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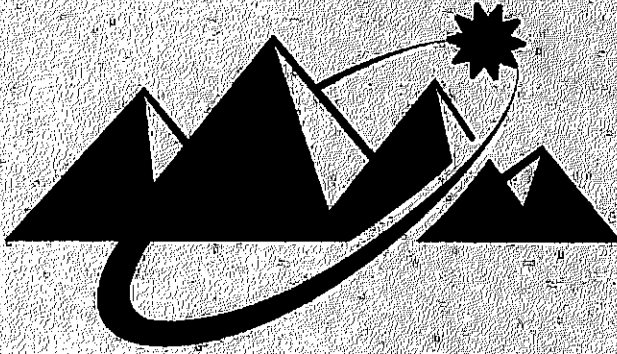
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The Next Wave of Innovation

The 7th Anniversary Silicon Flatirons Telecommunications Program Symposium  
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# RACE.NET NEUTRALITY

JERRY KANG\*

## INTRODUCTION

The “net neutrality” debate is undergoing a theoretical transition. Since the late 1990s, we have moved from “open access,” to “end to end,” to “net neutrality,” and by 2007, the question seems to have transformed into “anti-discrimination.”<sup>1</sup> To the extent that net *discrimination* frames the question, our history and experience with *race* discrimination should be cognitively salient. Although patently different subjects, these two forms of discrimination share some similarities.<sup>2</sup> After all, during much of this nation’s history, individuals were officially provided differential carriage (e.g., on segregated railcars),<sup>3</sup> access (e.g., to education),<sup>4</sup> and interconnection on the basis of race (e.g., to marriage).<sup>5</sup>

Although legal commentators have spotted such similarities, they have never been thoroughly explored.<sup>6</sup> This essay begins that study, with

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\* Professor of Law, UCLA School of Law. Thanks to Oscar Gandy, Douglas Lichtman, and Tim Wu for helpful comments on previous drafts. Thanks also to the Hugh & Hazel Darling Law Library at UCLA School of Law and Nathaniel Ross, who provided helpful research assistance.

1. See Tim Wu, *Why Have a Telecommunications Law?: Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15 (2006); see also Lawrence Lessig, *Re-Marking the Progress in Frischmann*, 89 MINN. L. REV. 1031, 1042 (2005) (“The aim of those pursuing network neutrality, however, is not some imagined neutrality, but rather the elimination of certain kinds of discrimination (just as most policies favoring equality focus on rules against certain forms of discrimination).”).

2. See, e.g., Wu, *supra* note 1, at 38-39 (“As discussed above, common carriage law was traditionally occupied with the distinction between ‘public’ business, and the rest, which were presumably ‘private.’ The same distinction is central to the anti-discrimination regime surrounding public accommodations in the United States. As the example[] goes, if you operate a restaurant, you must serve customers of all races but you have no duty to invite the man on the street to a dinner party at your house.”); Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 25 (2005) (critiquing baseline assumption of IP as “neutral” and situating it in the “broader debates about [equality] jurisprudence”).

3. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *abrogated by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

4. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

5. *Loving v. Virginia*, 388 U.S. 1 (1967).

6. Tim Wu has done the most to further this way of thinking. See, e.g., Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 150 (2003) (pointing out the value of the analogy as clarifying the distinction between

the goal of gleaning lessons for telecommunications policy.<sup>7</sup> Because the domains of discrimination differ radically, one expects little payoff from the comparison and contrast. I promise a modest surprise. More specifically, a comparison and contrast between race discrimination and net discrimination teaches us, first, to particularize the discrimination at issue and be wary of what I call normative carve-outs in defining discrimination. Second, the comparison sensitizes us to the clash between welfarist and deontological concerns that have not been adequately distinguished within the net neutrality debate. Third, it urges us to be cautious about facile assurances that individual, firm, or market rationality will ensure the public interest.

### I. DEFINITIONS AND NORMATIVE CARVE-OUTS

In order to discuss any sort of discrimination usefully, we must first define it. Let's start with a simple, narrow, and abstract definition: discrimination is the differential treatment of some entity X, based on that entity's supposed or actual attribute Y.

In the race context, X is typically a human being and Y is that person's race. Immediately, various complications arise. For example, with regards to X, we sometimes are concerned with *groups* of human beings or *entities* that are themselves not human (e.g. a church), but are nonetheless associated with racialized human beings (e.g., a predominantly Korean immigrant congregation). With regards to Y, complications include the fact that "race" is often used as a placeholder for related attributes, such as national origin, ethnicity, or color. Indeed, race itself has no uncontroversial definition from, say, scientific or medical practice. Instead, as the saying goes, race is a social construction, by which I mean to emphasize that the various racial categories and the rules by which we map human bodies into those categories have been created by society, as a function of history, culture, politics, and ideology.<sup>8</sup>

When I say that X (a human being) is treated differently "based on" some attribute Y (race), I mean that race is a "but for" cause of the differential treatment. In social cognition terms, the racial attribute triggers stereotypes and attitudes associated with that racial category, which alter interpersonal interactions and evaluations of the individual

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"justified and suspect bases of discrimination").

7. For an inquiry in the other direction — trying to glean lessons for race policy from telecommunications — see Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259 (2004). Lee's focus is not on the network neutrality debate, but he draws insights from network economics to parse race relations.

8. For a fuller discussion of this racial mechanics model, see Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131, 1138-47 (2000) [hereinafter Kang, *Cyber-Race*].

mapped to that category.<sup>9</sup> Examples of traditional race discrimination are well-known. Recall the examples of *Plessy*, *Brown*, and *Loving*.<sup>10</sup> Some modern cases are more subtle or contested. For example, White students sometimes complain that affirmative action makes them the new victims of discrimination. This is Grutter's lament.<sup>11</sup>

In the net context, X can be data (e.g., packet or stream), application service, hardware (e.g., consumer premises equipment), or some transport infrastructure.<sup>12</sup> Y can be any attribute associated with these entities, such as semantic content, digital rights management status, identities of communicating parties, type of application service, hardware manufacturer, and so on. Examples of network discrimination are also well known. One reason why AT&T was divested in the 1980s was that it provided discriminatory interconnection between its local exchanges and competing long distance providers, such as MCI.<sup>13</sup> There are more modern examples. For example, the Federal Communications Commission fined Madison River, a telco broadband provider, \$15,000 for blocking ports necessary to use Voice over Internet Protocol ("VoIP").<sup>14</sup> Just recently, AT&T announced that it will scan for and not transport any content that it deems to violate intellectual property laws.<sup>15</sup>

Notice that race discrimination and net discrimination, as I have used these terms, differ in their level of generality. When discussing race discrimination, we have been talking about the differential treatment of individuals based on a single attribute: race. We have ignored other attributes, such as gender, looks, intelligence, lineage, and so on. By contrast, in our definition of net discrimination, we selected neither a single X (entity) nor a single Y (attribute). In other words, net discrimination has not been particularized. At one extreme, it might raise a troubling question of viewpoint discrimination against unpopular content (e.g., a broadband provider blocking access to Arabic sites that stream videos of American troops shot by snipers in Iraq).<sup>16</sup> At the other

9. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499-1504 (2005) [hereinafter Kang, *Trojan Horses*]; see also Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1083-85 (2006).

