



## From Net Neutrality to Net Equality

JOHN MCMURRIA<sup>1</sup>

University of California, San Diego, USA

I argue that the conceptual foundations for net neutrality assume a race neutrality that obfuscates the daily experiences of racial discrimination and the institutional dynamics of structural racism. I begin this study with an assessment of the race-neutral conceptual foundations of net neutrality reasoning, and then discuss how Critical Race Theory (CRT) has challenged these race-neutral frameworks. Drawing from CRT, I locate the ways in which legal and economic structures of discrimination have historically inhibited people of color from gaining access to employment, ownership, and decision-making power in the media and telecommunications sectors. I conclude with thoughts on how CRT can inform media policy scholarship to challenge race-neutral thinking and develop conceptual foundations for supporting what advocacy groups representing people of color have called “net equality.”

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In its 2015 Open Internet Order, the Federal Communication Commission (FCC) claimed Title II authority to apply net neutrality rules for the Internet.<sup>2</sup> Network neutrality, the Commission argued, “drives a ‘virtuous cycle’ in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge” (FCC, 2015, p. 4). This cycle of innovation and investment is “critical,” the Commission continued, “to its ability to serve as a platform for speech and civic engagement” and its capacity to “help close the

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John McMurria: [jmcmurria@ucsd.edu](mailto:jmcmurria@ucsd.edu)

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<sup>2</sup> Title II is a category under the Communications Act of 1934 that applies to telecommunications common carriers. Title II gives the FCC authority to regulate common carriers to ensure they offer “just and reasonable” services regarding interconnection, rates, and quality. See Communications Act of 1934.

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digital divide by facilitating the development of diverse content, applications, and services" (FCC, 2015, p. 27).

Disagreeing with the FCC was the Multicultural Media, Telecom and Internet Council (MMTC), formerly called the Minority Media and Telecommunications Council, which has for three decades represented a number of civil rights organizations and minority business organizations in advocating for telecommunications policies. In a response to the FCC's Open Internet Order, MMTC President and CEO Kim Keenan (2015) wrote that the Council shared "in the Commission's goals to protect and promote an open Internet," but that the proposed use of Title II to enforce net neutrality rules could have potentially negative "unintended consequences on broadband adoption for people of color, the disabled, the economically disadvantaged, rural residents, and seniors" (p. 1). Keenan concluded that Internet policies must ensure that "every American shares in the opportunity of net equality" (p. 4).

This essay examines the foundations of this dispute over net neutrality and Title II regulatory authority through locating the fundamentally different approaches to law, economics, and technology that separate most *net neutrality* proponents from the MMTC's approach to *net equality*. I argue that the conceptual foundations for net neutrality presume a race-neutral perspective that obfuscates institutional structures of racism.<sup>3</sup> Indeed, the MMTC has identified racial discrimination as structurally imbedded in legal, economic, and government institutions and has advocated for flexible, context-specific policies to redress these structural barriers to racial equality.

I begin by showing how scholars of net neutrality draw from theories of law and economics that prioritize market efficiency, and in doing so, subordinate considerations of racial discrimination and inequality. In addressing race these scholars either assume that net neutrality has a universal benefit or they bracket race, gender, and class inequalities to isolate that causal relationship between net neutrality and innovation. A consideration of the FCC's deliberations on net neutrality reveals a preponderance of race-neutral perspectives from most proponents *and* opponents of net neutrality and Title II regulations.

Critical Race Theory (CRT) has challenged prevailing law and economics traditions for failing to account for institutionalized structures of racism. Drawing from core themes in CRT I trace the history of Black media policy advocacy as a movement that has exposed and challenged institutional racism through advocating for access to employment, ownership, and decision-making power in the media and telecommunications sectors. This history offers a counter-narrative and an alternative critical analytic that challenges race-neutral understandings of law and economics, a history that the MMTC has been at the forefront for the past 30 years.

This race-conscious analysis of structural racism in law and economics is evident in the MMTC's 2015 Access to Capital and Telecom Policy Conference. In panel discussions that included government officials, civil rights activists, Internet start-up entrepreneurs, and telecommunications executives, conference participants deliberated a range of strategies and tactics for gaining access to capital and for addressing racial discrimination in large and small companies. A consideration of this conference and

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<sup>3</sup> I say "presume" to question both the desirability and practical possibility of race neutrality in law and economics. For a critique of race-neutral or "color-blind" ideology in law, see Carbado and Harris, 2008.

recent MMTC policy proposals reveals the economic and regulatory barriers that continue to limit opportunities for minority employment and ownership in media.

I conclude by recognizing that other advocacy groups representing people of color have supported net neutrality and defended an open Internet as a communications technology that has allowed people of color to bypass corporate media control. Despite their differences, I emphasize that what these opposing camps share is an orientation toward media policy that challenges race-neutral depictions of technology, law, and economics. My methodology, then, is not to identify the specificities of net neutrality arguments and ask whether their enactment would benefit or disadvantage communities of color. Instead, I seek to reveal the prevalence of race-neutral reasoning in net neutrality scholarship and in FCC policy forums, as well as the challenges to this race-neutral analysis among CRT legal scholars and advocacy groups representing people of color.

