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# Legal gaps under deregulatory broadband policies and the resurgent rise of corporate power

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**22<sup>nd</sup> European Regional ITS Conference  
Budapest, 18-21 September, 2011**

**Barbara A. Cherry  
Legal Gaps Under Deregulatory Broadband Policies  
And the Resurgent Rise of Corporate Power**

**This paper considers the likely combinatorial effects of U.S. deregulatory broadband policies and the evolution of law as applied to corporations as a general matter. It explains how legal developments in both areas have dismantled bodies of law or doctrines that had developed to address corporate power in both commercial and political spheres and to protect consumers from vulnerability in commercial activities. Moreover, the coexistence of these developments enables an unprecedented transfer of corporate power between economic and policymaking institutions. With the decline in regulatory constraints, as well as the rise in constitutional rights to block attempts to impose regulatory constraints, there is a resurgent rise of corporate power. The result may be a phase transition undermining the rule of law so critical to sustainable democracies.**

**K23**

**Antitrust, broadband, common carriers, constitutional rights, consumer protection, corporations, telecommunications**

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## Introduction

Telecommunications regulation in the U.S., although developed as an industry-specific legal regime, is embedded within and relies upon coexisting enforcement of legal principles found in other bodies of law of general application beyond the telecommunications sector. For this reason, to better understand the effects of U.S. deregulatory broadband policies, we must analyze the evolution of telecommunications regulation within the broader context of the evolution of other bodies of law applicable to general business activities.

Cherry (2010) examines recent deregulatory broadband policies in the context of the evolution of the general business regulatory regime reflected in antitrust and consumer protection laws. It describes how some industry-specific problems in telecommunications are not addressed by this general business regime, creating legal gaps that can be bridged only by construction of new legal obligations. The network neutrality debate, for example, is a response to such a legal gap.

The consequences of deregulatory broadband policies are also affected by important legal developments relating to the regulation and rights of corporations. For example, Cherry (2011) examines how broadband providers will likely use an important development in federal constitutional law – resulting from a recent U.S. Supreme Court case, *Citizens United v. FEC* (2010), which held that corporations have the same constitutional rights for political speech as individuals – to block imposition of network neutrality obligations on constitutional grounds.

This paper expands analysis beyond *Citizens United v. FEC* by examining important legal developments arising from the evolution of law as applied to corporations as a general matter. It stresses that a more fundamental layer of legal developments, resulting in a contraction in government's ability to regulate corporations, underlies the more recent layer of deregulatory broadband policies. This layer is more fundamental in the sense that its temporal development commenced well before the recent era of deregulatory policies, and its applicability extends to commercial activities as a general matter and thus beyond those of the communications sector. Therefore, to understand the consequences of deregulatory broadband policies and the resultant contraction of available legal remedies to address behavior/activities of broadband providers – referred to here as legal gaps - it is necessary to consider those deregulatory policies in combination with legal developments affecting general corporate activities.

## **II. Evolution of the corporate form and erosion of legal doctrines to constrain corporate power**

In the U.S., the states assumed the primary power to issue corporate charters (Hamill, 1999; Smith, 2003). Initially, the privileges granted to corporations and the scope of corporate activities were strictly controlled. However, corporations' freedoms expanded during the 19<sup>th</sup> century as the means of issuing and enforcing corporate charters evolved. Moreover, with the rise of large, widely-held business corporations and of activities in interstate commerce, state regulation of corporation eroded with the rise of federal regulation. By the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, this federal regulation consisted of industry-specific regulation of railroads, telegraphy and telephony under federal agency oversight, and of regulation of businesses as a general matter under antitrust law.

### *A. Special Charters of Corporations and Doctrines of Their Enforcement*

Corporations are legal entities and “have always been creatures of statutes, requiring a formal recognition normally evidenced by a corporate charter issued by a sovereign person or government” (Hamill, 1999, footnote omitted). In early colonial America, colonial corporations were chartered by the King of England and later by colonial assemblies (Hamill, 1999). In the early United States, the states created corporate charters through individual, legislative acts. In corporate charters, the legislature granted privileges and specifically circumscribed the powers and purpose of the corporation. In this way, “corporate reliance on corporate charters afforded states a mechanism of regulatory control over corporations: if an entity would not accept the terms of its charter it could not gain the advantages of the corporate form” (Taylor, 2006, p. 998).