10. See *supra* notes 3-5.

11. Grutter v. Bollinger, 539 U.S. 306 (2003).

12. See Tim Wu, *The Broadband Debate, A User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69, 73 (2004) (referring to discrimination on the basis of "uses, users, or content" and also quoting FCC Commissioner Michael Copps as discussing anti-discrimination against "users, ideas, and technologies").

13. For a general discussion of AT&T's breakup, see JERRY KANG, COMMUNICATIONS LAW AND POLICY: CASES AND MATERIALS 535-59 (2d ed. 2005).

14. See Madison River Commc'ns, LLC, *Order*, 20 FCC Rcd. 4295, 4296-97 (2005), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-05-543A2.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf).

15. James S. Granelli, *AT&T to Target Pirated Content; It Joins Hollywood in Trying to Keep Bootleg Material Off Its Network*, L.A. TIMES, June 13, 2007, at C1.

16. Google seems to be doing precisely this on YouTube. Google has officially stated

extreme, it might refer to a mundane question of subscription status discrimination (e.g., a broadband provider not connecting a user to its wireless network because the user is not a paying subscriber). We are concerned more about the former than the latter, just as we might be more concerned about discrimination in law firm promotion based on race than on billable hours. The lesson here is to avoid confusion by specifying the X and Y in any net discrimination conversation.

What lessons can be drawn from a comparison between discrimination in both domains, race and net? First, we immediately notice how the definition of discrimination is sharply contested. In the race context, many “structuralists” would object to the narrow definition of discrimination I presented. For instance, a requirement of differential treatment of persons based on their race may not capture pure disparate impact cases. Interestingly, in the net context, various commentators have made similar structuralist arguments about the current Internet Protocol, which delivers packets on a best-efforts basis without quality of service (“QoS”) guarantees. This architecture is not neutral; instead, it discriminates against those services that require just such assurances.<sup>17</sup> Again, no differential treatment of some packet is necessary for there to be a colorable claim of “discrimination” as that word is reasonably used.

Having stated the obvious — that discrimination is hard to define<sup>18</sup> — let me focus on a single facet of this problem. In the race context, because the word “discrimination” has negative valence, there is a tendency to carve out normatively acceptable treatment from the term’s very definition. In other words, if some practice of differential treatment is “good,” then people shy away from calling it “discrimination.” Claims of normative acceptability typically point to: (i) some benign nature as gauged by purposes, effects, or social meanings; (ii) some rational cost-benefit analysis based on accurate probabilities; or (iii) some public/private distinction, in which private matters are insulated from ethical critique and legal intervention. To give examples, (i) affirmative action programs are said not to count as discrimination because of their benign nature; (ii) terrorist profiling is defended as not discrimination because of its claimed probabilistic rationality; and (iii) how we choose

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that it removed sniper videos that “display graphic depictions of violence *in addition to any war footage (U.S. or other) displayed with intent to shock or disgust, or graphic war footage with implied death* (of U.S. troops or otherwise).” Edward Wyatt, *Anti-U.S. Attack Videos Spread on Web*, N.Y. TIMES, Oct. 6, 2006 (emphasis added).

17. See Wu, *supra* note 6, at 148 (pointing out how the internet protocol “implicitly disfavors”); *id.* at 142 (making the same observation and calling it “favoritism”); Yoo, *supra* note 2, at 25 (pointing out “nonneutrality inherent in the choice of baseline principles” and referencing Herbert Wechsler’s “neutral principles” article).

18. See, e.g., Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483, 485-87 (2006) (comparing various definitions and framings of net neutrality debate).

marriage partners is suggested to be sufficiently private such that the question of discrimination is simply off point.

In the net context, we see similar attempts at normative carve-outs from the definition of “discrimination.” Interestingly, they too sound in terms of (i) benign natures, (ii) rational justifications, and (iii) public/private distinctions. Stopping spam or hacking, it is argued, should not be derogated as discrimination because of the benign purpose.<sup>19</sup> Allowing price discrimination, especially when costs are in fact different, is defended as economically rational and thus should not be stigmatized as discrimination.<sup>20</sup> Finally, private networks should be able to do what they will with their property, without any complaints of discrimination.<sup>21</sup>

In defining net discrimination, should we allow such normative carve-outs? Our experience with race discrimination analysis suggests no. Instead “discrimination” should be defined neutrally, to describe solely the behavior or act of treating differently some entity X on the basis of some attribute Y. Whether that behavior is socially, ethically, or legally warranted is a critical question, but one that should be asked subsequently.

This distinction between the *fact* of discrimination and its *value* helps clarify the analysis. First, it avoids arguments by definitional assertion. When someone responds “by definition, that’s not discrimination!” the other side is rarely persuaded since the thrust of the complaint has been side-stepped, not met head-on. Simply recall any shouting match between those who promote and those who resent race-based affirmative action, or those who promote and those who resent race-based profiling. Second, avoiding normative carve-outs allows grouping in one place all the arguments about the propriety of any discrimination. Otherwise, these considerations surface twice – initially at the definitional stage and later in considering whether some special set

19. Cf. Adam D. Thierer, “Net Neutrality”: *Digital Discrimination or Regulatory Gamesmanship in Cyberspace?*, 507 POL’Y ANALYSIS (Cato Inst., D.C.), Jan. 12, 2004, at 8-13 (identifying “Rational Reasons for Discrimination”), available at <http://www.cato.org/pubs/pas/pa507.pdf>.

20. Alfred E. Kahn, *Telecommunications: The Transition from Regulation to Antitrust*, 5 J. ON TELECOMM. & HIGH TECH. L. 159, 177-78 (2006) (“The opposition to ‘tiering’ as such – extra charges for ‘access to the express lane’ . . . is economically ignorant. The costs – both short-run (the opportunity costs of giving priority to the higher-speed uses) and long-run (the costs of the investments to provide additional broadband capacity, to relieve that congestion) – are, presumably, higher for the users requiring the ‘express lane.’ It is therefore *not discriminatory* for those costs to be levied on the services requiring their incurrence. . . .” (emphasis added)).

