

PHOENIX FOR ADVANCED
LEGAL & ECONOMIC
C E N T E R PUBLIC POLICY STUDIES
www.phoenix-center.org

2016 ANNUAL REPORT

PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES

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PRESIDENT'S MESSAGE

2016 again proved to be another extremely productive year for the Phoenix Center, so much so that all of our many accomplishments and accolades cannot be summarized here.

As always, the Phoenix Center's research in 2016 was prolific. To begin, the Phoenix Center issued eleven (11) scholarly papers in 2016. We are also extremely proud to report that Phoenix Center scholars had seven (7) papers published, or accepted for publication, in academic journals. Finally, Phoenix Center staff authored twenty-one (21) op-eds in various media outlets.

In addition to Phoenix Center publications, Phoenix Center Chief Economist Dr. George Ford authored an exhaustive paper on the economics of municipal broadband for the State Government Leadership Foundation. George also had a paper accepted for presentation and the Telecommunications Policy Research Conference ("TPRC").

And, building on our initial foray from last year, the Phoenix Center filed an amicus brief in the case of *SNR Wireless LicenseCo, LLC and Northstar Wireless, LLC v. FCC* before the D.C. Circuit Court of Appeals.

In 2016, the Phoenix Center also took steps to bolster our digital presence. Among other items, we authored several blogs on @LAWANDECONOMICS, the official blog of the Phoenix Center. We also again participated actively on Twitter with our handle @lawandeconomics, and we are pleased to report that we have approximately 3,000 followers.

Once again, our efforts have not gone unnoticed. For example, Phoenix Center Chief Economist Dr. George Ford remains in the top 1% of authors downloaded on the Social Science Research Network, and I am not far behind in the top 1.4%. More

importantly, the Phoenix Center's webpage received well over 1.5 million hits in 2016.

We also tried to contribute to the broader telecom community. To this end, I was again proud to serve as the co-chair of Federal Communications Bar Association's committee to oversee the FEDERAL COMMUNICATIONS LAW JOURNAL. In addition, I was honored to serve on the TPRC Program Committee. Moreover, Phoenix Center Chief Economist Dr. George Ford continued to serve on the Alabama Broadband Taskforce by appointment of the Governor.

We were also asked to present our research at a variety of forums both in the United States and abroad. For example, I was asked to speak at a conference organized by the Federal Communications Bar Association to commemorate the twentieth anniversary of the Telecommunications Act of 1996. Not to be outdone, George was invited to appear on C-SPAN's "The Communicators" to talk about the FCC's efforts to regulate set-top boxes. On the international front, I was asked to travel to Rome speak to the Italian government about zero rating, and George presented our research on "Fair Use" and copyright at the Tokyo Film Festival.

Finally, the Phoenix Center also put on several fantastic programs of its own this year. First, we held a "teleforum" to talk about the D.C. Circuit's landmark decision in *USTelecom v. FCC*. Second, we held our Fifth Annual Rooftop Policy Roundtable Discussion, where we had an excellent set of interactive conversations about the FCC's efforts to promote set-top box competition over drinks and cigars. Finally, we held our Sixteenth Annual U.S. Telecoms Symposium to another standing-room only crowd.

Once again, not a bad year...

— Lawrence J. Spiwak, President

PHOENIX CENTER PUBLICATIONS

The Phoenix Center continued to publish a prodigious amount of scholarly research in 2016. As always, all of the Phoenix Center's research is available free on the Phoenix Center's web page and on the Social Science Research Network.

PHOENIX CENTER POLICY PAPER SERIES

The Phoenix Center's POLICY PAPER SERIES seeks to provide an in-depth analysis of the current regulatory and political paradigms, as well as to provide constructive and well-reasoned solutions to the problems of the day. In 2016, the Phoenix Center issued the following POLICY PAPERS:

- PHOENIX CENTER POLICY PAPER NO. 50, *How (and How Not) to Measure Market Power Over Business Data Services* (September 2016).
- PHOENIX CENTER POLICY PAPER NO. 51, *Fair Use in the Digital Age* (September 2016).