In the late 18<sup>th</sup> and early 19<sup>th</sup> centuries, the legal benefits of corporations were deemed necessary for and available to few enterprises. “At that time, the principal legal benefits offered by the corporation, which were not available to partnerships, revolved around the corporation’s ability to exist beyond the natural life of the shareholders, to pool large amounts of capital, and to own property” (Hamill, 1999, p. 91, footnote omitted). Most early special corporate charters were granted to accomplish some public purpose, for which special privileges or de facto monopoly powers were granted. These included charters for banks and for large-scale

transportation projects such as canals and turnpikes (Hamill, p. 93; Smith, 2003, pp.251-252). These charters granted special powers or privileges tailored to the corporation's purpose. For examples, turnpikes were granted special powers of eminent domain, limited liability and the right to collect tolls (Smith, 2003, p. 251-252). As later discussed, use of special charters for such purposes declined in the early 20<sup>th</sup> century with the rise of federal regulation over activities such as railroads, telegraphy and telephony.

There were various means by which these special charters were enforced. One consisted of quo warranto actions, whereby the state (sovereign) may revoke corporate charters for misuse or nonuse (Linzey, 1995, p. 233).<sup>1</sup> These actions have their origins in the English common law, and were “based on the idea that the sovereign responsible for conferring the privilege also retained the right to forfeit the franchise” (Linzey, 1995, p. 240). Over time, most states enacted statutes, granting to an agent of the state, such as an Attorney General, the power to initiate proceedings to revoke charters in order to curb corporate abuses, which were widely used throughout the 19<sup>th</sup> century (Linzey, 1995, pp. 223-225).

Another means of enforcement was the ultra vires doctrine, under which “corporations were prohibited from doing anything that was not specifically authorized in their charters” (Cray and Drutman, 2005, p. 312, footnote omitted). “The ultra vires doctrine in the corporate setting originated as an English common law tradition allowing shareholders or parties dealing with corporations to sue to enjoin or invalidate corporate acts that were outside of the activities specifically authorized in a corporate charter. The ultra vires doctrine is rooted in the more ancient doctrine of quo warranto” (Sulkowski, 2009, p. 95, footnote omitted). Certain individuals had standing to bring an action because “[t]he primary justification for the doctrine was the dual protection of investment interests of the company's shareholders and security interests of its creditors” (Sulkowski, 2009, pp. 95-96, footnote omitted). “Lawsuits ... continued to be used into the 1900s to restrain corporate activities” (Sulkowski, 2009, p. 98, footnote omitted). In addition to injunctions, at times “courts agreed to dissolve corporations for illegalities into the 1890s” (Sulkowski, 2009, p. 98, footnote omitted).

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<sup>1</sup> “**Quo Warranto** actions are demands made by the state upon some individual or corporation to show by what right they exercise some franchise or privilege appertaining to the state which, according to the constitution and laws of the land, they cannot legally exercise except by virtue of grant or authority from the state (Linzey, 1995, footnote 63, emphasis in original, citations omitted).”

*B. General Incorporation Statutes and Increasing Freedoms of Corporations*

During the 19<sup>th</sup> century, general incorporation laws gradually replaced the special charter system of incorporation, although Hamill (1999) “empirically proves that incorporation by special charter remained a significant feature of the corporate landscape until the early twentieth century” (p. 86). This transformation occurred both because special charters were perceived as unfair in conferring privileges to only a few, and “[a]s the American economy grew ... legislatures could not keep up with the demand for special charters” (Taylor, 2006, p. 998).

Initially, the switch from special to general charters developed under standard pattern incorporation statutes that maintained regulatory control over corporations (Taylor, 2006, p. 999). These statutes limited the size of corporations and imposed limitations on the stated purpose of the corporation. “Any activities outside the express purpose stated in the charter were ultra vires. Other common constraints ... included limitations on capitalization, the types of shares a corporation could offer, and voting rights” (Taylor, 2006, p. 999, footnotes omitted).

However, “[t]he continued increase in the scale and scope of American business from approximately 1875 to 1930 caused states to move from using set-pattern general incorporation statutes to enabling incorporation” (Taylor, 2006, p. 1000, footnote omitted). Under the general incorporation statutes, corporations “could structure their affairs relatively freely through careful drafting of their articles and bylaws; that is, states were no longer imposing stringent conditions on access to the corporate form” (Taylor, p. 1000, footnote omitted).

