

FEDERAL COMMUNICATIONS LAW JOURNAL

SPECIAL ISSUE ON THE SIXTIETH ANNIVERSARY OF THE
COMMUNICATIONS ACT OF 1934

LETTERS OF INTRODUCTION

President Bill Clinton

President Myles Brand

ESSAYS

- | | |
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| Robert E. Allen | Abner J. Mikva |
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| Commissioner Andrew C. Barrett | Senator Carol Moseley-Braun |
| Jonathan Blake | Commissioner Susan Ness |
| Peter David Blanck | Eli M. Noam |
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Jeffrey Walker

Volume 47

December 1994

Number 2

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Federal Communications Bar Association

THE WHITE HOUSE
WASHINGTON

November 9, 1994

I am delighted to greet the readers and staff of the Federal Communications Law Journal and all who are commemorating the sixtieth anniversary of the Communications Act of 1934.

When President Franklin D. Roosevelt signed this historic legislation so many years ago, few realized the dramatic changes in communications that the future would hold. Yet that stroke of the pen ushered in the beginning of the Information Age, an era in which vast amounts of knowledge flow freely across continents and circle the globe in a matter of seconds.

Today, as we celebrate the vision of the authors of the Communications Act, we are still defining the role that telecommunications technology will play in our society. With a universe of electronic information at our fingertips, we can better educate our people, promote democracy, save lives, and create jobs across America. As we work to enhance the partnership between the public and private sectors, we continue to draw inspiration from the original Communications Act, which has long served to benefit all of our citizens and to propel our nation into the future.

Best wishes to all for a memorable anniversary.

Bill Clinton

INDIANA UNIVERSITY



November 14, 1994

THE PRESIDENT'S
OFFICE

Dear Friends:

This special issue of the *Federal Communications Law Journal* celebrates the 60th anniversary of the Communications Act of 1934. The journal was founded shortly after the passage of that act. The span of its existence covers an era of extraordinary advances in communications, a field that touches every arena of personal, professional, governmental, social, educational, and corporate life in the world today.

The essays in this anniversary issue, written by leaders in communications law, policy, technology, and business, comprise a multidimensional overview of key concerns in communications. This issue of the journal makes a significant contribution to the development of new perspectives, the productive analysis of problems, and the exploration of directions for the future.

The partnership of the Federal Communications Bar Association and the Indiana University School of Law-Bloomington in publishing the *Federal Communications Law Journal* highlights the important benefits of professional/university partnerships. IU law students and faculty have an unparalleled opportunity to work with leaders in the Federal Communications Bar. Correspondingly, the University can offer to the Bar the perspectives of outstanding law students and the scholarly work of IU faculty.

The interdisciplinary teaching and research that takes place among Indiana University's nationally ranked programs in law, journalism, telecommunications, and other fields relating to communications, were key factors in bringing the *Federal Communications Law Journal* to IU. We are very pleased to serve as hosts for one of the nation's most distinguished legal publications.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Myles Brand'.

Myles Brand
President

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EDITOR'S NOTE

Welcome to this special issue of Volume 47 of the *Federal Communications Law Journal*, commemorating the sixtieth anniversary of the Communications Act of 1934 and the Federal Communications Commission that the Act created. On behalf of the editorial board and the Indiana University School of Law-Bloomington, we are proud to present these thirty-nine essays, covering a wide variety of issues affecting communications law and practice.

When we began planning this issue, we invited contributions from a wide cross-section of people who stand at the forefront of their respective professions in communications industries, law, academia, media, and government. To achieve the broadest range of perspectives, we not only attempted to cross lines of race, gender, geography, and political ideology, we also promised authors as little editing as possible so as to preserve their voices and leave their messages intact. The opinions that follow are those of the identified authors alone, and we are deeply grateful to each of them for their generous contribution.

The result is an eclectic blend of opinions, recollections, criticism, analysis, and recommendations. There are thoughtful, sometimes humorous, accounts of past regulatory efforts, changes in communications industries and technologies, insightful assessments of how those changes have affected communications law and practice generally, and the personal and professional lives of the individuals involved. In the pages that follow, contributors detail how they have tried to keep pace with, or even anticipate, rapid changes in technologies, markets, administrations, laws, and regulations.

This issue recognizes the accomplishments of the past sixty years and the commitment and dedication of the people who made them possible; it speaks to as yet unmet needs, and the opportunities and obstacles that lie ahead. As the pace of change accelerates, it is our hope that this diverse collection of essays will spark the interest of not only our valued current readers, but also those people who are just beginning to discover the impact of communications media and information technologies in all phases of contemporary life.

As always, we welcome your suggestions, comments, and submissions. The *Journal* can be contacted at the Indiana University School of Law-Bloomington, 201 South Indiana Avenue, Bloomington, Indiana 47405; telephone (812) 855-5952; facsimile (812) 855-0555; internet fclj@indiana.edu.

Jason Roberts
Editor-in-Chief

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Federal Communications Law Journal

The *Federal Communications Law Journal* is co-published by the Federal Communications Bar Association and the Indiana University School of Law—Bloomington. The *Journal* publishes three issues per year, including articles, student notes, commentaries, and book reviews examining a wide range of U.S. and international communications and information issues, including telecommunications, the First Amendment, broadcasting, telephony, computers, intellectual property, communications and information policymaking, and related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to the Association's 2000 members and more than 900 additional legal practitioners, industry experts, government officials, and academics. The *Journal* is also distributed by WestLaw, Lexis, and, on an experimental basis, by Internet.

The *Journal* is managed by a student Editorial Board, in cooperation with the Law Journal Committee and an Editorial Advisory Board of the FCBA, and a Faculty Advisor.

Federal Communications Bar Association

The Federal Communications Bar Association is a non-profit member-supported organization, dedicated to the promotion of fairness and efficiency in the development and application of communications law and policy at all levels of government; excellence and integrity in the profession; education and training for those involved in communications law and policy; and, equality of opportunity in the profession of law.

Founded in 1936, the FCBA has approximately 2000 members, the majority of whom are lawyers who practice in the District of Columbia. Non-lawyer professionals in allied fields, foreign lawyers, and law students at accredited law schools are eligible for non-voting membership. The FCBA's roster also includes members from thirty-seven states, two Federal territories, and seven foreign countries. The FCBA currently maintains twenty-five Standing Committees and a number of Special Committees actively involved in communications law, policy, and education. In addition, the FCBA maintains Chapters based in Atlanta, Chicago, New York, and San Francisco. The FCBA is represented, as an affiliated organization, in the House of Delegates of the American Bar Association.

Through dedicated member support and participation in the Committees and Chapters, the FCBA regularly conducts educational programs which apprise members of legal technological and policy developments in communications and related fields. In addition to co-publishing the *Federal Communications Law Journal*, the FCBA monitors and reviews legislative, agency, and court developments relevant to the practice of telecommunications law; files comments with the Federal Communications Commission and other appropriate bodies on topics which are of concern to communications professionals; holds monthly luncheons featuring speakers on topics of particular interests to its members; annually co-sponsors telecommunications seminars; publishes a monthly newsletter; and, sponsors an annual Chairman's Dinner featuring remarks by Chairman of the Federal Communications Commission.

Indiana University School of Law—Bloomington

The Indiana University School of Law—Bloomington, founded in 1842, prepares students from throughout the United States and foreign countries for careers as lawyers—in private practice, government, business and other national organizations—academics, and other professionals. The Law School's 610 full-time students are drawn from more than 70 undergraduate colleges and universities throughout the United States.

Located on the main campus of Indiana University, one of the nation's largest public universities, the Law School works closely with other schools and departments, including the Schools of Business, Public and Environmental Affairs, and Journalism. The Law School's library is one of the largest in the country, with more than 455,000 volumes, 500,000 microforms, and eight full-time librarians. The library's collection is accessible through an on-line catalog, which also lists the 11.2 million holdings in the Indiana University libraries. The library is a U.S. government depository as well as one of only 13 libraries to receive copies of all U.S. Supreme Court briefs.

The Law School offers a broad curriculum in communications and information law, including courses in print and electronic media, the First Amendment, information law and policy, copyright, patent, trademark, international telecommunications, and related fields. Students may also take courses in Indiana University's nationally ranked Telecommunications Department and School of Journalism, which cooperate in publishing the *Federal Communications Law Journal*.

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PRIVACY VS. CONVENIENCE: THE BENEFITS AND DRAWBACKS OF TAX SYSTEM MODERNIZATION

by E. Maria Grace 409

The Internal Revenue Service has launched the Tax System Modernization (TSM) program, a \$23 billion plan to modernize its computer and information systems. TSM will be the largest computer upgrade ever undertaken by the federal government.

Like any other computer network, TSM will inevitably be threatened by computer viruses, professional eavesdroppers, power outages, natural disasters, and human error. Given the sensitive nature of tax returns, the IRS has the difficult task of modernizing its data collection procedures and telecommunications facilities without risking the privacy of taxpayers and offending the security measures required by the Privacy Act of 1974, Computer Security Act of 1987, and the Internal Revenue Code.

This Note questions the extent to which the TSM program will be able to incorporate the privacy and security standards required by Congress. Also, this Note offers several recommendations for identifying particular security and privacy weaknesses that require immediate attention. This Note concludes that the IRS must match the innovations that it uses to improve tax collection with innovations to protect the privacy of taxpayers.

MISSED CONNECTIONS: ONE FAILED ATTEMPT TO EASE RESTRICTIONS ON BELL OPERATING COMPANIES

by Jeffrey Walker 439

The divestiture of AT&T in 1983 began a revolution in telephone service, ending the communications giant's monopoly and sparking industry competition and lower telephone rates for consumers. However, the Modified Final Judgment, the court decision governing the Bell Operating Companies created in the wake of the divestiture, severely limits phone companies' ability to offer diverse communications products and to pursue customers outside their immediate geographic area.

More than a decade after the landmark decision to limit AT&T's monopoly, the District Court for the District of Columbia remains the sole regulator of this segment of the communications industry. This Note argues that in light of industry changes, the Baby Bells' superior ability to provide consumer services, and the value of additional competition, the decree court's restriction on Bell Operating Companies should be lifted. In its place, the Author advocates that Congress enact a proposal similar to the recent House Bill 3626, which would return regulatory power to the Federal Communications Commission and allow Bell Operating Companies to contribute their significant skills to the development of the communications infrastructure.

Reflections on the Sixtieth Anniversary of the Communications Act

Robert E. Allen*

This is the sixtieth year since the adoption of the Communications Act of 1934 and the tenth year since AT&T's divestiture of its local telephone operating companies. It is a good time to reflect on all this country has achieved in the field of communications as a result of enlightened, procompetitive policymaking. It is also timely to look ahead and consider the value of bringing the procompetitive policies of the past to bear on the remaining vestige of monopoly power in the American telecommunications landscape, the local exchange, as well as the benefits of fostering competition in the international arena.

During the past twenty-five years, the evolving telecommunications policy in this country has been decidedly procompetitive, and appropriately so. Competitive forces have spurred the delivery of the most advanced voice, data, and multimedia services to America's citizens in the shortest time frame, without burdening taxpayers or consumers with unnecessary costs. The competitive market structure attracts private investment and entrepreneurial activity. It has led to economic growth and job creation. There is no question that the nation as a whole has benefited from this strategy.

In particular, the nation's experience with competition in the communications equipment and long-distance markets is a testament to the benefits of procompetitive policies. Competition came first and most easily to the customer premises equipment market. Once the Federal Communications Commission (FCC or Commission) determined two decades ago that other manufacturers' terminal equipment should be allowed to be used with the Bell System network, the options available to customers increased dramatically. Instead of having a single, expensive, black rotary phone as

* Chairman and CEO, AT&T Corporation.

in the past, homes today routinely have several phones (both wired and cordless), an answering machine, a computer with a modem, and maybe even a fax or cellular phone—all made by a variety of manufacturers. Government no longer regulates the price of consumer equipment or the terms of its sales. Instead, its principal involvement is its participation with industry to develop technical standards.

The U.S. telecommunications network equipment business has also become fully competitive. Before divestiture, the Bell Operating Companies purchased their network equipment from their Bell System manufacturing affiliate. But once divestiture severed that captive relationship, new suppliers with fresh ideas entered the marketplace. The Bell companies now have the ability and the incentive to establish multiple sources of supply, which they have done, and to buy their equipment from whichever manufacturers offer the best combination of features and price.

Since divestiture, there has been extraordinary competition in the long-distance business as well, where carriers have introduced a plethora of new services, and prices have plummeted. Hundreds of new carriers have begun providing competing long-distance services. A dozen different carriers have put thousands of miles of fiber-optic cable into service across the country. Long-distance networks have, with greater speed and urgency, deployed advanced technologies.

The spur of competition has made AT&T a stronger company; it is now more efficient, more innovative, quicker to market, and more responsive to its customers. Because of the competitive marketplace, long-distance carriers and equipment manufacturers have invested heavily and successfully in a wealth of new technologies and services. Competitive market pressures assure that these trends will continue. The time is long past due for government to eliminate all remaining unnecessary regulation in these competitive markets, so that competition can continue to flourish unhindered by artificial regulatory constraints.

But competition is not yet universal. Customers everywhere in the United States have only one option for local telephone service: they must use the local telephone company that serves their area. Through the local telephone network, customers make all their local calls (local service) and, in over 99 percent of the cases, that same local network connects them to the long-distance carrier of their choosing (local access). And although it is otherwise a time of great industry ferment, the local monopoly remains rock solid. AT&T and its long-distance competitors know this firsthand, for they are the largest captive customers. In order to gain the access they need to their domestic customers, AT&T pays the local telephone monopolies

about forty cents out of every dollar they collect from their long-distance customers.

Until recently, interest in the potential for local competition was evident only in the industry's far reaches—where entrepreneurial firms such as MFS and Teleport have labored. But now there seems to be a serious collective interest on the part of federal and state policymakers and on the part of the industry to find out if, given the right set of regulatory safeguards and incentives, local competition has the potential to develop. AT&T supports these efforts and has recently asked the Illinois Commerce Commission to adopt the regulatory conditions required to test the viability of competition for local services in Illinois Bell's (now Ameritech's) serving areas. AT&T has also supported congressional efforts to implement these principles nationally.

In the local exchange market in particular, the government needs to establish the necessary and interrelated conditions required to allow genuine competition to develop to the fullest extent possible. These conditions require: elimination of government rules that distort market dynamics and undermine the potential for competition; comprehensive, nondiscriminatory, and cost-based interconnection with, and unrestricted use of, all fundamental components of the local exchange carrier network; and termination of local exchange carrier control over telephone numbers. This last requirement includes allowing local telephone customers to change local service providers without having to change telephone numbers, and to access the services of all providers in the same way that they access the incumbent provider's services, without the need for access codes or cumbersome dialing protocols.

If the collective efforts of policymakers and the industry are successful, and if true local exchange competition can be established, the benefits are potentially enormous. Foremost, competition would assure—as it has in other telecommunications markets—the most effective and efficient deployment of new products, services, and technologies, in turn offering users a wider range of choice at lower cost. It would lead to the acceleration of infrastructure development, the growth of existing firms, and the entry of new firms, producing significant new employment. All Americans would benefit as the capabilities of the nation's communications networks expanded and the cost of using them dropped.

Effective local competition would also permit the Bell companies to provide long-distance service, something they have sought even while they retain monopoly control of essential local exchange facilities. Premature entry by the Bell companies would wreak havoc on the adjacent long-distance business, which depends entirely on the Bell companies' essential

local exchange facilities for its operation. Only effective competition in local telephone markets could assure that the Bell companies would be unable to improperly leverage their local exchange operations into the long-distance market.

Despite the lack of customer choice, the Bell companies have argued that vigorous local competition exists, or will soon exist. They claim that alternative access providers, cable networks, and wireless services, either alone or in combination, are or soon will be effective alternatives to the local exchanges. These technologies, however, are not yet as available and affordable as alternative local telephone technologies, and it is not clear when, if ever, they will be.

The shift to local competition will take time, if it happens at all. It would be to the Bell companies' great advantage, and to the country's great disadvantage, if they were to enter the long-distance market with their essential local monopolies intact. Such premature entry would foreclose or impede competition in the long-distance industry and would dim the prospect of any meaningful competition in the local exchange. Government need not, and should not, let this happen.

In pursuit of local competition, the government also need not impair one of the crowning achievements of American telecommunications—universal service. Basic telephone service and access to network capabilities should be available to all Americans. Since enactment of the Communications Act, universal service has been supported through a system of subsidies that resulted in the provision of basic local service at rates below cost. This was made possible by charging higher rates for other services, such as long-distance. This system continues in effect today, with local service rates being subsidized by above-cost access charges paid by long-distance companies and their customers. These “implicit” subsidies have been supplemented by other “explicit” subsidies, such as the Universal Service Fund and Lifeline Assistance program, which are intended to provide affordable basic local service in high cost areas and assistance to needy individuals.

The current system has skewed competition and is in need of substantial reform. The goal of lawmakers, regulators, and industry participants should be to develop a system that maintains and enhances universal service, while eliminating the existing distortions and inequities. In particular, a new universal service funding mechanism should be competitively neutral and should maximize customer choice. This will occur if (1) funds are collected, disbursed, and otherwise administered by the FCC, the states, or some other disinterested third party; (2) financial responsibility for providing the funding is spread broadly and on a

competitively neutral basis; and (3) any subsidy allows each consumer, so far as is practicable, to choose among competing carriers wherever that choice exists.

In fostering competition on our own shores, the government should also be mindful of whether foreign markets are open to entry by American firms. Closed foreign markets deny American consumers competitive choices in the global market. Participation in American markets by firms with protected home markets poses risks to competition in the American marketplace. American regulatory authorities and policymakers should be cautious about allowing entry by foreign firms into the American market until there are comparable rights for American firms seeking access to foreign markets. They also should insist that foreign carriers participating in the American market provide the kinds of foreign interconnection that go with true competition and offer cost-based, nondiscriminatory accounting rates to all U.S. carriers.

Competition in the equipment and long-distance markets has brought tremendous benefits to consumers and the American economy. In order to maximize consumer benefits, the government should now take the next logical step and foster competition throughout the telecommunications industry. In particular, conditions should be put in place to test the potential for competition in the local exchange, and foreign carriers seeking to participate in American markets should be required to demonstrate that their home markets are open to competition.

Censorship By Media Elites Will Ultimately Threaten the Republic

Michael E. Bailey*

In the past thirty months, my campaign, Bailey for Life for Congress, has raised nearly \$300,000, aired over 1000 television ads on the major network affiliates in Indianapolis, Evansville, Indiana, Louisville, and Cincinnati, printed and distributed over 1,000,000 campaign flyers, and hosted at least 150 campaign rallies. Although I have never held public office, I am, perhaps, one of the best known politicians in Indiana, Ohio, and Kentucky.

In 1992 I won the Republican primary in Indiana's Ninth Congressional District. The victory was a huge upset, as we beat the party's endorsed candidate by taking 60 percent of the popular vote. Despite winning 70,000 votes in the general election, we were defeated by Democrat Lee Hamilton, who has held office for thirty years. I was beaten this year in the Republican primary by a popular Republican state senator.

The losses I have suffered in political elections, however, cannot be compared with the incalculable advancements of my views in the public arena. Politics has given me a platform in which to advance my viewpoints and has provided a forum in which to challenge my fellow Americans with the many ideas that are missing in both the public and political debate. This aspect of the free and open exchange of ideas in the American democratic process is what puts our society on a higher moral plain than most other nations today.

Of course, both liberals and conservatives would applaud and vociferously defend "free speech" in the American democratic process. To censor any political speech would hinder the democratic process and threaten the purity of the American Republic. It is for this sole reason, I believe, that the "reasonable access law," which protects the free speech rights of political candidates running for both state and federal offices, was

* The Author was a 1991 and 1992 congressional candidate in Indiana.

passed by Congress and faithfully administered—at least until recently—by the Federal Communications Commission (FCC or Commission).

You see, I am one of those dreaded pro-life evangelical Christians. Not only am I in politics, but I have an agenda which is diametrically opposed to most of popular culture. It is my constitutional right of free speech which enables me to enter the political process and attempt to convince American citizens to turn back to the timeless Christian principles upon which this country was founded.

For the government to muzzle my voice is both unconstitutional and un-American, but that is exactly what is happening right now. Certain media elites in Louisville and Indianapolis have decided that the reasonable access law protecting federal candidates is no longer serving their best interests and, therefore, they have arrogantly defied the law.

To add insult to injury, the FCC has supported these lawbreaking media elites by refusing to act on cases which are as much as two years old. The end result of these violations of the law is that the American political process has suffered an enormous setback by the newly formed fourth branch of the American government—*television station management*.

In case it seems as if I am being too dramatic, let me explain. Millions of Americans believe, as I do, that abortion is murder. Within a few years America will have murdered over 30,000,000 unborn babies.¹ Christians believe that God will judge a nation that sheds the blood of the innocent unborn. For this reason, to protect America from the wrath of almighty God, I chose to air the truth of abortion in my 1992 Bailey for Life for Congress television ads. My motivation was to change the American conscience about the brutal killing of the unborn via airing the truth on network affiliate television. The truth of abortion is simply this: Abortion kills a living human being. The resulting evidence of abortion is a dead human baby.

When I first presented my controversial pro-life television ads, showing actual bodies of children murdered through abortion, to television stations in April of 1992, the station management reacted vehemently against them. Stations had five days between the time we presented them with the ads and the time our schedule began. Numerous stations appealed to the FCC, but were told by FCC staffers that they must run the ads uncensored and at the times we had purchased. Free speech and the American democratic process were upheld in 1992. The Bailey Campaign ran over 700 ads during our first bid for Congress. About half of these ads centered on endorsements of the pro-life movement.

1. *The Abortion Decision*, L.A. TIMES, June 30, 1992, at 10.

By the time our 1994 campaign came around, everything had changed. Station management at both WHAS-TV (Louisville/ABC) and WAVE-TV (Louisville/CBS) caved in to viewer complaints and decided to censor the Bailey Campaign by refusing to run our pro-life ads before 8 P.M. Although refusing to run television ads in the times requested by a federal candidate is a gross violation of the reasonable access law and, of course, the United States Constitution, station management arrogantly defied the law.

WHAS stated that over 1000 negative calls ultimately convinced them that the ads should not be run until after 8 P.M. Does public opinion have precedence over free speech? Of course, they failed to mention that in a poll of 18,000 people in 1992, over 60 percent supported my right to air the ads!

In addition, the banning of ads before 8 P.M. restricts a candidate's ability to reach the voting public. Ads placed after 8 P.M. are expensive prime-time spots. Ads placed after 11 P.M. do not reach television viewers who go to bed before that time.

WTHR-TV (Indianapolis/NBC) actually refused to air the ads at all, but finally agreed to accept the ads after 8 P.M. In each of these examples, the television stations claimed that the ads could be damaging to children, and that it was therefore their prerogative to restrict the ads until after 8 P.M.

The hypocrisy and arrogance of these television stations is astounding. For starters, these stations show dead bodies, starving people, and unspeakable acts of violence every single day. All of these things air before 8 P.M. Showing an aborted child is no different than showing a human being killed by any other tragedy in this world—except for the fact that it is not politically correct. But the real tragedy here is that the reasonable access law has been ignored merely because station management decided it no longer had to obey the law. To make matters worse, the FCC did not enforce the law.

The Bailey Campaign was forced to hire legal assistance and pursue three separate emergency appeals before the FCC. Throughout this appeal process, the media diligently attempted to discredit our ads and our campaign. The Bailey Campaign incurred great political and financial damage due to the perception that we had lost a legal challenge by the local television stations. With limited time and limited resources, our campaign lost the battle in the FCC. Shortly thereafter, we lost the Republican primary election.