PHOENIX CENTER POLICY BULLETIN SERIES

The Phoenix Center's POLICY BULLETIN SERIES is designed to provide a forum for responding to discrete policy issues in a shorter format than our PHOENIX CENTER POLICY PAPER SERIES. The Phoenix Center published the following POLICY BULLETINS in 2016:

- PHOENIX CENTER POLICY BULLETIN NO. 38, *Private Solutions to Broadband Adoption: An Economic Analysis* (September 2016).
- PHOENIX CENTER POLICY BULLETIN NO. 39, *Promotional Effects and the Determination of Royalty Rates for Music* (November 2016).

PHOENIX CENTER POLICY PERSPECTIVES

The Phoenix Center's POLICY PERSPECTIVES SERIES is designed to provide a forum for its individual staff members to express their personal views on current policy developments. The Phoenix Center published the following POLICY PERSPECTIVES in 2016:

- PHOENIX CENTER POLICY PERSPECTIVE NO. 16-01: *The Economic Impact of Expanding Fair Use in Singapore: More Junk Science for Copyright Reform* (February 16, 2016).
- PHOENIX CENTER POLICY PERSPECTIVE NO. 16-02: *The Road to Nowhere: Regulatory Implications of the FCC's Special Access Data Request* (February 23, 2016).
- PHOENIX CENTER POLICY PERSPECTIVE NO. 16-03: *Are Government-Owned Networks Abusing Market Power in the Set-Top Box Market? A Review of Rates* (April 14, 2016).
- PHOENIX CENTER POLICY PERSPECTIVE NO. 16-04: *Cost or Benefit? A Review of the Consumer Federation of America's Report on Regulating Special Access Services* (April 18, 2016).
- PHOENIX CENTER POLICY PERSPECTIVE NO. 16-05: *Proper Incentives? The Economics of Spam Management by the Mobile Wireless Industry* (May 4, 2016).
- PHOENIX CENTER POLICY PERSPECTIVE NO. 16-06: *State Automobile Franchise Laws: Public or Private Interests?* (July 12, 2016).
- PHOENIX CENTER POLICY PERSPECTIVE NO. 16-07: *Learning from Bad Technique: The WIK-Consult Report on Business Data Services* (August 4, 2016).

PHOENIX CENTER PUBLICATIONS

ACADEMIC PUBLICATIONS

In 2016, the Phoenix Center had five of its papers published, or accepted for publication, in academic journals:

- *Taxation by Condition: Spectrum Repurposing at the FCC and the Prolonging of Spectrum Exhaust*, 8 HASTINGS SCIENCE AND TECHNOLOGY LAW JOURNAL 183 (2016) (originally published as PHOENIX CENTER POLICY PAPER NO. 44).
- *Lessons Learned from the U.S. Unbundling Experience*, 68 FEDERAL COMMUNICATIONS LAW JOURNAL 95 (2016) (originally published as PHOENIX CENTER POLICY PAPER NO. 45).
- George S. Ford, *Reflecting on Twenty Years Under the Telecommunications Act of 1996*, 68 FEDERAL COMMUNICATIONS LAW JOURNAL 17 (2016).
- Lawrence J. Spiwak, *Reflecting on Twenty Years Under the Telecommunications Act of 1996*, 68 FEDERAL COMMUNICATIONS LAW JOURNAL 62 (2016).
- *Value-based Pricing of Music*, 12 REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES 16 (2015).
- *Private Solutions to Broadband Adoption: An Economic Analysis*, forthcoming FEDERAL COMMUNICATIONS LAW JOURNAL (Winter 2017) (originally published as PHOENIX CENTER POLICY BULLETIN NO. 38).
- *A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore: A Critical Review*, forthcoming LAWS (2017).

OTHER PUBLICATIONS

- *The Impact of Government-Owned Broadband Networks on Private Investment and Consumer Welfare*, State Government Leadership Foundation (April 6, 2016).

CONFERENCE PAPERS:

Phoenix Center staff presented the following papers at academic conferences:

- *Promotional Effects and the Determination of Royalty Rates for Music*, presented at the 44th Annual Telecommunications Policy Research Conference (TPRC).