### **Net Neutrality as Race Neutrality**

The conceptual foundation for net neutrality principles is found in what has been called the original "end-to-end" design principles of the Internet, principles that its advocates say enable the Internet to develop as an engine for economic growth, innovation, and democracy. To consider these arguments more closely and, in particular, to understand how the end-to-end conceptual foundation fails to account for structures of racial discrimination and economic marginalization, I turn to Barbara van Schewick's (2012) influential book-length argument for supporting end-to-end design principles and net neutrality regulations. Van Schewick's work extends the arguments of others who have defended the value of end-to-end design principles and their wide-ranging social benefits, including Lawrence Lessig (2001) and Yochai Benkler (2006). Like these and other authors, race (or gender and class), are not relevant factors in analyzing the social and economic implications of an end-to-end Internet architecture.<sup>4</sup>

Van Schewick references Saltzer, Reed, and Clark's (1984) foundational essay to define the broad version of the end-to-end architectural principle. The broad version is a strict interpretation of the principle's requirement that network functionality remain simple and able to support a diversity of uses at the ends where application developers innovate and users access the network. Yet an Internet architecture can deviate from the broad version of these end-to-end principles, van Schewick (2012) writes, through "implementing more application-specific functionality in the network's core" or through "increasing network providers' ability to control applications and content on their networks" (p. 286). These deviations, she argues, decrease incentives for "independent innovators" because of the added costs required to secure network functionality and the added risks that the conditions and terms of network access could change at any time (p. 286).

Van Schewick argues that the social value of these broad end-to-end principles is efficiency and economic growth:

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<sup>4</sup> The absence of race, gender, and class as contexts in the net neutrality debate is prevalent. For example, see the 15 essays on net neutrality in "Special Section on Net Neutrality," 2007, *International Journal of Communication*, 1, pp. 377-716.

As a general-purpose technology, the Internet does not create value through its existence alone. It creates value by helping users do what they want to do, or by letting them do so more efficiently. Applications are the tools that let users realize this value. By reducing innovation in applications and limiting users' ability to decide how to use the network, these changes significantly reduce the Internet's usefulness and value for users, and, ultimately, for society as a whole. In addition, reducing innovation in applications limits the Internet's ability to contribute to economic growth. (van Schewick, 2012, p. 10)

In identifying efficiency and economic growth as central benefits of end-to-end architecture, van Schewick draws from the Chicago school of economics and the New Institutional Economics (NIE) that have widely influenced law and economics thinking since the 1960s. Prominent economists in the Chicago school, including Ronald H. Coase, Gary Becker, and Richard A. Posner, have drawn from classical economic theory to question the effectiveness and efficiency of state interventions into market forces. The two normative prescriptions of the Chicago school, as Mercurio and Medema (2006) summarize, are that "legal decision-making should promote efficiency" and "that in formulating public policy, decision-makers should rely heavily on markets" (p. 102). NIE too supports market efficiency, Mercurio and Medema continue, but factors in that individuals cannot fully know how to most efficiently maximize their economic self-interests. NIE examines society's institutions, here understood as social and legal norms that guide individual and organizational actions, and identifies new laws that can better optimize market incentives and constraints to "enhance society's wealth-producing capacity" (pp. 244–245).

Van Schewick uses these market efficiency-oriented economic theories to argue that the end-to-end Internet architecture provides the right balance of incentives and constraints to promote technological innovation and economic growth. Because of the high degree of uncertainty in knowing the best uses of a new technology, she argues, the end-to-end Internet design structure decentralizes application innovation to ensure that a diversity of persons and organizations can pursue as wide a range of applications as possible. Regarding organizations, van Schewick cites managerial research that finds that "incumbent firms may find it difficult to recognize the implications of the new technology or to change their resources and capabilities to take advantage of the new situation" (p. 323). "New entrants," she writes, "whose perceptions and capabilities have not been shaped by the existing situation have an advantage in recognizing the value of the new technology and in mustering the resources and capabilities to exploit it" (p. 323). She finds that venture capital firms facilitate organizational diversity because they invest in various technology start-ups to spread the risk of investing in these uncertain ventures. To isolate the benefits of end-to-end Internet architecture for technological innovation at the organizational level, she considers "organizations as singular units with resources, cost structures, goals, motivations, and cost-benefit assessment processes that influence how they make decisions" (p. 30). She discusses the internal relational dynamics within organizations "only when they are relevant to the effect of architecture on the organization of innovation and to the reactions of organizations to opportunities for innovation" (p. 30).

Critical Race Theory has critiqued just such approaches to market efficiency and technological innovation for obfuscating practices of racial exclusion that occur within business organizations and other societal institutions. Van Schewick is not unaware of racial inequality, yet she sidesteps questions of race

inequality to more forcefully draw causal connections between end-to-end architecture and societal benefits. "To isolate the effect of architecture," she writes,

I neglect the effect of potential differences in actors or non-architectural constraints and focus on the technological possibilities afforded by or constrained by different architectures without implying that such possibilities can be or will be realized by everyone or everywhere. (p. 362)

Tucked away in a footnote she explains that because "my analysis focuses on the possibilities afforded by these applications" rather than on "a description of current reality," in reality, "differences in class, socioeconomic status, race, literacy or geographic location may result in a much more hierarchical and less open environment than the one described in the text" (p. 488). Whereas CRT insists that questions of race inequality cannot be divorced from considering the relational dynamics of Internet architectures, innovation, and economic practices, van Schewick's argument is predicated on excluding considerations of race (and class and gender).

Van Schewick's subordination of the realities of race inequality in addressing the economics and social benefits of net neutrality was widely shared among the participants at the FCC's nine roundtable discussions that convened in September and October of 2014 to deliberate the pros and cons of net neutrality and Title II designation. For example, on the "economics of broadband" panel none of the six invited economists and neither of the two FCC staff economists mentioned race. The economists on this panel supporting net neutrality invoked the "virtuous circle" of innovation that an open Internet promoted, while opponents of net neutrality argued that minimal Internet regulations and market forces have exploded innovation and should not be constricted by Title II regulatory authority.<sup>5</sup>

Race, likewise, was not a topic of discussion in the three roundtables on "policy approaches," which invited law and policy professors including van Schewick, telecommunications executives, and video service companies. Predictably, telecom operators and network service companies opposed net neutrality restrictions to their operations while the video streaming service Netflix supported net neutrality to prevent Internet service providers from charging them more for Internet access.<sup>6</sup> Consideration of race inequality was absent too from the public interest advocacy groups Public Knowledge and Free Press. The latter, an anti-corporate populist media advocate, supported net neutrality to stop corporations like Comcast from slowing the Internet traffic of file sharing services like bit torrent.<sup>7</sup>

Within the other five FCC roundtable discussions were but a few references to race inequality. These included Amalia Deloney who represented the Center for Media Justice and the Media Action

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<sup>5</sup> For these roundtable discussions see Federal Communications Commission, Open Internet Roundtables, September 16 and 19, and October 2 and 7, 2014. Retrieved from <https://www.fcc.gov/general/open-internet-roundtables>.