21. See Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMM. POL’Y 435, 452 (1994) (suggesting that network owners be forced to be either private or public, and if they choose private, to have plenary power over their private zones).

of circumstances overcomes the presumption against discrimination (e.g., to achieve a compelling interest through narrowly tailored means). The point of avoiding normative carve-outs is to promote analytical clarity, crucial to good policy analysis.<sup>22</sup>

In sum, the general point is that “discrimination” is difficult to define. Accordingly, we must always specify the particular net discrimination at issue, which specific X (the object of differential treatment) and which specific Y (the entity’s attribute) are at issue. Although obvious, this caution bears repeating, especially because strawpersons are tempting.<sup>23</sup> Finally, we should avoid normative carve-outs from the definition of discrimination, at least during the policy analysis phase. If the discrimination should be legally tolerated, indeed economically encouraged, that case should be made not at the point of threshold definition, but *later* in the analytical process.

## II. INCOMMENSURABLE HARMS

Later starts now. What’s actually wrong with discrimination? If the professional philosophers will indulge me, I suggest that the reasons against discrimination can be roughly divided into two categories: deontological and welfarist. By “deontological,” I mean reasons based on some moral duty or obligation that is not principally determined by some consequentialist calculation. These arguments tend to sound in terms of equality, justice, and fairness. By contrast, “welfarist”

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22. I recognize that in drafting legislation or regulation, clarity may not be the sole or principal purpose. That said, certain bills are drafted consistently with this analytical structure; they prohibit discrimination defined in some general manner, and later in a subsection, carve out particular discriminations that shall not be deemed as such. For example, a bill titled the “Internet Freedom and Nondiscrimination Act of 2006” reads:

(a) It shall be unlawful for any broadband network provider . . .

(c) Nothing in this section shall be construed to prevent a broadband network provider from taking reasonable and nondiscriminatory measures—

(1) to manage the functioning of its network, on a systemwide basis, provided that any such management function does not result in discrimination between content, applications, or services offered by the provider and unaffiliated provider;

(2) to give priority to emergency communications . . . .

H.R. Res. 5417, 109th Cong. §3 (2006) (proposing to insert a section into the Clayton Act on “DISCRIMINATION BY BROADBAND NETWORK PROVIDERS”); *see also* Internet Non-Discrimination Act of 2006, S. Res. 2360, 109th Cong. §4(b) (2006), which states:

(1) may—

(A) take reasonable and non-discriminatory measures to protect subscribers from adware, spyware, malware, viruses, spam, pornography, content deemed inappropriate for minors, or any other similarly nefarious application or service that harms the Internet experience of subscribers, if such subscribers . . . .

23. *See, e.g.*, Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECH. L. 329, 333-34 (2007) (noting how opponents of “net neutrality” often adopt broader definitions as strawperson).

arguments emphasize net benefits and costs as measured by some metric of social welfare. They are principally consequentialist, have philosophical affinities with utilitarianism, and tend to focus on efficiency.

In the race context, as between deontological versus welfarist arguments, the former predominate. To be sure, various arguments emphasize welfare losses and gains. For example, racial diversity in the corporate boardroom is sometimes defended as generating better firm decisions. Prominently, the Supreme Court has also found that diversity improves learning, which is praised as a compelling interest — at least in higher education.<sup>24</sup> Still, such welfarist arguments constitute merely the tail of the dog. What makes race discrimination so emotionally and politically charged is that it alleges some deontological error, a violation of some moral imperative (whether it be treating human beings as equals or remaining steadfastly colorblind in state action), not some mere spreadsheet error.

By contrast, in the net context, welfarist arguments dominate. As Wu notes, nearly all sides of the debate seem to agree that the goal of “network neutrality” policymaking is to maximize innovation, which is well understood in welfarist terms.<sup>25</sup> Understanding the Internet as an infrastructural good also emphasizes efficiency concerns.<sup>26</sup> It is this predominance of welfarist concerns that make plausible Robert Hahn and Robert Litan’s contention that although nondiscrimination has “superficial appeal,” it should be rejected on efficiency grounds.<sup>27</sup> The *appeal*, I gather, draws on a family resemblance with the deontological imperatives against better-known forms of discrimination, such as those outlawed by Title VII of the Civil Rights Act. It is *superficial*, however, in their view because in net discrimination, welfarist arguments should be privileged over deontological ones.<sup>28</sup> Economist Alfred Kahn similarly suggests that deontological concerns are “social goals” that should be the subject of “extra-market, political determination.”<sup>29</sup> In

24. See *Grutter*, 539 U.S. at 322. But cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753-54 (2007).

25. See Wu, *supra* note 1, at 26.

26. See Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 922 n.12 (2005) (identifying normative commitment as “maximizing social welfare”); Wu, *supra* note 12, at 72-73 (discussing “infrastructure principle” as one of three prescriptive principles of Openist’s position).

27. Robert W. Hahn & Robert E. Litan, *The Myth of Network Neutrality and the Threat to Internet Innovation*, 2007 MILKEN INST. REV., at 33, available at <http://aei-brookings.org/admin/authorpdfs/page.php?id=1342>.

28. Cf. *Net Neutrality: Hearing Before the S. Comm. On Commerce, Sci. & Transp.*, 109th Cong. 61-62 (2006) (testimony of J. Gregory Sidak, Visiting Professor at Law, Georgetown University Law Center), available at [http://commerce.senate.gov/public/\\_files/30115.PDF](http://commerce.senate.gov/public/_files/30115.PDF).