Right now, I am angry enough to sue the stations, the FCC, and the federal government for violating my right of free speech. This violation cost me thousands of dollars in donations, undoubtedly was an embarrass-

ment to our campaign, and possibly cost me the election. In addition, because our ads were kept off the air before 8 P.M., hundreds of unborn babies, whose mothers might have seen the truth and made the decision to keep them, were aborted in the weeks that followed.

Placing the burden of appeal on the candidate, who has limited time and resources, rather than on the station, which has both time and money in abundant supply, is wrong. Stations must be forced to run all television ads submitted by federal candidates. If a station does not want to run the ad, that station should be the one to appeal to the FCC, not the candidate. The reasonable access law needs to be amended. The law should be rewritten to force the burden of appeal upon the television station, not the candidate. Obviously, the system is now broken.

It has been months since the Bailey Campaign first appealed to the FCC, and there still is no decision. Why should candidates be forced to spend money on legal fees defending themselves against the media elites who run these television stations via the public airwaves? Do we really want station managers to be the monitors of political speech? As a free nation, are we prepared to give these stations this kind of power over the political process?

Perhaps you are reading this, and you are militantly pro-choice. I doubt I am getting much sympathy from you. But let us imagine we are back in Nazi Germany in the early 1940s. You are running for office against Hitler. As part of your national campaign, you create television commercials showing the horror of the Nazi death camps. Dead Jewish children are explicitly shown in your ads. Should you be allowed to show these pictures? Of course—anything else would be blatant, unconstitutional censorship! My point is that some political discourse may be objectionable, distasteful, disgusting, and downright ridiculous, but such speech must be protected under both the United States Constitution and the reasonable access law, and must be enforced diligently by the FCC.

The inaction of the FCC was a victory for the television stations who demonstrated an obvious bias against the pro-life position. Think about what might be next. Perhaps stations may start censoring political speech that they find too religious. Maybe they will censor the political speech of leftist groups opposing nuclear power because such ads will show people dying of radiation. Who can guess? What is significant here is that a huge crack in the dam of free political speech has formed. Whether one is on the political left or right is of no consequence here. The basic constitutional right of free speech has been compromised.

Believe me, if the FCC rules against my constitutional right of free speech, there will be a price to pay. I am prepared to pursue this case

relentlessly, including taking it all the way to the Supreme Court. If I lose, all of America loses. Blatant unconstitutional censorship by media elites will ultimately threaten the Republic, and no one will escape unharmed.

Deregulating the Second Republic

Commissioner Andrew C. Barrett*

“The milestones into headstones change,” penned James Russell Lowell¹ in the years immediately following *Wabash Railway Co. v. Illinois*² and the passage of the Interstate Commerce Act of 1887.³ Indeed, as the nation marks the diamond jubilee of the Communications Act of 1934, interested fiduciaries have collated their wit, wise musings, and substantive concerns into one compact issue of this *Journal*. Successors will probably categorize our scratchings as “milestones,” “headstones,” or—at a minimum—a slim volume noting the general consternation of the bar, bench, and academy sixty years into a statutory regime.

But as brevity need not substitute for rigor, the Author proposes the following questions for analysis:

- (1) Given the recent calls for a redrafting of the Communications Act of 1934, has the time arrived to review the means by which we regulate the National Information Infrastructure (NII) and,
—if so—
- (2) What procedures should be addressed in implementing such a review?⁴

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1. JAMES RUSSELL LOWELL, *Sixty-eighth Birthday*, in *POETICAL WORKS OF JAMES RUSSELL LOWELL* 433, 433 (Cambridge ed. 1980).

2. *Wabash Railway*, 118 U.S. 557 (1886).

3. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

4. This Essay advocates a legislative response to the challenges facing the deregulation of the telecommunications industry. The Author presumes that the 104th Congress will take up the issue of information law reform in either the first or second session. For an

The goal of any redrafting of the Communications Act of 1934 should be to incorporate the intent of Congress.⁵ Clear, specific, and narrow standards are necessary as a matter of *prediction* and *process*.⁶ In the alternative, unclear standards shift political discourse from the floors of Congress to fax machines and ex parte contacts during the small hours prior to the sunshine period.⁷ Review of the legislative mandate underlying the Communications Act of 1934 could begin with extensive oversight hearings by the congressional committees assigned jurisdiction over technology, communications, and information law. From such hearings, a consensus on the changing character of the market *may* emerge and reactions to those changes *may* present themselves in the form of bills to amend the Communications Act of 1934. But to legislate those changes into the *ratio legis* of the statute, regulatory change *as an act of governance*—and not politics—requires “clear text” underlying the legislative mandate.⁸ Rational, ordered regulation is not served by discerning legislative intent or purpose from various, intermediate points of the

alternative, judicial-centered approach, see ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* (1992).

5. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, *reh'g denied*, 468 U.S. 1227 (1984). Lawyers assuming a regulatory paradigm based on Article I of the U.S. Constitution must presume, implicitly or explicitly, a deliberative model. As core curriculum in legal education teaches only a common *adjudicatory* model, common discourse becomes problematic in law review writings. Article III is no longer the primary source of regulation it was in the nineteenth century. Indeed, given the political question doctrine, the legislature may be the only forum for reform. See *Rust v. Sullivan*, 500 U.S. 173 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1987) (emphasizing the charge to the court of appeals to “seek a reasonable reading” of statutes to avoid constitutional infirmities).

6. Lawrence Friedman, *On Regulation and Legal Process*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 111, 112 (Roger G. Noll ed., 1985) (“Presumably, form can also change the affect of the rule.”).

7. For an early description of this problem, see the Beelar-Dirksen exchange on the floor of the Senate in 1959. *Proposed Administrative Procedure Reform: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on Judiciary*, 86th Cong., 1st Sess. iv-429 (1959); Charlotte P. Murphy, *Legislative Interest in Administrative Procedure During the 86th Congress*, 12 *ADMIN. L. BULL.* 132-36 (1959).

8. By narrowing the definition of standards, the Author refers to the academic tradition covering statutory construction and legislative drafting. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (a rather ambitious proposal for the introduction of common law methodology into statutory interpretation); REED DICKERSON, *LEGISLATIVE DRAFTING* (1954); ERNST FREUND, *LEGISLATIVE REGULATION, A STUDY OF THE WAYS AND MEANS OF WRITTEN LAW* §§ 27, 46, 51, 56 (1932); ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION* (1965). For an effort to develop a “language of statutes” parallel in strength and utility to the “language of the case,” see WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION, POLITICAL LANGUAGE AND THE POLITICAL PROCESS* (1993).

deliberative process.⁹ Discourse must lead to disciplined drafting and the language of that drafting becomes the standard defining the legislative mandate of the Federal Communications Commission (FCC or Commission).

Approached as a matter of process and not as analysis of the procedural transcript, rational and ordered regulation may provide the means by which we address the fundamental changes confronting deregulated telecommunications. Indeed, the premises under which we labour may now lack empirical justification. Regulatory slack water—the point at which independent, incompatible actions by financial markets and the Commission destroy what both the regulator and markets strive to create—awaits the decision maker who dismisses the connections between (1) deregulation, (2) the endorsement of *competition* as the juridical principle underlying that public policy, and (3) the ability to create a nationwide information infrastructure. Absent public finance, private investment is necessary to expand American telecommunications into an information “superhighway.” The availability of private capital for national infrastructure is predicated on a predictable rate of return—the level of risk fixing the cost of the financing—as determined by the American, or indeed, *global* financial community. An accelerated rate of technological change,¹⁰ a constitutional regime¹¹ granting wide discretion to independent agencies, and the vacillation of public policy between the goals of “deregulation” and “reregulation” are three factors lending uncertainty to the capital markets.¹² These three phenomena converge to constrain capital—the less

9. The D.C. Circuit Court of Appeals stated a reluctance to rely on legislative history in construing unambiguous statutes. *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987), *cert. denied sub nom.*, *Connecticut v. FCC*, 485 U.S. 959 (1988).

10. This is not always the exclusive realm of the private sector. See Carl Weinschenk, *Long Time Coming*, *CABLE WORLD*, May 23, 1990, at 90; *Flat Screens, Crystal Diplomacy*, *ECONOMIST*, Apr. 30, 1994, at 70. But see Edward Baig, *The Incredible Shrinking Dish*, *BUS. WK.*, May 30, 1994, at 143; *Infrastructure in the Sky*, *ECONOMIST*, Mar. 26, 1994, at 101.

11. The *Second Republic* is a direct reference to the framework established by Theodore J. Lowi in his analysis of the New Deal, the Supreme Court's reaction to that national initiative, and the consequences of the congressional delegation of power that occurred after *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935). For the roots of administrative discretion see ROBERT CALLIS, *SEWERS* (1647) (discussing the constitutionality of the delegation to royal engineers under Y.B. 8 Hen. 5 (1519)). For context, see MORTON KELLER, *REGULATING A NEW ECONOMY* 7-11 (1990). For Lowi's current characterization, see THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 271-310 (2d ed. 1979).

12. The nexus between investment and regulatory uncertainty must be addressed in the wider context of regulation's effect within firm theory. See Roger G. Noll & Bruce Owen, *The Political Economy of Deregulation*, in *THE POLITICAL ECONOMY OF DEREGULATION*

capital available, the more limited the vision of tomorrow's "superhighway" available to both regulators and policymakers. And the connection between certainty and our regulatory structure is all the more important because the end product must serve both the American consumer and an American industry racing to preserve its comparative advantage against international competitors.¹³

Acknowledging administrative jurisprudence's increasing complexity, the Court deferred to agency competence in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁴ The title of this Essay references the Second Republic critiqued by Theodore J. Lowi, whose analysis of *Schechter* reached its apotheosis in *Chevron*. The Court foreclosed the judiciary's last substantive ties to what was once a judicial power—economic regulation.¹⁵ But this alleged juridical flight from regulation is deceiving. Indeed, the time has come for American governance to

32-40 (Roger G. Noll & Bruce Owen eds., 1983). For a related view, compare generally, Andrew C. Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 FED. COMM. L.J. 39 (1993); *Dial "R" for Risk*, ECONOMIST, June 4, 1994, at 84; *Making a Meal of Mergers*, ECONOMIST, Sept. 10, 1994, at 87. Such uncertainty may be derivative of the legislative mandate or the regulatory process. See ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 727 (1941) (discussing planning in the agency context); *Multimediators*, ECONOMIST, Apr. 16, 1994, at 1 (discussing the regulator's current dilemma); *Taking the Scenic Route*, ECONOMIST, Apr. 16, 1994, at 67 (discussing regulatory constraints on the information superhighway).

13. See Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LIT. 1263 (1993). Japan has predicted a "superhighway" connecting the island with ten years. The international market has quickened with North American developments. Cf. Gail Edmondson, *Wireless Terriers*, BUS. WK., May 23, 1994, at 117; *Europe's Would-be Champions*, ECONOMIST, Aug. 27, 1994, at 60; *Singapore: Not another Boom*, ECONOMIST, June 18, 1994. And, indeed, it is refreshing to see American business acumen rebound abroad. See *The Race to Wire the World*, U.S. NEWS & WORLD REP., May 23, 1994, at 18; *Where is the Consumer in Consumer Electronics?*, ECONOMIST, Sept. 24, 1994, at 65, 65 ("The world's consumer electronics makers have one last chance to protect themselves before America's revitalized computer industry grabs the burgeoning 'infotainment' market for itself.").

14. *Chevron, U.S.A., Inc.*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984). The current Court may be returning to more a traditional economic rights doctrine. See *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

15. Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 428-34 (1981). The character of nineteenth century law and its role in fostering the industrial revolution is still the subject of significant debate. For the purposes of this Essay, the Author assumes that a combination of common law reasoning—Karl Llewellyn's "Grand Tradition"—and its promotion of economy fostered the financing of national infrastructure. See JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM 71-108 (1967); STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION, THE CHARLES RIVER BRIDGE CASE 165-71 (1971); ELIZABETH BRAND MONROE, THE WHEELING BRIDGE CASE 3-19, 163-78 (1992).

address the question of whether the Commission, and its peers, have evolved into complex decision-making bodies not unlike Article III courts. Though lawyers—traditionally proponents of a legal culture centered on Article III of the United States Constitution—were confined to the limits of *Schechter* and *Chevron's* narrow *adjudicatory* model, the same profession has developed new *deliberative* skills to meet challenges unique to the legal landscape or the regulatory palatinate of Article I. As such, collegial Article III-type decision making is conducted by agencies wielding powers previously reserved to both Articles I and III. However, the transformation of independent agencies into true prudential, collegial, Article III decision-making bodies has not been accepted as the scholarly model or as the professional model explaining the Commission's legislative mandate.¹⁶ For agencies to function as collegial decision-making bodies, they must receive the legislative mandate in a statute employing rigorous categorization and precise language—that is, clear text.

In my fourteen years, I have concluded that the regulatory state's fine line between law and politics is fiber thin. This transfer of an interpretive legal power—wielded masterfully by Article III judges in the early nineteenth century—to federal agencies with nascent institutional decision-making conventions and fledgling empirical skills has been followed by yet another destabilizing period. After the transfer of the regulatory power, we as a nation have been unable to articulate public expectations of the independent agency.¹⁷ As such, the legislature, the executive, the judiciary, and the American public have varied and conflicting expectations of the Commission's role in the administrative state. This lack of a relevant

16. MARTIN SHAPIRO, COURTS—A COMPARATIVE AND POLITICAL ANALYSIS 111-15 (1981); Paul Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 260; *Rate-Making—A Judicial, Legislative, or Ministerial Function?*, 9 COLUM. L. REV. 341 (1909). Accepting the Article III model entails a parallel acceptance of the limits imposed by both prudence and candor. See generally Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. (forthcoming May 1995) (a rigorous, insightful, and thorough survey of judicial candor in Article III fora).

17. Professor Friedman questions the efficiency imparted by common law reasoning. The division between his position and that of Judge Richard Posner, may, in a limited sense, be evidence of a categorical split. If there is a difference between litigation addressing private rights and economic regulation, then Friedman's case study—the transformation of the fellow-servant principle—may be different in form and substance from the macro-issues presented by market structure and deregulation. Compare Friedman, *supra* note 6, at 129 and Arthur A. Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 451-61 (1974) with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 440 (4th ed. 1992) and *Theories of Economic Regulation*, 5 BELL J. ECON. 335, 335-51 (1974) and George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65-82 (1977) and Paul H. Thebaine, *Why is the Common Law Efficient?* 6 J. LEGAL STUD. 51, 51-63 (1977).

mandate should be a primary concern of any redrafting of the Communications Act of 1934.

Noting the need for predictability and reckonability in the ordering of national commerce,¹⁸ there are three points within the administrative structure of the Second Republic from which predictability can be drawn. Of least impact is the decision-making process employed by each Commissioner. But to the extent that regulators can employ a consistent and ordered decision-making process—perhaps by recourse to theories with public choice or public value foundations—the overall process may become predictable.¹⁹ The next most important source of predictability is the rulemaking of the Commission. Here the assumptions and formulae underlying rulemaking are all-important, and so is the use of standards within the rules themselves. Not unlike the use of narrow, specific standards within agency rulemaking, full delegation from Congress in the enabling statute is the greatest source of certainty *at law*. But full delegation must be executed with rigorous, narrow, specific standards in the legislative mandate *of the statute itself*.

The Supreme Court has held “that laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning . . . [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”²⁰ The needs of the consumer, small business, and big industry are parallel to the ordinary person. Moving from a regulated to a deregulated

18. KARL LLEWELLYN, *THE COMMON LAW TRADITION, DECIDING APPEALS* 17-18, 215 (1960).

19. Languages of law and economics—as common law reasoning or the Socratic, dialectic method—are the regulator’s tools. As the legal academy no longer promotes a common, unified professional language, less intellectual comity may exist between future lawyers. See Friedman, *supra* note 6, at 115. Assumptions and language will become more suspect as intellectual diversity promotes variation instead of the doctrinal scholarship formally fostering uniformity. But economics is still useful in promoting competition. See Ronald H. Coase, *Economics and Contiguous Disciplines*, 7 J. LEG. STUD. 201, 202-17 (1978); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975) (frameworks relevant to the current mandate). Given alternative mandates, other languages may enter the public discourse. See, e.g., Fred H. Cate, *Communications Policy Making, Competition, and the Public Interest: The New Dialogue*, 68 IND. L.J. 665 (1993) (employing a “new dialogue” through an “endless policy loop”). *Contra* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990). As one applies professional languages to statutory texts, that choice itself excludes certain options. See Theodore J. Lowi, *The State in Political Science: How We Become What We Study*, 86 AMER. POL. SCI. REV. 1 (1992).

20. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

industry entails some market turbulence. The concern should be over whether that turbulence is a factor of the transition *or* of the rules and statutes prompting that transition.²¹ Born of a legal regime based in delegation of powers (to independent agencies), and evincing broad, general mandates (in the form of legislative standards), the Communications Act of 1934 was emergency legislation rescuing a sector of the American economy from general market failure.²² The independent agency created by the Act, the Federal Communications Commission, shares this background consideration with other agencies of the same era—the Federal Power Commission (FPC), the Security and Exchange Commission (SEC), the National Labor Relations Board (NLRB), the United States Maritime Commission, and the Civil Aeronautics Board (CAB). Only one agency—the National Bituminous Coal Commission—was later abolished. Others found *subsequent* roles in the governing paradigm established by *Schechter*.

But a bureaucracy capable of making such transitions can not rewrite the law itself. And it is axiomatic that a tool fashioned for one chore performs a subsequent task with structural difficulty. Indeed, much of criticism directed at the FCC in the 1950s, 1960s, and 1970s, was issued by those noting this fundamental premise.²³ The Commission founded to order radio chaos and to act in lieu of the antitrust laws with respect to the emerging telephony monopoly, has spent much of the intervening sixty years deciphering what the legislature wants it to do as the underlying market has changed. Concurrently the Commission tried to manufacture the tools required to complete its original legislative mandate.²⁴ Indeed, the

21. In addressing the former, Congress passed the Natural Gas Policy Act of 1978, litigated as *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982) (holding the one-house legislative veto provision of § 202(c) unconstitutional).

22. See generally ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM* 122-23 (1989). Lowi notes *Schechter's* impact on congressional autonomy (Article I powers) and teaches that the process of delegation without clear, precise, mandates is "*legiscide*." Arguably, the same model—perhaps a form of "*juriscide*"—has been employed in reverse to Article III courts. See LOWI, *supra* note 11, at 273-77. Compare *Mistretta v. United States*, 488 U.S. 361 (1989).

23. A list of the more important criticisms includes WALTER GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* (1956); FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); Ronald H. Coase, *The Economics of Broadcasting and Public Policy*, 56 *AMER. ECON. REV.* 440 (1966); Louis L. Jaffee, *The Independent Agency—A New Scapegoat*, 65 *YALE L.J.* 1068 (1956).

24. In this aeneid, it has been aided by the publishing bar and the academy. The trade and general press have assisted as well. *Economist* has published four sturdy surveys over the past year which give a general view of the market changes affecting our industry. See *Feeling for the Future*, *ECONOMIST*, Feb. 12, 1994, at 5 (television); *The Mathematics of Markets*, *ECONOMIST*, Oct. 9, 1993, at 3 (finance); *Saw it on the Radio*, *ECONOMIST*, Oct.

Commission has begun to see itself as an independent agency of an older Progressive tradition, which focuses on the means by which infrastructure, and not mere economic sectors, is regulated.²⁵

Anniversary issues are known for dire predictions and fantastic visions. There will be those cheering, or lamenting, the end of regulation as we know it. Such may be the case, but absent the extension of *Schechter* to limit the reach of the regulatory state or the return of congressional government asserting the same, one is forced to address the Second Republic on its own terms. If we are to meet the challenge of the changing global economy, then our course must be within the current administrative state's analytic framework. Common ground can be found in two theoretical areas: (1) the organization of agencies has varied over time—perhaps as a function of the activity regulated—and (2) the specificity of congressional, legislative mandates has weakened. As an ailing industry in the 1930s, telecommunications was subjected to regulation by an agency guided with abstract, universal, discretionary, and proscriptive legislative standards.²⁶ A statute orienting the Commission toward a role in regulating national information networks and servers—and *not an ailing, pre-Information Age industry*—would be drafted more along the lines of the Interstate Commerce Act of 1887 which sought to regulate underlying infrastructure.²⁷ Accordingly, a redrafted Communications Act of 1996 requires concrete, specific, rule-bound, and proscriptive standards. This approach calls for precise language and rigorous categorization—it calls for clear text. Categorization is not easy. Is a newspaper on-line still “print,” is it a broadcast, or is it something else? Is “network” an applicable category in the post-cable broadcast industry? These are *categorical* problems implicit with technical change. The legislative mandate of any law reform must match the categorization to both the structure of the market and the underlying purpose of the statute itself; this coupling of categorization and market structure with drafting—when accompanied by

23, 1993, at 18 (telecommunications); and *The Third Age*, *ECONOMIST*, Sept. 17, 1994, at 3 (computer industry).

25. See HORWITZ, *supra* note 22, at 10 (1988). Defining agencies established prior to 1916 as institutions *to formulate general rules for structural sectors* of the economy, Horwitz labelled the Commission's *initial* purpose as asserting price-and-entry controls for the protection of key industries in the 1930s. *Id.*

26. LOWI, *supra* note 11, at 98-99.

27. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 10101-11917 (1988 & Supp. IV 1992)). Though superficially modeled on railroad precedent, communications law drafters in 1934 could not draw on the same rich state regulatory tradition to classify and define statutory lexicon. Unlike radio technologies, switch, engine, and rail were “mature” technologies by the time they were regulated.

precise nomenclature—supports a textualist methodology respectful of the legislative mandate. Only by meeting these two criterion will Congress ensure that the new delegation of power to the Commission conveys, in Lowi's words, "the full ambit of authority" to the Commission.²⁸

Given the lawyerly, shared tradition of elusive, malleable reasoning at the common law, the use of narrow standards to foster predictability and certainty may seem counterintuitive.²⁹ Indeed, the flexibility of common law reasoning has entered our discourse through legislating drafting with nomenclature like "common carrier" and "universal service" (which began life as market hype coined by Theodore Vail in his promotion of the new National Bell Telephone Company in 1880 and is now being applied in the common law tradition to subsequent forms of technology).³⁰ And even when the issue of vagueness is tried in an Article III court of law, such review is performed under an adjudicatory model tailored, post-*Schechter*, to the needs of private rights litigation and not necessarily for the needs of economic regulation.³¹ Accepting the private rights paradigm for the adjudicatory model does not mean that paradigm meets the needs of the deliberative model. Post-*Chevron*, the Supreme Court has partially blocked Article III as a source of standards. Absent the grant of such authority to the Commission *sua sponte*, Congress must guide the independent agency by means of standards explicit to the statutory mandate. And though there is a pronounced shadow land where adjudication addresses both private rights and economic regulation,³² the dichotomy between regulation and

28. Lowi, *supra* note 11, at 96. Such a quid pro quo, mutual consideration between Congress and independent agencies, requires federal officials to respect the autonomy of Article I, perhaps through textual interpretations of statutes. See POPKIN, *supra* note 8, at 336, 354-64 (general survey of the textualist approach).