<sup>6</sup> For these roundtable discussions see Federal Communications Commission, Open Internet Roundtables, September 16 and 19, and October 2 and 7, 2014. Retrieved from <https://www.fcc.gov/general/open-internet-roundtables>.

<sup>7</sup> For the subordination of race in anti-corporate populist media advocacy, see McMurria, 2012.

Grassroots Network. She voiced concern that without net neutrality Internet service providers could discriminate against disempowered groups, preventing them from equally accessing the Internet to organize protests including those against racialized police brutality. Julia Johnson, Chair of MMTC, argued that net neutrality could prohibit Internet providers from charging large volume users like Netflix more for access and, conversely, reducing access costs for low-income users. The new rules, Johnson continued, might prevent Internet providers from offering sponsored data plans that reduce the cost of access for low-income users who in the past have chosen these plans. The FCC further marginalized the MMTC's perspectives by placing Johnson on a panel discussing the narrow topic of "legally sustainable rules" instead of the big picture roundtables on "policy approaches" and the "economics of broadband."

### **Approaching Law and Economics Through Critical Race Theory**

Unlike the law and economics traditions that have informed net neutrality deliberations and their subordination of race, CRT has challenged such subordinations. CRT grew out of a social movement of legal scholars and others who questioned liberal legal assumptions about the race neutrality of U.S. law and the increasingly market-based economic approaches of the Chicago school and the New Institutionalists. Instead of considering law as a legal remedy to maximize market efficiency, CRT has emphasized racism as an ordinary, everyday occurrence that exists within and across all of society's institutions of government, law enforcement, education, and commerce. CRT situates race and the law within historically constituted relations that have privileged whites over people of color regarding life opportunities for work, education, political participation, and self-expression. These racial contexts are complex, according to CRT, and vary across races and intersect with other forms of historical marginalization, including class, gender, national origin, and sexuality (Delgado & Stefancic, 2012).

Consider Carbado and Gulati's (2003) critique of market efficiency as a guiding framework for law and economics. In studying the literature on hiring practices, the authors found a "homogeneity incentive" where in "order to increase efficiency, employers have incentives to screen prospective employees for homogeneity, and, in order to counter race stereotypes, nonwhite employees have incentives to demonstrate a willingness and capacity to assimilate" (p. 1762). Drawing from empirical studies the authors show that employers believe that enhancing employee team effectiveness and efficiency requires engendering "trust, fairness and loyalty" among team members. (p. 1789). Often these decisions result from short-term thinking, which leads to hiring employees that share similar qualities and attributes.

Drawing from social identity theory and similarity-attraction theory, Carbado and Gulati show that people generally have an affinity for, and attraction to, "those they perceive to be part of their in-group" (2003, p. 1795). Statistical judgement theory suggests that people take "mental shortcuts" (p. 1795) in deciding affinity such that

white workers may see a new black colleague as likely to be lazy, untrustworthy, disloyal (especially to her white colleagues), frequently angry (perhaps as a result of oversensitivity about race), and difficult to communicate with (due to her likely having different values, different interests, and different cultural and experiential points of reference). (pp. 1795-1797)

This not only limits employment for people of color to those "likely to possess the quantum of cultural capital necessary to gain entry" (p. 1814), but also places a burden on nonwhites to "not identify as an outsider" (p. 1813) or to demonstrate that "one is a different kind of outsider" who can blend in (p. 1813). These hiring and workplace practices that comprise "*intra*racial" distinctions are largely immune from antidiscrimination law or affirmative action programs (p. 1792). Net neutrality proponents subordinate these race-based hiring practices and intra-organizational dynamics in failing to consider, as van Schewick put it above, the "potential differences in actors" (van Schewick, 2012, p. 362) within organizations when elaborating the benefits of open Internet architectures.

Similarly, net neutrality reasoning subordinates considerations of race inequality when claiming that decentralization of application innovation invites a diversity of new entrants and that venture capital practices benefit diverse start-ups. The MMTC has cited studies that venture capital practices heighten barriers to entry for people of color. Because venture capital investors lend to start-ups with high-tech experience, the low level of race diversity in the high-tech sector means few persons of color qualify. Furthermore, venture capital investors have shown a bias toward entrepreneurs who share the attributes of members of previously successful start-ups, which heavily skew toward white male computer science graduates from elite universities. Thus only 1% of Internet venture capital has been invested with Black entrepreneurs. Without access to venture capital, Black start-ups lose the excitement factor that generates third-party investors (Initial Comments of the Diversity and Competition Supporters, 2012).

The issue of unequal access to venture capital is related to the much broader issue of wealth inequality among whites and people of color. According to a recent study, while income inequality in 2011 among whites, African Americans, and Latinos was stark, wealth inequality was staggering. The median income for white households was \$50,400 compared with \$32,028 for Black households and \$36,840 for Latino households. The median wealth of white households was \$111,146 compared with just \$7,113 for median Black households and \$8,348 for median Latino households (Sullivan et al., 2015).