29. Kahn, *supra* note 20, at 176 (“But either that is exactly what it is or should be about

starker terms, he contends that network neutrality proponents are “talking either nonsense or the – prosaic – prose of competition and monopoly,” which are problems within the welfarist category for which exist “reasonable, non-ideological resolutions.”<sup>30</sup>

Still, in the net context, as Bill Herman has recently argued, there is something else going on.<sup>31</sup> In my terminology, it is deontic, and it is not nonsense.<sup>32</sup> We find it in the literature of the various grass roots consumer organizations engaging the issue. For example, the “Save the Internet” FAQ states: “Net Neutrality is the reason why the Internet has driven economic innovation, *democratic participation, and free speech online*. . . . On the Internet, *consumers are in ultimate control* — deciding between content, applications and services available anywhere, no matter who owns the network.”<sup>33</sup>

Non-welfarist concerns also appear in proposed findings of draft legislation, as in the Net Neutrality Act of 2006: “Because of the vital role that broadband networks and the Internet play for America’s economic growth *and our First Amendment rights* to speak, the United States should adopt a clear policy endorsing the *open nature of Internet communications and freely accessible* broadband networks.”<sup>34</sup>

Of course, these more political and distributive justice anxieties can be shoehorned into welfarist lingo, but the fit is awkward. My point here

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or — their rhetoric of ‘monopoly’ and ‘discriminations’ and squeezes notwithstanding — the [net neutrality] advocates are really talking about social goals that cannot be achieved by a market economy, however perfectly functioning — uses of resources and distributions of income in their opinion properly subject to extra-market, political determination.”).

30. *Id.* at 188; see also Bruce M. Owen, *The Net Neutrality Debate: 25 Years after United States v. AT&T and 120 Years After the Act to Regulate Commerce*, PERSP. FROM FSF SCHOLARS (Free State Found., Potomac, Md.), Feb. 20, 2007, at 3-4 (complaining that network neutrality advocates are vague and lack analytical rigor, then quickly translating the debate into a vertical integration economics problem). In the course of his argument, Owen suggests that the original decision to break up AT&T and create a “stark and permanent isolation of the monopoly local service companies from participation in any competitive business requiring use of their monopoly facilities” may well have been a good idea. *Id.* at 6-7. Surely net neutrality advocates would be comfortable doing the same with all wireline broadband Internet service providers.

31. See Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103, 116 (2006) (explicitly distinguishing the value of innovation from the value of media diversity, which is promoted by a neutral network that does not discriminate based on content).

32. For gestures in this vein, see, e.g., Mark Cooper, *Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks*, 71 U. COLO. L. REV. 1011, 1012 (2000) (“We should understand that we are part of a worldwide political battle; that we have views about what rights should be guaranteed to all humans, regardless of their nationality; and that we should be ready to press those views in this new political space opened up by the Net.”).

33. Save the Internet, Frequently Asked Questions, <http://www.savetheinternet.com/=faq> (emphasis added) (last visited Sept. 23, 2007).

34. H.R. Res. 5273, 109th Cong. § 2(13) (2006) (emphasis added).

is not that this translation is impossible; rather, it is simply to spotlight the fact that welfare contests are not all that's going on.

Suppose we take such deontic anxieties at face value.<sup>35</sup> These concerns are not solely about efficient pricing and dead-weight loss, but also about the basic distribution of communicative power and opportunities among private actors. The concern is that broadband pipe owners will subtly manipulate the content that flows through their bottlenecks, at least in pathological cases.<sup>36</sup> In other words, even though broadband Internet providers generally look and feel like common carriers who dutifully deliver packets from here to there with little regard to who sent the packets and what they mean, they aren't actually common carriers. Even though your traditional "phone company" may be providing the fast Internet connection over the high frequency portion of the same twisted pair copper line that provides traditional telephone service, they are not actually providing "telecommunications services" regulated under Title II of the Communications Act. Rather, they are providing "information services" subject to far weaker requirements of Title I.<sup>37</sup>

In this way, the serious anxieties expressed about mass media consolidation resurface in the net neutrality debate.<sup>38</sup> It is all of one piece. As fewer and fewer entities own more and more media properties, they invite the public to relax and to enjoy the benefits of improved efficiencies. Media owners promise never to exercise any sort of spin because they are just satisfying market demand, and if they do anything untoward, fierce competition would instantly discipline misbehavior.

The public, however, remains skeptical. Ownership does influence content. Rupert Murdoch's ownership of FOX alters what is broadcast on FOX.<sup>39</sup> Even the free-market oriented reporters of the Wall Street Journal recognize that this is so, at least when their own jobs and autonomy are at stake.<sup>40</sup> This may not entirely be a bad thing; indeed,

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35. My colleague Doug Lichtman reminds me that findings of fact in draft legislation may reveal as much about the strength of particular interest groups and focus group politics than anything especially deontic or public-interest minded.

36. Vincent Blasi has written astutely about the virtues of adopting a pathological perspective in interpreting the First Amendment. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

37. See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report & Order & Notice of Proposed Rule Making*, 20 FCC Rcd. 14,853 (2005).

38. For insightful discussion of the relationship between mass media ownership and self-governance, see C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2006).

39. See C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 736 (2005) (discussing the "Berlusconi effect").

40. So do the free-market minded Wall Street Journal reporters who boycotted their jobs for half a day in protest. Posting of Jim Romenesko to Poynter Online, [http://poynter.org/forum/view\\_post.asp?id=12696](http://poynter.org/forum/view_post.asp?id=12696) (June 28, 2007).

the FCC has suggested that this is precisely what diversity of ownership should entail.<sup>41</sup> But it is facile to suggest that ownership is entirely irrelevant. To provide just one example, Cumulus Media Inc. stopped playing the Dixie Chicks when they criticized the sitting President for starting the Iraq war.<sup>42</sup> It was also ownership that prompted the broadcast networks to remain silent about the digital TV spectrum that was given *gratis* to current television broadcast licensees, *sans* billions of dollars in auction payments.<sup>43</sup>

Further, such deontic concerns are not recent inventions — they have been around for a long time, even before the Internet. To give just one example, in the Modified Final Judgment, Judge Harold Greene specifically barred AT&T from the nascent “electronic publishing” industry for at least seven years. Electronic publishing was 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.”<sup>44</sup>

Among other things, Judge Greene feared that AT&T would discriminate against other e-publishers by giving priority traffic to its own publishing operations, collecting and analyzing intelligence about competitors gleaned from transactional data, and providing second-class maintenance to a time sensitive enterprise. These arguments were not strictly economic. Instead, Judge Greene continued:

Beyond [these competitive considerations], AT&T’s entry into the electronic publishing market poses a substantial danger to First Amendment values.

The goal of the First Amendment is to achieve ‘the widest possible dissemination of information from diverse and antagonistic sources.’ *Associated Press v. United States*, 326 U.S. 1, 20 (1945). This interest in diversity has been recognized time and again by various courts. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969)....

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... The Federal Communications Commission is charged by the

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41. See 2002 Biennial Regulatory Review, *Report & Order & Notice of Proposed Rule Making*, 18 FCC Rcd. 13,620 (2003).

42. See Geoff Boucher, *Fans Not Buying Chicks’ Apology*, L.A. TIMES, Mar. 19, 2003, at E4.

43. See KANG, *supra* note 13, at 645 (describing DTV coverage).

44. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 181 (D.D.C. 1982).