Moreover, as agrarianism gave way to industrialization during the 19<sup>th</sup> century, states competed to attract businesses to incorporate in their jurisdictions. This led to a corporate charter “race to the bottom”, whereby states competed by enacting statutes that granted corporate charters under increasingly permissive terms. This permissiveness accelerated when “[b]eginning in 1891, New Jersey enacted a series of laws that effectively relinquished its ability to regulate and control corporations through charters” (Cray and Drutman, 2005, p. 314). In this regard, “New Jersey became the first state to allow corporations to buy and sell stock or property in other corporations and issue their own stock as payment, creating ‘holding companies’ that were crucial to the functioning of trusts” (Cray and Drutman, 2005, p. 314, footnote omitted). New Jersey also repealed its state antitrust law in 1892, enacted “an embarrassingly permissive” general incorporation statute in 1896, and “permitted companies to issue nonvoting stock, which enabled certain owners to raise capital while retaining control of a corporation with ease and

permitted directors to amend bylaws with the consent of the shareholders” (Cray and Drutman, 2005, pp. 314-315). Although New Jersey latter attempted to revoke some of these privileges in 1913, the decline in corporate control could not be arrested as “[m]any companies simply moved to Delaware, which in 1899 had adopted an even more permissive law than New Jersey – and offered even lower fees to incorporate” (Cray and Drutman, 2005, p. 316, footnote omitted). “As a result, the corporate law of Delaware has effectively become that national corporate law for the past one hundred years” (Cray and Drutman, 2005, p. 316).

As previously discussed, “charter revocation was one of the primary means used by states to control corporations and corporate behavior” (Thoennes, 2004, p. 223). As further discussed in Section III, this means of enforcement has been significantly limited by judicial decisions on constitutional grounds, beginning with the U.S. Supreme Court decision in *Trustees of Dartmouth College v. Woodward* (1819). “In addition, the circumstances under which a state can revoke a corporate charter have become increasingly restricted in recent years with the codification of *quo warranto*” (Thoennes, 2004, pp. 223-224).

While the growth of general incorporation statutes diffused throughout the states, the ultra vires doctrine also eroded as a legal remedy. “The most important explanation why ultra vires lawsuits fell out of favor was their abuse by corporations seeking to avoid contractual obligations” (Sulkowski, 2009, p. 99, footnote omitted). In fact, [t]he ultra vires was at one point so sacrosanct that contractual obligations could be escaped even when contracts had been partially performed to the disadvantage of a creditor or supplier and the enrichment of the company” (Sulkowski, 2009, p. 99, footnote omitted). To counter this corporate abuse of the doctrine states revised their statutes.

At the same time that states revised their statutes to eliminate abuse, shareholders shifted reliance from ultra vires lawsuits against corporations to actions against individuals based on the fiduciary duties of corporate managers and directors (Sulkowski, 2009, p. 100). With longstanding roots in equity, under the common law certain individuals have fiduciary duties, “demanding that fiduciaries comport with standards of behavior that society deems to be required by the fiduciary position” (Taylor, 2006, p. 1007). Corporate managers and directors hold such duties to shareholders, and these duties “have long been considered vital in controlling corporate management” (Taylor, 2006, p. 1006).

The common law as to the fiduciary duty of corporate management “began to develop in

the mid-nineteenth century with the increase in size and complexity of corporate activities” (Taylor, 2006, p. 1008). This fiduciary duty included duties of care and of loyalty. Both of these duties “originally placed meaningful demands on directors” (Taylor, 2006, p.1012).<sup>2</sup> Taylor (2006) explains how these duties devolved over time. “As the conduct of corporate affairs became more prevalent and more complex, courts began to loosen the demands placed on directorial action under the duty of loyalty” (Taylor, 2006, p. 1013). This decline in the duty of care from approximately 1910 to 1970 was followed by the rise of safe harbor statutes enacted in the 1980s and 1990s, which protected directors in self-interested transactions authorized by disinterested majority of directors or shareholders as fair (Taylor, 2006, p. 1016). As to the duty of care, “[i]n recognition of the fact that corporate managers often must make risky decisions, ... the law recognized that directors should not bear personal liability for those decisions that out in hindsight to have been ill considered” (Taylor, 2006, p. 1019, footnote omitted). This view became known as the “business judgment rule”, finding managers and directors “liable only when they failed to exercise ‘ordinary knowledge,’ defined as ‘common sense, and ordinary attention’” (Taylor, 2006, p. 1011, footnote omitted). Since the 1980s, meaningful constraints under the business judgment rule have been deemed virtually eliminated after the states, triggered by a court case in Delaware, passed statutes enabling directors to avoid personal liability for most breaches of the duty of care (Taylor, 2006, pp. 1021-1022).