OP-EDS:

The Phoenix Center had the following op-eds published in 2016:

- *The FCC and the "Second Side of the Market"*, THE HILL (January 7, 2016).
- *FTC Staff Bias on Intra-Brand Car Competition is a Bad Deal for Consumers*, THE HILL (January 19, 2016).
- *The FCC's Cynical Set-Top Box Play*, THE HILL (February 3, 2016).
- *Laws, Sausages and Air Traffic Control*, THE HILL (February 10, 2016).
- *The FCC's Lack of Respect for Due Process*, THE HILL (March 2, 2016).
- *The Obama Administration is Misleading Consumers on Set-Top Box Prices*, THE HILL (April 22, 2016).
- *Puerto Rico's Hamiltonian Moment*, THE HILL (May 6, 2016).
- *How Municipal Broadband Railroads Due Process*, BLOOMBERG BNA (May 18, 2016).

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- *Statutory Damages are a Vital Part of the Copyright System*, THE HILL (May 25, 2016).
- *What is the True Cost of a Set-Top Box?* BLOOMBERG BNA (May 31, 2016).
- *Privacy, Profits and Broadband Investment*, THE HILL (June 8, 2016).
- *The FCC's Lack of Respect for Due Process - Part II*, THE HILL (July 7, 2016).
- *Questionable Economic Benefits of Chattanooga's Gig*, THE TENNESSEAN (August 17, 2016).
- *FCC Chairman Doubles Down on Political Hubris After Court Decision*, THE HILL (August 22, 2016).
- *Cities Can't Just Ignore Federal Law On Utility Poles*, THE HILL (September 7, 2016).
- *State and Local Governments Should Stay Out of the Internet Business*, YELLOWHAMMER NEWS (September 16, 2016).
- *Fair Use Does Not Mean a Fair Market*, CONTENT CAFÉ (September 19, 2016).
- *Set-Top Box Shenanigans at the FCC*, THE HILL (September 19, 2016).
- *Let's Not Rush to Judgment on AT&T-Time Warner Merger*, THE HILL (November 1, 2016).
- *A Political Temper Tantrum at the FCC*, THE HILL (December 1, 2016).
- *The Curious Case of Tesla's Lawsuit*, DETROIT NEWS (December 2, 2016).

@LAWANECONOMICS BLOG:

In 2016, the Phoenix Center published the following items on @LAWANDECONOMICS, the official blog of the Phoenix Center:

- *The Investment Effects of the FCC's New Asymmetrical Privacy Regime* (March 17, 2016).
- *Some Preliminary Thoughts On Dr. Rysman's Special Access Empirical Analysis* (May 5, 2016).
- *The FCC's Intellectual and Empirical Vacuum Over Market Power for Special Access Services* (May 10, 2016)
- *Municipal Broadband and Predatory Pricing* (May 16, 2016).
- *Second Circuit Debunks FCC's Set-Top Box Arguments* (September 8, 2016).

AMICUS BRIEFS

- Phoenix Center filed an amicus brief in the case of *SNR Wireless LicenseCo, LLC and Northstar Wireless, LLC v. FCC* before the D.C. Circuit Court of Appeals.

PUBLIC COMMENTS

- Phoenix Center submits letter to the Federal Trade Commission regarding workshop entitled *Auto Distribution: Current Issues & Future Trends* (Project No. P131202).

CONTRIBUTING TO THE PUBLIC DIALECTIC

2016 provided fertile soil for those interested in policy research. In this section, we highlight some (but not all) of what we at the Phoenix Center found to be the interesting policy issues of 2016 and where we believe we added constructively to the debate.

Network Neutrality

In 2016, the net neutrality debate came to a head with the landmark decision in *USTelecom v. FCC* in which the D.C. Circuit upheld the FCC's *Open Internet Order* in its entirety. However, net neutrality is an issue that simply will not fade away.

For example, the FCC still has a docket open as to whether it should classify SMS and short codes as a Title II common carrier service, thus bringing those services under the ambit of the *Open Internet Order*. In a paper entitled *Proper Incentives? The Economics of Spam Management by the Mobile Wireless Industry*, we looked into this question and found that the interests of the industry and the consumer are aligned. As such, mobile wireless carriers should be expected to act in ways that protect the interest of consumers. Accordingly, we found that regulatory intervention is unnecessary and value reducing.

