponsored enterprises, and export and overseas marketing assistance (Nader 2000). Cato adds to these:

> Many corporate welfare programs provide useful services to private industry, such as insurance, statistics, research, loans, and marketing support. Those are all functions that many industries in the private sector do for themselves. If the commercial activities of government are useful and efficient, then private markets should be able to support them without subsidies.
>
> In addition to spending programs, corporate welfare includes barriers to trade that attempt to protect U.S. industries from foreign competition at the expense of U.S. consumers and U.S. companies that use foreign products. Corporate welfare also includes domestic legal barriers that favor particular companies with monopoly power over free-market competitors. Corporate welfare sometimes supports companies that are already highly profitable. Such companies clearly do not need any extra help from taxpayers. In other situations, corporate welfare programs prop up businesses that are failing in the marketplace. Such companies should be allowed to fail because they weigh down the economy and reduce overall U.S. income levels. (Crane & Boaz 2005, 337)

In the case of the US telecommunications industry, the means through which corporate welfare has been enjoyed have been myriad, not least of which has been through the historical cultivation of the status of "natural monopoly." Telephone and cable companies have had a strong incentive to appeal to governments to grant them "natural monopoly" franchises, as success in gaining such status provides legitimacy in the face of what would otherwise be considered anticompetitive behavior. Thomas DiLorenzo cites a study that "found no significant differences in prices and profits of utilities with and without regulatory commissions from 1917 to 1932," and notes how in that case, "rate regulators did *not* benefit the consumer, but were rather 'captured' by the industry, as happened in so many other industries, from trucking to airlines to cable television" (DiLorenzo 1996, 50). DiLorenzo also notes that when AT&T's initial patents expired in 1893, many new independent phone companies sprouted up. In 1894, independents had 5 percent of market share, but by 1907, "AT&T's competitors had captured 51 percent of the telephone market." The competition helped to significantly drive down prices. "Moreover, there was no evidence of economies of scale, and entry barriers were obviously almost nonexistent, contrary to the standard account of the theory of natural monopoly as applied to the telephone industry" (DiLorenzo 1996, 50). In looking more specifically at the cable industry, Thomas Hazlett has argued that the federally authorized local franchising process is not justified on the basis of cable service being a "natural monopoly." Instead, potential competitive entrants have been disadvantaged by cozy relationships established by incumbents who pay monopoly rents to municipal officials in exchange for what in essence is protection from competition, creating market conditions that "prove hostile to competition and to consumer interests" (Hazlett 1990, 66).

The benefits of corporate welfare have been the foundation of the market power of the corporate persons/cable monopolies. The legal convention of the corporate person was invented in order to reinterpret and extend to private corporations the rights that previously had been available only to individuals. The paradox of this entity is, on the one hand, the great importance that is attached to the enjoyment of citizenship rights by corporations, while on the other hand, the degree to which powerful corporations are adamant and effective in resisting the elaboration of formal codes of civic obligation. In other words, and not surprisingly, corporations have been effective in claiming the rights of citizenship, while avoiding the responsibilities – not at all in keeping with the spirit of civic republicanism that today's communitarians are so quick to ask of the weakest citizens of society. As legal scholar Samuel Walker notes of communitarians, "Even to mention some restrictions on big business would expose them to attacks as 'radicals' and frighten off much of their present membership" (Walker 1998, 168). Moreover, he notes, "Communitarian spokespersons have a bad tendency to avoid any direct challenge to powerful economic interests and instead attack the far less powerful groups" (Walker 1998, 178).

As we can see in the case of global trade and investment policy, although efforts have been underway for decades to establish a dialogue about, if not the realization of, corporate obligations, these have been effectively avoided. But the vigor, speed, precision, and effectiveness with which transnational corporate rights have been formally articulated and legally enforced has been uncanny. Adding further complexity and contradiction to this situation are the substantial and ongoing government expenditures that go not only into the processes of articulating and enforcing corporate rights of property and contract, but also into direct and indirect financial subsidies of corporate activity. More commonly known as "corporate welfare," such subsidies are where neoliberal and communitarian forces show similarly conspicuous blindness. While, for different sets of reasons – mainly economic and moral – neoliberals and communitarians argue that citizenship should not be a pork barrel project, both groups tend to be silent when corporate citizens belly up to the public trough. This is no novelty in American telecommunications policy.