CRT has developed frameworks for contextualizing these wealth inequalities through historicizing the structural barriers that have impeded people of color from acquiring wealth through business opportunities, home ownership, and family inheritance. Oliver and Shapiro (2006) offer three concepts for understanding this wealth inequality. The "racialization of state policy" (p. 4) addresses the ways in which government policies have structurally benefited whites over people of color. "Economic detour" (p. 4) comprises laws and economic practices, especially in the years leading to mid-century, which have restricted Black businesses from entering white markets. The third concept is the "sedimentation of racial inequality" (p. 5) that has compounded wealth inequality through a "history of low wages, poor schooling, and segregation [that] affected not one or two generations of blacks but practically all African Americans well into the middle of the twentieth century" (p. 5). These sediments of racial inequality have compounded access to forms of wealth inequality, as the case of the post-1980 real estate boom exemplifies. In 2011, home ownership in white households was 73%, but only 47% among Latinos and 45% among African Americans. Further, white home owners have accrued 30–50% more on their real estate investment than African Americans and Latinos (Sullivan et al., 2015, p. 3). These past and ongoing forms of structural disadvantage for people of color are further compounded because most wealth acquisition today comes from transfers from one generation to the next (Darity, 2009).

One way to convey this history of structural barriers to economic opportunity and their ongoing sedimentation is through what CRT has called the "voices-of-color thesis." While net neutrality proponents and official regulatory bodies subordinated the voices of people of color, Delgado and Stefancic (2012) have argued that with "their different histories and experiences with oppression, black, American Indian, Asian, and Latino writers and thinkers may be able to communicate to their white counterparts matters that the whites are unlikely to know" (p. 8). These experiences are diverse and "intersectional" across multiple contexts of identity formation, including gender, class, and sexuality, and therefore defy essentialist understandings of race. These experiences among disenfranchised people of color often express alternative understandings of economic relations that confront structures of discrimination and economic inequality (p. 63). Against accusations that aspirations toward professionalism and corporate ladder-climbing among people of color sustain structures of corporate power, the voices-of-color thesis directs attention to how people of color across all levels of the economy have confronted discrimination and have worked to confront practices of economic exploitation.

To convey and confront these experiences of racial discrimination, CRT has promoted storytelling in law and policy to provide thick descriptions of the complex ways in which the sedimentation of racial inequality has impacted daily life and economic opportunity. This storytelling counters liberal legal practices that claim colorblindness or adhere to neutral principles of procedural fairness rather than confront substantive injury. These stories place inequalities in historical context and elaborate their ongoing structural mechanisms (Delgado & Stefancic, 2012). A consideration of African American experience in the media and telecommunications sectors reveals much about the racialization of state policies that have created barriers to African American access. As narratives of combating racial exclusion, these experiences invoke the sediments that continue to marginalize people of color and the policies required to address them.

### **Historical Barriers to Black Economic Opportunity in Media and Telecommunications**

Structural barriers to economic opportunity and wealth accumulation for people of color have been particularly significant in the media and telecommunications sectors. No African Americans owned a radio station until 1949, and none owned a TV station until 1975 ("First Black-Owned TV Signs on in Detroit," 1975; Honig, 1984). In 1977, the National Black Media Coalition and the National Association of Black Owned Broadcasters pressed the FCC for ownership assistance, which came in 1978 in the form of tax breaks for broadcast license holders who sold to minority owners and the option for stations facing an FCC renewal or revocation hearing to sell to minority buyers at no more than 75% of market value. Though these policies facilitated station sales to minorities, structural barriers persisted, including difficulties securing investment capital, securing Black communications attorneys and engineers, and accessing the business clubs where most station sales were conducted (Honig, 1984). By 2006, minorities comprised 33% of the U.S. population, but owned just over 3% of the nation's broadcast stations. Furthermore, many minority-owned stations attracted listeners of color who had been systematically undercounted in Nielsen ratings, which reduced advertising revenues (Turner & Cooper, 2006).

In the early 1970s, people of color too sought ownership of the new communication technology of cable television. Because people of color had been largely excluded from owning broadcast stations, there

was a particular urgency among civil rights leaders and Black business leaders to develop this new and growing communication technology. As significant urban infrastructures in majority Black neighborhoods, Black-owned cable systems could create jobs and reinvest profits back into Black communities. Residents could become investors in the cable systems via their monthly subscriptions. And control over these new communications systems could create media outlets for Black perspectives, which were marginalized in broadcast television. Between 1971 and 1981, roughly 30 majority Black-owned cable companies were granted cable franchises, including in South Los Angeles; Dayton, Ohio; Gary, Indiana; and Columbus, Ohio (McMurria, forthcoming).

Yet securing access to capital for construction remained a barrier. The white-controlled cable companies that had consolidated ownership in multiple systems across the country had established networks for financing and building operations, but were leery to support Black-owned cable systems unless the multi-system operators took controlling interests. FCC regulations in the 1970s included no provisions for Black ownership. When Black-held franchises looked to other federal agencies for assistance they were turned away (McMurria, forthcoming). Furthermore, tax laws allowed multi-system cable operators to swap cable systems to provide one another with market exclusivity, leaving minority-owned systems with little choice but to sell to these multi-system operators or face shareholder derivative suits (D. Honig, personal communication, April 11, 2016). Given these racialized structural barriers to Black ownership of cable systems, only a few Black-owned franchises began operating, and by 1981, only one remained in operation. Presently there are no minority-owned cable systems.

