

## Democratizing Online Life via Cultural Infrastructure

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Anthony Varona, *Toward a Broadband Public Interest Standard*, 61 **Admin. L. Rev.** 1 (2009), available at [SSRN](#).

I was recently reading Bob Garfield's book *The Chaos Scenario*, which describes the accelerating deterioration of old business models for mainstream media. Garfield's weekly podcast/radio show, [On the Media](#), has meticulously documented the problems journalists, musicians, and news programs are encountering as content converges onto broadband-based intermediaries. In the face of all these dramatic changes, what are legal scholars adding to the debate?

In cyber- and media law scholarship, Anthony Varona deserves special notice for integrating the two fields in his recent article "Toward a Broadband Public Interest Standard." Varona tries to revive an old and oft-neglected standard for broadcasting—the public interest—for the digital age. In areas where scholarship too often degenerates into arid formalism, libertarian rejectionism, and toothless jeremiads, Varona is a breath of fresh air. He has articulated both a comprehensive justification for better broadband regulation and a method of achieving it. The article is both a rigorous intervention into extant debates on network neutrality and importantly demonstrates (and helps remedy) the partiality and ideological character of many of those debates.

Varona's work connects two lines of thought. First, he has authored an intervention in the network neutrality debate—a controversy over the degree to which carriers and internet service providers should be obliged to protect consumer interests and guarantee a level competitive playing field online. Second, Varona has evaluated strategies for expanding access to broadband internet. He has canvassed a wide variety of sources to convey an accurate (and alarming) picture of how many individuals in the US are shut out of access to broadband (a service so important that Finland recently declared a right to it). He identifies the cultural and political importance of broadband access, and the unacceptable inequalities that result when low and middle income people are cut out of this new virtual public sphere. He has crunched the numbers and identified just how little a subsidy is needed to get universal broadband. I find that kind of factually-intensive analysis particularly important, because while I've heard about the need for subsidies from many different activists, I have only encountered an exact price estimate in Varona's work. That is a good step forward for the digital divide debate.

Varona's intervention in the network neutrality debate here is very important. He recognizes that an "antitrust lens. . . does not encompass the totality of harm a non-neutral Internet would cause to diverse political expression, noncommercial content, and democratic engagement generally." As the recent Candeub/Frischmann letter to the FCC reflects, an increasing number of scholars are recognizing the bias that a purely antitrust-based analysis of broadband can result in. Varona supplements this partial debate by developing an analysis that goes beyond economics and takes into account the cultural and political dangers of "economically efficient" vertical integration. After reading his work, readers can better critically interrogate the pervasive complacency about media concentration that has too often characterized FCC policymaking during the second Bush administration.

Varona also has a unique command of the multifarious literature on the market structure of current internet access providers and the politics of municipal provision that attempts to supplement or supplant them. Industrial structure here is important because of the "cable/DSL" duopoly—the vast majority of those seeking speedy access to the internet only have access to zero, one, or two providers. For some time the "deregulationist" school of the network neutrality debate has been predicting the entry of a plethora of new options, such as WIMAX, satellite, and cell-phone access to the internet. While some of these services are coming online, Varona reminds us of just how slow that access is

developing, and how little targeted regulation threatens it.

Varona also focuses on the consumer-education tactics common in cutting edge work in behavioral economics, proposing a market-oriented approach to developing demand for broadband among those able to pay for it. Varona evinces a sophisticated understanding of the role of cross-subsidization in infrastructure—how payments by those well-able to afford a service can help contribute to a network that can be configured to help everyone. Given increasing inequality in the US, this is a shrewd approach to assuring universal access, sure to enrich (and be enriched by) extant scholarship on access to health care, energy, roads, and education.

Varona also manages to untangle the bramble of lawsuits now undermining municipal efforts to extend access to broadband. His analysis of the relevant federal and state statutes is perceptive. He convincingly and concisely marshals the best arguments against these lawsuits, seamlessly combining doctrinal and policy arguments. Varona painstakingly contextualizes the stakes of this policy space.

Varona is one of very few scholars to go beyond discussing the assurance of access to the internet to proposing a realistic plan for improving what users find online. Having studied other nations' efforts to cultivate indigenous entertainment options and search engines, I find Varona's ideas for promoting deliberative spaces online both consistent with past efforts to improve cultural infrastructure and importantly building on them. His proposals for public fora and public broadband content online are convincing and appear increasingly important given the dangers of corporate control over online spaces. His work nicely complements Dawn Nunziato's and others working in the field of network neutrality—for if those advocating network neutrality don't get their way, or are undercut by a Lochnerized first amendment absolutism, it will be crucial to create spaces online with publicly accountable standards for access and prioritization. My own work on search engines—whose methods of prioritizing content are tightly held trade secrets—convinces me that the research Varona has done here is crucial to the development of spaces on the internet that are transparent and contribute to democratic dialogue.

Though I have focused on the academic contributions of Varona's article, its potential influence on practical efforts to improve the public sphere is very promising. James Fishkin, the premier scholar of practical instantiations of deliberative democracy in real space, would likely find in this work an exciting translation of such ideas into the networked public sphere. Varona has suggested very practical responses to Cass Sunstein's worries about "narrowcasting" and the decline of common knowledge of news and civic life. Varona has managed the rigorous application of well-defined normative commitments to pressing social problems. He has addressed what is perhaps most important to the preservation of democracy—a way of assuring that our communications networks and fora actually focus public attention on the most important problems we face. Works ranging from Walter Lippmann's *The Phantom Public* to Bryan Caplan's recent *The Myth of the Rational Voter* have lamented an American populace too unengaged to make democracy work. While the task here is difficult, Varona shows how law can contribute to the communications infrastructure needed for a better public sphere.

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