The corporate person has individual rights of free expression. But as Holmes and Sunstein (1999) demonstrate, no rights are free, and it is at citizens' expense that corporate free speech is protected. If government largesse provides the economic basis upon which a corporation speaks, is not the resulting expression a form of state action? This view accurately punctures a vital foundation upon which liberal speech rights rest. Given the amount of taxpayer expense that is dedicated to keeping corporate free speech rights afloat, it makes perfect sense to place obligations upon those corporations. A familiar view among communitarians is that rights must be accompanied by responsibilities (e.g., Etzioni, 1995). The implications of formalizing corporate free speech rights especially are that there are associated corporate responsibilities. It was not always the case that the rights of the corporate person prevailed in American jurisprudence. Rather, it was an invention whose origins date back to the late nineteenth century, when the Supreme Court determined (in an 1886 judgment in Santa Clara v. Southern Pacific Railway) that, under the Fourteenth Amendment, corporate property could not be taxed differently than the property of individuals. Today, as one legal theorist has noted, "The protests of modern legists notwithstanding, the business corporation has become the quintessential economic man" (Mark 1987, 483). That being the case, and having assigned "economic man" the role of "person" and, indeed, of "citizen," it stands to reason that the standards of good citizenship must be defined and sustained. As another writes, "Corporate persons, like natural persons who fail to live up to society's expectations, might be coerced into doing the right thing" (Millon 2001, 51).

"Convergence" ends the need for the liberal policy fiction of public and private

In 1923, in a moment of frustration about being pushed out of radio broadcasting, an AT&T executive made the following prescient statement:

> We have been very careful, up to the present time [1923], not to state to the public in any way, through the press or in any of our talks, the idea that the Bell System desires to monopolize broadcasting; but the fact remains that it is a telephone job, that we are telephone people, that we can do it better than anybody else, and it seems to me that the clear, logical conclusion that must be reached is that, sooner or later, in one form or another, we have got to do the job. (Danielian 1939, 123–4)

Out of the ashes, the phoenix of AT&T, and the entire telephone industry, stands poised to alter the terrain of mass communication in the United States in unprecedented ways, and perhaps, by its model and by its market power, in much of the rest of the world. It is commonplace to celebrate or lament the dislodging of corporations from the moorings of the nation state, especially in discourses about global communication (Calabrese 1999). But lest they stand nakedly accused of escaping the accountability to the states and citizens from whom they profit, global corporations have taken on the mantle of the "global corporate citizen" (Sklair 2001, 149–97). In the case of telecommunications, transnational operations date back to the late nineteenth century telegraph cables that connected countries across borders and oceans. In the 1990s, following the breakup of AT&T, there was rapid acceleration of foreign direct investments by US telecommunications companies, particularly in wireless telephony and cable television service (Calabrese 1995). Today, with more relaxed ownership policies than ever, privatized national firms have joined forces with US companies to create behemoths of global telecommunications infrastructures.

The US model of telecommunications policy is one of powerful corporations that accumulated their massive wealth not through competition but through cozy deals as "protected" (read "regulated") monopolies, whose profits were assured and whose exposure to competition was kept to a minimum. Protection of an industry is not an intrinsic evil, especially in exchange for public service obligations. But now the deep pockets of ostensibly private telephone and cable monopolies are being deployed increasingly to control the flow of news and entertainment, working as they are to define their rights to purvey content on infrastructures that were unwittingly financed by the public. Cable and telephone monopolies gained their wealth the old-fashioned way: through deals that had more to do with seeking protection from competition than with embracing it. Although the history of telecommunications infrastructure development is indelibly marked by corporate welfare, the sleight-of-hand rhetoric about bootstrap entrepreneurship that has gotten the telephone and cable companies to their present positions of market dominance has been accompanied by policy neglect toward their public service obligations, including shouldering the financial burdens of sustaining a healthy public service communication environment.

It is too soon to tell in what direction the winds will blow in the United States with respect to the future relationship between telecommunications services and information services, as we are in the midst of a major re-examination and redefinition of this arena. However, among the basic principles that should be most dear to sustaining the spirit of public service obligation are that networks not be permitted to prevent access to any legal content, that they not be permitted to favor their own services over those of competitors (either in terms of price or quality of service offered), and that they share significantly in bearing the cost of the reinvention of public service media for the digital age, whether it be through universal service funding, cofinancing of municipal broadband services, or other means as yet unforeseen (Boucher 2006).[10] The bottom line should be a sustained resolve by policy makers to not forget that the success and concentrated market power of the US telecommunications industry was extracted from the hide of the American public, courtesy of the US government, and that the public is owed much in return.