Communications Act with granting broadcast licenses in the 'public interest, convenience and necessity.' . . .

. . . .

Certainly, the Court does not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company.

In determining whether the proposed decree is in the public interest, the Court must take into account the decree's effects on other public policies, such as the First Amendment principle of diversity in dissemination of information to the American public. . . .

. . . .

Applying this diversity principle to the issue here under discussion, it is clear that permitting AT&T to become an electronic publisher will not further the public interest.<sup>45</sup>

My point here is not to persuade readers that Judge Greene was right or wrong. Instead, it is simply to observe that matters beyond efficiency — in this case, phrased in terms of First Amendment rights-talk — mattered in the breakup of AT&T, which was, after all, a common carrier. And surely something similar is going on today with the net neutrality debate.

Having made this deontological versus welfarist distinction, what is the payoff of the race versus net discrimination comparison? First, attention to race discrimination sensitizes us to the existence of deontological objections even in the net discrimination debate.<sup>46</sup> And this sensitivity has policy consequences. For example, Christopher Yoo argues that even if every broadband provider were structurally quarantined out of adjacent markets, there would be no reduction in market power. "Vertical disintegration . . . has no effect on last-mile providers' ability to extract supracompetitive returns. Consumers will receive benefits only by promoting entry by alternative network capacity."<sup>47</sup> Even if this is right, it focuses solely on welfarist concerns

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45. *Id.* at 183-84 (citations omitted).

46. Baker suggests that increased sensitization is necessary because many economics-minded analysts have a tin ear to noncommodified concerns. See Baker, *supra* note 39, at 742-44.

47. Yoo, *supra* note 2, at 16.

about monthly broadband bills charged to consumers. The deontological concern — that private firms will leverage their ownership of broadband pipes to control the content traveling through those pipes — is far better satisfied by the quarantine.

Second, and tightly related, we can better appreciate that the hardest questions arise from clashes *across* the deontological-welfarist boundary. To be sure, hard questions surface within each category. For instance, within the welfarist category, there are difficult empirical questions in the race discrimination debate. Does affirmative action in admissions provide net welfare benefits or losses, however measured? Similarly, within the net discrimination debate, which legal arrangements will maximize social welfare by simultaneously encouraging innovation without undermining capital investment?<sup>48</sup> After all, not everyone emphasizes the marvelous innovations at network's edge,<sup>49</sup> others bet on the center.<sup>50</sup>

However difficult these intra-category questions are, even harder questions come from the incommensurability between deontological and welfarist arguments.<sup>51</sup> In the race context, for instance, how shall we compare a deontological complaint (for example, you should not intern me simply because I am ethnically Japanese) against a welfarist justification (we must intern you because our military leaders have concluded that your kind constitute a military threat of espionage and sabotage)?<sup>52</sup> The same goes within the net context. Suppose that there is some welfarist justification for not opening access to cable broadband pipes based on vertical integration efficiencies. Many will still complain that such economic analysis does not meet their fundamental concern, namely that some private corporation that provides what “looks and

48. See generally van Schewick, *supra* note 23, at 383-89 (discussing benefits, costs, and trade-offs on innovation and welfare).

49. For an example of someone who does see innovations coming from the edge, see Wu, *supra* note 1, at 37-38 (“The strongest track record of innovation comes from the network edges, not the center.”).

50. See, e.g., BRUCE M. OWEN & GREGORY L. ROSSTON, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, LOCAL BROADBAND ACCESS: *PRIMUM NON NOCERE* OR *PRIMUM PROCESSI*? A PROPERTY RIGHTS APPROACH 28-29 (2003), available at <http://www.aei.brookings.org/admin/authorpdfs/page.php?id=285>.

51. Cf. Oscar H. Gandy, Jr., *Quixotics Unite! Engaging the Pragmatists on Rational Discrimination*, in *THEORIZING SURVEILLANCE: THE PANOPTICON AND BEYOND* 318, 321 (David Lyon ed., 2006) (suggesting special difficulty of trying to maximize incompatible outcomes when evaluating on “historically distinct, if not orthogonal criteria, such as efficiency and equality”).

52. See generally ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2004); Jerry Kang, *Thinking through Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195 (2002).

feels” like a transportation service — often the descendants of legal monopolies, with all the benefits of first mover advantage, exploiting public rights-of-way — should not be able to exercise even limited influence over the content or applications that flow through those pipes. The implicit argument here is that some (admittedly inchoate) right to access information without private influence is being infringed, not that some utility function is inadequately maximized.

At this point, the predictable response is to suggest that these deontological concerns are woolly-headed and bleeding-hearted, and that in the net context, we should focus only on welfarist concerns.<sup>53</sup> But precisely the same thing can be said and has been said of many forms of race discrimination. Those who fancy themselves as Bayesian discriminators proudly assert that they are acting on the basis of evidence-based stereotypes (generalizations about social categories) that are justified by accurate assessments of base rate probabilities. It is not “efficient,” they exclaim, to screen White, Christian grandmothers for bombs at airports; rather, we should focus on swarthy skinned, young Muslim males. It is not “efficient” for me as a restaurant server to give top-notch service to a Black customer because they do not tip as well, and here are the statistical data to demonstrate that.<sup>54</sup> It is rational for me to compliment people with last names such as Wu, Yoo, Ohm, and Kang on their English because Asians in America are majority immigrants, and if they are offended, they are being too sensitive. And so on. If someone objects to this kind of thinking, why shouldn’t the same response be made? Stop being woolly-headed and bleeding-hearted! My guess is that there would at least be a pause. And rightly so.<sup>55</sup>

Let me be clear: I am not equating exclusively welfarist analyses of net neutrality to statistical racial discrimination. That said, one must argue for — not simply assert — the position that net discrimination must be understood exclusively in welfarist terms.

In sum, race discrimination sensitizes us to two different categories of arguments against discrimination that exist even in the net context: deontological and welfarist. Within each category, the analysis is difficult on both theoretical and empirical grounds. However, still more perplexing is an inter-category comparison *across* the deontological and

53. This argument has been made in even more strident terms—namely, that welfare should always trump fairness. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002). For a devastating critique, see Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511 (2003) (reviewing LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002)).

54. Cf. Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1630 tbl.6 (2005).

55. See generally Gandy, *supra* note 51, at 323-31 (summarizing arguments raising concerns about various forms of racial statistical profiling).

welfarist boundary. The net discrimination debate also suffers from this difficulty. Although welfarist arguments predominate, there is a deontological vein of thinking that must be addressed, and on its own terms. The deontological concerns are neither paranoid nor nonsensical, and welfarist assurances do not lift deontological dread.