With all of these changes, corporations vastly expanded their freedoms. States’ power to revoke charters is more limited. General incorporation statutes broadened the scope of permissible corporate activities as a general matter relative to the special chartering process. The scope of activities was further broadened by a “race to the bottom” as states competed to provide a more favorable forum and environment for establishing business corporations. Shareholders substituted ultra vires lawsuits with actions against corporate management for breaches of fiduciary duties, which was also “symptomatic of a race to the bottom, in terms of restrictions on corporate freedom” (Sulkowski, 2009, p. 101). In turn, the fiduciary duties of corporate management devolved so that “we are left with a vacuum in the area of regulatory control over corporate management” (Taylor, 2006, 1024).

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<sup>2</sup> “The duty of loyalty doctrine originally held director-fiduciaries liable for any benefits they obtained in the presence of a conflict of interest. Duty of care doctrine compelled directorial concern and attention as to the well-being of their beneficiaries by examining the impact of directorial action on shareholders and requiring directors to exercise meaningful care” (Taylor, 2006, p. 1012, footnote omitted).



*C. Persistence of Special Charters for Transportation and Communications Projects Until Federal Regulation*

Notwithstanding the growth of general incorporation statutes, “[s]pecial charters for transportation and communication projects ... served as one of the many tools to deal with the absence of federal regulatory over enterprises posing significant interstate issues” (Hamill, 1999, p. 147, footnote omitted). In particular, “[t]he pattern of special charters issued, during the 1875 and 1903 period for transportation and communication projects, with railroads being the most visible and important, can be attributed to the states’ attempt to regulate rates and other matters because of the absence of federal regulation” (Hamill, 1999, p. 147). The communications projects during this period consisted of telegraphy and telephony.

The rapid decline and ultimate disappearance of these special charters during the early 20<sup>th</sup> century “was aided by the replacement of special chartering and other ineffective state regulatory mechanisms with effective federal regulation over the nation’s railroads” (Hamill, 1999, p. 154). In 1885, Congress created a special Senate Select Committee on Interstate Commerce, popularly known as the Cullom Committee (named after Sen. Cullom), to review the economic abuses associated with large corporations, particularly with regard to the railroad industry (Schwartz, 1973, p. 31). In early 1886, the Cullom Committee issued its report, known as the Cullom Report. The Cullom Report provides a comprehensive record of the committee’s investigation and recommendation for federal legislation, which was limited to the railroad industry. Later that same year, a definitive ruling by the U.S. Supreme Court in *Wabash, St. Louis & Pacific Railway Co. v. Illinois* (1886) – that the States lacked jurisdiction to regulate railroad transportation in interstate commerce – further precipitated a crisis for Congress to act. The following year Congress passed the Interstate Commerce Act of 1887 based on the recommendation of the Committee.

In the Cullom Report, the Committee emphasized that the general question of policy before them was *how to control the growth and influence of corporate power and to regulate its relations to the public.*<sup>3</sup> The Report identified various reasons for federal regulation of interstate

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<sup>3</sup> Stated in its entirety, “The interest everywhere manifested in its investigation has convinced the committee that *no general question of governmental policy occupies at this time so prominent a place in the thoughts of the people as that of controlling the steady growth and extending influence of corporate power and of regulating its relations to the public;* and as no corporations are more conspicuously before

commerce. These reasons included the importance of railroads to commerce, the inadequacy of common law remedies for customers under the common law of common carriage, the lack of state jurisdiction over interstate commerce, and the insufficiency of competition to protect customers from discriminatory and oppressive practices (Cullom Report, 1886, pp. 176-180). Following the recommendation of the Cullom Report, Congress enacted the Interstate Commerce Act (ICA) of 1887, creating the first federal regulatory commission, the Interstate Commerce Commission (ICC), with authority over railroads. The Mann-Elkins Act of 1910 later extended the ICC's regulatory authority to telegraphy and telephony. Subsequently, in the Communications Act of 1934, which created the Federal Communications Commission (FCC), Congress retained the same framework of common carriage regulation and transferred jurisdiction of telegraphy and telephony from the ICC to the FCC.