29. LLEWELLYN, *supra* note 18, at 17-18.

30. KENNETH GOIRDON & JOHN R. HARING, OFFICE OF PLANS & POLICY, FEDERAL COMMUNICATIONS COMMISSION, THE EFFECTS OF HIGHER TELEPHONE PRICES ON UNIVERSAL SERVICE 2 (Working Paper No. 10, 1984); JARICE HANSON, CONNECTIONS: TECHNOLOGIES OF COMMUNICATIONS 57-87 (1994) (discussing Vail's promotions); see *Rogers v. Head*, 79 Eng. Rep. 226 (K.B. 1611); *Rich v. Kneeland*, 79 Eng. Rep. 282 (K.B. 1613) (for the derivation of "common carrier").

31. Broadly worded statutes precluding predictability are clarified by a narrow interpretation defeating future charges of vagueness. *Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1982); see also *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). Vagueness becomes a problem when a statute "does not give fair warning of the proscribed conduct or if it is an unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion." *Keeffe v. Library of Congress*, 777 F.2d 1573, 1581 (D.C. Cir. 1985). But see *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (undue delegation doctrine used a canon of statutory interpretation).

32. See, e.g., *Dirks v. SEC*, 463 U.S. 464 (1983) (holding that the SEC's narrow construction—that simple neglect or nonfeasance under the Securities Investor Protection

nonregulation is only theoretically problematic. In daily matters, the lines are clearer. Fostering a superhighway is economic regulation; ALJ proceedings with respect to licensing are adjudication over some bundle of private rights.³³

Legislative standards, certainty, predictability, and reckonability can collide in unassuming statements. An example of uncertainty and unreckonability was recently offered by my respected colleague of fourteen years Delano Lewis, Co-Chairman of the National Information Infrastructure (NII) Advisory Council and president of National Public Radio (NPR). During an interview discussing the need to address universal service in the drafting phase of law reform, Lewis's position was paraphrased:

Whether *or not* the council weighs in on pending telecommunications legislation, the group's *real impact and influence* could be felt once policymakers begin to implement new measures, if they pass.³⁴

By implicitly avoiding the legislative process and implying an interpretive function post-drafting, Mr. Lewis inadvertently placed the NIIAC in the position of the Federal Communications Commission, an independent agency with both Article I and Article III powers. Add NIIAC "to the mix," and Article II joins the process. While this is the norm in other countries, it may contravene American rule of law. To the extent Lewis sees the council as a body to advise Secretary of Commerce Ron Brown, these remarks are benign and the spirit of the council beneficial. But as the article's subject was the future of universal access—a policy goal defined in an Act and through a legislative mandate to the Commission—Mr. Lewis seems to imply the NIIAC would engage in *ex parte* proceedings after the Congress completed its legislative mandate to the Commission. This is public administration by fax machine and a most pernicious source of uncertainty. It would be better to lobby Congress as an executive

Act § 14(b)—was not void for vagueness).

33. But even the Court's very necessary focus on individual rights brings uncertainty to economic regulation. Juridical principles used to review social regulation—when used by lawyers in regulatory discourse—impart destabilizing uncertainty and contravene the tradition of progressive, economic, early nineteenth century jurisprudence. As such, a juridical fora which once imparted certainty and predictability to economic affairs now imparts uncertainty to the same. STEPHEN BREYER, *REGULATION AND ITS REFORM* 13-36 (1982); Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 552-60 (1979). The need for more specificity in administrative standards was argued by HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962).

34. Jeffery Silva, *Universal Access Turning Out to Be Very Thorny Issue*, RADIO COMM. REP., May 9, 1994, at 10, 10 (emphasis added). See also *Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 144-47, 182-86 (1994) (statements of Reed E. Hundt and Larry Irving).

department—under Article II—and to establish one’s thoughts in the statute’s clear text. To do otherwise is contrawise to Article I of the Constitution.³⁵ Under *Schechter*, complete delegations with narrow standards reviewable only by Article III courts and Article I oversight hearings isolate economic regulation from the intense political pressures surrounding social regulation.

Why is this a market impediment? When describing the classical model of appellate pleading and adjudication, Karl N. Llewellyn wrote a telling excursus on predictability and reckonability as values of traditional jurisprudence.³⁶ The law ought to be predictable so as to allow the citizen to order his or her affairs. Contradict this simple maxim—as one could argue has been the norm under the Second Republic—and one citizen is left confused as to the state of the law. Allow this contradiction *industry-wide* and whole markets will be impeded. Capital is not released from Wall Street; joint venture ships are cancelled; emerging technologies are deferred. Predictability at regulatory law is not only critical, it is largely ignored by the social, rights-based jurisprudence taught in law schools and practiced in the nonregulatory realm.³⁷

35. See generally U.S. CONST. art. I, § 1, cl. 1; § 7, cl. 2; § 8, cl. 18. Mr. Lewis does describe the “endless policy loop” cited by Cate, *supra* note 19, at 666-69. Though this process-based argument satisfies the academic need for characterization, Professor Cate may have overlooked some structural issues. See Cate, *supra* note 19, at 675-77. Compare LOWI, *supra* note 11, at 92-97. Ultimately, even such “policy without law” must meet the broad confines of *Schechter* and *Chevron*.

36.

Our institution of law-government would be highly satisfactory, as a human device, if at this stage it could commonly offer, on the scale of ‘certainty’ of outcome, a reckonability equivalent to that of a good business risk. Surely . . . we should be able to hope for that level of reckonability by the time one reaches the [appellate stage].

See LLEWELLYN, *supra* note 18, at 18. Here agencies parallel appellate courts; indeed, the Federal Communications Commission is often the springboard of litigation bound for Article III fora.

37. In Aman and Mayton’s *Administrative Law*, the conventional wisdom is presented as, “once admitted, as it must be, that some delegation is proper, these matters, of precision in language and important *social values*, come down to matters of degree, and not matters of principle. The judge has to understand whether a delegation is of a primary social choice (and not a more trivial matter best committed to administrative routine) and whether the terms of the delegation are not too open-ended.” ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 31 (1993) (emphasis in original). This does not discount social choices, but underscores that a system oriented toward social choice theory may not consider the economic soundness of those choices. Social choice theory may leave fallow whole areas of analysis. Even within these circles, the current academic regime is engaged in a contentious debate. MARY ANN GLENDON, *RIGHTS TALK, THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 76-170 (1991); PHILIP SELZNICK, *THE MORAL COMMONWEALTH* 91-118 (1992).

If the role of telecommunications in our economy has shifted from one of many economic sectors to one of a fundamental, structural foundation of the entire economy, then Congress may need to revisit the role of telecommunications regulation. As with the hearings on airline deregulation by Senator Edward M. Kennedy (D-Mass.) in the 1970s, such a congressional effort should begin with hearings designed to investigate the changes in the economy and to suggest ways of redrafting the Communications Act of 1934 to meet those changes. The preparations for redrafting should be comprehensive in scope and, in order to garner the best analysis in the country, should be organized twelve to eighteen months in advance to allow for public and private institutions to compile their studies.

Such hearings could consider many alternatives to the current scheme of regulation. Predictability would be fostered by drafting concrete, specific, rule-bound, and proscriptive legislative standards that:³⁸

1. Incorporate specific FCC doctrines compatible with the emerging market.³⁹
2. Substitute words of narrow breadth for those currently used of wider breadth.⁴⁰
— and —
3. Are the product of rational, articulated competition theory (and subsequent technical classification) reinforcing congressional economic or social choices.⁴¹

38. LOWI, *supra* note 11, at 98-99.

39. As for the delegation of power with a *sua sponte* mandate, such delegation may invoke constitutional concerns. The question would be whether the legislative mandate, in the spirit of *Chevron*, would be within even the wide ambit of *Schechter*. What is now the *Schechter-Chevron* pale was first discussed in James Wallace Bryan, *Constitutional Aspects of the Senatorial Debate on the Rate Bill*, 41 AMER. L. REV. 801, 811 (1907) (Pay particular attention to the author's counterattack on the legal arguments present on the floor of the Senate by Joseph B. Foraker (R-Ohio) on February 28, 1907.).

40. POPKIN, *supra* note 8, at 353. Such drafting could look to *Commonwealth v. Massini*, 188 A.2d 816 (Pa. Super. Ct. 1963) and *Central Television Serv., Inc. v. Isaacs*, 189 N.E.2d 333 (Ill. 1963) for initial guidance on statutory interpretation while narrowing to terminology to meet the needs of the superhighway. For instance, the statutory role of "universal service" may be moribund. See HANSON, *supra* note 30, at 69. In its inquiry, the legislature may wish to define the term in light of technological change by determining how it interacts with the goal of greater competition and the fiscal requirements of the National Information Infrastructure (NII) initiative. Such a definition may involve public choice analysis. Alternatively, public value theorists would point to some overarching *ratio legis*. See, e.g., CARL L. BECKER, MODERN DEMOCRACY 11-12 (9th ed. 1952) (connecting the daily workings of communications lawyers to larger movements).

41. The role of such a theory must be to provide the Commission with the very benchmark, the "Golden Rule" of statutory interpretation provided Article III judges. *Green v. Bock Laundry Mach. Co.* 490 U.S. 504, 527-30 (1989) (discussing the application of the

Sea-changes are tense periods for policymakers; they are merely the lawyer's landscape. Storms from Lake Michigan, the Midwest's great inland sea, sweep Chicago *each* winter. Cayuga's waters churn *every* spring and autumn, wrapping upstate New York's pebbled shores in thick fog and still water. What is important for the regulator is not the fury of the sea-change. It is the conditions below, in the lakes' silent depths. Like Washington lawyers, lakeland mariners have tools with which to order change. For regulators, the most important tool is to know the limits of one's craft. Where do *Schechter* and *Chevron* end? They end where questions of popular will begin. Competition theory—as a legal, not an economic doctrine—is in need of definition and the legislature must provide the forum. Not only has the market changed, but Washington itself is now focused on the central question of who we are as an American people. And as the American people have been wind-blown by post-war demographics, the global economy, and the Cold War's surrender, so now their public servants are buffeted by a parallel sea-change. Such fundamental queries affect all areas of governance and they are too important to be left to unrepresentative fora.⁴²

No market is a fixed structure and markets trading securities, stocks, bonds and credit in advanced technologies are most apt to change. As the market changes, so must the mandate from Congress. To do this, Congress should probably revisit the statute—with a comprehensive review—more than once every six decades. In addition to the cart load of policy papers, think-tank treatises, newsletters, and blurred facsimiles that will cross congressional desks during this legislative reform, two monographs written at the beginning of the “commission movement” may hold a message for those grappling with change. When Henry Bruère, Director of the Bureau of Municipal Research, City of New York, reviewed that municipality's

“Golden Rule” to the Federal Rules of Evidence). Congress may want to do some substantive fact-finding before it drafts the standards underlying the Commission's future mandate. The Commission recently utilized this fact-finding to establish auction criteria for PCS spectrum. John McMillan, *Selling Spectrum Rights*, 8 J. ECON. PERSP. 145, 147, 151-60 (1994); *Revenge of the Nerds*, ECONOMIST, July 23, 1994, at 70.

42. BECKER, *supra* note 40, at 65-100. For the legal foundations of competition theory, see JOEL DIRIAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY (1954); ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1988). But greater questions loom. Perhaps the silent depths are better reflected by public philosophical debate. Compare GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992) with ISAAC KRAMNICK, REPUBLICANISM & BOURGEOIS RADICALISM (1990). Wood cites Carl Becker in a polemic that has recently come to Washington by way of the heartland. For a summary, see Gordon S. Wood, *Hell Fire Politics*, N.Y. REV. OF BOOKS, Feb. 28, 1985, at 29; KRAMNICK, *supra*, at 1-40, 261-95.

initial foray into regulation, he noted that independent agencies were the cautious solution to a problem attracting more crazed arguments for state ownership. Reform was cautious, deliberative and thoughtful. A half century before, America's first regulator wrote two review articles on the growing problems presented by the clash of interests surrounding railroad rate regulation. Stating that chaos was the state of the nineteenth century deliberative model, he reminded American intellectuals, "The most important material interests of the American people are deserving of better care than an honest confession of ignorance."⁴³

The force of change may require a sunset provision in the redraft of the Communications Act of 1934; this would bring the Congress back to the three core criteria every five to six years. Examining these three criteria periodically will bring to regulation Llewellyn's "Grand Tradition" of *The Common Law Tradition, Deciding Appeals*.⁴⁴ Though *Chevron* and *Schechter* have pulled Article III out of regulation, the common law tradition provides a model for congressional drafters sharpening their wits and pencils for law reform. And we should not find it odd that a treatise describing the certainty and reckonability of the appellate process holds a certain light to the legislative and regulatory dialectic, for "the better and best law is to be built on and out of what the past can offer; the quest consists in a constant reexamination and reworking of a heritage, that the heritage may yield not only solidarity but comfort for the new day and for the morrow."⁴⁵

43. Charles Francis Adams, Jr., *Railroad Inflation*, 107 NORTH AMER. REV. 130, 164 (1869); Henry Bruère, *Public Utilities in New York*, 31 ANN. AMER. ACAD. 535, 535 (1908).

44. LLEWELLYN, *supra* note 18.

45. *Id.* at 37-38 (this section provides a discussion of the means by which an adjudicatory model produces certainty and reckonability; it remains for the current communications law bar to provide a similar model for the deliberative fora). As for James Russell Lowell, the entire text was penned, "As life runs on, the road grows strange; With faces new, and near the end; The milestones into headstones change; 'Neath everyone a friend." LOWELL, *supra* note 1, at 433.

FCC Licensing: From Comparative Hearings to Auctions

Jonathan Blake*

The way in which the Federal Communications Commission (FCC or Commission) determines who, among competing applicants, will receive licenses for radio frequencies has a profound impact on how spectrum-based businesses and services are regulated. The FCC's choice of a licensing mechanism not only permeates the entire regulatory fabric of our communications industries, arguably the most important of the twenty-first century; it also reflects our society's priorities. A survey of how other countries award licenses, which is beyond the scope of this essay, reinforces this view.

Auctions are the latest licensing mechanism of choice, but they have not altogether replaced the earlier licensing mechanisms of comparative hearings and lotteries, which continue to be available when the FCC is required to use them or believes it is appropriate to use them.

Much ballyhooed, the new auction process is, legally, much less extensive in scope than some believe. For example, Blair Levin, Chief of Staff to FCC Chairman Reed Hundt, at the opening of the first-ever FCC auction process on July 25, 1994, stated that auctions inaugurate a new era in which the government no longer will tell prospective users of spectrum how they can use it; users will decide for themselves. In fact, however, the auction mechanism applies only to the third step in the three-phase process that Congress has entrusted to the FCC and does not permit licensees to decide how they will use spectrum. Still, there is pressure to break down this barrier, and in recent years, the FCC has drafted its use requirements

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more and more broadly, thereby giving licensees more flexibility to respond to consumer preferences.

The first step is the decision as to what generic uses specific frequency bands can be put. In this first, or "allocation," phase the FCC continues to decide that a certain amount of megahertz located in a certain portion of the spectrum can be used for cellular telephone service or radio broadcasting or taxi dispatch service. As new uses for the spectrum are discovered or invented, spectrum has to be found to accommodate them. Fortunately, scientific advances also are allowing the use of spectrum that could not previously have been used or allow it to be used more intensively than in the past. Both kinds of breakthroughs make room for new spectrum uses and generate new allocation decisions.

A second step which is needed only in some services, most notably broadcasting, is the allotment process. Thus, if the FCC has decided to allocate some 400 MHz of spectrum for television use nationwide, it must still decide whether Channel 9 will be used in Baltimore, Washington, or Richmond.

The last step, the assignment or licensing process, occurs only after the frequencies have been allocated and allotted. Then, it is necessary to license them to the public. It is at this stage that the FCC uses comparative hearings, lotteries, or auctions to choose among competing applicants.

The premise of the comparative hearing process was that because the airwaves are public property, the government should license them so as to most benefit the public. Using the public interest as its touchstone, the FCC should decide how they should be used (allocations), where they should be used (allotments), and who should be licensed to use them (assignments).

Eventually cracks in that model began to appear. When the FCC made clear how it would choose among competing applicants, applicants naturally structured themselves to earn high scores under these criteria. Applicants made promises about programming and ownership that they did not live up to at all, or not for long. It also meant that all applicants began to look alike; they all received high marks. So, the FCC stretched to make distinctions based on tenuous, insignificant grounds, such as the famous case where one applicant for a broadcast station received a hearing advantage because it promised more restroom facilities than its adversary.

Another problem was time and expense. With three rounds of agency decision making—before an FCC administrative law judge, the Review Board, and the Commissioners themselves—plus review by the court of appeals, the comparative hearing process often required more than a decade and a ton of money.

Judge Leventhal, in a noted case, observed that the comparative hearing approach might be suited to achieving a pool of high-quality applicants, but perhaps a lottery process would be just as effective and less expensive and time-consuming where the differences between the best two or three applicants were insignificant.

It is not clear whether this was intended as a legislative proposal, but certainly it was the rationale for many congressmen, particularly those who had a lingering faith in government's role, who voted for lotteries as a tie-breaking mechanism to be used by the FCC where two or more applicants were equally qualified. This pragmatic approach to lotteries was also expressed by commissioners confronting the task of picking between equally well-qualified cellular applicants.

But pragmatism was not the rationale of others who supported lotteries as a licensing mechanism. President Reagan, his first FCC Chairman, Mark Fowler, and his successor, Dennis Patrick, profoundly distrusted government's ability to make licensing decisions. When Chairman Fowler spoke of television as a toaster with pictures, he meant many things. But one of them was that the government should have no greater regulatory role with respect to television than with respect to toasters, except as required by technical considerations. In fact, the FCC used lotteries not for a tie-breaking function but to pick among scores of applicants, with only the winners having to be found minimally qualified.

As with comparative hearings, but at a much quicker pace, serious shortcomings with the lotteries emerged, first and foremost in the cellular lotteries. It became almost immediately apparent that they encouraged speculation. Applications were filed by those who did not wish to construct and operate cellular systems and probably could not have done so. Schemes to "game" the lotteries mushroomed. Rules to prevent this were devised, but the gaming was often one step ahead of the regulations. The process of resolving disputes about whether improprieties had occurred posed its own adjudicatory headaches and delays, and generated its own abuses. Thus, at one point, a third of the rural cellular licenses were being held up because of disputes. Lotteries had not turned out to be so much faster or cheaper than comparative hearings.

Moreover, because lotteries were every person's chance for a big payoff and winners routinely sold their licenses as soon as possible to real operators, it was soon observed that lotteries led to private auctions. In turn, this led to the question: why shouldn't the government conduct the auctions? Under such a system, the government, not lucky lottery winners, would reap the value of the spectrum on behalf of the public to whom it

belonged, and the delays and controversy surrounding lotteries would be avoided.

Furthermore, this was the policy goal that Chairman Fowler had really been after all along, not so much to raise money for the government, but because he believed that, according to the laws of the marketplace, the highest bidder would best use the spectrum in the public interest. This repudiated the principle of government as decision maker on which the comparative hearing mechanism had been based.

Reluctantly and because of fiscal needs, Congress authorized auctions on a permissive basis, only for five years, and not for broadcast frequencies. But even Congress was thrilled by the first auction results, and the momentum toward making auctions permanent and expanding their scope was palpable and immediate.

Within two days of the second set of auctions, however, some of their potential for abuse emerged. Winning bidders balked at making payments, and the FCC soon announced that it was investigating the possibility of collusion and other bidding abuses.

Another defect had been apparent from the outset and had been addressed somewhat by the auction legislation. Auctions could turn spectrum-based businesses into a bastion of the most well-financed, often incumbent companies—companies that might even be willing to make premium bids to acquire spectrum that otherwise might be used for innovative new services competitive with the services the established players were already operating.

With the seeming blessing (though not unmixed or specific) of Congress, the FCC addressed this problem by constructing various advantages in the broadband personal communication services (PCS) auctions for small businesses, rural telcos, minorities, and women. Some argue that these advantages are not sufficient; others argue they go too far; still others claim that they will lead to shams, with powerful incumbents controlling these so-called designated entities through various investment mechanisms. The debate recalls the effort in broadcast comparative hearings to give hearing merits to applicants that included minority owners/managers. The policy worked in the sense that many winners of comparative hearings contained minority owners/managers. But early ownership shifts by winning applicants were common. The result was that meaningful, long-term minority participation was not greatly enhanced.

Another problem with lotteries and auctions is that they provide no assurance that the best service will be rendered to the public. Arguably, a local or national PCS system, to take one example, is important to the

public and should not be entrusted to a blind choice determined only by the size of the competitors' bids.

The auction apologists would argue that the government *should* set high qualifying standards and tough performance requirements to ensure that good systems and service will result, whoever is the highest bidder. But the FCC has not and probably will not do so. The emphasis on raising money is too single-minded, notwithstanding Congress's express direction to the FCC that only public interest factors, not monetary considerations, should direct the FCC's implementation of its auctioning authority.

However, the FCC's modest standards for applying for, constructing, and operating new spectrum-based services like PCS will be invoked in petitions to deny the applications of winning bidders. Once again litigation expense, delay, and abuse will be introduced into the process.

Shams, collusion, trafficking, nonperformance, delays, litigation expense, and poor quality service will, therefore, be part of the auction experience. Excessive bidding will add its own peculiar pressures to these tendencies. Requests for delays in meeting payment obligations have already been made. Winning applicants that have overbid may ask to be excused temporarily or indefinitely from construction deadlines or coverage or other service requirements. They may ask permission to dilute their minority or female ownership because the total financial burden is greater than they expected, and new nonminority and nonfemale funding will be needed to survive. Winning applicants may also seek to use their frequencies for different purposes than those for which they were allocated.

Auctions, in short, will breed their own problems, and though the solutions proposed for these problems may in some circumstances be market-based, still the government must select, craft, and implement them. No solution is problem-free: all licensing mechanisms contain the potential for abuse. The search for a risk-free mechanism is illusory. Better to knuckle down to the difficult responsibilities of implementing an imperfect process than to proclaim the arrival of the millennium.

Undoubtedly, the choice of auctions will have ramifications well beyond licensing. The comparative hearing process led to an absurd preoccupation with licensee performance—counting the seconds of program material devoted to public affairs topics, interviewing leaders in sixteen categories of public life, etc. The lottery heyday was characterized by nihilism. Even those few regulations that remained on the books were enforced only grudgingly, if at all. For example, the FCC took thirteen months after a decision to impose must-carry rules on cable television systems to craft that decision, and the forty-page decision mentioned the

public interest only once. Many speculated that even that was an oversight. Not surprisingly, the decision was overturned by the courts.

In the auction era, where dollars are equated with public worth and maximizing dollars will be the most important criterion, there will be strong pressure to also base allocation and allotment decisions on this standard. Public television, which received one-third of the station channels allotted in the 1950s and 1960s, would not be so fortunate today. Police and fire departments still have enough political clout to gain access to spectrum. But others who propose new services will have to produce dollars quickly if they expect to gain entry to radio frequencies. The whole notion of public service and the public interest will be eroded, except in the case of broadcasting where specific provisions have been legislated—indecentcy, equal employment opportunity (EEO), drug convictions, alien ownership, children's programming, and political material.

Auctions, in other words, will generate their own serious problems which should not be underestimated or denied. It seems that the task of government has become so daunting that we anoint a few constituencies with very pressing needs, give them special leverage, and throw everything else back on the market. Perhaps this is the way to go, but a better guess is that auctions are only the latest step in the ongoing dialectic and that we will continue to struggle toward a balance between private initiative and public oversight.