Another one of the emerging issues post-*USTelecom* is the complex issue of "zero rating." Among other research on this topic, the Phoenix Center authored a paper entitled *Private Solutions to Broadband Adoption: An Economic Analysis* in which we focused on the welfare implications of "free but limited plans" designed to spur broadband adoption. We are pleased that the paper received positive response. For example, Phoenix Center President was asked to present the paper in Rome to members of the Italian Parliament, and the

paper was accepted for publication in the *FEDERAL COMMUNICATIONS LAW JOURNAL*.

AllVid

Another topic that dominated the telecom debate in 2016 was FCC Chairman Tom Wheeler's controversial *#unlockthebox* proposal, in which he sought to force cable and satellite providers to make available to third-party equipment providers: (1) channel listings; (2) information about what a device is allowed to do with content, such as record it; and (3) the content itself.

Among other contributions to the debate, the Phoenix Center authored several papers and op-eds demonstrating that the factual predicate put forth by the Chairman to support his proposal (i.e., that cable and satellite companies charge consumers \$231 a year in box rental fees) was utterly false. In addition, we demonstrated that municipal broadband providers charge the same or more than their private sector counterparts for set-top boxes. Moreover, as mentioned in the previous section, our Rooftop Policy Roundtable focused on the intellectual property problems raised by the *#unlockthebox* proposal. Finally, Phoenix Center Chief Economist Dr. George Ford was invited to participate on CSPAN's "The Communicators" program to discuss the issue.

Municipal Broadband

In 2016, we allocated a significant amount of our research agenda to the topic of municipal broadband. For example, Phoenix Center Chief Economist Dr. George Ford authored a comprehensive new study released which was sponsored by the non-profit State Government Leadership Foundation entitled *The Impact of Government-Owned Broadband Networks on Private Investment and Consumer Welfare*.

CONTRIBUTING TO THE PUBLIC DIALECTIC

Among other findings, George demonstrated, consistent with the evidence, that municipal broadband must be, in almost all scenarios, subsidized entry. George also showed, using basic economic theory, that subsidized municipal broadband is incapable of increasing competition, if competition is measured as the number of firms offering service in a given area. Market conditions determine the number of firms that can profitably serve a market, and the lack of additional private entry suggests that additional entry is unprofitable. Forcing a government-operated firm into the market using subsidies, especially one that obtains significant market share and removes a major anchor tenant (the government) from private networks, is likely to force the exit of private firms and/or weaken the case for private investment in upgrades. If municipal systems are truly not interested in profit maximization, as is frequently claimed, then municipal entry may be, in the long run, a poison pill for all private sector investment. Finally, George demonstrated that because municipal operators are disconnected from profit maximization and asymmetrically subsidized, economic theory suggests that even the mere threat of municipal entry can reduce private sector investment. This deterrence effect is particularly pernicious at a time when private providers are undergoing widespread and costly upgrades to their networks. Worse, the resulting lack of private supply may then be used to justify the municipal entry that caused the lack of competition in the first place.

On the legal side, Phoenix Center President Larry Spiwak authored a detailed analysis for BLOOMBERG which highlighted how recent case law provides that municipal broadband may, in fact, violate the due

process clause of the Constitution. Larry also authored an analysis for THE HILL on the legal implications of the Six Circuit's ruling in *Tennessee v. FCC* on future federal preemption efforts.

In 2017, we hope to combine both our economic and legal research on municipal broadband into a single book that will aid policymakers going forward.

Business Data Services

Other hot issue in 2016 was the thorny topic of Business Data Services (formally known as "Special Access" Services). At the heart of the debate was the Commission's desire to institute a massive rate cut for select political constituencies. However, in a series of papers, not only did we show that the data did not support the Commission's claim of market failure, but that the Commission could not even provide a cohesive definition of "market power." In addition, consistent with the Phoenix Center's mission of providing public peer review of studies submitted into the debate, we demonstrated how papers published by both the Consumer Federation of America and WIK-Consulting on the topic of BDS contained so many analytical errors that they should not be accorded any probative weight in the debate.

Due Process

Respecting, and more importantly protecting, Americans' due process rights must be a fundamental priority of those in power. Unfortunately, 2016 proved to be a year where increased vigilance proved to be increasingly necessary.