#### *D. The Rise of Federal Antitrust Law*

Because the ICA provided a federal regulatory framework only for the railroad industry in interstate commerce, the policy question of how to regulate corporate power in general had been deferred. Only three years after passage of the ICA, Congress responded with passage of the first federal statute to regulate interstate commerce for general businesses, the Sherman Act of 1890. For interstate commerce generally, Congress identified problems similar to those encountered in addressing the railroad problem. Congressional response was necessary due to the inadequacy of common law remedies and the lack of State jurisdiction over interstate commerce (Areeda & Hovenkamp, 2000, §104a).

The Sherman Act was enacted to prevent restraints on competition arising from the conduct of large businesses, often organized as “trusts”, that were organized to suppress competition and had monopolistic tendencies. However, Congress faced the challenge of designing a statutory framework to achieve the intended purposes. Given the lack of relevant preexisting federal common law, the “[c]reation of a new federal jurisdiction inevitably required the courts to receive, apply, and develop ‘the common law’ in the same way that a new

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the public eye, and as there are none whose operations so directly affect every citizen in the daily pursuit of his business or avocation as the corporations engaged in transportation, they naturally receive the most consideration in this connection” (Cullom Report, 1886, pp. 2-3, emphasis in original).

jurisdiction customarily does” (Areeda & Hovenkamp, 1995, §302, p. 4).<sup>4</sup> The brevity of the legislation – to prohibit every contract, combination or conspiracy in restraint of trade and to prohibit monopolization of any part of trade in interstate commerce – and its subsequent enforcement by the courts for over a century support this characterization. The Sherman Act provided the statutory foundation for a new body of law that provided flexibility to evolve in the courts consistent with the common law tradition.

### **III. Evolution of corporations’ constitutional rights to block government regulation**

The U.S. Constitution contains direct and indirect limitations on government power. The indirect limitations are reflected in the separation of powers among three branches of government, the original purpose of which was to protect individuals from the arbitrary exercise of government power (Cherry and Wildman, 2000, pp. 66-67). The direct limitations expressly constrain government power, such as in the Bill of Rights, the purpose of which is to give priority of certain individual interests over those of government (Cherry and Wildman, 2000, p. 67). An important means of blocking government regulation is to seek a judicial judgment that the relevant assertion of government power is unconstitutional.

The enforcement of constitutional principles on behalf of corporations can have both beneficial and harmful consequences from a societal perspective. On the one hand, enforcement of constitutional principles can facilitate the creation of an environment that more sustainably supports investment in and development of commercial activities of great benefit to society. For example, as Cherry and Wildman (2000) explains in great depth, enforcement of constitutional principles limits vulnerability of private parties from expropriation of property by government. Protection from expropriation is particularly important to enable private investment in critical infrastructures – such as public utilities, which under U.S. law includes the provision of railroads, telegraphy, telephony, and electricity.

On the other hand, enforcement of constitutional rights enables parties to externalize the effects of their behavior onto society. This paper examines how corporations have used constitutional challenges to block, in its entirety or in part, the exercise of government power to

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<sup>4</sup> For this reason, Areeda and Hovenkamp assert that "the Sherman Act may be seen not as a prohibition of any specific conduct but as a general authority to do what common law courts usually do: to use certain customary techniques of technical reasoning, to consider the reasoning and results of other common law courts, and to develop, refine, and innovate in the dynamic common law tradition (1995, §302, p. 4).

regulate certain corporate activities. It then explains how the growing recognition of corporations' constitutional rights, when combined with other developments that have either eroded state legal remedies or forgone federal regulation, has acutely circumscribed the scope of legal remedies to constrain the behavior of providers of broadband Internet access services. This section briefly reviews the evolution of corporations' constitutional rights, restricting discussion to seminal legal developments most relevant to those rights of broadband providers that are likely to constrain government regulation of their activities.

In *Trustees of Dartmouth College v. Woodward* (1819), “the Court laid the framework for weakening the common law principle of retention of sovereign power over state chartered corporations” (Linzey, 1995, p. 231, footnote omitted). In this case, the Court “held that a corporate charter ‘is a contract, the obligation of which cannot be impaired without violating the Constitution of the United States’” (p. 230, footnote omitted; citing the opinion, 17 U.S. at 650). Thus, under the Contract Clause,<sup>5</sup> a “charter could not be revoked or privileges withdrawn without some just reason” (Linzey, 1995, p. 231, fn 56), and “[n]o longer would the corporation created by the sovereign be subjected to arbitrary interference” (Linzey, 1995, p. 232). Thus, the Contract Clause limits the state’s power to revoke charters under actions of quo warranto or the ultra vires doctrine.