Celebrating Communications Technology for Everyone

Peter David Blanck*

INTRODUCTION

Developing communications technology to support people with disabilities has rocketed to the top of the national agenda. In February 1994, the Technology-Related Assistance Act was reauthorized to help people with disabilities use new communications technologies at home, school, and work.¹ Shortly thereafter, President Clinton signed the Goals 2000: Educate America Act, a comprehensive education bill that will foster a thorough study of the effects of communications technology on school reform for children with disabilities.² Meanwhile, only four years after its passage, the landmark Americans with Disabilities Act of 1990 (ADA) is reshaping telecommunications, employment, public accommodations, and perhaps most important, public attitudes.³

As fast as communications policy for people with disabilities is changing, on this sixtieth anniversary of the Communications Act of 1934, much work still remains. To stimulate discussion of the emerging issues, I convened an Annenberg Washington Program conference during the spring of 1994, entitled *Communications Technology for Everyone*, which featured assessments of communications policy and technology from

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1. Technology-Related Assistance for Individuals with Disabilities Act, Pub. L. No. 103-218, 108 Stat. 51 (1994) (codified in scattered sections of 29 U.S.C.A. §§ 2201-71 (West Supp. 1994)).

2. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified at 20 U.S.C.A. § 5801 (West Supp. 1994)).

3. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 26 U.S.C. (Supp. IV 1992)).

leading experts. Speakers at the conference exchanged ideas on (1) how accessible communications technology can assist students with disabilities, (2) how government, industry, and advocacy groups can provide communications technology to people who need it, and (3) how the rights of persons with disabilities can be guaranteed by laws like the Communications Act of 1934. In this Essay, I briefly address each of these areas in turn.

I. USING COMMUNICATIONS TECHNOLOGY TO PROVIDE AN ACCESSIBLE CURRICULUM

The ordinary classroom can present “monumental” communications barriers to students with disabilities, according to Anne Meyer, co-executive director of the Center for Applied Special Technology (CAST). Many people often see these barriers as outgrowths of the students’ disabilities. But, just as stairs can bar access to a building, the medium of print can constitute a barrier for students with disabilities. Communications technology can offer alternative access systems which have a strong appeal—so strong, in fact, that students without disabilities may also be drawn to them.

At the 1994 Annenberg conference, Meyer and CAST co-executive director David Rose introduced several CAST “pioneers”—individuals who have been working with CAST to develop better technologies for communication in school.

- Caroline, a six-year-old, has cerebral palsy with hearing loss; she cannot hold a book. CAST has designed software that permits Caroline to read a book on a computer. A page of text and illustrations appears on the screen alongside video of a signer, and a digitized voice reads the text aloud. Caroline uses a customized chin switch to enter commands. This technology enables Caroline to undertake the kind of independent explorations that other kindergartners perform.

- Andrea, a first-year graduate student studying special education, has a learning disability and hearing loss. CAST is working with her to develop software that displays textbook pages on a computer screen. A voice reads aloud as the pertinent text is highlighted on screen. She can pull out part of the text into a notepad for review and look up the definition of unfamiliar words in an electronic dictionary.

- Megan, a fourth-grader in a mainstream classroom, loves reading and hopes to be a writer. She has cerebral palsy and significant visual impairment, and her speech is difficult to understand. Now, when she is assigned to give a presentation to her class, Megan composes her remarks ahead of time on the computer, then uses the computer’s speech output capability to convey the information to her classmates. Other students no

longer stop her in the middle of a presentation and ask her to repeat something.

- George, a thirty-nine-year-old worker on a commercial farm, has developmental disabilities. As part of his work, he studies weather maps. The maps are available on computer databases, but accessing them requires a series of steps that exceed George's skills—such as starting the telecommunications program on a computer, dialing the database, keying in the password, and interpreting options. Using macros and text-to-speech capabilities, CAST has consolidated these steps into four keystrokes so that George can reach the database on his own. In this case, the information itself is accessible, but the ordinary access route is not.

- Robert, a college freshman, is legally blind and has cerebral palsy; he has trouble reading and writing. He hopes to study the law and become an attorney, using digitized books that are read aloud electronically. CAST has developed a prototype interface to allow Robert to use a commercial electronic information service. The interface magnifies the screen and its icons, reads aloud electronic mail and other digitized texts, and responds to voice commands. The system helps Robert move closer to his goal of full independence.

- Judy, age twenty-three, had a brainstem stroke as a college freshman; the only muscles she can control are her eyelids. Working with other organizations, CAST has developed a system that Judy can control. A camera attached to a computer focuses just below her hairline. She blinks her eyes to activate computer commands.

Helping these students with disabilities, like many other communications technology applications, requires software. Today, few textbooks have been converted into electronic form, and the procedure for doing so—scanning the data into a computer one page at a time—is costly. Although publishers generally typeset and design books electronically, most companies are unwilling to part with the digital data. But expense is not the only problem. Most digitized books have an “added quality,” like ramps built onto existing structures. Ideally, the alternative access system would be built-in from the outset through “universal design.”

With that goal in mind, CAST has created an instructional program for early reading with built-in comprehensive access. The result is a series of early reading books available on paper and CD-ROM. The CD-ROM version has many advanced features. An introductory cartoon presents the book titles using music and speech. After the student selects a book, each page is displayed on the screen. On command, the CD will read the page aloud, using different voices for different characters. The student can “click” a mouse to hear an individual word pronounced, or use a micro-

phone to read the book, and then hear the rendition and compare it with that on the CD. By magnifying and coloring illustrations and writing responses to stories, students can make the books their own.

For students with disabilities, teachers can customize the learning experience. For example, the pace of the oral reading can be slowed down, or the text can be magnified. The system can scan through its options for students who can operate only a single switch. The colors of text and background can also be adjusted to each student's learning preference. As a result, a single CD can virtually republish a book for each child in the classroom.

Communications technology brought into the classroom to help students with disabilities often ends up aiding other students as well. "We have gone into a lot of classrooms around a specific child with a disability to try to make an accessible curriculum, and the classroom reorganized around good technology," Rose said. "It became part of their general curriculum plans."

II. GETTING COMMUNICATIONS TECHNOLOGY TO THE PEOPLE WHO NEED IT

The students who demonstrated their communications technology at the Annenberg conference are still the exception, according to Robert Williams, commissioner of the Administration on Developmental Disabilities in the Department of Health and Human Services. Most students lack access to the communications technology they need, and many who have the technology lack the training that will enable them to put it to everyday use. The challenge, he said, is "not to come up with just a few more exceptions, but to change the rules of the game entirely."

One important change would be to design universal access into technology. Engineers often design technology for people like themselves, "mostly men in their twenties who don't have any apparent disabilities," said Deborah Kaplan, vice president of the World Institute on Disability.

Kaplan, whom President Clinton appointed to the National Information Infrastructure Task Force, said that schools and industry have a major role to play in promoting universal access.⁴ They must be made aware of software and hardware with built-in accessibility, then use their buying power to support it. Doing so is particularly important now, with many institutions poised to invest heavily in links to the National Information

4. See generally DEBORAH KAPLAN & JOHN DE WITT, TELECOMMUNICATIONS AND PERSONS WITH DISABILITIES: BUILDING THE FRAMEWORK, THE SECOND REPORT OF THE BLUE RIBBON PANEL ON NATIONAL TELECOMMUNICATIONS POLICY (Jan. 18, 1993).

Infrastructure. And, as accessible communications technology becomes more widely disseminated, the price will fall. For example, closed-captioned television decoder boxes initially cost several hundred dollars, but when federal policy mandated that all television sets be manufactured with this capacity, the cost plummeted to less than twenty-five cents per television. "There's a lesson there about market efficiencies and mass-marketing accessibility," Kaplan said.

Paul Hearne, president of the Dole Foundation for Employment of People with Disabilities, noted that one of the arguments advanced by industry—that there is no consumer demand for accessible communications technology—has a familiar ring. Twenty years ago, representatives of bus companies contended that there was no demand for accessible buses because "we never see any people with disabilities on the bus." "That's because they can't get on the bus," retorted advocates for people with disabilities. "It's the same thing with the information infrastructure," Hearne said. "We have to argue that from the beginning the information infrastructure must be accessible to people with disabilities."

Along with universal design, other possible approaches for changing the rules of the communications game include:

Creating "schools without walls" for students with disabilities. H. Rutherford Turnbull III, co-director of the University of Kansas's Beach Center on Families and Disability, recommended that to help prepare individuals with disabilities for employment, communications technology should bring the community to the classroom and the classroom to the community. Colleges and universities could also provide telecommunications data and services to state and local education agencies.

Supporting sympathetic people in industry and government. Many industry and government leaders are interested in universal access and other needs of the disability community. At the same time, there are vast bureaucracies at the federal, state, and local levels whose officials need to be informed about accessible communications technology.

Involving people with disabilities in developing the technology. Michael Hartman, manager of the employment program for people with disabilities at the NASA/Goddard Space Flight Center, said that more young people with disabilities should be encouraged to study technology, science, and engineering as a way of gaining power over future technological advances. Robert Williams of the Administration on Developmental Disabilities noted that "When I go around our nation and hear young people tell me that what they expect after high school is to end up on social security, something is terribly wrong Technology is only a tool. It is up to us to help young people use that power."

III. GUARANTEEING THE RIGHTS OF PERSONS WITH DISABILITIES

The "seamless web" of the information superhighway, as the administration has called it, includes more than schools. People with disabilities face grave unemployment and underemployment problems.⁵ Communications technologies will not only foster skills in children previously excluded from the classroom, but they will also make all children familiar with technology-aided integration and thereby eliminate some phobias and stereotypes. In these ways, an inclusive classroom can foster an inclusive workplace and society.

Paul Steven Miller, Commissioner of the Equal Employment Opportunity Commission (EEOC), stressed the importance of empowerment instead of paternalism. "For too long we have had able-bodied people sitting around talking about what is best for the 'other,' for that group of people." To develop workable communications policy, people with disabilities must be included, particularly in the discussion about the National Information Infrastructure. "When building standards were developed, people with disabilities were not part of developing those standards, and we saw what happened," he said.

According to Carol Rasco, assistant to the President for domestic policy, the Clinton administration is working toward full inclusion for people with disabilities. When asked about financial assistance to provide communications technology for those who need it, Rasco suggested that government incentives, through the tax code or otherwise, might be appropriate. In the workplace, employers are often surprised to learn how simple and inexpensive inclusive technology can be.⁶

The United States has established the principles of a disability policy, said Robert Silverstein, staff director of the Senate subcommittee on disability policy. Congress is "making sure that every piece of legislation that goes through is consistent with that policy." The guiding principles are "inclusion, not exclusion; independence, not dependence; and empowerment, not paternalism." Silverstein stressed that the ADA is premised on the view that "disability is a natural part of the human experience, and we have to remove those attitudinal and physical barriers that prevent people with disabilities from fully participating."

5. See Peter D. Blanck, *Integrated Employment, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. (forthcoming 1994).

6. See PETER D. BLANCK, ANNENBERG WASHINGTON PROGRAM, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT: TRANSCENDING COMPLIANCE—A CASE REPORT ON SEARS ROEBUCK AND CO. (1994).

Katherine Seelman, director of the National Institute on Disability and Rehabilitation Research of the Department of Education, noted that the issues have advanced substantially since 1986, when she helped to organize the first Annenberg Washington program forum on communications technology for people with disabilities. Nevertheless, she said, “some issues remain very pressing: financing, training, and especially the involvement of individuals with disabilities in all of this.”

CONCLUSION

Although many issues remain unresolved, five vital precepts emerge regarding the future of communications policy for persons with disabilities:

1. Accessibility must be built in, not added on. Universal design will benefit all users, not merely those with disabilities. Using laws like the Communications Act of 1934, the government can encourage or perhaps mandate universal design and set standards.
2. As communications technology becomes more important, accessibility becomes more important. The National Information Infrastructure must not be off-limits to people with disabilities.
3. Communications technology has the potential to make education vastly more inclusive through individualized curricula, “schools without walls,” and other innovations.
4. Accessible communications technology has implications beyond education: for health care reform, telemedicine will bring doctors to geographically isolated people; for welfare reform, telecommuting can reduce chronic unemployment among people with disabilities.
5. Additional dialogue and research are needed regarding emerging communications technological accessibility problems, not only for people with disabilities, but for all underrepresented individuals in society—the poor, the isolated, and the vulnerable.

A profound question underlies these five precepts on this sixtieth anniversary of the Communications Act of 1934: Will the National Information Infrastructure help people with disabilities and other underrepresented people move closer to full participation in American society? Or will it further isolate them from the mainstream?

Developing the Global Information Infrastructure

Seth D. Blumenfeld*

The telecommunications industry is participating in a major dialogue that has been launched by the Clinton administration's program for a National Information Infrastructure (NII) and its concept of a Global Information Infrastructure (GII). A GII is the logical next step in the development of the NII since U.S. consumers are international consumers, and our economy is inextricably linked to the economies of virtually every other country.

MCI is contributing to the development of the NII and GII in many ways. Through its networkMCI project, MCI will be investing more than \$20 billion to expand the scope and capabilities of the information superhighway. The networkMCI vision represents the largest commitment by a U.S. long-distance company to invest in and create alliances to build the communications infrastructure for the twenty-first century. MCI is also deploying its broadband information superhighway, which uses SONET technology at speeds fifteen times faster than any commercially available network, throughout the MCI domestic network. This technology will be implemented on international routes by 1995. Moreover, MCI will be investing more than \$2 billion in fiber rings and local switching infrastructure in major U.S. metropolitan markets.

The administration has adopted five principles for developing the NII: encouraging private investment, promoting competition, creating a flexible regulatory framework, providing open access, and ensuring universal service. The implementation of these principles will encourage the private sector to build the NII and stimulate the most productive uses of what will become a powerful economic tool. These same principles are also central to the successful development by the private sector of an advanced, globally accessible and affordable GII.

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To a significant degree, the backbone for a ubiquitous, seamless global network already exists in the form of satellites and fiber-optic cables that interconnect countries. What is missing are the domestic networks in many countries that permit affordable and instantaneous access to the advanced services which can be carried through that backbone network, and legal environments receptive to foreign investors and competitors.

The U.S. government can play an important role in the development of the GII, but that role must be clearly delineated. That role should be to afford private industry the leeway it needs to develop creative, timely, and efficient solutions to customers' needs, while at the same time, working with and encouraging foreign countries to open their markets. The U.S. government should afford U.S. telecommunications companies both the structural and regulatory flexibility to continually refine and expand their global service offerings. U.S. telecommunications companies must be able to develop, through relationships with other domestic and foreign companies, the service and technological synergies and complementary skill sets that are essential to satisfying the requirements of customers operating on a global scale.

The U.S. government can assist the efforts of companies in building the NII and GII by: (1) not erecting regulatory barriers that increase cost and risk; (2) permitting companies to engage in foreign commercial relationships; and (3) working closely with the governments of other countries to create environments that allow private telecommunications to invest in, and deliver, information services to those countries.

Perhaps the U.S. government's greatest challenge is to promote cooperation and collaboration among competing companies and countries in a manner that advances the overall goal of opening markets to private enterprise. This effort will require close coordination with U.S. industry. It will also require international diplomacy that facilitates change, respect for the sovereignty of both the United States and other countries, and clarity about GII objectives and requisite actions.

One of the most significant contributions the U.S. government can make at this pivotal time is to help "internationalize" the way industries and governments think about communications issues. It is worth bearing in mind that the U.S. government has had its greatest successes in facilitating change in other countries' communications markets when it has itself set an example. In order to succeed in this endeavor, the U.S. government must do four things.

First, as other countries liberalize their markets, the U.S. government must remain sensitive to the need for the United States to "retain the high ground in its own market." Areas that deserve careful attention in this

regard include: laws and regulations that might make sense in a domestic context but could impede a GII when translated to the global arena; areas of the U.S. market that are more closed to foreign participation than that which the U.S. government is advocating internationally; and domestic policies and regulations that inadvertently provide an excuse for closed markets or for more restrictive regulation abroad.

Second, the U.S. government must be aware that because of different cultures and traditions, no other market or regulatory scheme will be a carbon copy of what we have in the United States. To speed the development of the GII, U.S. policy must accommodate these variances.

Third, the U.S. government must continue to push for fair treatment of U.S. companies in foreign markets. There are a variety of means to accomplish this, such as having the Federal Communications Commission set benchmarks for determining whether markets are open and reserving the right to adopt other measures should the benchmarks not be met over time.

Fourth, the U.S. government must pursue synchronized communications and trade policies; all parts of the U.S. government must be seen, both internally and externally, as pursuing consistent policies.

The U.S. government can expedite the development of a seamless, interoperable GII by continuing to work with other governments to strengthen and streamline formal and informal international bodies, such as the International Telecommunication Union (ITU). Such streamlining will permit swift and internationally effective action on global standards. For these international customers, the U.S. government needs to promote standards that support technological development and the worldwide introduction of new services. However, to ensure that the standards developed represent the best interests of U.S. companies and consumers, it is essential that the government involve industry at all levels in the interagency planning process.

The rapid development of a GII depends not only on strengthening the international standards process, but also on the global extension of protection such as privacy and intellectual property. The U.S. government should advance domestic interests in these areas. The government should work to eliminate the artifacts of past monopoly structures and regulatory regimes in other countries. Open markets and collection rates that approach costs—both consistent with the principles of the GII—should be a high priority. Moreover, as foreign markets become more hospitable to competition, the U.S. government should support industry's efforts to take swift advantage of such opportunities.

The U.S. government needs to continue its support of collection rates which approach cost through the following three-pronged program: (1)

supporting U.S. industry efforts to negotiate lower accounting rates and thereby rebalance settlements between U.S. carriers and their foreign correspondents; (2) encouraging the introduction of competition into the international telecommunications market wherever and whenever possible; and (3) participating actively in bilateral and multilateral forums to develop guidelines to facilitate lower rates.

A healthy worldwide communications sector provides the surest guarantee that private industry can meet the challenges of building, operating, and providing services over a global information infrastructure. The U.S. government can encourage the growth of that sector by: (1) working to eliminate regulatory and political barriers to the international diffusion of technology, including both tariff and non-tariff barriers such as standards and quotas; (2) developing a focused and coordinated program of assistance for developing countries that draws on industry, international financial institutions, the U.S. Telecommunications and Training Institute, and U.S. aid programs; (3) promoting international privatization efforts; and (4) allowing U.S. companies the flexibility to attract capital from a variety of sources so they may create the services necessary to compete successfully on a global scale.

In sum, the U.S. government can play a key role in promoting a GII by ensuring, through the steps discussed above, that U.S. telecommunications companies have the ability and flexibility to respond to the demands and expectations of the international marketplace.

In Search of the Multimedia Grail

Daniel L. Brenner*

There are very few practicing lawyers in multimedia. Unlike other emerging communications industries, little law governs this area. Multimedia lies at the intersection of video software, information distribution (or telecommunications), and interactive personal computer interfaces. The fact that multimedia covers all three disciplines leads to some confusion about what multimedia is and how we should think about it.

From a cable television perspective, the distributive aspects of multimedia are the most significant. But what you see depends on where you sit. A representative of the computer industry or the author's guild would offer a different perspective. What unites all three orientations in pursuit of the multimedia grail is the ability of each to extend its line of business by harnessing the attributes of the other two. Without the combination of all three players—software, telecommunications, and computers—multimedia will not emerge.

Consider how multimedia exists when two of the three pieces converge. This would be the formation of a duomedia. For example, the CD-ROM marketplace is growing—that is a convergence of software and computer minus telecommunications. There are about 2500 CD-ROM titles in circulation with an estimated 5000 titles by year's end.¹ The number of households owning personal computers with compact disc players increased nearly fourfold last year to 1.9 million households.² By 1995, it is estimated that there will be 8.6 million households with CD-ROM capacity in their computers.³

Likewise, the duomedia of telecommunications and computers (but without video) comprise the exploding world of on-line services, from e-mail to Prodigy to LEXIS. Take the duomedia of telecommunications and

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1. *From Prime Time to My Time*, *ECONOMIST*, Feb. 12, 1994, at 9, 10.

2. Steve Lohr, *Company News: Multimedia Annual Reports*, *N.Y. TIMES*, Mar. 5, 1994, § 1, at 41.

3. *Id.*

video: without personal computer interactivity, the combination of video plus telecommunications minus computers is cable television, ADSL, pay-per-view TV, and other forms of video on demand using a terminal box on the TV set. Perhaps the most mature form of interactive communications in this combination is home shopping by television. QVC and the Home Shopping Network lead a field of networks, and existing players like MTV are adding home shopping to their programming arsenal. America's mail order and home shopping industries do an estimated \$80 billion a year in business.⁴ So the duomedia world is with us today. The demand for each duomedia in this decade has made the search for the multimedia grail a worldwide preoccupation. The excitement and profits that ought to reside at the intersection of all three—video, telecommunications, and computers—entice players in these markets, as well as those who serve these three major markets, to embark on their quest.

Much of what has been discussed in the popular and trade press about multimedia is the stuff of dreams. There were 780 NEXIS database stories mentioning the information superhighway or multimedia between January 2 and 9 of this year; between February 2 and 9 the number rose to 890. There are dollars to be chased, from the \$80 billion home shopping and mail order business, to the \$15 billion generated every year in video rentals,⁵ to the \$35 billion on-line information services business.⁶ These figures reflect just a shadow of the multi-billion dollar magazine and television businesses and the \$17-billion-a-year book-publishing business that are also loosely described as "information services."⁷

There are skeptics of an ultimate convergence. They believe convergence conflicts with the fundamental character of what many suppose is the building block of multimedia—television. As Ted Turner said, "Every single interactive TV experiment has failed. Most people want to sit back and watch—interacting is hard work."⁸ Frank Biondi of Viacom reminds us that "television is, at bottom, a passive experience—which is its beauty."⁹

No one doubts that there is a business in interactive video at some level. The *Economist* recently calculated that Nintendo makes more money

4. *From Prime Time to My Time*, *supra* note 1, at 10.

5. *Id.*

6. *Id.*

7. Alan Deutschman, *Scramble on the Information Highway*, FORTUNE, Feb. 7, 1994, at 129, 131.

8. John Heilemann, *What If They're Right?*, ECONOMIST, Feb. 12, 1994, at 3, 3.

9. *From Prime Time to My Time*, *supra* note 1, at 10.

than ABC, CBS, and NBC put together;¹⁰ video games are as big as the film or music business and are growing faster than either. So far the only stars of the new medium are the Super Mario Brothers and Sonic the Hedgehog. Imagine when things get more sophisticated. What regulatory principles work and do not work in describing this new medium, or in this case, a new medium of different media? We should acknowledge the reality that in this age of convergence, we face overlapping and often conflicting regulatory structures, detailed and untested statutes like the 1992 Cable Act,¹¹ and unsettled intellectual property rights.

First, market definition will be difficult in the multimedia world. The first examples of interactive in the mid-1980s involved applications in education. Multimedia was a natural for bringing together text, sounds, and video or film in an interactive experience. The interactivity of the process made education come alive for the student. Mixed media made the presentation more fascinating than simply reading it in the traditional linear book form. Even “plain Jane” books on computer—which allow you to search for certain words or characters on “pages” before or after the page you’re reading—have advantages over the traditional book. For example, reading Dostoevski on computer would permit you to jump to references to characters 100 or 200 pages earlier that you might have forgotten but whose behavior explains what happens on the page you’re reading. Books on computer even permit you to turn a page over electronically, just as one folds over the corner of a book page.

But measuring multimedia effectiveness is a tricky matter. Keeping a student’s attention in an interactive, multimedia context may be no easier than in the lecture hall. There’s a study reported in Martin Greenberger’s *Multimedia In Review* about a teacher who was talking about Genghis Khan’s invasion of China in 1213.¹² Of the twenty-seven students in the class, only two were thinking about anything remotely resembling China. Most were thinking about the lunch they were expecting, the weekend they were looking forward to, a boyfriend or girlfriend, or some sporting event. Of the two students who were thinking about China, one was recalling a meal his family had at a Chinese restaurant the previous week. The other was wondering why Chinese men wore pony tails.