For example, in a multitude of op-eds, Phoenix Center President Lawrence Spiwak called out numerous flagrant examples of how the FCC under Chairman Tom Wheeler was systematically violating due

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process concerns at every turn. The Phoenix Center also filed an amicus brief before the D.C. Circuit in the case of *SNR Wireless LicenseCo, LLC and Northstar Wireless, LLC v. FCC* before the D.C. Circuit Court of Appeals highlighting what we believed to be a series of gross due process violations by the FCC in that case.

Such concerns were not limited to the FCC, however. To wit, Phoenix Center Chief Economist Dr. George Ford authored an op-ed demonstrating a profound bias by the staff of the Federal Trade Commission towards state automobile franchise laws. In addition, Phoenix Center President Lawrence Spiwak recognized that municipal broadband may be unconstitutional in light of the D.C. Circuit's ruling in *Association of American Railroads v. Department of Transportation*, which held that the due process clause of the Constitution is violated when government acts as both regulator and competitor.

Intellectual Property

Intellectual Property continues to be one of the fastest growing areas of the Phoenix Center's research agenda. In 2016, we covered a wide range of intellectual property topics with some very innovative research.

For example, we provided a detailed critique of a study by often-cited study by Roya Ghafele and Benjamin Gibert where the authors claim to show that Singapore's choice to amend its copyright laws in 2005 to include "fair use" was responsible for substantial economic gains. However, we conclusively demonstrated in a paper entitled *The Economic Impact of Expanding Fair Use in Singapore: More Junk Science for Copyright Reform* that because the empirical analysis by Ghafele and Gibert was of such

stunningly poor quality, their study is worthless for policy purposes.

We also made a significant contribution to the literature with our paper *Fair Use in the Digital Age*. In this paper, we constructed an economic model to derive an optimal level of fair use (or fair dealing). Among other things, we found that "optimal" fair use should be stricter when: (1) the cost of the original work is high; (2) the size of the market for the original work is small; (3) piracy and other forms of leakages, which simply reduce the market potential for the original work, are large; (4) the cost of distributing secondary works is lower; (5) small amounts of transformation matter a lot to consumers; and (6) the fixed cost of producing secondary works are smaller. This paper received tremendous attention, and we were delighted that our Chief Economist Dr. George Ford was asked to present the paper in person to policymakers in Australia, New Zealand and Japan.

Finally, the Phoenix Center authored a paper entitled *Promotional Effects and the Determination of Royalty Rates for Music* where we demonstrated that any promotional effect is fully internalized in a marketplace bargain between the music and radio industries and, as such, any alleged promotional effect provides no basis for federal law to mandate the free use of music by the terrestrial radio broadcast industry.

Conclusion

As policy debates have become increasingly politicized over the years, we still believe (perhaps over-optimistically) that, in the end, substance matters. The policy choices we face are hard, and they should be treated with the respect and analytical rigor they deserve. Hopefully, the Phoenix Center has contributed positively towards restoring some of this analytical rigor to the dialectic.

CONFERENCES AND SYMPOSIUM

ROOFTOP POLICY ROUNDTABLE:

This June, the Phoenix Center held our Fifth Annual Rooftop Policy Roundtable Discussion where we facilitated a set of interactive conversations on the roof of the University Club to a standing-room only crowd over drinks and cigars. This year, we explored the merits of the Federal Communications Commission's controversial *#unlockthebox* proposal, under which the Commission sought to force cable and satellite companies have to make available to third-party equipment providers: (1) channel listings; (2) information about what a device is allowed to do with content, such as record it; and (3) the content itself. Joining us to discuss the matter were Neil Fried - SVP, Government and Regulatory Affairs, MPAA; Ross Lieberman - SVP, Government Affairs; American Cable Association; Alec French - Founder & Principal, Thorsen French Advocacy; and Robert Quinn - Senior Vice President, Federal Regulatory and Chief Privacy Officer, AT&T.

PHOENIX CENTER TELEFORUMS

The Phoenix Center's Teleforum Series allows us both to walk through our relevant research and to hold discussions with industry experts about pressing policy issues of the day.