### III. RATIONALITY'S CONSTRAINTS

Many Americans believe that race discrimination is largely a problem of the distant past. Many believe that we have learned from our mistakes and that we are now a far more rational people and economy, driven by a hard-nosed and practical reason. This position is supported by a loose syllogism. We are rational; race discrimination is irrational; therefore, we must not be engaging in race discrimination. An addendum to this syllogism is that anything that looks like "discrimination" that is in fact rational should not be called discrimination in the first place.<sup>56</sup> This is the normative carve-out discussed above.

Does this argument get the facts right? To start off, are we in fact rational? "Rational" in the above syllogism roughly means instrumental rationality. An individual behaves rationally to the extent that her actions help satisfy her preferences and achieve her chosen goals. Individuals do not, however, behave completely rationally. The heuristics and biases literature has cataloged a laundry list of cognitive errors.<sup>57</sup> Hedonic psychology reveals that we do not know very well what will make us happy.<sup>58</sup> Still more interesting is the recent work in implicit social cognition, which describes how mental associations that operate automatically and not necessarily with any self-awareness or self-reflective endorsement can nevertheless alter our behavior.<sup>59</sup> As evidence of these various implicit biases and their predictive validity

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56. See, e.g., Thierier, *supra* note 19, at 6 ("[S]ometimes discrimination really isn't discrimination at all. More specifically, what one party considers discrimination may be judged by others to be perfectly sensible or justifiable behavior.").

57. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law And Behavioral Science: Removing The Rationality Assumption From Law And Economics*, 88 CAL. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

58. See generally DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2006); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007).

59. See generally Kang, *Trojan Horses*, *supra* note 9; Kang & Banaji, *supra* note 9. For succinct summaries of the science, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 954-58 (2006); Kristin A. Lane, Jerry Kang, & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. (forthcoming 2007). For an introduction to social cognition and the way it affects legal scholarship, see Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004).

increase, we have more reason to question the rationality presumption. We may not be treating people in a colorblind fashion notwithstanding our explicit and sometimes righteous endorsement of that moral principle.

Even if individuals are not entirely rational, perhaps markets do much better. Indeed, an illustrious line of economic thinking suggests that race discrimination is inefficient and therefore cannot survive in a competitive market.<sup>60</sup> If a racist firm inappropriately discounts the value of a human resource on the basis of an irrelevant attribute, such as race, then other non-racist firms will price the human asset correctly and simply out-compete. The inevitable result is that race discrimination will be burned away.

Again, this account gets things descriptively wrong. First, the market may simply satisfy a “taste” for discrimination held by consumers. If a client feels subtly more confident having a White male attorney over an Asian female attorney as the lead lawyer for mission-critical litigation, then an unhindered market will just as subtly satisfy that request. Second, such preferences may produce self-fulfilling prophecies in the form of positive feedback loops that cause underinvestment in human capital<sup>61</sup> and potentially disrupt performance on ability tests.<sup>62</sup> Third, even if certain competitive firms recognize this phenomenon and want to exploit it for competitive gain, there would be a collective action problem in dismantling the feedback loop because a single firm cannot alter the general incentive structures created by the general marketplace.<sup>63</sup>

To be fair, no one makes the unqualified claim that individuals always, without exception, behave rationally. And no one suggests that markets are perfect disciplinarians. So, the real debate is about how often and in what contexts do individuals and markets behave “rationally” in contexts where race matters. My only point here is that we have good reasons to be cautious of any robust rationality

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60. See, e.g., GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971). The most prominent modern proponent of this view is Richard Epstein, though Epstein posits not that a competitive market will necessarily eradicate discrimination, but rather that any discrimination which survives in such a market must be rational and therefore have useful social consequences. See RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

61. See GLENN C. LOURY, *ANATOMY OF RACIAL INEQUALITY* 30 (2002).

62. For a discussion of the stereotype-threat literature, see Kang & Banaji, *supra* note 9, at 1086-90.

63. See LOURY, *supra* note 61, at 38-39; see also Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000) (applying positive feedback loop analysis to White dominance in the legal profession); Daria Roithmayr, *Locked In Segregation*, 12 VA. J. SOC. POL'Y & L. 197 (2004) (following similar analysis to examine residential segregation as a locked-in monopoly).

assumption.

In the net context, the analogous syllogism goes something like this. Broadband providers are rational. Discrimination is irrational, in that it does not further their self-interest. Therefore, broadband providers will simply not discriminate, and ham-fisted regulation is unnecessary. As the talking point goes, net neutrality is a solution in search of a problem. In still more colloquial terms, don't worry, be happy. Among others, Jim Speta<sup>64</sup> and Phil Weiser<sup>65</sup> have invoked such arguments in suggesting that broadband providers, even if monopolists, will not discriminate in adjacent markets for content or application services.

There are many questions here. First, is discrimination actually irrational in the sense that it would not be in the firm's self-interest? For both the "single-monopoly profit" rule and the principle of "internalizing complementary efficiencies" ("ICE principle") there are well-known and less well-known exceptions.<sup>66</sup> Second, even if non-discrimination would be in the firm's self-interest, can we assume that firms will act rationally in the vertical integration context? If the question is articulated as whether managers of broadband firms can write out the economic proofs of the ICE principle, the answer is no.<sup>67</sup> More seriously, we have numerous examples in which firms with market power do not seem to behave rationally. Phil Weiser and Joseph Ferrell call them "incompetent incumbents."<sup>68</sup>

But again, this may be a strawperson. Even if a single firm behaves irrationally, surely the market in its grand totality acts "as if" it were rational. But this survival of the fittest assumption applies best to highly competitive markets with low barriers to entry. In broadband, we have highly centralized markets — typically duopolies with high entry barriers.<sup>69</sup> And where we have such concentration, there is little reason

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64. See James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39, 76 (2000) ("It is against the platform owner's interest to attempt to monopolize content — even if the platform owner is a monopolist in transmission service.").

65. See Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 U. COLO. L. REV. 819, 834 (2000).

66. For well-known exceptions, see van Schewick, *supra* note 23, at 17-25. For more novel exceptions, see *id.* at 9-16.

67. For definitions, see *id.* at 8.

68. Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 114-17 (2003).