Whatever the effectiveness of multimedia, its licensing will prove to be a significant business hurdle and not simply a legal afterthought. While

10. *Id.*

11. Cable Television and Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. §§ 521-611 (Supp. IV 1992)).

12. Miahaly Cfikszenmihalyi, in *MULTIMEDIA IN REVIEW* 32 (Martin Greenberger ed., 1992).

cross-licensing in the video games market is just underway, full-scale licensing from other media for multimedia will prove to be very difficult.

Obtaining proper authorization to use music, film, or text as part of a multimedia work involves complicated, as yet undetermined, contractual arrangements. Bits of a music score, a scene from *King Kong*, or the opening paragraphs of *Bonfire of the Vanities* might all fit as part of a multimedia artist's conception. However, setting the value of those uses is difficult. It is little wonder that the first release of 7th Level, a multimedia company co-owned by a former saxophonist of the rock group Pink Floyd, is a storybook consisting of forty-two public domain songs, including *Old MacDonald Had a Farm* and *Itsy Bitsy Spider*. No one knows how widely multimedia will evolve. No rights group wants to be excluded from potential profits down the road. What if one portion of a multimedia CD is constantly replayed, while other segments, although licensed, remain unused? Does frequency of use, or mere use, govern? Added to these problems is the multiplication of intellectual property through morphing, sampling, or more garden-variety derivative work creation like adding music to what was once only text.

Furthermore, it may be within the power of the user, not the author, to combine multimedia elements to create new derivative works. The user will not be licensed by the copyright owners for such creation and those expected uses must be included in any license granted to the author, or, more accurately, the assembler of the elements of the derivative work. The result is that licensing intellectual property for multimedia is not an issue that can be thrown to lawyers with instructions "to work it out." In addition to the drafting guidance in the multimedia licensing treatises, let me suggest a few general directions.

During this development period of multimedia, it will be useful and necessary (though risky) for the major contributors to multimedia of source material—music, film, television, and text—to create "voluntary compulsory" license terms with a later accounting, as the value of these elements in multimedia becomes better understood.

Any such leap of faith by copyright holders, however, needs some approximation of how long of a leap and how profound the faith. Perhaps capping the allowable number of consecutive seconds of any film clip or phonorecord would be a way to describe an allowed use. Morphing and sampling would be disallowed without license. The total royalty to source providers could be capped at some percentage of the wholesale purchase price of the CD.

So, for example, if the contents of a multimedia CD consisted of no more than 20 percent of its material coming from derived sources, the

copyright owners of those sources would be entitled to share some percentage of the wholesale price of the CD. The compulsory license would last for a fixed term (for example, seven years), after which an accounting would be made to determine whether or not the users had been adequately compensated.

Additional restrictions might be placed on such a compulsory license right. For instance, any source material should be available in copy form to the public generally. Thus, movies that have never been released on video cassette or TV commercials not generally available in copy to the public could not be accessed under a compulsory license. While these proposals are merely a starting place, in order for multimedia to develop using existing sources, a compromise will have to be found.

Furthermore, the distribution aspects of multimedia present a serious regulatory issue. One important question is the right of a multimedia "speaker" to access wireline or wireless bandwidth to disseminate a product. One reasonable approach would be to impose on traditional common carriers the obligation, where bandwidth exists, to sell capacity to multimedia customers. For nontraditional common carriers, it is not as clear that a common carrier duty of transport should be extended. That is because carriers such as cable television or wireless cable do not hold themselves out as common carriers. Instead, they are packagers of the programs that they offer to subscribers, generally speaking. Cable's leased access obligations do not extend to two-way communications.¹³

On the other hand, in the future, where cable and other one-way technologies become two-way technologies and hold themselves out as common carriers, it will be harder to exclude multimedia from their platform simply because some aspect of their enterprise remains one-way downstream. Still, there may be a distinction between companies, including cable operators who offer "plain old video services" on a switched basis and those who do not install such facilities.

Other licensing problems will emerge. Will copying of multimedia programs for personal use be allowed? Can customers who develop valuable derivative works from multimedia works enjoy compulsory licensing of their derivative works? Should there be a common rights organization like ASCAP or Harry Fox to expedite the compulsory license?

While seldom the task of lawyers, there are still many questions to answer about multimedia and society. Some believe multimedia will liberate the learning process by taking the best of education and entertainment and invoking it to assist the next generation to expand its understand-

13. 47 U.S.C. § 543 (Supp. IV 1992).

ing of nature and the universe—multimedia as an ontological enterprise. Others wonder about a screen-based form of education, whether the screen is computer, television, or something in between. Does it amount to little more than a creative plaything, distant from the serious work of education?

Outside of the schoolroom, one has to wonder how many more hours in the day there can be for multimedia in addition to all the other demands made by leisure time pursuits. Navigational aids like *Your TV* will make the 500 channel environment workable and television viewing time better spent. Add interactive information services to TV watching time, and multimedia will have to either displace something in the schedule or meals will get cut even shorter—faster fast foods. Since there is a natural minimum time to microwave a Lean Cuisine meal, mealtime cannot be cut much more.

For lawyers hoping to guide multimedia clients, the task should be to simplify the rights process on the one hand and the regulatory process on the other so that this new medium of media—multimedia—can have a chance to demonstrate its utility. Otherwise, acquisition of rights will become gnarled in a knot of claims for compensation based on fear of the unknown, and multimedia's potential will be limited.

Similarly, if broadband networks cannot be expanded to deliver the capacity needed for two-way multimedia, the industry will remain a duomedia phenomenon. To put it another way, multimedia is at the pre-bottling stage. Until Coca-Cola was bottled, the only way to get a Coke was to go to the local drugstore. Today, virtually the only way to use CD-ROM and home video is to go to the book, computer, or video store to acquire it. It is worth noting that a market-driven licensing right led to the bottling of Coke and its adoption as something to be consumed at home.

In sorting out these legal and regulatory questions, we can take a cue from the computer industry. While computer software writers have resorted to the courts to protect computer programs, the history of computers—the third part of multimedia—has not been one of intense regulatory oversight or government-mandated standards. The heavy helping hand of Washington has not significantly intruded in the computer industry, and the result has been a continuing story of cheaper, more powerful, and more versatile computing. Law and regulation are not always the culprits in preventing advances in technology in the media. But copyright law and regulation entry in this area could stand as real stumbling blocks, given the complexities of rights and the pathways that in the past have been highly regulated. Relaxation of the usual legal throttles could let market forces, which have

done a splendid job in bringing low cost, high quality computing to the world, help us to find our way to the multimedia grail as well.

A Law Antecedent and Paramount

Fred H. Cate*

I

“Congress shall make no law . . . abridging freedom of speech or of the press.” Whatever else the First Amendment may mean, the Supreme Court has interpreted it to forbid the government from restricting expression because it disagrees with the sentiment expressed;¹ restricting expression prior to its utterance or publication;² and making impermissible distinctions by content,³ compelling speech⁴ or access to the expressive capacity of another,⁵ without demonstrating that the abridgement is narrowly tailored to serve a compelling governmental interest. These First Amendment principles restrict not merely Congress, but all federal and state governmental agencies, and apply to expression that the Court has determined does not independently warrant protection,⁶ conduct that involves no speech,⁷ and activities ancillary to expression.⁸

Despite the force and breadth of the Supreme Court’s interpretation of the First Amendment, its application has not been uniformly consistent. When confronted with restrictions on telegraph and telephone communications and on over-the-air radio and television broadcasting, the Court has assumed—often with little explanation—that “differences in the character-

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1. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989).
2. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931).
3. See, e.g., *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (plurality opinion).
4. See, e.g., *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943).
5. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
6. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
7. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989).
8. See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

istics of new media justify differences in the First Amendment standards applied to them.”⁹

Telegraph companies, for example, were routinely treated by courts as common carriers, analogous to the railroads that their lines so often ran along, rather than to the press or other speakers whose messages their lines carried. As common carriers, telegraph companies were subject to significant legislative and judicial regulation. They were required to serve all who requested carriage at a reasonable price and subject to reasonable regulations, without discriminating among customers or other carriers. The First Amendment played no role in the evaluation of these restrictions on telegraph companies.

Laws governing the telegraph were the obvious model for the telephone. In 1910, Congress passed the Mann-Elkins Act,¹⁰ classifying telephone companies as common carriers and subjecting them to the regulations of the Interstate Commerce Commission. In 1934, Congress passed the Communications Act,¹¹ the legislation that this *Journal* issue commemorates. Title II of the Act, regulating common carriers, was taken almost intact from the Mann-Elkins Act. As with regulation of the telegraph, there was no mention of the First Amendment; a law designed for regulating the nation’s railroads had been given a new name and applied to the nation’s largest communications industry.

The First Amendment rights of broadcasters have fared only marginally better. In the Radio Act of 1927,¹² Congress restricted broadcasting to persons licensed by the federal government, and then only on the frequencies and during the times assigned to them. Broadcast licensees which carried the advertisements of one political candidate were required to give or sell equal time to opposing candidates. In a single provision, the Act forbade censorship of broadcast programming while it banned obscene, indecent, or profane language. Finally, the 1927 Act created a new administrative body—the Federal Radio Commission—to oversee the licensing process.

Under the guise of remedying interference with military, particularly naval, transmissions, and among commercial and amateur stations, the Radio Act of 1927 permitted the newly created Commission to deny use of the broadcast spectrum to anyone whose future expression the Commission

9. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367 (1969).

10. Pub. L. No. 61-218, § 7, 36 Stat. 539, 544-45 (1910) (superseded by the Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064).

11. Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064 (codified as amended in scattered section of 47 U.S.C.).

12. Radio Act of 1927, ch. 169, 44 Stat. 1162.

believed might not serve the “public interest, convenience, or necessity.” As with common carriers, all would-be broadcasters became subject to a prior restraint, unless and until the Commission chose to remove the bar created by the Act. The Act compelled licensed broadcasters to grant access to their transmission capacity to candidates for public office. The significance of this incursion is only enhanced by the fact that the people who passed and signed the law were and would be again candidates for public office. The 1927 Act also required censorship of broadcast programming, at least to the extent necessary to enforce the Act’s ban on “obscene, indecent, or profane language,” while purporting to forbid government control over the content of broadcast expression. The First Amendment was nowhere to be found.

The 1927 Act was soon replaced by the Communications Act of 1934, Title III of which, covering broadcasters, was taken virtually intact from the 1927 Act. When broadcasters challenged the 1934 Act’s restrictions on their First Amendment rights, they were told by the Supreme Court that “[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”¹³ The Court’s reasoning, which was to become the basis for half a century of future cases, began with the concept of electromagnetic spectrum scarcity, where there are more potential broadcasters than there was broadcast spectrum to accommodate their transmissions.

The Supreme Court expanded on the reasons why the First Amendment applies with less force to broadcasting than to print media in *Red Lion Broadcasting Co. v. Federal Communications Commission* (FCC or Commission).¹⁴ Justice White, writing for the unanimous Court, stressed that “[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees.”¹⁵ As a result, broadcasters owe a duty to the public to provide them with “suitable access to social, political, esthetic, moral, and other ideas and experiences.”¹⁶ Rather than occupy the spectrum for their own expressive purposes, broadcasters are to serve the interests of the public as identified by the FCC and enforced by the courts. Like other trustees, broadcasters can be restrained from, or compelled to, action to serve the interest of their trust beneficiaries. “It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community,

13. *NBC v. United States*, 319 U.S. 190, 226 (1943).

14. *Red Lion*, 395 U.S. 367 (1969).

15. *Id.* at 390.

16. *Id.* (citations omitted).

obligated to give suitable time and attention to matters of great public concern."¹⁷

Red Lion demonstrates the power of the scarcity doctrine. It has been found to justify not only licensing broadcasters and setting standards for picking and choosing among applicants, but also compelling broadcasters to cover subjects they might not otherwise have selected and permitting the expression of others in response to that coverage. Only five years after *Red Lion* was decided, the Court would unanimously strike down a far more limited intrusion into the First Amendment rights of newspaper publishers. The interests of the public in a competitive and responsible press in *Miami Herald* could not justify "[c]ompelling editors or publishers to publish that which "reason" tells them should not be published."¹⁸ In *Red Lion*, similar interests were used by the unanimous Court to justify obliterating the independent First Amendment interests of broadcasters. The only difference between the two cases was the medium involved.

II

Today, spectrum scarcity is widely recognized as having little relevance to broadcast regulation. Moreover, the Supreme Court recognized in *Turner Broadcasting System, Inc. v. FCC*,¹⁹ that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation,"²⁰ the technology through which most Americans today view video programming.

Telephone companies, too, are beginning to be recognized by courts as First Amendment speakers. Four federal courts in the past year have enjoined enforcement of the telephone-cable cross-ownership ban²¹ on the basis that it is "facially unconstitutional as a violation of plaintiffs' First Amendment right to free expression."²² Almost a century of regulations

17. *Id.* at 394.

18. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

19. *Turner Brdcst.*, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994).

20. *Id.* at 2458.

21. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b), 98 Stat. 2779, 2785 (codified at 47 U.S.C. § 533(b) (1988)) ("It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.").

22. *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 932 (E.D. Va. 1993), *aff'd*, No. 93-2340 (4th Cir. Nov. 21, 1994); *see also* *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994); *BellSouth Corp. v. United States*, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994); *Ameritech Corp. v. United States*, Nos. 93C6642, 94C4089, 1994 U.S. Dist. LEXIS 15512 (N.D. Ill. Oct. 27, 1994).

that ignored the First Amendment rights of communications common carriers and undervalued the First Amendment rights of broadcasters is under attack and the pace of change, while slow, is escalating. The 1934 Communication Act's disregard for the First Amendment applied in the context of electronic media is finally being reversed.

A new medium of communication, however, is attracting the attention of regulators and once again calling into question the role of the First Amendment. This new battleground for fundamental First Amendment freedoms is the network of computer networks, the so-called information superhighway, and its dramatically expanding precursor, the Internet. Growing at a rate of 750,000 new users per month, the Internet today connects more than 45,000 separate networks and 25 to 30 million users in more than 100 countries.²³ The fastest growing sector of the Internet is commercial information providers, which is not surprising given that corporate spending on information technology in the United States in 1993 reached \$200 billion, up from just over \$150 billion in 1992.²⁴

The Clinton administration has responded to charges that the power, scope, and enormous potential of information technologies warrant government regulation by launching an ambitious information policymaking initiative focused on the National Information Infrastructure (NII). Set forth on September 15, 1993, in the *Agenda for Action*, the administration's initiative addresses the "essential role" of the government in promoting and controlling the nation's information infrastructure.²⁵ The central component of this initiative is the Information Infrastructure Task Force, chaired by Ron Brown, Secretary of Commerce.

Absent from the current policymaking debate about electronic information is any mention of the First Amendment. Neither the legal constraints imposed by the First Amendment on government regulation of expression, nor the importance of free expression, appear in the *Agenda for Action*, are the subject of any NII Task Force committee or working group, or even warrant mention in a single speech on the NII by any senior administration official. The silence is reminiscent of the 1934 Act's regulation of telegraph and telephone companies, and radio and television broadcasters.

The absence of the First Amendment is of substantially greater consequence in the case of electronic information than it was with

23. *Latest Estimates of Internet Growth*, ONLINE NEWSLETTER, Nov. 1994, available in LEXIS, News Library, Nwsltr File.

24. *Massive Outlays*, WALL ST. J., Nov. 14, 1994, at R18.

25. INFORMATION INFRASTRUCTURE TASK FORCE, NATIONAL INFORMATION INFRASTRUCTURE AGENDA FOR ACTION 6 (1993).

telegraphy, telephony, and broadcasting, because the vast majority of communication in the United States today is electronic. This is not a peripheral issue. Text is composed on word processors, stored in computer memories, transmitted via local networks, telephone lines, and satellites, and captured on printers, facsimiles, and computer monitors. Images and sounds are captured by cameras, scanners, microphones, and other sensors, stored on tape or disc, broadcast over the air or through coaxial cables or optical fibers, and displayed on television or computer screens or heard on radio. Data and voice signals are collected by telephones, computers, and remote sensors, and transmitted via pairs of copper wires, optical fibers, and satellites, or beamed through the air. Documents are printed, photocopied, facsimiled, scanned, and increasingly stored electronically.

No form of communication other than face-to-face conversation and hand-written, hand-delivered messages, escapes the reach of electronic information technologies. As those exceptions indicate, no communication that bridges geographic space or is accessible to more than a few people exists today without some electronic component. And the dominance of electronic communication is growing. E-mail, computer bulletin boards, national and even global networks, truly portable telephones, digital facsimile machines, voice mail, nationwide paging services, interactive television, video telephones, and countless other technologies are decreasing our reliance on those few remaining non-electronic communication systems, such as the post office, and forever changing the way we communicate. If the First Amendment does not apply to these media, it has little relevance today, and even less in the twenty-first century.

The omission of the First Amendment is all the more significant in light of the substantial regulatory role that the administration anticipates the government should play. In his first address on the NII after publication of the *Agenda for Action*, Vice President Al Gore—the intellectual and political force in the administration pushing the NII—analyzed the current information marketplace to the environment that, in his view, permitted the sinking of the *Titanic*. The Vice President asked why the *Titanic*'s radio operators did not receive the warnings about icebergs in the vicinity and why so few ships responded to the *Titanic*'s distress signals.

The answer is that—as the investigations proved—the wireless business then was just that, a business. Operators had no obligation to remain on duty. They were to do what was profitable. When the day's work was done—often the lucrative transmissions from wealthy passengers—operators shut off their sets and went to sleep. . . .

Ironically, that tragedy resulted in the first efforts to regulate the airwaves.

Why did government get involved? Because there are certain public needs that outweigh private interests.²⁶

The Vice President's focus on regulating "private interests" to serve "public needs," however worthy, raises special concerns when those private interests are involved in providing information services and products. The complete absence of the First Amendment from the policymaking debate exacerbates those concerns because it suggests that they have not been identified and resolved, but rather ignored by the government.

The First Amendment and the judicial opinions and commentary interpreting it are more than just limits on government action; they reflect principles and aspirations which, while inconsistent and even flawed, offer important guidance for regulation or regulatory forbearance. In short, the First Amendment is central to the information policymaking process not only because compliance with its terms is constitutionally required of every law or regulation emanating from that process, but also because the First Amendment, and the discussion surrounding it, contribute something positive and valuable to the process—a constitutional commitment to free expression and to reaping the benefits of free expression without government interference.

If sixty years experience with the Communications Act of 1934 has taught us nothing else, it must caution against excluding powerful communications media from the full protection of the First Amendment. To do so with today's electronic information technologies would create an exception that would make the rule of freedom of expression meaningless.

26. Vice President Al Gore, Remarks at the National Press Club (Dec. 21, 1993) (copy on file with the *Federal Communications Law Journal*).

Trends in Communications and Other Musings on Our Future

Commissioner Rachelle B. Chong*

THE CHANGING WORLD OF COMMUNICATIONS

For sixty years, that stalwart document, the Communications Act of 1934 (Act), has governed federal regulation of all interstate and foreign communication by wire and radio, including telephone, telegraph, broadcasting, and satellites. The Act also established the Federal Communications Commission (FCC or Commission) in order to consolidate regulatory authority which had previously been spread among several agencies.¹

In 1934, the world of communications was vastly different than our high-tech world of today. Sixty years ago, almost all wire line telephone and telegraph systems were operated by the American Telephone & Telegraph Company, now AT&T. Radio was the dominant broadcast medium. Station owners included the National Broadcasting Company (NBC), a subsidiary of the Radio Corporation of America (RCA), which operated a commercial radio network of twenty-four radio stations. Television was still in experimental stages; it would not be until 1941 that the FCC would authorize commercial television operation on ten commercial stations.

Congressional members in 1934 could hardly have imagined the vast changes in communications technology that have occurred in the last sixty years. A variety of examples show how far we have come.

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1. Agencies with jurisdiction over the airwaves prior to 1934 included the Federal Radio Commission, the Interstate Commerce Commission, the Post Office Department, the State Department, and the Department of Commerce.

- From the centralized telephone network of AT&T that existed in the 1930s, the breakup of AT&T in 1984 has completely changed the landline telephone landscape. Monopolies have given way to competition in most markets previously dominated by the Bell System. Landline telephones now reach 93.4 percent of all American households,² nearly realizing the Act's goal of universal service.
- In 1934, "birds" referred to winged avaries. In 1962, a communications satellite named Telstar I relayed the first live transatlantic telecast. Now, an estimated seventy communications satellites, or "birds," orbit the Earth, providing vital links for a wide range of communications needs, ranging from data transmissions to the sending of video images for a television newscast. Last year, Teledesic Corporation³ proposed a global network of 840 low-earth-orbit communications satellites. Such a network would provide a global telephone system reaching even the remotest village in Africa or Siberia.
- Video conferencing, as launched by AT&T's "Picturephone" at the 1964 World's Fair in Flushing, New York, is now a reality, reducing travel costs for users, especially businesses.
- Optical fiber for long-range communications, developed in 1970, has revolutionized the speed and capacity of data that can flow across a line.
- In 1990, General Instruments announced the development of a way to compress and transmit high quality video images digitally. This revolutionary breakthrough will allow all forms of information—data, video, or sound—to flow over telephone, television, and computer lines.
- The last three decades have brought us wireless telephones and paging services which have untethered people from wired landline telephones. An increasingly mobile society of Americans has embraced wireless communications with enthusiasm. Furthermore, the rise of the personal computer since the mid-seventies has revolutionized the workplace.

These developments have changed how people communicate and have dramatically affected our lifestyles.

2. UNITED STATES TELEPHONE ASSOCIATION, 1993 PHONE FACTS 3 (reporting the November 1992 statistics provided by the FCC Industry Analysis Division, Common Carrier Bureau) (copy on file with Author).

3. Teledesic Corporation has as its two most prominent investors Bill Gates and Craig McCaw.

BACK TO THE FUTURE

Like Congress members in 1934 trying to envision what communications technology would become in 1994, it is nearly impossible for us to envision what the world of telecommunications will look like sixty years hence—in the year 2054. Nonetheless, we must make policy choices today that will affect that future world. We find ourselves at an important crossroads facing an unprecedented convergence of the telecommunications, cable, computer, entertainment, broadcasting, and publishing industries.

Visionaries generally describe the future to be a multimedia world of seamless, two-way video, voice and data connections that will allow people to communicate on a new, more advanced level. Current technologies such as the television, computer, and telephone are expected to merge into an extraordinary whole. “Teleputers” are envisioned that will combine the functions of a networked personal computer and a television entertainment device.⁴

Due to these tremendous advances, policymakers can no longer regulate these industries in isolation but must take a broader perspective which takes this convergence into account. To chart a course for the next sixty years of communications, it is helpful to identify current trends and technological developments, and then to consider this information when forming new regulatory policies to encourage the vibrant growth of the communications industry.

CONVERGENCE

Convergence of technologies is a dominant theme in today’s telecommunications world. Advances in technology—such as fiber optics and digital technology—have allowed many players in the communications industry to use their current systems for the provision of a new type of product—broadband services. A tremendous amount of capital and expertise is required to build these upgraded or new systems. Companies are assessing their ability to play in the multimedia world of tomorrow, and are seeking partners to enhance their ability to stay competitive.