In March 2016, the D.C. Circuit issued its landmark case of *USTelecom v. FCC*, in which the court upheld the Federal Communications Commission's controversial *Open Internet Order* in its entirety. To discuss this important case, the Phoenix Center held a Teleforum entitled *USTelecom v. FCC - A Legal & Economic Post-Mortem*. Joining us were Russ Hanser, Partner - Wilkinson Barker Knauer, LLP; Hank Hultquist, Vice President - Federal Regulatory - AT&T; Jeff Lanning, Vice

President of Federal Regulatory Affairs - CenturyLink; and Dr. George Ford, Chief Economist - The Phoenix Center.

PHOENIX CENTER ANNUAL TELECOMS SYMPOSIUM

On November 15, 2016, the Phoenix Center held its sixteenth Annual U.S. Telecoms Symposium to another standing-room crowd. The theme of this year's Symposium was *How Does the 2016 Election Impact Broadband Policy?* and the discussions were both informative and lively.

The Symposium began with the traditional "economist panel" to discuss how best to promote broadband investment in the twenty-first century. This year's panel was comprised of Dr. Tim Brennan, Professor of Economics - UMBC and former Chief Economist - Federal Communications Commission; Dr. John Mayo, Professor of Professor of Economics, Business and Public Policy - Georgetown University; and Dr. George Ford, Chief Economist - The Phoenix Center. We are very grateful to Dr. Jerry Duvall, Senior Advisor to the Division Chief for Economics, Telecommunications & Analysis Division - International Bureau, Federal Communications Commission for moderating this year's panel.

Our next panel focused on the political landscape after the 2016 election. To discuss this topic, we were fortunate to have two seasoned Washington hands join us for an excellent discussion: the Honorable Rick Boucher - Former Chairman, House Energy and Commerce Committee on Communications and Technology and Rich Galen - Former press secretary to Vice President Dan Quayle and Speaker of the House Newt Gingrich.

Building on this discussion, our final panel focused on legislative priorities for the

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115th Congress. Joining us for this discussion were James Assey, Executive Vice President - NCTA; Kelly Cole, Senior Vice President, Government Affairs - CTIA; Peter Davidson, Senior Vice President, Federal Government Relations - Verizon; and James Reid, Senior Vice President of Government Affairs - Telecommunications Industry Association.

As always, our Symposium ended with the presentation of the Phoenix Center's Annual Jerry B. Duvall Public Service Award. The Duvall Award does not seek to recognize the recipient's personal politics; policymaker who most demonstrated the "political courage in, and contribution of analytical rigor to, the United States telecoms policy debate." This year, it was our privilege to bestow our Duvall Award upon Federal Trade Commissioner Maureen Ohlhausen. Given Commissioner Ohlhausen's efforts both to promote adherence to the rule of law and regulatory humility, we could think of nobody who epitomized this standard more in 2016.



MISSION STATEMENT

The Phoenix Center for Advanced Legal & Economic Public Policy Studies is a non-profit 501(c)(3) educational and research organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of telecommunications and high-tech industries.

Founded in 1998, the Phoenix Center's mission is to provide independent assessments of the economic and material implications of regulatory and economic policy in the U.S. and abroad.

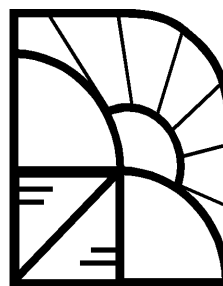
The Phoenix Center achieves this goal by providing an honest and credible voice in the public dialectic by supporting objective, solutions-based academic research to the forefront that is unencumbered by political hyperbole or agendas and is instead well grounded in fact, law and economic theory.

Long-Term Goals:

- (1) The Phoenix Center's seeks to remind stakeholders that it is crucial to avoid political hyperbole and instead approach public policy with the analytical rigor and solemnity it deserves.
- (2) The Phoenix Center seeks to promote public confidence in the democratic process, government's institutions and in the free enterprise system.
- (3) The Phoenix Center seeks to foster an environment where citizens can openly and vigorously debate today about what kind of a world they want to live in tomorrow.

The "ideal of democracy rests on the belief that the view which will direct government emerges from an independent and spontaneous process. It requires, therefore, the existence of a large sphere independent of majority control in which the opinions of the individuals are formed."

— Friedrich von Hayek



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