*Santa Clara County v. South Pacific Railroad*, 118 U.S. 394 (1886), is considered the first case in which the U.S. “Supreme Court recognized corporate personhood as conferring constitutional rights” (Cray and Drutman, 2005, p. 318, footnote omitted). In particular, *Santa Clara County* has been cited for the proposition that corporations are persons under the Fourteenth Amendment of the U.S. Constitution.<sup>6</sup> Noteworthy is the timing and context of this case; the case was brought by a railroad company, and decided during the period of transformation to from small to large business corporations and in the same year that the Cullom

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<sup>5</sup> The Contract Clause provides that “No State shall ... pass any ... Law impairing the Obligation of Contracts” (U.S. Constitution, Art I. Sec. 10, Clause 1).

<sup>6</sup> The Fourteenth Amendment provides in relevant part that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (Clause 1). Upon closer inspection, this case provides a dubious basis for precedent as the case is cited for a proposition that is reflected only in a cursory statement from the U.S. Supreme Court Justice during oral argument and not part of the Court’s legal decision (Hartmann, 2002).

Report was issued by the U.S. Senate. “In establishing the doctrine of ‘corporate personhood,’ the *Santa Clara* court provided corporations with a potentially powerful new shield against public accountability” (Cray and Drutman, 2005, p. 318, footnote omitted). Indeed, soon thereafter in other cases, the U.S. Supreme Court specifically recognized corporations as persons under the Due Process and Equal Protection Clauses of the Fourteenth Amendment (Krannich, 2005, pp. 93-94). In many of these cases, railroad companies were again the plaintiffs (Krannich, 2005, p. 94; Thoennes, 2004, pp. 210-211, fn. 50).

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides in relevant part: “nor shall private property be taken for public use, without just compensation.” In early cases, takings were found only when government exercised its eminent domain power to directly appropriate property. In *Pennsylvania Coal Co. v. Mahon* (1922), for the first time “the U.S. Supreme Court held that a taking could occur by virtue of overreaching regulation through government’s use of its police power” (Cherry and Wildman, 2000, p. 70). In subsequent cases, the Takings Clause has been used to invalidate actions of state and federal agencies, including those with jurisdiction over public utilities (Cherry and Wildman, 2000, pp. 70-74).

Finally, cases holding that corporations have free speech rights are of more recent vintage. The First Amendment of the U.S. Constitution provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.” The First Amendment has also been held applicable to the states through the Due Process Clause of the Fourteenth Amendment, as in *Near v. Minnesota* (1931). Freedom of speech not only protects individual interests, but also serves the public purpose of sustaining a constitutional democracy (Cherry & Wildman, 2000, p. 88). With regard to corporations engaged in communications, newspapers have the highest level of constitutional protection, given the separate Free Press Clause in the First Amendment. Aside from the press, the level of free speech rights for mass media providers differs among technology platforms, where government is required to meet a higher level of judicial scrutiny to justify regulation for cable providers than broadcast providers (Botein, 1998, pp. 292-456). In some circumstances, even free speech rights for telephone companies have been used to invalidate or constrain government regulation. These include invalidating a federal ban on the sales of television programming by telephone companies directly to their customers,<sup>7</sup> and holding that a

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<sup>7</sup> *Chesapeake & Potomac Telephone Co. v. National Cable Television Association*, 42 F. 3d 181 (4<sup>th</sup> Cir. 1994).

state utility commission's requirement that a telephone company help spread a message to which it disagrees in its bill inserts to customers violated the utility's free speech rights.<sup>8</sup>

Another important line of free speech cases involves the rights of corporations to participate in political activities. In this regard, political speech – unlike commercial speech – receives the highest level of First Amendment protection. There has been “precedent for restricting the free speech rights of corporations to a greater extent than natural persons for reasons directed related to unique characteristics of the corporate form” (Cherry and Wildman, 2000, p. 273, footnote omitted). More specifically, in *Austin v. Michigan Chamber of Commerce* (1990), the U.S. Supreme Court upheld a Michigan statute that prohibited certain corporations from using corporate treasury funds for independent expenditures in support or opposition of candidates in state elections. The Court found this restriction on corporations' political speech was justified because the state had a compelling interest in preventing a specific type of corruption arising from unique characteristics of corporations. Although the state statute did not apply to media corporations, the Court implied that its application to them could potentially be constitutional as well (Cherry and Wildman, 2000, p. 274). However, in *Citizens United v. Federal Election Commission* (2010), the U.S. Supreme Court overruled some of its prior cases, including *Austin*, to hold that corporations must be treated identically to natural persons with regard to political speech. Cherry (2010) discusses the implications of *Citizens United* for network neutrality rules, as broadband providers are likely to raise a constitutional challenge to such rules on free speech grounds.