These structural barriers to Black ownership continued when Congress created its first cable legislation in 1984. At a Congressional hearing on minority participation in the media, Congresswomen Cardiss Collins, Chicago's first Black woman elected to Congress, campaigned to include language in the cable legislation that would encourage minority employment and ownership in the industry. When Collins questioned then National Cable Television Association President Thomas Wheeler (who led the campaign for net neutrality rules as FCC Chair in 2015), he supported Equal Employment Opportunity provisions, but did not support provisions to facilitate Black ownership. Instead, Wheeler argued that the current cable bill that limited municipal franchise fees and prohibited rate regulation would open opportunities for everyone to own and build cable systems because decisions would be made in the "consumer marketplace" and not the "political marketplace." He added too that provisions to set aside public access and leased access cable channels provided a valuable outlet for Black expression ("Minority Participation in the Media," 1983, p. 212).

Kathleen Herman, the spokesperson for the cable franchising authority in Atlanta, Georgia, took issue with Wheeler's position. She argued that it was essential to give municipal franchising entities the authority to establish and enforce policies to secure minority ownership and employment opportunities. Herman mentioned that the Atlanta franchise authority required that minorities own at least 20% of the franchise and that the franchise allot at least 20% of its service and construction expenses to minority-owned business. She elaborated that it was a "daily struggle" to ensure that the franchise holder upheld these requirements in addition to Equal Employment Opportunity provisions (Minority Participation in the Media, 1983, p. 245). Herman also took exception to Wheeler's comments that public access would suffice to develop Black programming. She said that the access channels were inadequately funded and that

"everybody knows that you have to spend a lot of money in order to promote a channel" and to create a "media business where we can have some real impact on our audience" ("Minority Participation in the Media," 1983, p. 244). The 1984 cable legislation passed with none of the provisions Collins proposed.

To address these structural barriers to minority employment and ownership in the media and telecommunications industries, David Honig, a communications and civil rights attorney, and former researcher for the National Black Media Coalition, founded the Minority Media and Telecommunications Council in 1986. Though Honig and MMTC submitted dozens of minority ownership proposals in the 1980s, the FCC did not consider them. In the 1990s, Congress and the courts made creating minority ownership provisions even more difficult. In 1995 Congress repealed the Tax Certificate Policy and the Supreme Court raised the level of scrutiny for race-conscious federal programs. In 1998 FCC Chairman William Kennard commissioned five research studies on minority ownership to find a legal framework for including provisions for minority ownership. But the FCC never evaluated the studies, which were completed in 2000. Following the passage of the 1996 Telecommunications Act, Congress charged the FCC with biannually reviewing existing ownership rules through 2002, then quadrennially beginning in 2006, to ensure that they were still needed, given the rapid developments of new media technologies. During the 2002 review, the MMTC presented 14 detailed proposals to advance minority ownership, and subsequently an FCC Advisory Committee on Diversity for Communications in the Digital Age presented 18 recommendations. The FCC did not address or implement any of these (Honig, 2006; Horwitz, 2005; Reply Comments of the Diversity and Competition Supporters, 2007).

In 2009, the FCC turned its attention to establishing a national broadband plan. The MMTC represented a coalition of civil rights organizations and minority-owned small businesses to voice their concern about addressing the low level of access to terrestrial broadband service among people of color and those with low incomes. The MMTC was particularly concerned about broadband adoption, which addressed the structural support systems that enabled productive use of the Internet, including access to digital literacy assistance and quality science, technology, engineering, and mathematics education.

When the FCC shifted its broadband focus to establishing net neutrality rules, the MMTC and its coalition expressed concern that this focus moved away from the structural concerns that have limited access to the digital economy among people of color. They were particularly concerned that the language of neutrality obfuscated these structural barriers as they had in welfare programs in the past. The coalition cited the New Deal programs of the 1930s and 1940s that were "facially neutral enactments," but in reality actually deepened the poverty and unemployment divide between Black and white Americans (Comments of the National Organizations, 2010, p. 24).<sup>8</sup> The MMTC coalition questioned how a policy could be neutral when people of color remained far behind in income, wealth, education and access to capital. Of concern too was that net neutrality rules could inhibit the expansion of wireless broadband, which in recent years had facilitated higher usage rates among people of color compared with whites. The MMTC coalition proposed provisions to ensure consumer access to content, transparency in service, and full disclosure of network services. But the coalition argued that limiting Internet service providers from charging heavy users more for access could potentially raise rates for low-income users who might not

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<sup>8</sup> For the racial biases of the New Deal and Fair Deal programs, see Katznelson, 2006.

have heavy bandwidth needs. Without incorporating the concept of "Digital Equal Opportunity," the coalition concluded, net neutrality would not address the structural barriers that have marginalized people of color (Comments of the National Organizations, 2010, p. 28).

Further, in 2012, the MMTC coalition asked the FCC to give more attention to the needs of Minority-Owned Business Enterprises and socially and economically disadvantaged businesses to assist them in gaining access to spectrum and investment capital (Initial Comments of the Diversity and Competition Supporters, 2012). The FCC has not responded to these requests.

### **Current Barriers to Black Economic Opportunities in Telecommunications and the MMTC's Proposed Solutions**

The MMTC's 2015 annual Access to Capital and Telecom Policy Conference provides a snapshot of the range of issues and proposed solutions for addressing structural inequalities in the telecommunications sector. As the conference name indicates, access to capital remains a central barrier to Black opportunities. The range of participants and perspectives at the conference indicates that addressing racial discrimination requires multiple approaches and context-specific policy solutions. Conference panelists included current and past FCC Commissioners, diversity officers in large telecommunications firms, state telecommunications officials, civil rights activists, media executives, and representatives from technology start-ups. Conference participants frequently referenced the history of racial discrimination in the past to identify its sedimentation in the present and invoked past civil rights leaders to embolden current struggles against racial barriers.<sup>9</sup>

For example, presenters spoke of the importance of having racial diversity at all levels of business and government to transform the structures and institutions that have reproduced race and economic inequality. One panel addressed the importance of having people of color at the highest levels of corporate decision making. Ronald Parker, representing the Executive Leadership Council, a nonprofit that promotes Black leadership, began with mentioning the civic rights activist Leon Sullivan who had advocated for Black decision-making authority in economic development projects. Parker cited Sullivan as one of the first African Americans to sit on a corporate board of directors. After mentioning the low number of people of color on Fortune 500 boards, Parker spoke of the importance of these boards for making strategic and investment decisions that must include the perspectives of people of color. Adonis Hoffman, a former FCC staffer and founder of the nonprofit advocacy group Business in the Public Interest, spoke of his participation in the Black Power movement while growing up in South Central Los Angeles. Regarding working with corporations, Hoffman said that they know what the problems and barriers are, but choose not to act on them.