This notion of convergence is driving telecommunications companies to enter strategic alliances that were unheard of in prior decades. For example, telephone companies are upgrading their coaxial lines to provide video programming. Cable systems are seeking to provide telephone or data

4. See GEORGE GILDER, *LIFE AFTER TELEVISION* 32 (1990). Gilder, a futurist, envisions “teleputers” as personal computers adapted for video processing and connected by fiber-optic threads to other “teleputers” all around the world. *Id.*

services via their existing cable infrastructure into the home. Satellite systems are already offering video and audio programming which compete with cable TV systems and over-the-air broadcasters. All are jockeying for the best position in what they see as the multimedia world of tomorrow.

COMPETITION

Movement towards competitive markets is another theme. Over the past twenty years, the trend has been to introduce competition to all communications sectors previously reserved for monopolies. Still left is the local telephone loop and, in many areas, the local distribution level of cable television. Efforts are already underway, however, to introduce competition in both areas.

MOBILE COMMUNICATIONS SERVICES

A third trend is the tremendous demand that Americans have for ubiquitous, wide-area mobile communications services. The explosive growth of the wireless industry has demonstrated the public's desire for these mobile units. Moreover, these handy devices have profoundly impacted how people communicate with each other. With the advent of the new personal communications services (PCS) industry, mobile communications will continue to flourish as increased competition drives rates down, and wireless data services and pocket-sized portable phones become commonplace.

PERSONAL COMPUTERS

Equally making its mark is the phenomenal rise in popularity of the personal computer (PC) in American homes. As PC prices continue to fall, more and more Americans are buying computers. They use them to play games, to work at home, or access the Internet or commercial online services such as CompuServe, Prodigy, or America Online.

The unregulated, freewheeling environment of the Internet has encouraged its tremendous growth, as thousands of Americans log on each day to explore the tremendous amount of information available through the Internet.⁵ The promise of the information superhighway is especially

5. News reports vary on how many people log on daily to the Internet. One news story reports that the Internet has 25 million users and is estimated to be doubling each year. See Peter H. Lewis, *Internet for Profit*, COMPUTER SHOPPER, Nov. 1994, at 178. The Executive Director of the Internet Society, Mr. A. M. Rutkowski, estimated that the Internet appears to be adding new users at the rate of 750,000 per month. He estimated the number of users now on the Internet to be between 25 and 30 million. *Latest Estimates of Internet Growth*, ONLINE NEWSLETTER, Nov. 1994, available in LEXIS, News Library, Nwsltr File.

tantalizing to many computer users who hope their computer will be the gateway to deep fountains of knowledge and new forms of entertainment, such as participation in interactive forums or games.

VIDEO ENTERTAINMENT

Another trend is the transformation of video entertainment from the three television network scenario of the past. Video programming now has many distribution avenues, including television broadcast stations, cable systems, and satellite direct broadcast systems. In trials, video programmers are already offering programming on the video dialtone systems of telephone companies. Future entertainment is expected to consist of interactive video entertainment and programming incorporating virtual reality technology.

As a result, content is increasingly seen as the key commodity of the Information Age. After all, who cares if we have 500-channel video systems unless there are programs worth watching on them? The growth of video channels with innovative and fresh programming is an important trend. New program channels oriented towards niche markets, for example, children's shows or women's sports, will offer interesting new fare.

Many companies have seen the potential inherent in this market. Even companies formerly oriented only towards common carriage, like Comsat, are developing entertainment and sports programming subsidiaries and taking ownership of sports teams. It is not a coincidence that studios and networks are greatly prized acquisitions in the frenzy of mergers as companies fight to enter strategic alliances.

A final aspect of the transformation of video entertainment can be seen in the new competition among service providers for advertising revenue. Advertising revenue is being redistributed as new entrants fiercely compete with the formerly dominant television networks. National cable channels and direct broadcast satellite systems, for example, are able to find niche audiences nationally where none existed in a local or even regional service area.

MUSINGS ON THE FUTURE

Given these trends, we must be forward-looking in our regulations and policies. We first must have the courage to discard outdated regulations and policies in a nonpartisan manner. This is no longer a world in which broadcasting, cable, and telephone operations are distinct businesses separate from one another. Yet, the Communications Act regulates each industry separately based upon historical differences. Different parts of the

statute regulate cable companies, telephone companies, broadcasters, and satellite service providers in isolation.

These differences in regulatory treatment create artificial barriers to competition. Competition must be introduced as quickly as possible in all markets, and these artificial barriers swept away as we continue to deregulate. There should be frank discussion of the scope and need for regulation that will be appropriate in these new competitive markets. This process may be accelerated by sweeping telecommunications legislation, if Congress, the affected industries, and other interested parties, including consumer groups, can reach consensus as to the contents of such regulation.

We must encourage simple, pragmatic regulations. By "simple" regulations, I mean a process by which the goal of regulation is clearly identified and then the most streamlined, nonburdensome method of regulation is crafted to reach that goal. Too often, government regulation is incomprehensible to laypersons, and overburdensome on licensees who have businesses to operate. By "pragmatic" regulation, I mean injecting practical business and economic considerations when designing regulations.

Flexible regulatory frameworks are also necessary. By "flexible," I mean building into our regulations some flexibility in recognition of the rapid pace of technology in telecommunications. We cannot afford to focus our gaze on the current state of technology. We must gear our regulation to the principles of open access and competitive entry. In that way, we can spur innovation instead of stifle it by our regulations.

We must also recognize the global nature of the communications infrastructure. Regulators cannot restrict their view to solely domestic issues. We must carefully listen to views from other countries and share our experiences and ideas. The United States is a world leader in telecommunications. To maintain our leadership role, we must understand the needs of other countries as well as our own.

Around the world, people are beginning to realize the possibilities inherent in a Global Information Infrastructure, or "GII" as we are calling it in this country. Entrepreneurs are beginning to appreciate the value of global information networks. The integration of the computer and far-flung digital networks will bring enhanced productivity and help make companies more adaptable to changing market conditions. For developing nations, the information network will be an invaluable resource to aid in developing their economies, infrastructure, and political institutions. The GII will lead to advancements in education, health care, and other fields that will directly benefit those involved. We hope that governments and telecommunications companies around the world will support this initiative and work together to make it a reality.

In sum, we stand at the threshold of a new era in communications. As policymakers, we must consider not only the immediate impact of our actions but also look to the future effect. In the world of converging technologies, we must make sustained efforts to adopt good decisions that will usher us into the next phase of the Information Age.

Smart Agenting

Barry Diller*

This is a speech about speed—no, not that kind—those days are long over. The languid delicious city may move at a slower pace, but it is out of step with the wild run the world of media and communications are fast becoming—seeping through to almost every part of society—everyone running in place, busier and busier—life moving faster, getting more complicated, hectic. We work harder, longer, we travel further faster, given more options, requiring more decisions. Decisions based on tons more data, contradicting and conflicting with one another. Life is getting infinitely more complicated. Instead of illuminating and making our lives easier—modernization and technology are leaving us mostly confused.

It's like having bees in your head, but these are the bees of the revolution in information technology and they are spinning us out of control. You would have thought that the information we process and the television we watch and the things we need to buy (you see, now that I am a retailer I have always got to get buying in somewhere) would be enhanced by all the access we now have and all these modern tools we get to use.

In information, the average American is literally bombarded daily with facts and opinions, products and promotions—each year through the endless morass a little less effective, each year making everyone a little more insecure about their effectiveness—their ability to influence events—make action create reaction.

To be minimally knowledgeable about what's going on, just keeping up with your own industry, means forty-two lifetime tasks. The QVC library alone accesses 650 online databases. I get roughly eighty articles sent to me a day, and that's been edited down at three separate levels. What

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is really distressing is that while I am getting more and more information, I find it increasingly difficult to know what's going on.

Jimmy Lee, who runs Chemical Bank's lending, told me the other day that he spends four hours a day on pure business reading. And it's not just in business literature. From medicine to pop culture, the Harvard library subscribes to 160,000 journals and periodicals. Major research libraries are adding two miles of shelf space a year. Archivists say the amount of information available is doubling every four years. The quality, care, time to weigh the facts and analyze seriously lessens under the onslaught. To capture an increasingly distracted public, much is sensationalized.

The news we depend upon for factual balance—television, magazines, talk radio—all these reporters and pundits pumping up every story, then tearing it apart and then dropping it. Remember the war on drugs? Does anyone know who is the current Drug Czar? Or if we even have one? Or what about the radon scare? Or global warming?

The media is then both a contributor to and a victim of this explosion. They are simply crying for attention. And the public, dazed and overstimulated, only hears the loudest voices.

Even our language is exploding. Since 1966, we've added more than 60,000 words to the English language. As consumers and as providers of information and entertainment: We need help.

But first, more confusion.

Remember the old days, when we all sat down to watch one of three networks? We used to have a remote control with two buttons on it. It was called the "clicker." Now it has seventy-six buttons. I'm not kidding—seventy-six. No person's finger is thin enough and very few brains are fat enough to work these things.

And what are you watching on TV? Thirty-six channels . . . forty-seven . . . ninety? Twenty years ago there may not have been a lot of diversity, but at least we sat down and watched. Now between all these viewing services, we do not have the slightest clue what is on unless we thumb through the *TV Guide*, which is taking on the weight of the Yellow Pages. We don't even watch anymore—we surf! And why not? How are we supposed to categorize all these options and then choose?

In the midst of this banquet of choices, our diet is actually thinner. We retain less. The VCR was supposed to help us, but who other than a rocket scientist can figure out how to program the damn thing?

Everybody used to love to go shopping. In the old days you used to go to a store where you knew the salesperson and they knew what they were talking about. You could find a parking place, find what you wanted,

and leave. It is not so easy anymore. According to the *Futurist*, average consumers spend 9 percent of their free time just gathering products.

In a recent study, 60 percent of the shoppers questioned said sales help personnel did not know what they were talking about, and 66 percent said they recently walked out of a store because they could not even find sales help.

What do these three odd bedfellows—information, television, and shopping—have in common? They are examples where reach has exceeded grasp and where more is actually less. More access, papers, channels, and products all mean less comprehension and less satisfaction.

When I left Fox two years ago and was wandering around the U.S., I was thinking about these things—just what was going on in entertainment, communications, computers, and technology, and did they in fact have an interrelationship?

I came upon QVC—where action and reaction, where all these disciplines, albeit primitively, come together. They were all tasked to sell mundane, and, yes, sometimes silly things. But, oh, what a revelation!

QVC uses the telephone on a massive scale, answering 114,000 phone calls a day. On some days the number reaches 320,000. QVC utilizes a television set 24 hours a day, live, every day, 364 days a year, all lashed to unbelievable computing power. We do not only track all those calls and manage hundreds of millions of dollars worth of inventory, we also ship thirty-four million packages a year.

I thought this system and what it could evolve into could help solve problems. What a great chance to play a role in the architecture of what seemed at hand at QVC—a company that had almost converged the television, computer, and two-way communications.

When we find an easy, national way to send information back and forth that is powered by a smart computer, we will open up the world. We will not go from seventy channels to the five hundred that scare you, but to one channel. This channel will access thousands of possibilities and opportunities. You will be able to edit your own information, watch the television shows you want to watch, and buy anything at any time at the best price. You will get back the “clicker” with just two or three buttons on it, and the machines will tailor all these available choices to your life, taste, location, and income.

You see, I not only firmly believe that it will be nice and profitable for this infrastructure to be built, but it is absolutely necessary, if for no other reason than to help us cope with the flood of information and choices in which we are all drowning. This is not an elective, we have no option. Getting to this simplified future is not going to be easy.

I acknowledge that there is much confusion about the technology involved—open v. closed architecture, coaxial v. fiber-optic wires, or no wires at all. The jargon alone can kill you—asynchronous transfer modes, multi-user dungeons. How about moos or rasterbators? We've gone from megabytes to gigabytes to terabytes, from infobahns to infobondage, and form bauds to broadband to boredom.

What the techies who brought us all this stuff have forgotten is that we are all just dumb human beings.

Maybe the revenge of the nerds is actually to get everyone so confused that we are all utterly at their mercy.

And then there is the media and the hype, the over-expectations as they blow it up so high before it is time. You know the "500 channel" universe we have all been bombarded with the last year and a half. Well, I was there at its creation. A year and a half ago, at the Western Cable Show, John Malone was describing the technological strides being made in digital compression, and he thought we would soon be able to put more channels on current cable wires. Malone went on to say that perhaps as much as six to ten times the current number of channels might be available. Later, a reporter stood up and asked, "You mean a cable system that currently offers fifty channels might offer 500?" Malone thought for a second and offhandedly said, "Yes, I guess so." Thus, the monster was born.

From there, the race was on among the media to come up with ever more outlandish scenarios. The markets, of course, responded. And eventually, when reporters found that the future they had forecasted was less than fantastic and further off than they had predicted, there was a new race to puncture the hype.

What should be understood is that all this nonsense will sort itself out—but it will not be easy. There is in front of us a radical revolution coming in information and how we process it that will affect all of our lives forever. We are now at the most terrible time—the apex of confusion in this technological evolution.

Also making this difficult to comprehend is the cacophony of noise coming from many of the players. Those who are supposed to be guiding us into the future are more often confusing us with pronunciations that make little sense.

Computer guys say that it is all about movies on demand. Well, we already have plenty of movies—and normal people in their skins know that putting up this elaborate infrastructure is not worth it if this is "the" thing it would be used for. One telephone executive in California proudly predicted that these new systems will allow moviegoers to choose among

ten or fifteen different endings to a film. Most people have enough trouble getting to the theater and following the plot, much less wanting to choose the ending.

A subplot to this tragi-comedy is the jockeying for position among the different players. Computer nerds think that they are going to control this massive new industry; that Hollywood has to move Silicon Valley because entertainers need computer expertise. Movie makers think that they will be the real winners, since they know how to reach mass audiences. The telephone companies, with their massive switching capacity and cash flow, remain convinced that they will come out on top, and cable executives are afraid that they will not.

And if that were not enough to strangle the life out of making the huge investment necessary, the rules and regulations that govern communications in America are beyond byzantine. As of October of last year, the Federal Communications Commission (FCC) counted 34,687 pages filed for rulemakings, comments, reply comments, and all other parts of the Cable Act docket.

Not only is FCC rulemaking complicated and controversial, it is slow. The companies that are supposed to lead us into the twenty-first century face an FCC approval process that dates back to the early part of this century, and one that was designed to manage requests by railroads to extend their tracks.

But it is not just the FCC. What about the Department of Justice and the federal courts? Bob Allen of AT&T says he and Craig McCaw have had to file one million pages of documents on their proposed merger.

Figuring all this out—the technology, the players, and the disparate entities that need to converge—is a wildly daunting task. The only solution that I know is the one I have depended upon since I started in the entertainment business twenty-six years ago: To have a simple idea and then to carry it through without listening to all the sensible reasons why it cannot be done. The morning line odds always say that it is impossible—like convincing the skeptics that you could make movies directly for television, telecasting whole novels over ten or twenty hours, or even starting a new network. A good idea always works when it is simple, when it fills a need, when it can be explained easily, and when you do not give up. But, this time, keeping it simple and pushing the confusion and government meddling aside to get to the fundamentals is a humongous task.

So, what are we going to do? Is there a principal idea strong enough, big enough, simple enough to pull all this together? What I have been working on, musing on, and driving myself crazy to figure out is how do

you tame all this. What can pull all this together? Is there somewhere in this pile of fascinating but finally irritating info-garbage an actual idea?

I think that there may be. Look at the development of the personal computer for a hint—word processing and spread sheets. They each did one simple thing, but it was a very powerful simple thing, and you just could not do it anywhere else as easily. Now, think of frustrations—with information, with television viewing, with shopping. What is the linkage? What are the possibilities? I think that they lead to one simple thing—smart agenting. Smart agenting? What is it? Well, I certainly do not mean something that gets movie stars better work.

Linking a computer and its power to search, find, and help us sort through this complicated world—that is what I call smart agenting. Using it to gather the data for only what we need or want to know. Using it in television entertainment and shopping, by giving us choices based on our interests and needs. Smart agenting would do the homework for us in each of these areas, homework for which we are hopelessly ill-equipped today.

The problem for us is an overload of information, entertainment, and the goods we need and buy. Up until now no system existed to slow it all down for us and make it comprehensible. Computers are fast—that little mother chip is doubling in capacity every two years—and it is a frightening thing to comprehend with our slow minds.

What the computer can do when it is tasked to our interests—to search out and find based upon a detailed profile of who we are—is simply amazing. Drawing on databases of infinite detail and density, that box can now in a millisecond—and with perfect pitch—find what it would take endless hours and extraordinary patience to do for ourselves if it could be done at all.

While I was preaching this technology the other day to a friend who was looking at me somewhat uncomprehendingly, he asked as we were flying over Utah, “You mean if I was going on a trip to Salt Lake would it tell me the best restaurant?” I said, “No, no, you don’t understand. It would not do that. It would already know everything about you—what you like and what you do not, what you can afford to pay and what will not kill you to eat. It will just tell you where to go wherever you are—as if you had sent a huge advance team in before. It will give you a clear map to get there, in a millisecond.”

It will do this in every area you want it to, from sending you the newest audio compact discs you would love to have if you had the time and temerity to spend a few hours at Tower Records, to getting you the best price of the best model—targeted like a laser at thousands of the nasty little and big needs in your ever busier life. That is its power.

When it gathered your confidence and would “do it all for you,” one day later you would get it at your door and it would render a terrific service. It could be linked to an information system that culled and collated the things you wanted and needed to know, and it could also tell you that it had stored the program you would have missed otherwise. And if it did these things and concentrated on you—your needs, wants, your schedule, your family and friends and nothing else—I think that it would be that simple idea that could not be provided elsewhere. Then, your life would be genuinely advantaged and for that, you will change your habits and you will make that leap. You will learn how to work it.

This smart agenting—finding consistent ways to develop it, make it dependable, get people to trust it—is the driving idea, the building block, to a full interactive convergence of computers, television, and two-way communications.

What I found at QVC—the working out of the simple logistics, taking interactivity to smart agenting, using our logistics and computer literacy to push the formula through—this could be a worthy piece to play with in this great puzzle. And, of course, it is a puzzle. It is a mystery ride, and figuring it out for my business is a great adventure. How will it affect your lives? How promotion, marketing, and design have to change as this radical revolution takes hold over the next few years will be your adventure. So plunge in and get confused and frustrated. If you do not embrace the technology, its imperatives will eventually crush you. It may take shorter or longer. The arguments do not really matter because if you do not get curious about it and find an application to develop in you own work, I can easily promise you that somewhere there is a competitor who will.

Now, I know that anyone over the age of fourteen has a certain amount of technophobia—I did and it only gets worse. My recommendation: Fight it, because you have got to learn it and because in the end it will inspire you as it educates you to the possibilities and the endless opportunities.

Consolidation, Coordination, Competition, and Coherence: In Search of a Forward Looking Communications Policy

Mark D. Director*
Michael Botein**

Coherent national communications policy making has increasingly eluded us. Missteps and false steps have impeded progress. The courts, the Congress, and the Federal Communications Commission (FCC or Commission) have clashed regularly. The result has been a lack of direction, as the involved factions attempt to cope with new technology's unfulfilled promises.

The challenge for policymakers is to pursue coherent policies in an intellectually honest manner. It is an awesome task to reweave the frayed fibers of social policy, economic reality, and constitutional constraint; but, this is necessary to achieve a strong national communications policy.

Legislative and regulatory initiatives are valuable in some situations. For the foreseeable future, however, it will be more important to examine and define fundamental goals rigorously. The sixty-year-old Communications Act of 1934 (Communications Act or Act) has survived largely intact, and it may be able to endure well into the future. In fact, the Act's least enduring parts are likely to be the more recent additions—the 1984 and the 1992 Cable Acts. The latter already supplants much of the former, but both

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the First and Fifth Amendments loom as potential threats to major portions of the latter.

Enduring policies should be based on considerations beyond current events. For example, the recent rash of proposed mega-mergers is not the building block for long-term policies. Thankfully, Congress did not rewrite the Communications Act as a kneejerk reaction to potential mergers between the Baby Bells and cable multisystem operators—a “trend” that may have evaporated before it even really emerged. This may serve as a lesson about the potential folly of purely reactive legislation in the communications sector. To seek a more enlightened future course, we should begin by assessing the policy disarray that has been created.

In the common carrier arena, evolution is stalled. Reviewing courts have rejected a number of the Commission’s attempts to adopt important new policies, most recently concluding that the Commission lacked statutory power to exclude nondominant carriers from filing tariffs.¹ Combined with lengthy delays in implementing other significant new rules and policies (including, for example, approval of video dialtone applications), such developments have left the common carrier sector without any clear policy direction and with uncertainty about the scope of the agency’s jurisdiction to regulate changing markets. Broadcasters also have received little policy guidance. Constitutional and policy disagreements about sexually explicit and violent broadcasting have plagued the industry and have consumed an inordinate amount of administrative resources. At the same time, efforts to improve children’s programming and to assess other content-related policies have floundered amid a vigorous battle of advocates and major questions about whether (or when) the First Amendment boom will be lowered on the Commission’s and Congress’s restrictions on broadcasters.

Judicial attacks on the comparative hearing process have added uncertainty to the traditional licensing scheme.² Although the FCC has continued to relax ownership rules, it has grappled continually with the tension between its commitment to ownership diversity and its desire to promote broadcasters’ potential economies of scale through duopolies and multiple ownership. Finally, the networks still confront a confounding

1. *MCI Telecomm. Corp. v. AT&T*, 114 S. Ct. 2223 (1994).

2. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (vacating and remanding an FCC comparative licensing decision with instructions for the agency to consider the applications without regard to its policies favoring the integration of ownership and management); *see also* *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992) (vacating and remanding an earlier decision in the same case).

future. Legal and economic questions breed hesitancy about possible multimedia growth strategies.³

Cable television still labors under probably the most complex and least comprehensible communications policy regime. It is hard to predict future policy developments for an industry which has endured countless policy changes in the four decades of its existence. To confound matters further, the Supreme Court's rather obtuse decision in the recent *Turner Broadcasting* case⁴ is open to at least two contradictory interpretations. One portion of the Court's opinion suggests that at least some regulatory restrictions on cable television, which would not be permitted if imposed on print media, will be permitted—despite the First Amendment—because of cable's perceived role as a “gatekeeper.”⁵ The open question is how broadly a relaxed level of First Amendment scrutiny will be applied. If it were applied as a broad “exception” to cable's general status as a protected First Amendment speaker, the rationale would uphold the FCC's regulatory thrusts under the 1992 Cable Act. Alternatively, a narrow interpretation of this “exception” would allow regulation only where a regulation directly addresses cable's “gatekeeper” functions—as in the case of the must-carry or third-party access rules. This would subject much (if not most) cable regulation to heightened scrutiny under cable's newly affirmed status as a protected First Amendment speaker. Under the latter interpretation of the Supreme Court's decision, courts could invoke the First Amendment to amputate substantial portions of the 1992 Cable Act, thereby restoring the industry to its prior less-regulated status—most recently during the second half of the 1980s. The FCC will have to be reactive, rather than proactive, until the true meaning of the majority opinion in *Turner Broadcasting* emerges.

Finally, a variety of still-emerging media have contributed little more than a set of additional acronyms—e.g., DBS (direct broadcast satellite), MMDS (multichannel multipoint distribution service), ADSL (asymmetric

3. *E.g.*, *In re* Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd. 3282, *reconsideration granted in part*, 8 FCC Rcd. 8270 (1993), *aff'd sub nom.* Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994) (resulting in the relaxation of the financial interest and syndication rules applicable to the networks, and authorizing their complete sunset in November 1995, unless an FCC review to be completed in 1995 determines that the relaxed rules should be retained, in whole or in part).