69. See, e.g., S. DERRICK TUCKER, FREE PRESS, CONSUMERS UNION & CONSUMER FED'N OF AM., *BROADBAND REALITY CHECK II* 19-21 (2006) (reporting that cable by itself accounts for 58 percent of residential and small business lines, that cable and DSL together constitute 98 percent of the broadband market, and that 40 percent of U.S. ZIP codes have one or fewer broadband providers), available at <http://www.freepress.net/docs/bbrc2-final.pdf>.

to think that market competition will enforce rationality.<sup>70</sup>

This rationality discussion raises two other points. First, we ought to be cautious about the value of explicit self-reports. Having entered the post-civil rights era, social scientists have struggled with the “willing and able” problem in trying to gauge current stereotypes and attitudes toward various racial groups. Explicit surveys are no longer very useful because, first, people are no longer willing to tell social scientists what they really think about sensitive matters. Respondents instead engage in impression management to sound politically correct. Even when individuals are sincere, research in implicit social cognition has demonstrated that we lack introspective access to various mental constructs, even as those constructs influence our evaluations and behavior.

Interestingly, a similar “willing and able” problem exists in the net discrimination context. All sides of the debate agree that we would benefit enormously from real data on whether broadband providers do in fact have an incentive to discriminate, and whether they will do so.<sup>71</sup> The FCC just launched a Notice of Inquiry to help fill this void.<sup>72</sup> But getting good data is difficult for some of the same reasons outlined above. First, it seems naïve to take at face-value what firms promise publicly because they are managing impressions to stave off potential regulation.<sup>73</sup> Second, even if firm representatives sincerely believe that the firm’s private interest aligns fully with the public’s interest in maximum innovation and social welfare,<sup>74</sup> they may lack introspective

70. To be sure, many are now relying on intermodal competition, as telephone companies go after cable companies with wireless and powerline carriage in the works. However, such competition is more incipient than extensive. See Herman, *supra* note 31, at 137.

71. Many broadband service providers have contractual terms that afford them great license over the content transported through their pipes. See, e.g., *id.* at 126 (citing examples from Cox, AT&T, and the Canadian firm Telus).

72. See Broadband Industry Practices, *Notice of Inquiry*, 22 FCC Rcd. 7894, ¶¶ 8-11 (2007).

73. Commentators have, however, accumulated some revealing exclamations. See, e.g., Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 934 (2001) (reporting that AT&T’s Jack Osterman said of early plans for the Internet, “[f]irst . . . it can’t possibly work, and if it did, damned if we are going to allow the creation of a competitor to ourselves.”); *At SBC, It’s All About “Scale and Scope”*, BUS. WK., Nov. 7, 2005, [http://www.businessweek.com/magazine/content/05\\_45/b3958092.htm](http://www.businessweek.com/magazine/content/05_45/b3958092.htm) (quoting AT&T Chairman Ed Whitacre as saying “[n]ow what they would like to do is use my pipes free, but I ain’t going to let them do that because we have spent this capital and we have to have a return on it. So there’s going to have to be some mechanism for these people who use these pipes to pay for the portion they’re using. Why should they be allowed to use my pipes? The Internet can’t be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!”).

74. For skepticism on this point, see Baker, *supra* note 39, at 751. He points out the difference between enterprise-based and welfare-based economics. For example, cost savings that are “efficient” for the enterprise/firm may not be “efficient” for all of society.

access to the various implicit cognitive processes in individual managers' heads and implicit organizational processes in firm practices that produce self-serving forms of discrimination.<sup>75</sup>

The other point concerns the normative addendum to the rough syllogism. That addendum suggests that any "discrimination" that is in fact rational should be normatively tolerated. Put another way, instrumental rationality should necessarily purchase normative acceptability. But there are many objections to this argument, and current antidiscrimination law rejects it.<sup>76</sup> In the net context, this rationality justification seems especially weak since the private interest may only poorly align with the public interest. Since broadband access is an infrastructural good and because the broadband provider cannot capture and monetize the positive externalities, its rational decisions to pursue its private interest may substantially harm public welfare.

Here is one final concern about what rationality is supposed to buy. In the race context, suppose someone defends her action as responding on the basis of accurate base rates that distinguish between racial groups. A thoughtful person might ask *why* do the base rates differ? Nature? Nurture? Some inextricable mix of both? What if part of the reason for the difference is the normatively problematic past? If we ignore such a history, then our instrumentally rational actions today might fuel yet another cycle in a positive feedback loop, which locks in past injustices.

Surprisingly, there are parallels for net discrimination. When a broadband provider makes rational decisions to maximize its private welfare, we must understand that such a calculation depends on the firm's current conditions, which were produced by a specific, historically contingent path. And with broadband providers, that path often included the privilege of legal monopoly, usage of public property at little or no cost, and benefit from network economics that cement first-mover advantage. For example, telephone companies were historically monopoly franchises, granted the right to use public right-of-ways for private profit. If we decide to correct the past, that is, move away from legal monopoly (*cf.* the legal monopoly of Whiteness and segregation)

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75. Richard Nelson and Sidney Winter point out that firms operate on process schemas, a sort of automatic pilot, with limited ability to process an overwhelming flow of information. RICHARD R. NELSON & SIDNEY G. WINTER, *AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE* 14 (1982); *see also* Lemley & Lessig, *supra* note 73, at 937 (discussing how firms develop core competencies, protect legacy businesses); *id.* at 950 (discussing possibility of corporate endowment effect); *id.* at 944-45 (pointing out that explicit intent is not necessary for monopolist pipe owners to skew innovation in their favor and towards familiar technologies and existing expertise).

76. *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978) (actuarially justified sex-differentiated employee contributions to employer pension plan are disparate treatment). *See generally* Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003).

towards a level playing field (*cf.* desegregation and the civil rights movement), we cannot expect to do so simply by formally ending legal monopoly, then allowing the incumbent to do whatever is in its self interest — especially when network effects inure to the incumbent's benefits.<sup>77</sup> That would cement past privilege into present advantage. We certainly understood the basic economics — if not the actual implementation — when we tried to introduce competition into the local exchange.<sup>78</sup>

In sum, the race discrimination debate teaches us to be more skeptical about optimistic and self-serving claims that rationality will burn away net discrimination, and leave behind only normatively acceptable byproducts. First, we may not act as rationally as we hope and trust we do. Second, even when we are instrumentally rational in pursuing our private interests, that may not further the public's interest, which might include both deontological (e.g., corrective justice) and welfarist ambitions (an infrastructure for innovation and communicative participation).