Thus, under the evolution of constitutional law, corporations have been recognized as having some constitutional rights that provide an important means for blocking government regulation.<sup>9</sup> Therefore, as state regulation of corporations eroded under the rise of federal regulation, federal regulation has also been increasingly limited by the rising recognition of corporate constitutional rights.

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<sup>8</sup> *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

<sup>9</sup> Corporations also have protection under the Double Jeopardy Clause of the Fifth Amendment; the right to a jury trial, a speedy trial, a right to counsel under the Sixth Amendment; and protection from excessive fines under the Eighth Amendment. However, “purely personal” constitutional rights have not been extended to corporations when the function of the right was to protect individuals. Examples include the privilege against self-incrimination, right to privacy, (less protection from) unreasonable search and seizure under the Fourth Amendment, and the privileges and immunities Clause under the Fourteenth Amendment.

#### **IV. Forsaking industry-specific regulatory power under deregulatory policies**

Against this backdrop of replacing state law remedies over corporations by federal law, in the latter portion of the 20<sup>th</sup> century and continuing in the 21<sup>st</sup> century there has been a retrenchment from availability of federal remedies. One mechanism of retrenchment is the rise in recognition of constitutional rights for corporations discussed in section III. Another is the federal government's forsaking of its remaining (constitutionally permissible) power under deregulatory policies.

Deregulatory policies have reduced or eliminated industry-specific regulatory power. In this regard, policies of federal preemption block state legal remedies. Since enactment of the Telecommunications Act of 1996, examples include the FCC's classification of broadband Internet access services as information services, and FCC's preemption of VOIP regulation.

In reducing or eliminating industry-specific regulatory power, deregulatory policies also shift reliance to economic competition and legal remedies available under other bodies of state and federal law applicable to general businesses. Yet, by this time, as discussed in sections II and III, the availability of certain federal and state remedies had already been contracting. Further contraction of available federal and state remedies is continuing under recent U.S. Supreme Court and federal Circuit Court of Appeals decisions.

Cherry (2010) discusses legal gaps in shifting reliance from industry-specific regulation of telecommunications and broadband access services to general business regulation under antitrust and consumer protection laws. These laws share a common purpose to facilitate the exercise of effective consumer choice in a market economy (Averitt and Lande, 1997, p. 713).

The antitrust laws are intended to ensure that the marketplace remains competitive, so that a meaningful range of options is made available to consumers, unimpaired by practices such as price fixing or anticompetitive mergers. The consumer protection laws are then intended to ensure that consumers can choose effectively from among those options, with their critical faculties unimpaired by such violations as deception or the withholding of material information. Protection at both levels is needed in order to ensure that a market economy can continue to operate effectively. (Averitt and Lande, 1997, pp. 713-714)

Since enactment of the Telecommunications Act of 1996, the legal gaps include loss or uncertainty of remedies under consumer protection law, where there is a conflict among the Circuit Courts of Appeals over the continued viability of the filed rate doctrine after detariffing

(Cherry, 2010, pp. 14-15).<sup>10</sup> In addition, U.S. Supreme Court decisions have created new uncertainties for enforcement of federal antitrust law, such as the uncertain viability of the essential facilities doctrine in *Verizon Communications Inc. v. Trinko* (2004), and the Court's announcement of essentially a new pleading rule in *Bell Atlantic Corp. v. Twombly* (2007) (Cherry, 2011, pp. 15-17).

Recently in *AT&T Mobility v. Concepcion* (2011), the U.S. Supreme Court further limited the applicability of general consumer protection statutes, and impliedly common law actions based on unconscionability of contracts. The Court held that the savings clause in section 2 of the Federal Arbitration Act (FAA) preempts California's statutory rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. As a result, AT&T Mobility can enforce the provision of its consumer contract that requires binding arbitration yet also prohibits arbitration by classes of consumers. In interpreting the FAA, the Court ignores coexistence of the industry-specific regime of common carriage at the time that the FAA was enacted in 1925 – where there were three mechanisms for consumer remedies (in the courts, through arbitration, or before federal or state commissions) including class actions – and thus the severity of the loss of consumers' legal remedies as a result of its decision.

Thus, shrinking industry-specific regulation is being accompanied by the contraction of remedies under antitrust and consumer protection laws. For this reason, increased reliance on forms of general business regulation – the intention of deregulatory policies - is misplaced.