4. *Turner Brdcast. Sys., Inc. v. FCC*, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994).

5. *Id.* at 2466 (“The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.”).

digital subscriber line)—to the jargon. Whether these “fringe” distribution media will evolve into significant market forces remains to be seen. What is clear, however, is that regulation will not propel them to market prominence.

This lack of direction and the resulting sense of frustration is hardly surprising. The conditions for inertia are clear and prevalent. First, the government consistently has failed to bring any coherence to the potentially conflicting policy goals of encouraging marketplace freedoms and regulating in the “public interest.” The sixty-year-old Communications Act directed the FCC to bring order to a chaotic business through regulation. Efforts to preserve licensees’ status as “public trustees,” however, tend to ring hollow amid an industry that has been urged by deregulation, constitutional mandate, and economic promise to pursue efficiency and profit maximization above virtually all else.

Perhaps the latest evidence of this is the *Turner Broadcasting* decision itself. Once defended as an essential aspect of the FCC’s commitment to broadcast localism, the cable must-carry rules now are justified as a response to an economically dysfunctional marketplace. Deregulation has deprived “localism” of any meaningful content, to the extent that neither regulators nor jurists can seriously find a substantial government interest to justify a regulation of expression, such as the must-carry rules. The result constitutionally elevates broadcasters’ balance sheets over the First Amendment. Should we permit government regulation of speech to save local broadcast television, if we can find little good to say about it? Although the *Turner Broadcasting* decision wraps itself in the appealing verbiage of “diversity,” the opinion seems to acknowledge that there is nothing very diverse about the broadcast services protected by must-carry.

Although the Fowler FCC argued that the public interest and the profit interest were identical, the claim remains the target of significant skepticism. Policies of localism and diversity once appeared to have meaning and purpose; they now have been reduced to empty concepts. Today, their prime significance is that they may allow a broader range of entrepreneurs to profit from media ownership and operation. The benefits of these policies for the “public” are open to substantial debate.

Second, our national communications policymaking apparatus remains leaderless; economic goals, more than social policies, dictate its future. Government officials advocate their narrow responsibilities; in the telecommunications field, agencies’ flexibility of action remains subject to the constraints of the decade-old AT&T antitrust consent decree—the

Modification of Final Judgment (MFJ).⁶ The changing tides of international trade objectives, antitrust enforcement policies, and inconsistent industrial policies exert more influence on the direction of national communications policy than almost any other principles. Policymakers view communications more as a potential engine of economic growth than as a business sector that is infused with unique constitutional considerations—all because of the vital economic role that information distribution and processing play in today's world.

We may move into the next decade without a significant revision of the Communications Act or the adoption of major new national communications policies. It may be tempting to sit back and let technology and economics drive market developments.⁷ The courts, Congress, the Commission, and the Department of Justice could intervene intermittently and narrowly to deal with major developments or politically charged controversies. After all, we essentially have proceeded this way for years. Moreover, other countries have adopted the "U.S. model" in regulating newly privatized communications media.

Before accepting the status quo, however, it may be useful to consider how to address, more effectively, four important concepts: consolidation, coordination, competition, and coherence.

Consolidation: There are two critical aspects to this concept. The first is concentration of control among industry players. There is uncertainty about whether substantial consolidation will or should occur. There is no reason to believe, however, that we should have special rules for the media to encourage or frustrate consolidation. Antitrust principles will change over time in order to properly address new issues. The MFJ has served a monumental purpose, but now should be relegated to history, along with many of the existing statutory and regulatory ownership limits. The market should be more fluid; existing rules often impose rigidity, thus creating artificial barriers to assessing reality.

The second aspect of this concept is the consolidation of media—including the overused buzzword "convergence." The courts' historical approach to creating rigid distinctions among the media—e.g., "scarcity" in broadcasting—is obsolete. Electronic media have become increasingly

6. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

7. European and other national and regional policymakers, by contrast, have attempted—albeit not always successfully—to adopt new, and potentially far-reaching, policies. For example, despite endless squabbling among its member nations, the European Commission slowly has begun to develop important new policies in areas such as equipment standardization, network interconnection, and carriage of "local" content.

transparent. A television set might show the same program from any one of several sources: broadcasting, cable, DBS, MMDS, videocassette, videodisc, or compact disc (CD-ROM or CD-I). If the medium once was the message, the message is now the message. Accordingly, policies should not be defined by the characteristics of the distribution technology; they should be expressed more generally and broadly.

Coordination: The government must make sense of itself, and supply some policy leadership. Terminating the MFJ (even if its principles are embodied temporarily in laws) will restore the courts to their traditional and appropriate role of deciding cases. The government then will have two remaining challenges: providing leadership at the national level and fostering more effective federal-state partnerships. The European Union (EU) has nurtured international cooperation through concepts such as "subsidiarity" and "harmonization."⁸ Its relative success is significant, because the EU has no tradition of federalism.

Competition: This is perhaps the most troubled and troublesome concept. The country undoubtedly has a commitment to competition as a vehicle to realize desirable objectives. At times, however, there has been ambivalence about whether competition is a means to an end or an end in itself. The Communications Act clearly indicates that unbridled competition is not always the preferred approach. The basic choice of spectrum licensing, rather than a private spectrum market, reflects a legislative preference for "managed competition."

One of the major problems with present competition policy, however, is that government authorities lack information as to market forces. For example, a merger of a Bell Operating Company and a large cable company might be desirable, depending upon the answers to some fundamental questions, such as the following: Are a switched/low capacity telephone network and an unswitched/high capacity cable system noncompetitive? Would a merger create scale economies for the resulting firm? If the answer to both questions were in the affirmative, presumably the government would allow the merger; if the answers were negative, presumably it would not. At present, however, government agencies cannot reliably assess these issues.

If the government stays with its present competition policy, it must make rational decisions about how other policies that promote or require

8. "Subsidiarity" refers to the concept of promoting the implementation of EU policies at the lowest (most decentralized) possible level of government, e.g., at the member-state level. "Harmonization" refers to the concept of permitting EU member-states to modify EU directives to suit national conditions, as long as such modifications do not result in a departure from the basic thrust of the directive.

competition fit with the basic scheme for distributing spectrum. The FCC's attempts to "pretend" that there is a vigorously competitive market and to make choices based on that assumption have created dysfunction and conflict. If more competition is preferable (for whatever reason), then we must reevaluate some of the basic principles that have guided the communications industry for six decades. For example, in a rough and tumble marketplace, historical perspectives on, and regulatory approaches toward, "universal service" and the "public interest" will not work; in fact, concerns about these issues may disappear altogether.

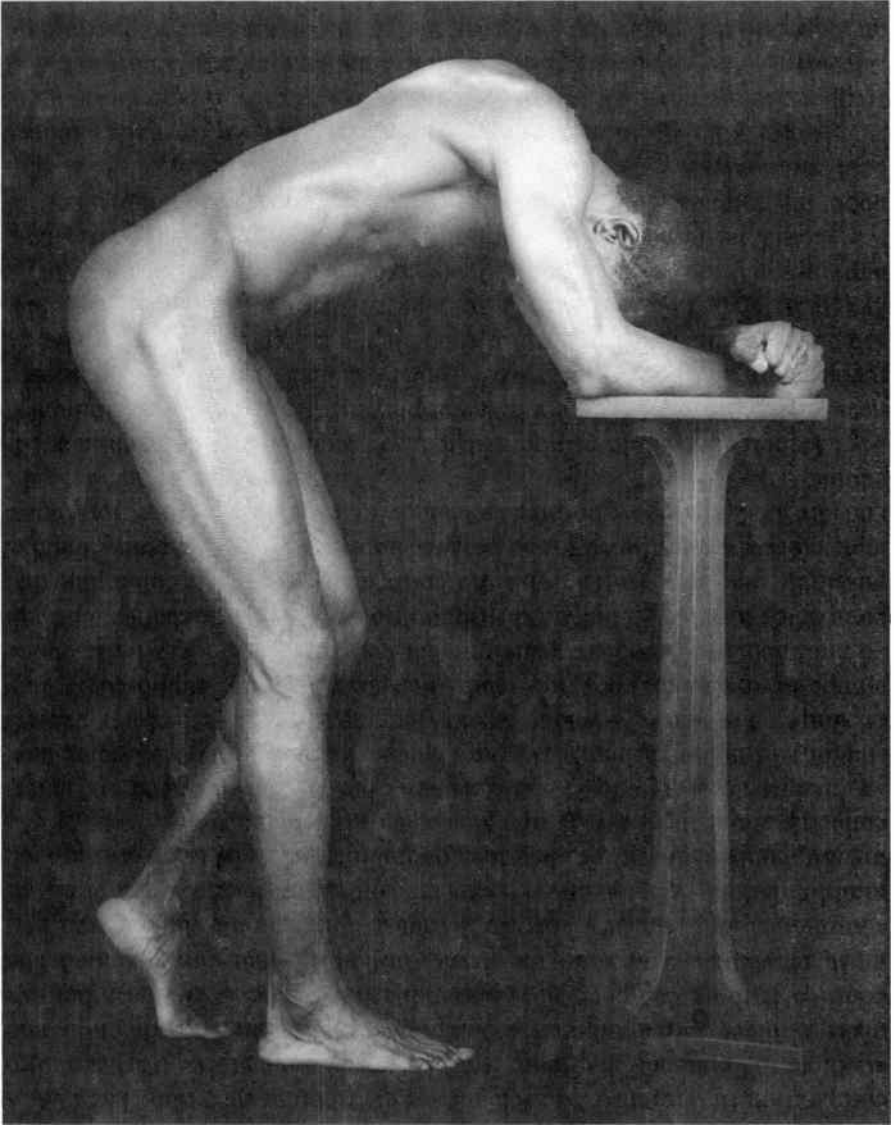
Coherence: Whatever the direction chosen, we will need an understanding of the broad impact of our choices. Regulation of cable television is simply foolhardy, without acknowledging a rule's effect on cable's competitive market position and the government's supposed policy commitments to broadband, multimedia networking. Freeing local phone companies to enter the video distribution business is a dramatic step with possible cataclysmic effects on the entire market. It is encouraging that legislators appear attuned to the broader implications of this policy choice, and are considering widespread changes to provide guidance for future action.

Coherence should not be equated with equivalence or even-handedness. Coherence demands not a "level playing field," but rather an honest recognition that seemingly narrow policy choices can have widespread effects. It requires a real effort to reconcile the effects of differing policies. We may well find compelling reasons to distinguish among differing activities and to apply distinct policies to them. At the very least, however, we should be honest and forthright about the distinctions, and realistic about the potential constitutional constraints. Again, we need more detailed data and analysis.

From all indications, we have entered an era of abundance. More frequencies are being allocated, and spectrum generally is being used more intensively and efficiently. Distribution facilities are being constructed at an unparalleled pace; the news of the death of alternative distribution pipelines is both premature and exaggerated. The emergence of new media may result in the entry of major new market participants. With less regulation and more outlets, the opportunity for increasingly diverse content has grown. Whether the opportunity will be seized, however, remains to be seen.

Our policies have grown out of scarcity and a fear of market dominance. In some cases, often inconsistently, we have adopted policies to address abundance rather than scarcity. Broad reassessment and reappraisal seem appropriate. The challenge for the next decade will be to

move from the management of a scarce and powerful resource to the exploitation of a more abundant and even more powerful one. For the policymaker, the central task will be trying to allocate—or at least oversee and channel—the benefits of abundance.



Thomas, 1986
Robert Mapplethorpe

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The Sensitive Society

James F. Fitzpatrick*

We are living increasingly in the “Sensitive Society.” I use the term “sensitive” not in its meaning of “caring” or “sympathetic.” Rather, I use it to mean a society that is thin-skinned, ready to take offense, intolerant of criticism or satire, and which rejects honest or misguided disagreement. This is *not* the world of Mark Twain, Ambrose Bierce, or H.L. Mencken. Comment, observation, satire, reportage, editorials, cartooning, caricature, playwriting, and painting—all are now supposed to take into account the sensibilities of the reader or observer. That feeling undergirds a great deal of the controversy about art today, and poses a great potential threat to artistic and creative freedom in the future.

The history of the Mapplethorpe debate¹ was one that deeply

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On May 14, 1994, one week after speaking to the graduating class of the Indiana University School of Law-Bloomington, the Author delivered this commencement address at the Corcoran School of Art in Washington, D.C. A graduate of the Law School and member (and former president) of its Board of Visitors, the Author is perhaps best known for his ardent defense of First Amendment rights. He has served as pro bono counsel to many art communities, opposing legislative and judicial efforts to impose content restrictions on federal art grants, and he has served as President of Washington Project for the Arts and on the boards of the American Civil Liberties Union, the Shakespeare Theater in Washington, and the British American Arts Association. The Author's edited address is included with the kind permission of the Corcoran School of Art.

1. A planned exhibit of the photographs of Robert Mapplethorpe, funded by the National Endowment for the Arts (NEA), was cancelled by the Corcoran Museum in 1989 after Senator Jesse Helms charged that the exhibit included “obscene” photographs. Grace Glueck, *Art on the Firing Line*, N.Y. TIMES, July 9, 1989, at B1. It subsequently was presented by the Washington Project for the Arts. After the Mapplethorpe exhibit opened in Cincinnati, the host museum and its director were indicted for allegedly violating criminal obscenity laws. They were subsequently acquitted by a jury. Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, at A1. Congress responded to the controversy by forbidding the NEA from funding allegedly “obscene” art. Pub. L. No. 101-512, 104 Stat. 1960, 1962 (codified at 20 U.S.C. §§ 951-74 (1988 & Supp. II 1990)). The prohibition was struck down as unconstitutional in *Finley v. NEA*, 795 F. Supp. 1457 (C.D. Cal. 1992), and *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991). The Chairman of the NEA, John Frohnmayer, was subsequently fired by President George Bush during his reelection

involved the arts community in the “Sensitive Society.” My first exposure to this issue was June 19, 1989. That very day an invitation had arrived at our house announcing the opening of the Mapplethorpe exhibit. We went to a dinner party that night and my dinner partner, who was a strong supporter of the Corcoran, as we all were, announced with some astonishment that the museum had just cancelled the Mapplethorpe exhibition. She was a major underwriter of the show. I asked whether, if we could get permission from the Mapplethorpe Foundation to do the show at the Washington Project for the Arts (WPA), we could have her \$20,000. She said that we could. We went around the table that night and got enough pledges to underwrite the show.

The next morning the head of the Mapplethorpe Foundation flew to Washington; we toured the WPA facilities and by 1:00 P.M. we had come to an agreement that we would do the Mapplethorpe exhibition. In just two weeks, over 50,000 people came to see the show. That record was replicated across the country where more than a half million people saw the show at seven different venues.

You know the subject matter. Along with stylized, formal floral arrangements and chic portraits of celebrities, there were a few pictures that explored the netherworld of male sexuality and there were a couple of portraits, commissioned by their parents, of nude children.

I can report that after looking at the Mapplethorpe photographs at the WPA, there was no rioting, widespread fainting, and no heavy breathing. People who saw the show almost universally applauded the efforts to put it on. One grandmother, after viewing Mapplethorpe’s images of male members, told us with some jocularly that she was happy to see that things like that still existed, something that she remembered from her distant youth. Another older lady told us that she was so offended that she saw the show three times!

One key lesson emerged from this experience—images are much more titillating in the describing than in the seeing. Another important lesson is that controversy and the threat of censorship sells. Before this brouhaha, Mapplethorpe’s large photographs sold for \$3,500. After the controversy, they sold for \$40,000 to \$50,000. This reflects one of the immutable lessons of those who would attempt to deny society the opportunity to look for itself—censorship never, never works.

But, the Mapplethorpe exhibition did spawn a prolonged debate over appropriate content standards for government support for the arts. The issue about what society looks at, reads, and hears became the newest assault on

campaign.

freedom. What the right-wing critics wanted, in fact, was that only “acceptable” art be funded by the NEA—and that means what was acceptable to Senator Helms, the Robespierre of modern American society. They wanted art that is straight, Christian, bland, pro-flag, anti-abortion—all the elements of red-blooded Americanism. However, our society is simply too heterogeneous and too diverse to have officially sanctioned, acceptable art. As Robert Hughes has written: “This has always been a heterogeneous country, and its cohesion, whatever cohesion it has, can only be based on mutual respect. There never was a core America in which everyone looked the same, spoke the same language, worshipped the same gods and believed the same things.”²

The concept of “acceptability” as an element of *government* decision making, then and now, must be firmly and unqualifiably rejected. It is clearly inconsistent with the tenets of a free society to have a government stamp of approval on acceptability. Experiences with repressive societies—the Nazis in the 1930s and the Russians in the 1920s and 1930s—provide dramatic and painful lessons of a government’s definition of “acceptability.” A central lesson is that in a repressive society, artists are the first victims. By nature they are independent, questioning, and unconventional—the very qualities a repressive society cannot stand.

But fighting off Jesse Helms and his form of orthodoxy is the easy part. Resisting orthodoxy from the political left is much more demanding.

One such current manifestation of the “Sensitive Society” is the concern over political correctness. Artists have a strong stake in opposing “correctness” of *any* sort. The impulses behind this “correctness” are, in fact, ones that many of us identify with. We should not be encouraging homophobia, or tolerating racial intolerance or sanctioning anti-feminist views. But I fear that when those sentiments transcend individual reactions and create strong social pressures to conform, then there inexorably is a danger to creativity and individualism. And the artist has the most to lose if there is an imposed orthodoxy, either from the right or the left.

The “Sensitive Society” is a sharp departure from the way we have historically viewed the rights of free expression in this country. For decades, the primacy has been the freedom of the speaker, the creator. The theory, going back centuries to Milton, is that the truth will come out if there is a cacophony of competing viewpoints.³ Under that approach, the bigoted comment will, in the long run, be overcome by voices of reason and tolerance. Historically, a speaker’s rights under the First Amendment

2. ROBERT HUGHES, *CULTURE OF COMPLAINT* 17-18 (1994).

3. JOHN MILTON, *AREOPAGITICA* (Everyman ed., 1st ed. 1875) (1644).

have not been limited simply because they might cause outrage in the audience. It was only when a speaker's comments could create a severe public disturbance that one might consider a limitation on the speaker's voice.⁴ And even in those circumstances, the government would be required to have sufficient force on hand to protect the controversial speaker.

That view is changing in contemporary society. There is a new paradigm—one is increasingly concerned with the sensibilities of the listener, not the rights of the speaker. Shouting “water buffaloes” from a dorm room, no matter that it may have had a nonracial intent, can engage a student in a protracted and complicated process.⁵ Disciplinary codes in universities are now designed to weigh the acceptability of these comments, even some that are ludicrously trivial, in somber, formalized judicial proceedings.⁶

I would suggest that the artist has the strongest stake in opposing this viewpoint. An artist's role is to follow the muse, or at least to follow one's own sensibility, in attempting to portray the truth of a particular subject. Sometimes that truth, as seen by the artist, is offensive. As Jane Alexander recently said, “Artists challenge, ask difficult questions, and rattle our cages. They can make our skin itch, our souls bristle, and they can touch us to the heart's deep core.”⁷

Sometimes an artist's truth might offend the religious right. Sometimes it might offend the American Nazi party. Sometimes an artist's truth might offend the pre-deified President Nixon. Sometimes it might offend Franklin Roosevelt or John Kennedy or Lyndon Johnson or Jimmy Carter. Sometimes it might offend the Catholic Church. Or it might offend right-to-lifers, and sometimes free-choicers. Sometimes it might offend

4. See *Cantwell v. Conn.*, 310 U.S. 296, 308 (1940).

5. In 1993, Eden Jakobwitz, a first-year student at the University of Pennsylvania, yelled through his dorm room at a group of noisy students outside, “You water buffaloes! If you are looking for a party, there is a zoo a mile away.” The students, it turned out, were African-American, and Jakobwitz was charged by the University with violating its speech code. Jakobwitz denied any racist intent; he claimed that “water buffalo” was a translation of the Hebrew word “behamah,” meaning foolish person. “The University of Pennsylvania, in a series of bizarre moves which made the Star Chamber look like the avatar of due process, proceeded to self-destruct in public. It insisted on pressing the prosecution Only the withdrawal of the complaint—blamed on unfavorable press reaction—saved Penn from complete immolation.” Burton Caine, *The Dormant First Amendment*, 2 *TEMPLE POL. & CIV. RTS. L. REV.* 227, 245-46 (1993).

6. See *UWM Post, Inc. v. Board of Regents of Univ. of Wis.*, 774 F. Supp. 1163, 1167-68 (E.D. Wis. 1991); *Doe v. University of Mich.*, 721 F. Supp. 852, 857 (E.D. Mich. 1989).

7. Jane Alexander, Speech at the National Endowment for the Arts' Art-21 conference (Apr. 1994) (copy on file with Author).

Robert Hughes, or Hilton Kramer, or even Paul Richard at the *Washington Post*.

Playwright and poet Thulani Davis said in her keynote address to the National Endowment for the Art's Art-21 conference in Chicago last April: "Artists have been in harm's way because they refuse to give up ideas in order to entertain."⁸ Simply put, the expression of the artist's talent and genius, which is at the heart of our constitutional concept of free speech, should not be judged on whether the sensitivities and beliefs of any audience are ruffled. There must be other ways of arriving at the truth, rather than silencing the speaker. Moreover, sadly, this instinct to silence speech (and necessarily silence artistic creativity), poses a severe strain on those artists who are laying out their souls trying to describe the truth as they see it, on canvas, in sculpture, or in a dark room.

Lawyers are, to some extent, expected to be involved in public service projects, helping the disadvantaged to secure their full constitutional and legal rights. In law this is called a *pro bono* program, and it is relatively easy because such participation is consonant with the lawyer's role as a public figure.

However, undertaking a similar obligation may be much more complicated for the artist—but it should be done. I was struck by an article in the *Washington Post Book Week* describing Cormac McCarthy, the Pulitzer winner for his novel *All the Pretty Horses* and now the rage in literary circles. McCarthy was described in Greta Garbo terms: "He never wanted anything more than to be left alone to write."⁹ This captures the view of the artist whose only goal is to create one's work. However, both as a matter of protecting and enhancing one's rights to creative freedom and as an essential element of our universal obligation to support a better society, artists cannot stand aside and let others carry that cause.

8. Thulani Davis, *Masterpieces for a Mixed-Up Age*, WASH. POST, May 1, 1994, at G3.

9. David Streitfeld, *Book Report*, WASH. POST, May 8, 1994, at X15.

INTELSAT: Transforming a Market Leader to Meet Changing Global Telecommunications

Irving Goldstein *

The International Telecommunications Satellite Organization (INTELSAT) is the product of a unique experiment—an ever-growing group of sovereign nations and territories coming together to own and operate a global telecommunications satellite network. INTELSAT was created at a time when the satellite industry was in its infancy, and has grown from the initial 11 nations to the current 134 member nations. Technological advances and the expanded use of satellite telecommunications have nurtured this growth. While the INTELSAT experiment has been a tremendous success, some are concerned that time may pass it by, that the nature of telecommunications has developed to a point where an international cooperative is no longer suited to the contemporary and future market environment.

We believe, however, that INTELSAT's time has not passed. INTELSAT will not go the way of the dinosaurs, becoming extinct because of an inability to adapt to a changing world. INTELSAT is acutely aware of the growing market challenges confronting it and is taking steps now to adapt to these changes. In the thirty years since INTELSAT's creation, the world of global communications has been transformed by technical progress and regulatory initiative. The spread of deregulation, the corporatization and privatization of national telecommunications providers, the growth of competitive industries, and the proliferation of new satellite companies have created greater choice in the marketplace and, therefore, greater competition

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for market share. In light of these dynamic changes, INTELSAT is transforming itself in order to remain competitive.