## CONCLUSION

This essay is another one of my attempts to cross-pollinate the race and communications literature.<sup>79</sup> A comparison and contrast between race discrimination and net discrimination teaches us, first, to particularize the discrimination at issue and be wary of normative carve-outs in defining discrimination. Second, we must recognize and respect the clash between welfarist and deontological concerns. Third, we should beware of assurances that private rationality guarantees public interest.

These insights do not translate into specific policy recommendations; they were never meant to. For readers yearning for something more concrete, I only offer some doctrinal gestures. As explained above, we must always particularize the discrimination at issue — which entity X is being treated differently on the basis of which attribute Y? In this specification, it may or may not be useful to think in terms of “suspect classifications” that borrow from equal protection doctrine or bona fide occupational qualifications (“BFOQs”) that borrow

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77. Lee, *supra* note 7, at 1266.

78. The Telecommunications Act of 1996 insisted on no monopoly franchises, see 47 U.S.C. § 253(a) (2000), and demanded interconnection to counter network effects, see § 251(a)(1) (all carriers), and § 251(c)(2) (special requirements for incumbent local exchange carriers).

79. See, e.g., Kang, *Cyber-race*, *supra* note 8 (analyzing how the social construction of race may unfold in the technological construction of cyberspace); Kang, *Trojan Horses*, *supra* note 9 (analyzing mass media policy in light of implicit social cognition).

from Title VII. But the more relevant analogy is to First Amendment law, with its greater skepticism of content-based regulations as compared to constraints on mere time, place, or manner. This doctrinal analogy would underscore the importance of the first of the FCC's "Four Freedoms" on net neutrality: the right to access all lawful content.<sup>80</sup> It would also support the nondiscrimination provision attached to the recent AT&T and Bell South merger,<sup>81</sup> which the Net Neutrality Notice of Inquiry floats as a potential general principle.<sup>82</sup>

I conclude by asking an odd question: what is the value of common carriage?<sup>83</sup> Imagine that after converting to all IP networks, telephone companies simply declared that they were no longer common carriers. Instead, they were providing "information services," and in fact, similar to cable operators, were engaged in constitutionally protected speech.<sup>84</sup> What if the telephone companies then ensured better quality connections to their preferred customer partners (say Expedia's travel agents over Priceline's) who paid them a kick-back? Even more extreme, what if a telephone company, controlled by an activist media mogul, implemented software algorithms to disconnect calls that seem to facilitate terrorist agendas or titillate with prurient language?

This is not so crazy. AT&T as broadband service provider intends to scan for what it thinks to be illegally copied content;<sup>85</sup> Google as video hosting service is taking down sniper clips (which by themselves are offensive but not illegal);<sup>86</sup> and in 1992, Congress granted to cable operators the right to censor prurient content that would appear on leased

80. See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, 20 FCC Rcd. 14,986, 14,988 (2005). The four principles set out in this policy statement embody the "Four Freedoms" identified by former Chair Michael Powell: freedom (i) to access lawful content, (ii) to use applications and services of their choice (subject to law enforcement), (iii) to attach legal devices to the network that do no harm, and (iv) to enjoy competition among providers. See Michael K. Powell, FCC Comm'r, Address at the Silicon Flatirons Telecommunications Program Conference: Reflections on Communications Policy (Nov. 13, 2000).

81. See AT&T Inc. & BellSouth Corp. Application for Transfer of Control, *Memorandum Opinion & Order*, 22 FCC Rcd. 5662 app. F at 5814 (2007) ("AT&T/BellSouth also commits that it will maintain a neutral network and neutral routing in its wireline broadband Internet access service. This commitment shall be satisfied by AT&T/BellSouth's agreement not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination."). The focus on "source, ownership or destination" is in effect a proxy for content-based discrimination.

82. See Broadband Industry Practices, *supra* note 72, at ¶ 10.

83. In a prescient article, Eli Noam predicted the end of common carriage. See Eli M. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 COLUM. L. REV. 955 (1997).

84. See *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

85. See Granelli, *supra* note 15.

86. See Wyatt, *supra* note 16.

access and PEG (Public, Educational, and Government) channels.<sup>87</sup> In fact, in his concurrence in *Sable Communications of California v. FCC*,<sup>88</sup> Justice Scalia suggested that even telephone companies — notwithstanding their public utility status — could drop dial-a-porn callers if they so choose.<sup>89</sup>

I think most telephone users would think all of this to be odd and disturbing. Sure, television stations and networks control what can be seen on TV; cable operators control what can be seen on cable; websites control what content can be downloaded from their servers. But the telephone? Even the telephone company gets to control who says what to whom? What's more, these firms could benefit all the while from 47 U.S.C. § 230, which shields “interactive computer service” providers with nearly bulletproof immunity.<sup>90</sup> In other words, they would receive the central benefits of common carriage, but bear none of the costs.

My question is hypothetical because regulators would probably never allow this convenient opting out of common carriage. This is apparent from the FCC's regulatory approach toward VoIP, which follows the basic principle that if it works like a traditional telephone from the end-user's perspective, it will be regulated like a traditional telephone.<sup>91</sup> But why couldn't the same arguments against net neutrality regulation be deployed against common carriage regulation for telephones? If we must keep “hands off the Internet,” why not also keep our grubby regulatory “hands off the telephone”?

With only modest creativity, telco executives could assert that the next generation of fancy telephone networks (4G) will only be built if they can shed the legacy vestiges of common carriage. Not just fringe regulations, mind you, but the core obligations against unreasonable discriminations and preferences.<sup>92</sup> When that plea comes, my guess is

87. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

88. 492 U.S. 115, 132-33 (1989) (Scalia, J., concurring).

89. See *id.* at 133 (“I note that while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it.”) (Scalia, J., concurring).

90. Section 230(e)(3) states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). This immunity does not apply, however, to intellectual property claims, criminal prosecutions, and claims under the Electronic Communications Privacy Act. See generally KANG, *supra* note 13, at 392-94.

91. See, e.g., Universal Service Contribution Methodology, *Report & Order & Notice of Proposed Rulemaking*, 21 FCC Rcd. 7518, ¶¶ 3, 48-49 (2006) (requiring interconnected VoIP providers to start contributing to the universal service fund, without definitively deciding whether they are an information service or telecommunications service); Federal-State Joint Board on Universal Service, *Report*, 13 FCC Rcd. 11,501, ¶¶ 87-90 (1998) (distinguishing computer-to-computer IP telephony from phone-to-phone IP telephony).

92. See 47 U.S.C. § 202, which states:

Discriminations and preferences.

that there would be a pause. And again, rightly so.

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(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.