Conclusions

It is premature, and perhaps much too optimistic, to predict that the crisis of neoliberal economics will generate new strength and resolve to bring the state back into a more visible and active role in raising the moral standard applied to the regulation of markets, or that states will make a long-term commitment to social provision as a bulwark against the reality and potential for profound market corruption and failure in the future. And it is equally premature to assume that the many problems associated with the lack of accountability measures in transnational trade and investment will be resolved because of recently renewed interest by the United States government in participating in multilateral governance agreements and enforcement procedures. But there is at least reason to be hopeful that such measures will become more commonplace, and more effectively enforced, as leaders of powerful states slowly recognize the degree to which "enlightened self-interest" is at stake. The public–private dichotomy has considerable value as a heuristic for guiding policy making that is designed to prevent private wealth from controlling public communication. That policy practice fails in so many ways to live up to the promise of liberal theory is commonplace. That it is so frequently allowed to do so in the absence of adequate oversight or safeguards to prevent it is criminal. In the case of telecommunications policy, the stakes include systemic harm to the quality of public communication, the public sphere, and the public itself.

Notes

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1 The full statement made by Thatcher in a London speech at a 1985 meeting of the American Bar Association was "[Democratic nations] must try to find ways to starve the terrorist and the hijacker of the oxygen of publicity on which they depend" (Thatcher 1985).

2 Both Powell and Cisco also agree that while regulation is unnecessary, network providers should work towards supporting network neutrality practices.

3 Specifically related to former executive branch employees, such as FCC employees, who seek industry and lobbying positions after they leave their government post, the OGE states, "If the matter was under the employee's official responsibility … then the employee is barred for two years after leaving Government service from representing anyone back to the Government in the same manner." United States Office of Government Ethics, Common Ethics Issues: Post-Employment, 18 U.S.C. § 207; 5 C.F.R. parts 2637 and 2641, available at http://www.usoge.gov/common_ethics_issues/post_employment.aspx

4 For information on the Bipartisan Campaign Reform Act of 2002, see Federal Election Commission, "Bipartisan Campaign Reform Act of 2002," http://www.fec.gov/pages/bcra/bcra_update.shtml.

5 For the sake of convenience, we use the term "media" in this paper to refer to all technological forms of mediated communication, both in terms of "content" and "structure." We are referring to the print media of newspapers and magazines, radio and television broadcasting, cable television, satellite communication, telephony, and Internet communication. We realize that the term media does not always get used in this expansive way, so we beg the reader's forbearance regarding our choice of a convenient umbrella term.

6 The policies for loosening end-to-end control began decades earlier, beginning with a 1956 federal court decision to allow there to be "foreign attachments" (hardware not manufactured by AT&T) to the Bell system. Also, in 1971, the FCC decided to allow "specialized common carriers" to market telecommunication services requiring interconnection to the AT&T system. Nevertheless, it was not until the 1982 breakup of AT&T that such piecemeal decisions were consolidated into a more coherent policy.

7 Meredith Corp. v. FCC (D.C. Cir, 1987): re: Syracuse Peace Council, Memorandum Opinion and Order (2 FCC Rcd. 5042, August 6, 1987): The circuit court mandated that the Commission consider the constitutionality of the Fairness Doctrine. The court found that the FCC, based on the evidence in the case, properly recognized that the television station, WTVH-Syracuse, had failed to meet its fairness requirement. However, the court sent the case back to the FCC (remanded it) because it wanted the FCC to consider the constitutionality of the Fairness Doctrine. The FCC drew the conclusion that the Fairness Doctrine unduly restrained the free speech rights of broadcasters.

8 According to the United States Code, "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used" (47 U.S.C. Sec. 153(46)). Also, according to the US Code, "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service"(U.S.C. Sec. 153(20)).

9 As Bryan Turner aptly notes, "welfare-state rights are clearly reversible and [should] not be taken for granted" (1992, 37).

10 Some of this thinking is inspired in part by Virginia Democratic Congressman Rick Boucher.

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