## **V. Bridging the growing legal gaps**

This section reviews options for addressing the growing legal gaps in available state or federal law legal remedies with regard to activities of broadband providers. The most direct and effective option is to reinstitute some industry-specific regulation. This option could be accomplished by restoring FCC jurisdiction, either by FCC reclassification of broadband Internet access service as a telecommunications service (that is, as having a telecommunications service component) or by specific act of Congress. Alternatively, Congress could directly impose

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<sup>10</sup> The filed rate doctrine originated with interpretation of the Interstate Commerce Act of 1887 and was subsequently applied under the Communications Act of 1934. Under the filed rate doctrine, all rates, terms and conditions in tariffs are considered lawful, with no deviation permitted even under legal claims such as fraud.



specific legal obligations on broadband Internet access service providers under a rationale likely to survive a constitutional challenge under the Free Speech Clause. Classification of broadband Internet access service as a common carrier service would help in this regard, particularly if the recent FCC rules are stricken upon judicial review (Cherry, 2011, pp. 635-636).

As for antitrust and consumer protection laws applicable to businesses as a general matter, Congress could enact laws to overrule holdings in various court decisions. For example, Congress could revise the Federal Arbitration Act to permit state law consumer protection laws and/or common law actions to void enforcement of certain contract clauses, effectively restoring legal remedies based on unconscionability, particularly as to contracts of adhesion. Such clauses include mandatory arbitration, prohibition of class arbitration or judicial class actions, and exculpatory clauses or severe limits on liability. Congress could also revise antitrust law to expressly recognize the essential facilities doctrine, and too counter US Supreme Court's change in plaintiffs' pleading requirements.

Finally, some efforts could be made to directly constrain *corporate* power. One option is the revival of historical legal remedies. For example, in the context of corporate actions that harm the environment, Linzey (1997) asserts "it is essential that citizens rediscover the tools originally used to keep corporations politically subordinate to citizen control" (p. 41). In this regard, he observes that quo warranto state statutes still exist in 49 states and the District of Columbia under which corporate charters could be revoked. Moreover, through revision of state quo warranto statutes, Linzey (1995) "proposes a quasi-private cause of action where citizens could obtain judicial review of the [state] Attorney General's decision not to bring a revocation action" (pp. 226-227). This option could also be applied to corporate actions in other contexts. A less likely and more politically difficult option is to narrow or even eliminate certain constitutional rights of corporations. This option would require amendments to the U.S. Constitution and/or reversals of precedent by the U.S. Supreme Court. The occurrence of either is remote in light of U.S. historical experience.

### **Concluding remarks**

Cherry (2008) examines the challenge for institutional governance under deregulatory policies, which has been intensified by the adverse effects of the social acceleration of time.<sup>11</sup> This challenge consists of providing regulatory resilience through regulatory structures and policies of increased adaptability yet maintaining the rule of law. This challenge “needs to be viewed more generally in terms of new developments in the co-evolution of markets and policymaking systems that are pressing for a phase transition in their interrelationship” (p. 3).

Cherry (2011) expands analysis to consider the combinatorial effects of the FCC’s decision to classify broadband Internet access services as information services and the U.S. Supreme Court’s decision in *Citizens United*, finding that expansion of corporations’ free speech rights likely enhances broadband providers’ ability to successfully challenge the FCC’s recent network neutrality rules on constitutional grounds. The present paper broadens inquiry to consider the likely combinatorial effects of deregulatory broadband policies and the evolution of law as applied to corporations as a general matter. In this regard, it explains how legal developments in both areas have dismantled bodies of law or doctrines that had developed to address corporate power in both commercial and political spheres and to protect consumers from vulnerability in commercial activities. Moreover, the coexistence of these developments enables an unprecedented transfer of corporate power between economic and policymaking institutions. With the decline in regulatory constraints, as well as the rise in constitutional rights to block attempts to impose regulatory constraints, there is a resurgent rise of corporate power. The result may be a phase transition undermining the rule of law so critical to sustainable democracies.

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<sup>11</sup> Scheuerman (2004, p. xv) defines the social acceleration of time as “a long-term yet relatively recent historical process consisting of three central elements: technological acceleration (e.g. the heightening of the rate of technological innovation), the acceleration of social change (referring to accelerated patterns of basic change in the workplace, e.g.), and the acceleration of everyday life (e.g. via new means of high-speed communication or transportation).

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