Other panelists referenced past government provisions that could be reinstated to redress racial exclusion. In combating corporate inaction, Timothy Alan Simon, Commissioner Emeritus of the California

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<sup>9</sup> For videos of the conference panels see Multicultural Media, Telecom and Internet Council, Access to Capital and Telecom Policy Videos, July 16-15, 2015, Westin Georgetown Hotel, Washington, DC. Retrieved from <http://mmtconline.org/2015-access-to-capital-and-telecom-policy-videos>.

Public Utilities Commission, referenced the importance of a 1980 law in California that required state agencies to hire minority suppliers. Johnson took issue with the notion that Internet technologies were changing too fast to consider policies to ensure diversity. He applauded Jesse Jackson's efforts with the PUSH coalition to hold the high-tech industry accountable for more diverse hiring practices (Horowitz, 2015).

People of color in technology and media firms spoke of their challenges navigating existing corporate ownership structures. Keith Clinkscales, CEO of REVOLT Media and TV, an organization sponsored by music impresario Sean Combs, spoke of the necessity of having leverage in a field of corporate conglomerates. REVOLT benefited from the leverage won by Congresswoman Maxine Waters who required Comcast to distribute four minority-owned networks as a stipulation for merging with NBC Universal. REVOLT received one of these slots for its network. An executive at another Black-themed cable network, TV One, spoke about original programming and production strategies. The conference invited digital entrepreneurs for a series of workshops on how to start up with limited funds, how to use the latest small business start-up software, how to fundraise, and how to go public.

These discussions about access to capital and business success were intertwined with connections to recent events that sparked the Black Lives Matter movement. A panel on the "social justice connection" included George E. Curry, editor in chief of BlackPressUSA.com, telling a story about Emmitt Till's mother and presenting a book award to Eric Broyles for his book, *Encounters with Police: A Black Man's Guide to Survival* (Broyles & Jackson, 2014).

The conference included an FCC Commissioners' luncheon attended by the Commission's two Republican affiliated appointees, Ajit Pai and Michael O'Rielly, perhaps because they were the only two on the five-member Commission who voted against the net neutrality rules under Title II authority. The questions posed to the commissioners indicated the MMTC's advocacy agenda. They asked about expanding the Lifeline program to make broadband access more affordable for low-income residents, expanding broadband access to rural areas, and revitalizing AM radio, which has had a large audience among people of color. Most significantly, MMTC solicited support for reinstating the FCC's Advisory Committee on Diversity for Communications in the Digital Age, which FCC Chairman Thomas Wheeler had sidelined in recent years. The MMTC asked the FCC to authorize the committee to conduct further studies to address market-entry barriers for minorities and women that could withstand the Supreme Court's strict level of scrutiny for race-conscious government actions. The luncheon closed with MMTC President Kim Keenan saying a prayer for "net equality."

Though the Supreme Court has made efforts to create race-conscious government policies more difficult, FCC inactions, according to MMTC founder David Honig, have presented the most significant barrier to supporting people of color in telecommunications initiatives (D. Honig, personal communication, April 11, 2016). For example, the FCC has rejected the Advisory Committee on Diversity's 2010 proposal to provide assistance to "individuals who have faced substantial disadvantages" including physical disabilities, unequal access to higher education, unequal access to credit, and unequal treatment in hiring (FCC, Advisory Committee on Diversity, 2010, p. 1). Because the U.S. Court of Appeals for the Third Circuit has indicated that the FCC must continue to address questions of ownership diversity, the MMTC

has continued to press the FCC on this matter (MMTC, 2015). Furthermore, the MMTC has 47 long-pending proposals to support minority ownership and employment. These include reinstating and expanding the tax certificate programs, providing additional time for small businesses to secure capital for media ownership, and creating a Civil Rights Branch of the FCC's Enforcement Bureau to monitor Equal Employment Opportunity abuses across all media platforms (Initial Comments of the Diversity and Competition Supporters, 2012). The FCC has recently rejected long-standing proposals, including a Minority Ownership Incubation Proposal that encouraged large broadcast owners to provide financing, technical assistance, and equipment to construct minority-owned broadcast stations.

### **Voices of Color and Net Equality**

In its telecommunications advocacy, including its opposition to net neutrality and Title II authority, the MMTC has created a coalition of dozens of diverse organizations representing African Americans, Latinos, Asian Americans, and Native Americans. These organizations have included NAACP, League of United Latin American Citizens, National Urban League, Latinos in Information Sciences and Technology Association, National Association of Multicultural Digital Entrepreneurs, National Black Caucus of State Legislators, National Congress of Black Women, and Rainbow PUSH Coalition (Reply Comments of the National Minority Organizations, 2014).

But other coalitions representing communities of color have supported net neutrality and Title II authority. The Open Internet Civil Rights Coalition (OICRC) is composed of the following organizations: National Hispanic Media Coalition, 18MillionRising.org, Presente.org, Center for Media Justice, Common Cause, and Media Action Grassroots Network (Open Internet Civil Rights Coalition, 2015).<sup>10</sup> The OICRC expressed optimism in the potential of an open Internet to create new opportunities for communities of color. With an open Internet, the coalition stated, the "opportunities are infinite, barriers to entry are low, and communities, including people of color, are able to bypass broken legacy systems replete with individual, institutional, and structural discrimination and insurmountable barriers" (p. 7). These opportunities include accessing capital for business start-ups through "crowdfunding" and "retail platforms like Etsy." The open Internet, the coalition continued, "facilitates artistic expression by eliminating intermediaries so artists can interact directly with their audiences," and offers "a particularly powerful tool for organizations that serve people of color to promote social change" (pp. 3, 8). Without open Internet rules for mobile services, OICRC stated, "communities of color will be less able to rely on mobile devices to make childcare arrangements, receive health advice, access social services, participate in political debate, find employment, and engage with friends and family" (p. 4). The coalition is particularly concerned about mobile phone carriers blocking applications like they have done with peer-to-peer file sharing applications.

There are significant difference between the OICRC and the MMTC coalitions. While the former seeks to bypass the legacy systems that have institutionalized discrimination, including venture capital

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<sup>10</sup> Of these organizations, the National Hispanic Media Coalition has been active for decades in challenging non-Hispanic control of Spanish-language media. For an excellent account of their history of activism, see Perlman, 2016.

lending, corporate music labels, and mainstream media outlets, the latter seeks to hold these institutions accountable for inclusive hiring practices and ownership opportunities. The former tends to view the Internet as a communications tool for small business and political activism, while the latter sees the Internet as a high-tech employment sector that must be more open to minority participation and ownership. The OICRC tends to defend the Internet as a space of *alternative action* to challenge corporate power. The MMTC sees the Internet and the high-tech sectors as requiring *affirmative actions* from government and corporations to make access more affordable for low-income users and more open for minority employment and ownership.

Though these coalitions share in the goal of moving beyond the provisions of net neutrality in advocating for a broader vision of net equality, they remain divided in their positions on net neutrality. In a response to a draft of this article, Malkia Cyril, director of the Center for Media Justice and co-founder of the Media Action Grassroots Network, offered this comment on the relationship between net neutrality and net equality:

Net neutrality is a crucial component of net equality. Ensuring that telecom and technology companies have no undue advantage over the average Internet user, preventing censorship online for the purposes of profit, and preventing changes to the platform that push some voices louder than others are necessary civil rights protections in a digital age. Net neutrality isn't the best name for the set of civil right rules that ensure communities of color and others pushed to the margins of civil society have an equal shot at a powerful public voice, because they alone can't level the digital playing field. We need those rules, but we need more too. We need an end to persistent high-tech surveillance of communities of color. We need universal access that doesn't trade our agency and turn us into perpetual consumers. We need community-based ownership that allows us to be innovators and bypass incumbents and the bias of mainstream media. Some traditional civil rights groups believe this can all be achieved with the right corporate partnerships. That capitalism, when played correctly, is a game people of color can win. That myth has been proven false again and again. Tech companies certainly need to pay their fair share, in jobs, in taxes, in opportunity—but good corporate partners would respect our civil and human rights, not constantly attempt to bypass them. No, good corporate partnership is not a substitute for free speech, universal access, and an end to mass surveillance. Net neutrality is a central strategy for net equality because it lays a path to this racial justice vision. (M. Cyril, personal communication, May 6, 2016)

One way to bridge these differences among coalitions of color is to recognize that they both share perspectives that challenge race-neutral perceptions about the workings of law and economics. Whether the goal is community-based ownership or minority-owned business, preventing high-tech corporate surveillance or holding high-tech companies accountable for equal employment opportunity, stopping Internet providers from degrading functionality among disenfranchised populations or making access universal and affordable, challenging race-neutral thinking in law and policy is a significant shared goal. The MMTC's distinction between Internet access and broadband "adoption" is significant here, for the

latter confronts the institutional sedimentations of racial inequality that operate through the institutions of education, employment, law, housing, healthcare, law enforcement, and media. Important too is recognizing that racial justice requires vigilance in contesting corporate power, as Cyril and other advocates prioritize.

Achieving this shared goal of net equality requires confronting the race-neutral logics that inform net neutrality scholarship and that have prevailed within federal regulatory deliberations and decision making. This includes questioning Chicago school and New Institutionalist economic frameworks and incorporating others, including those generated through the CRT movement. Following CRT's voices-of-color thesis, this will require integrating the experiences and stories of people of color into our conceptions of law and economics rather than segregating them as externalities to the Internet's virtuous cycle.

### References

- Benkler, Y. (2006). *The wealth of networks: How social production transforms markets and freedom*. New Haven, CT: Yale University Press.
- Broyles, E. C., & Jackson, A. O. (2014). *Encounters with police: A black man's guide to survival*. Washington, DC: Eric C. Broyles.
- Carbado, D. W., & Gulati, M. (2003). The law and economics of critical race theory. *The Yale Law Journal*, 112, 1757–1831.
- Carbado, D. W., & Harris, C. I. (2008, October). The new racial preferences. *California Law Review*, 96, 1139–1214. Retrieved from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1282268](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282268)
- Comments of the National Organizations: Before the Federal Communications Commission. (2010, January 14). Minority Media and Telecommunications Council. Retrieved from <http://mmtconline.org/lp-pdf/Natl%20Orgs%20Comments%20Underdeveloped%20Issues.101210.pdf>
- Communications Act of 1934. (1934). 47 U.S. Code § 201. Retrieved from <https://www.law.cornell.edu/uscode/text/47/201>
- Darity, W. (2009). Stratification economics: Context versus culture and the reparations controversy. *Kansas Law Review*, 57, 795–811.
- Delgado, R., & Stefancic, J. (2012). *Critical race theory, an introduction* (2nd ed.). New York, NY: New York University Press.
- Federal Communications Commission. (2015, February 26). Report and order on remand, declaratory ruling, and order. Retrieved from [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf)

- Federal Communications Commission, Advisory Committee on Diversity for Communications in the Digital Age. (2010, October 14). Preference for overcoming disadvantage. Retrieved from <http://www.fcc.gov/DiversityFAC/101410/preference-101410.doc>
- First black-owned TV signs on in Detroit. (1975, October 6). *Broadcasting*, 32. Retrieved from <http://americanradiohistory.com/Archive-BC/BC-1975/1975-10-06-BC.pdf>
- Honig, D. (1984). The FCC and its fluctuating commitment to minority ownership of broadcast facilities. *Howard Law Journal*, 27, 1-14.
- Honig, D. (2006, October 5). How the FCC helped exclude minorities from ownership of the airwaves. Speech delivered at Fordham University, McGannon lecture on communications practices and ethics. Retrieved from <http://mmtconline.org/lp-pdf/DH-McGannon-Lecture-100506.pdf>
- Horowitz, C. (2015, March 26). Intel succumbs to Jesse Jackson "diversity campaign." Falls Church, VA: National Legal and Policy Center. Retrieved from <http://nlpc.org/stories/2015/03/26/intel-succumbs-jesse-jackson-diversity-campaign>
- Horwitz, R. (2005). On media concentration and the diversity question. *The Information Society*, 21, 181-204.
- Initial Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rule Making: Before the Federal Communications Commission (2012, March 5). Minority Media and Telecommunications Council. Retrieved from <http://mmtconline.org/wp-content/uploads/2012/04/DCS-QuadRev-Comments-030512.pdf>
- Katznelson, I. (2006). *When affirmative action was white*. New York, NY: W. W. Norton and Company.
- Keenan, K. (2015, February 18). Protecting and promoting the open Internet, GN docket nos. 14-28. Letter to the Federal Communications Commission. Multicultural Media, Telecom and Internet Council. Retrieved from [http://mmtconline.org/wp-content/uploads/2015/02/OpenInternet\\_ExParte\\_021815\\_FINAL.pdf](http://mmtconline.org/wp-content/uploads/2015/02/OpenInternet_ExParte_021815_FINAL.pdf)
- Lessig, L. (2001). *The future of ideas: The fate of the commons in a connected world*. New York, NY: Random House.
- McMurria, J. (forthcoming). *Republic on the wire: Cable television, pluralism, and the politics of new technologies, 1948-1984*. New Brunswick, NJ: Rutgers University Press.
- McMurria, J. (2012). Citizenship and media ownership. In V. Mayer (Ed.), *Making production visible: The international encyclopedia of media studies* (Vol. 2, Section 1, Chapter 5, pp. 1-23). Malden, MA: Wiley-Blackwell.

- Mercuro, N., & Medema, S. G. (2006). *Economics and the law: From Posner to postmodernism and beyond* (2nd ed.). Princeton, NJ: Princeton University Press.
- Minority Participation in the Media: Hearing before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, 98th Cong. 1 (1983). Retrieved from <http://files.eric.ed.gov/fulltext/ED246148.pdf>
- MMTC. (Multicultural Media, Telecom and Internet Council). (2015, April 27). On petitions for review of an order of the Federal Communications Commission. *Howard Stirk Holdings, LLC v. Federal Communications Commission and United States of America* (D.C. Cir.). Retrieved from <http://mmtconline.org/wp-content/uploads/2015/04/MMTC-Brief-042715-As-Filed.pdf>
- Oliver, M. L., & Shapiro, T. M. (2006). *Black wealth/white wealth: A perspective on racial inequality* (10th anniversary ed.). New York, NY: Routledge.
- Open Internet Civil Rights Coalition. (2015, September 21). Brief for *amicus curiae* open Internet civil rights coalition for affirmance in support of respondents. *United States Telecom Association, et al. v. Federal Communications Commission of the United States of America* (D.C. Cir.). Retrieved from [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-335435A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-335435A1.pdf)
- Perlman, A. (2016). *Public interests: Media advocacy and struggles over U.S. television*. New Brunswick, NJ: Rutgers University Press.
- Reply Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking: Before the Federal Communications Commission (2007, November 1). Multicultural Media, Telecom and Internet Council. Retrieved from <http://mmtconline.org/lp-pdf/11-01-07DCS-Reply-Comments-110107.pdf>
- Reply Comments of the National Minority Organizations: Before the Federal Communications Commission (2014, September 15). Multicultural Media, Telecom and Internet Council. Retrieved from [http://mmtconline.org/wp-content/uploads/2014/09/FINAL-DOC\\_Natl-Minority-Orgs-Open-Internet-Reply-091520141.pdf](http://mmtconline.org/wp-content/uploads/2014/09/FINAL-DOC_Natl-Minority-Orgs-Open-Internet-Reply-091520141.pdf)
- Saltzer, J. H., Reed, D. P., & Clark, D. D. (1984). End-to-end arguments in system design. *ACM Transactions on Computer Systems*, 2(4), 277–288.
- Special Section on Net Neutrality. (2007). *International Journal of Communication*, 1, 377–716.
- Sullivan, L., Meschede, T., Dietrich, L., Shapiro, T., Taub, A., Reutschlin, C., & Draut, T. (2015). *The racial wealth gap: Why policy matters*. Waltham, MA: Institute for Assets and New York: Demos. Retrieved from <http://www.demos.org/publication/racial-wealth-gap-why-policy-matters>

Turner, S. D., & Cooper, M. (2006). *Out of the picture: Minority and female TV station ownership in the United States*. Washington, DC: Free Press. Retrieved from <http://www.freepress.net/sites/default/files/fp-legacy/otp2007.pdf>

van Schewick, B. (2012). *Internet architecture and innovation*. Cambridge, MA: MIT Press.