Global satellite telecommunications is a growing market, with estimated revenues of about \$3 billion. Satellites, however, constitute only a small component of the worldwide telecommunications service industry. Total worldwide telecommunications revenues currently approach \$600 billion, with about 78 percent for services and 22 percent for equipment. Europe and the Americas contribute about 75 percent of these revenues and the Asia-Pacific region provides 20 percent. International services have been growing about 15 percent per year, fueled by growth in international trade, travel, and liberalization of telecommunication policies. Barriers among industry segments are eroding due to deregulation, mostly within the nations which are the larger users of telecommunications services, and due to advances in technology and competitive pressures to provide value-added services across a mix of transmission facilities. This worldwide trend has spawned a new array of viable products and competitors. Rapid market developments have created the need for flexibility in providing high-quality customer service, which is often the decisive factor in consumer choice. The growth of the telecommunications marketplace and regulatory changes have created the impetus for change within INTELSAT. The interplay between the evolving telecommunications environment and INTELSAT's structure and organizational decision-making process, however, raises concerns about INTELSAT's ability to meet the demands of its future.

The increasing competition INTELSAT faces primarily comes from fiber-optic cables and other satellite systems. The boom in the fiber-optic industry is a direct product of deregulation and privatization of national telecommunications entities, which allows them to invest in new industries and markets and to expand into specialized services. Global fiber-optic capacity has doubled each year for the past five years. Over the next five years, it is expected to double again from its current level. Global fiber growth is concentrated in major point-to-point transoceanic routes and regional loops in Europe, Africa, and the Asia-Pacific region. Fiber costs per unit of capacity have declined rapidly due to technological improvements.

Fiber is perceived by customers to provide lower prices and higher quality than satellites for major routes. INTELSAT believes, however, that the differences in cost and quality are not as great as customers perceive. Nonetheless, as a result of the growth in fiber-optic capability, the migration from satellites to fiber on high-density routes has significantly reduced INTELSAT's growth in telephony services. Some of the customers migrating to fiber-optic cable are members of INTELSAT's own closed

group of customers (namely signatories) who are often investors and developers of cable networks. Despite the growth in fiber-optic capacity, however, INTELSAT still holds a large market share of telephony service because there are a number of areas in which cable is not practical. There are many routes for which cables cannot be provided economically and where they are significantly less cost-effective than satellites. Also, system planners desire media diversity and more diverse paths than there are cables available. Accordingly, INTELSAT believes that satellite and fiber-optic cables can play complementary roles in providing telecommunications services and will share in future market growth.

In addition to the increasingly intense competition from fiber optics, INTELSAT also is facing growing competition from alternative satellite capacity providers. The number of separate satellite systems has been growing dramatically. Domestic telecommunications satellite systems are now operated by twenty countries, and eight additional countries have announced plans to establish such systems. Many of these systems carry or plan to carry regional telecommunications services as well. Regional satellite systems exist in Europe, the Middle East, and Southeast Asia. There are private systems currently available to provide transoceanic telecommunications services in competition with INTELSAT. A number of companies have announced their intention to establish or expand satellite systems within the next ten years. Deregulation has allowed for the growth of new commercial satellite ventures and will affect the type of services and markets targeted by such ventures. For instance, although competing international satellite systems authorized by the United States are currently restricted in the amount and type of international public switched services that may be provided over their networks, this policy has minimal practical effect. In fact, this policy is scheduled for elimination by January 1997, allowing open competition for all services.

The anticipated growth in this area of communications is staggering. Satellite capacity provided by alternative satellite systems is expected to increase by 60 percent within four years, excluding domestic capacity in areas INTELSAT does not currently serve, like the United States where regulatory policies preclude INTELSAT's provision of domestic services. Regional capacity is expected to increase by 120 percent, global by 108 percent, and domestic by 8 percent by 1998. This new capacity is tailored for specific domestic and regional markets and service applications, thus allowing competitors to respond to the growth in emerging markets.

Private sector participation now dominates the telecommunications services industry. Privatization has been most intense in Latin America, but is increasing rapidly throughout Asia and Europe. Under a corporatized

structure, the telecommunications entity has legal autonomy from the central government for administrative and financial functions. Many other telecommunications operators have been, or are, considering full or partial corporatization or privatization, and most of INTELSAT's largest signatories already have a corporatized structure.

While INTELSAT's competitors have been liberated by deregulation, allowing them to maneuver within markets and to explore growth opportunities, INTELSAT is still restricted by its unique circumstances. To understand the difficulty in meeting the challenges facing INTELSAT, it is necessary to understand INTELSAT's structure and history, which present hurdles along with market challenges. INTELSAT was established in 1964 when representatives of eleven nations signed international agreements setting forth interim arrangements for a global commercial communications satellite system. Born from the desire to make satellite telecommunications available to the nations of the world on a global and nondiscriminatory basis, INTELSAT, in the course of its thirty years of existence, has established the world's only global telecommunications satellite network. Currently comprised of twenty-two geostationary satellites, it provides international, regional, and domestic telecommunications services ranging from public switched telephony to broadcasting to dedicated business services.

Governance of INTELSAT is predicated on the traditional principles of an intergovernmental cooperative. The overarching international public interest mandate of the organization brings diverse governments together in such a way that their individual interests are compromised to achieve a common good. Accordingly, the current decision-making process mixes political, public policy, and business considerations.

The original substantive interest of the organization was focused in its practical definition: to provide globally interconnected public switched network telephony (PSN) on a nondiscriminatory basis. The business mission of the organization was less complicated when it was created than it is today. Accordingly, the decision-making structure, although complicated and possibly conflicted, was easier to apply than it is at present.

Now, however, the interests of the membership have become more diverse and are more fraught with potential conflicts of interest which are less conducive to compromise. Many of the original, traditional investment patterns, strategic objectives, and business interests of the organization and its members no longer exist—or have changed considerably. As the organization's members have diversified, privatized, and become subject to competition, their view of INTELSAT's role vis-à-vis their companies has changed. In many cases, this altered interrelationship gives rise to conflicts

of interest between INTELSAT and its members, among members, and even among various constituencies of the same member company. Today, political considerations and unilateral business interests of individual members can obscure or take precedence over business decisions which are in the best interests of INTELSAT as a whole.

The present decision-making process itself is susceptible to excessive delay. Under current practice, INTELSAT management does not have the authority or discretion to make many of the decisions normally delegated to management in a commercial enterprise. The scope of authority presently exercised by the INTELSAT Board of Governors is broader and more preemptive of management's role than that found, for example, in a corporation.

While INTELSAT recognizes market trends and is aware of new growth markets, its current structure limits INTELSAT's ability to optimize business opportunities. First, the intergovernmental membership often distances INTELSAT from the end user, which limits INTELSAT's market knowledge and its flexibility in meeting customer requirements, while creating pricing inefficiencies. A cooperative organization such as INTELSAT is highly risk averse and, therefore, hesitant to seize business opportunities that a corporation might be quick to explore. Because INTELSAT is a cooperative originally formed for rather limited purposes, it also resists vertical or horizontal expansion into nontraditional businesses.

A new decision-making structure must be adopted which allows decisions to be based principally on a commercial basis, not on difficult to achieve compromises aimed at accommodating the conflicting interests of individual members.

Recent actions by INTELSAT's Board of Governors have alleviated some of the foregoing system constraints, but have not totally resolved them. INTELSAT now accommodates new regulatory schemes which allow end users, authorized by an INTELSAT member, to directly access the INTELSAT network. The authorizing member, however, retains the flexibility to shape the extent of direct access by an authorized customer. For instance, the United Kingdom has taken a leading role, along with some South American countries, in allowing direct access to INTELSAT by end users. The U.K. has completely opened the British telecommunications market by granting a blanket authorization for any U.K. telecommunications entity to directly access the INTELSAT system. The authorization, however, is only applicable provided the end user agrees to invest in INTELSAT in accordance with its utilization share. Nonetheless, this development will significantly expand INTELSAT's current base of customers in the U.K.

Limitations inherent in the present INTELSAT decision-making process and policies may only be diminished by a structural change to a truly commercial business entity, a corporate INTELSAT. Changing INTELSAT's structure, and the long-term future of the organization, have been the ongoing focus of the INTELSAT Assembly of Parties, which has convened a Working Party to examine these issues. The Working Party is studying a number of options for long-term organizational change aimed at enhancing INTELSAT's competitiveness. One of the structural options considered by the Working Party invokes the transformation of INTELSAT into an international corporation, amending the current agreements to accommodate greater direct access and greater flexibility in investment.

The Working Party also is considering a broad range of issues inherent in any structural change. These issues include matters of governance, regulatory policies, and financial and personnel concerns. The Working Party also is considering options which may be implemented in the short- to medium-term to enhance INTELSAT's ability to discharge its overriding mandate. This mandate, universal service and nondiscriminatory charging, remains inviolate in any discussions of INTELSAT's future structure.

In addition to efforts on the organizational level, INTELSAT is devoting more resources to customer development and service initiatives. INTELSAT is engaging in aggressive marketing efforts, including a global advertising initiative to showcase its growing capabilities to an emerging group of new communications customers and to maximize its presence in markets around the world. The goal of this effort is to focus on new growth markets to offset the continuing decline in growth of PSN traffic. INTELSAT's operating revenue, which does not take account of members' revenues, is projected to grow by 60 percent, from \$658 million in 1993 to about \$1 billion by 1998. However, while the worldwide demand for telephony services is growing, revenues generated from this service sector are anticipated to decline as a percentage of INTELSAT's total business, from 60 percent to 40 percent during this period. This decline is a direct result of the influx of new telecommunications service providers and greater reliance upon fiber-optic cables for high-density telephony routes, both of which will only allow INTELSAT to capture a smaller percentage of growth in telephony traffic demand than in previous years.

Future INTELSAT revenue growth will be derived mainly from highly competitive services, including broadcast, private business, and regional/domestic services. These services also are being targeted by the alternative satellite systems. Broadcast continues to be a major growth market with annual industry growth of about 20 percent. INTELSAT is

currently a leader in this market. This growth has resulted from increasing worldwide demand for television programming, increased number of direct-to-home video services, and reductions in sizes and costs of antennas. In addition, cable operators and broadcasters are expanding local and regional video networks. Satellites are more suitable than fiber for point-to-multipoint broadcasting, distribution to remote areas, and short-term coverage requiring transportable antennas. INTELSAT and competing satellite carriers are aggressively pursuing growth in the broadcast market, which will be a major marketing battleground in the years ahead.

The competitive challenges INTELSAT faces are real and present now. Continued robust growth of the telecommunications market is expected in the coming years, and INTELSAT will remain dedicated to securing its share of that market. INTELSAT's key competitive advantage is its extensive global connectivity, i.e., access to virtually every country through earth stations already directed at INTELSAT satellites. INTELSAT remains the only truly global communications network. The size of the INTELSAT system, which permits economies of scale and scope, and its long history of quality, security, and reliability are additional competitive strengths. INTELSAT's acquisition of adequate and market-responsive satellite capacity, increasing use of advanced digital techniques, and improved service flexibility are key indicators of INTELSAT's intention to compete and to compete vigorously. Overall demand for INTELSAT services will result in the organization becoming a \$1 billion service provider by 1998.

We realize that the present structure of INTELSAT must be changed if we are to compete effectively. The governance structure must be made more efficient and responsive to marketplace demands. The business strategies of the organization must allow for greater access to the financial markets. INTELSAT must also be free to pursue business opportunities and growth markets without the constraints of artificial structural limitations. These fundamental changes are necessary for INTELSAT to remain the leader in global telecommunications.

Drive Smoothly to Get on the Information Superhighway

Albert H. Halprin*

Though it may seem an odd assertion, telecommunications regulators can learn a lot from the game of golf. To succeed, golfers and policy-makers alike must learn to distinguish between what they know and what they believe. The first lesson in golf is that the ball will travel farther and stay straighter if the golfer's swing is easy and unforced. Every golfer knows this, yet one's natural instinct when teeing off is to swing as hard as possible, in the belief that this will make the ball go as far as possible. When golfers act on what they believe, rather than what they know, their shots wind up off-course.

The same knowledge/beliefs dichotomy exists in the realm of telecommunications regulation. We know that regulation is intended as a substitute for competition and is imposed in the absence of competition. Where genuine competition exists, there is no need for regulation beyond the general strictures of the antitrust laws. Yet, the belief underlying most deregulation initiatives in the telecommunications field is that new and complex regulations are needed to smooth the transition and preserve competition in a newly opened market.

The danger is that the complex web of new regulations, however well intended, will become a barrier to achieving the underlying goal of deregulation—the substitution of competition for regulation. The thicket of “transitional” regulations can become so dense that it makes the goal of a competition-driven market impossible to achieve. Indeed, the knowledge/beliefs dichotomy helps to explain why, twenty-five years into the process of introducing competition into the United States telecommunications market, the industry, in many respects, is more pervasively regulated than ever before.

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A more sweeping example of the knowledge/beliefs dichotomy and its consequences can be seen in the worldwide collapse of Communism. Marxist-Leninist theory foresees a process of societal transformation culminating in the “withering” and eventual dissolution of the state. The first, necessary step in launching this process is the creation of a “dictatorship of the proletariat.” But the Communist dictatorships established in the twentieth century never withered. In the name of creating the necessary preconditions, the state expanded its authority relentlessly, assuming ubiquitous and permanent control over all aspects of society. The Communist state ultimately became an institutional barrier to the very transformation it was conceived to initiate. Eventually, it collapsed under its own weight.

The same phenomenon could occur in the telecommunications field, albeit on a far less apocalyptic scale. The sixtieth anniversary of the Communications Act is a particularly appropriate context in which to focus on the risk that the benefits of open, competitive markets could be choked off by regulatory complexity imposed in order to manage the transition to competition. We are at a turning point. A new and very strong consensus appears to have emerged in the 1990s in favor of removing all remaining regulatory barriers to entry into telecommunications service markets. There is unusually broad agreement that competition should be allowed and facilitated in the market segments that continue to be served by a monopoly provider, including the local exchange. Debate today is not over whether certain telecommunications markets are natural monopolies but rather the terms and conditions of competition.

Reflecting this consensus, several bills debated in the 103d Congress would have preempted remaining state barriers to competitive entry into the local exchange services market, except in specifically defined rural areas. The bills also would have led to the removal of line-of-business restrictions that prevent the Bell companies from providing interLATA services and manufacturing telecommunications equipment. The restriction that bars telephone companies from providing video programming to their subscribers, in competition with cable TV operators, also would have been lifted.

Congress failed to enact these sweeping telecommunications measures, but the momentum behind the bills' main provisions has not abated. On their own initiative, numerous states have begun to open the local exchange to competition. The leaders in this movement have included New York, Maryland, Michigan, Illinois, Connecticut, Washington, and Wisconsin. At the federal level, the Federal Communications Commission (FCC or Commission) continues, despite court setbacks, to foster “expanded interconnection,” the purpose of which is to enable competition in the

interstate access services market.¹ To the extent permitted under its existing statutory authority, the FCC also has sought to enable competition in the video programming distribution market through its video dialtone proceeding.²

Moreover, shortly after the telecommunications bills died in Congress, Vice President Al Gore and FCC Chairman Reed E. Hundt recommitted the federal government to the principle of across-the-board competition in telecommunications. Both have cast future telecommunications policy-making as a stark choice between perpetuating monopolies and replacing them with competition.³

Thus, the United States appears to be on the verge of eliminating the last vestiges of monopoly and throwing its entire telecommunications market open to competition. In principle, this is a good thing. Markets that are not natural monopolies should not be kept closed by regulatory fiat. There is a widespread consensus in the United States that competition in service markets spurs technological development and deployment. In general, what is happening is that public policy is catching up to the market. Regulatory lag has always been a substantial problem in the telecommunications field. For example, private line services and switched services continued to be subject to separate regulatory regimes long after the market had eroded any artificial distinctions between the two types of offerings.

But deciding to open all markets to competition is not without risk. The danger is that the goal of deregulating everything will fall victim to regulatory complexity. Specifically, the risk is that as we move to open all markets, we will follow the established pattern of imposing additional layers of “transitional” regulations—resulting in a regulatory framework so complex that the goal of open competition is never achieved.

This risk is particularly grave in the local exchange services market, which is by far the largest segment of the United States telecommunications

1. *In re Expanded Interconnection with Local Tel. Co. Facilities, Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd. 7369 (1992), *reconsidered by Memorandum Opinion and Order*, 8 FCC Rcd. 127, *reconsidered by* 8 FCC Rcd. 7341 (1993), *vacated in part and remanded sub nom. Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir.), *modified by Memorandum Opinion and Order*, 9 FCC Rcd. 5154 (1994).

2. *In re Telephone Co.-Cable TV Cross-Ownership Rules*, §§ 63.54-63.58, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 5781 (1992), *aff'd*, *National Cable TV Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

3. See Thomas Walsh, *Gore Pledges Infopike Fight*, DAILY VARIETY, Oct. 18, 1994, at 2; Reed E. Hundt, Keynote Address at the Interface VIII Conference (Oct. 4, 1994) (copy on file with Author).

services market, accounting for almost two thirds of the industry's \$169 billion in revenues in 1993.⁴ Moreover, until recently, local exchange services were operated on a pure monopoly basis in most U.S. jurisdictions. Opening this market to competition will be an inherently complex process, requiring solutions to thorny problems including: universal service and carrier-of-last-resort obligations, interconnection of competing local networks, mutual compensation for terminating calls from competing networks, and telephone number assignment and portability. If, in addition to resolving these essential questions, regulators add further rules intended to ensure a competitive local exchange, the regulatory framework could reach such a level of complexity that the market will never emerge from regulation.

THE ORIGINS OF REGULATORY COMPLEXITY

A market characterized by a single company operating as a monopoly is easier to "regulate" than are numerous companies operating in multiple market segments characterized by varying degrees of competitiveness. Before the monolithic Bell System began to face competition, continuing surveillance was sufficient to regulate its operations. There was no need to scrutinize the minutiae of its activities, since there were no competitors to protect from access discrimination, cross-subsidy, or other anticompetitive behavior. But the fragmentation of the Bell System and the gradual introduction of competition in certain market segments have resulted in a steady increase in the number of "borders" regulators must patrol.

A clear and consistent pattern has emerged as previously monopolistic markets have been opened to competition. Each step in the process has coincided with the adoption of new rules and new regulatory mechanisms that result in more, not less, detailed oversight of certain carriers' activities. Private line services were the first market segment opened to competition by the FCC. Before doing so, the Commission undertook the exhaustive "seven-way cost study" to determine the "costs" and "profitability" of different Bell services.

This inaugurated an era of attempts by the FCC to determine the "cost" of providing not just services but individual rate elements and sub-elements, culminating in FCC docket 18,128—one of the most complex and least productive regulatory proceedings in history.⁵ Of course, both the

4. U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 29-1 to 29-7 (1994).

5. *In re AT&T, Long Lines Dep't, Memorandum Opinion and Order*, 61 F.C.C.2d 587 (1976), *reconsidered* by 64 F.C.C.2d 971 (1977), *further reconsidered* by *Second Order on Reconsideration*, 67 F.C.C.2d 1441 (1978), *aff'd in part sub nom. Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

integrated nature of the network and the distortive impact of regulation make it impossible to identify the "true" cost of individual services, assuming for the sake of argument that such a concept is meaningful.

Regulatory complexity also has been a problem in the area of enhanced and information services, despite the FCC's stated objective since the 1970s of fostering development of a competitive market. The first regulatory regime it established, in the *Computer I* proceeding,⁶ to further this goal became rapidly obsolete. It was followed by the *Computer II* regime, which created a distinction between "basic" services provided by network operators under traditional common carrier regulation and "enhanced" services. Moreover, AT&T (and later the divested Bell companies) were required to offer enhanced services via a separate subsidiary.⁷ The stated purpose of this rigid structural separation requirement was to ensure equal treatment of all enhanced service providers, whether affiliated with a Bell company or not. But the practical result of this requirement, coupled with the information services restriction imposed on the Bell companies under the AT&T antitrust consent decree, was that the U.S. information services market grew slowly and developed inefficiently. In the mid-1980s, the FCC sought to remedy this situation through its *Computer III* proceeding which, among other measures, replaced the structural separation requirement by accounting safeguards, including the joint cost rules, cost allocation manuals, annual independent audits, and uniform reporting requirements.⁸ Yet, this effort to remove regulatory impediments to the efficient operation of a competitive enhanced services market remains in doubt to this day, due to successful court challenges of aspects of the *Computer III* regime. Also, the decree's information services

6. *In re* Reg. and Policy Problems Presented by the Interdependence of Computer and Comm. Servs. and Facils., *Tentative Decision*, 28 F.C.C.2d 291, paras. 34-38 (1970), *Final Decision and Order*, 28 F.C.C.2d 267 (1971), *aff'd sub nom.* GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir.), *aff'd by Order*, 40 F.C.C.2d 293 (1973).

7. *In re* Amendment of § 64.702 of the Commission's Rules and Regs. (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384, *modified by Memorandum Opinion and Order*, 84 F.C.C.2d 50 (1980), *aff'd and clarified by Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer & Comm. Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration, Memorandum Opinion and Order*, 56 Rad. Reg. 2d (P & F) 301 (1984).

8. *In re* Amendment of § 64.702 of the Commission's Rules and Regs. (Third Computer Inquiry), *Report and Order*, 104 F.C.C.2d 958 (1986), *reconsidered by 2 FCC Rcd.* 3072 (1987), *further reconsidered by 3 FCC Rcd.* 1150 (1988), *vacated and remanded sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); *In re* Computer III Remand Proceedings: Bell Operating Co. Safeguards and Tier 1 Local Exch. Co. Safeguards, *Report and Order*, 6 FCC Rcd. 7571 (1991), *vacated in part and remanded sub nom.* California v. FCC, No. 92-70083 and No. 92-70186 (9th Cir. Oct. 19, 1994).

restriction was not lifted until 1992. A key lesson of this experience is that transitional regulations, once imposed, are difficult to remove, even if they prove unnecessary or a hindrance to the goal of a fully deregulated market.

THE NEED FOR A NEW APPROACH

The drawbacks of regulatory complexity must be recognized, and a new approach must be developed to address the same concerns in a manner that does not threaten to cancel out the potential benefits of deregulation and competition. Many of the concerns that have prompted regulators to impose new restrictions and border patrols when opening a market are legitimate, including the need to prevent cross-subsidy, ensure access, and ensure the interconnection of networks. The key is to find ways to achieve these objectives without resorting to regulatory complexity.

In particular, regulations adopted to smooth the transition to a competitive market should, by definition, be of limited duration. Their expiry should be triggered automatically by changes in the affected market. Many of the regulations the FCC has imposed in opening markets to competition nominally have been temporary. Frequently, however, a formal FCC proceeding is required before these restrictions can be eased or removed. The delays inherent in such a cumbersome process mean that regulation continues to bog down the market.

For example, when the FCC implemented price cap regulation of AT&T's interstate services, the FCC contemplated the removal of the price caps for particular classes of services upon a finding that AT&T no longer exercised market power in those services. But no self-effectuating trigger for easing the regulations was included in the price cap rules. Thus, the FCC undertook a comprehensive review of the state of competition in the interexchange services market before deciding in 1991 to remove price cap regulation of AT&T's large business services.⁹ Only a year later, the Commission launched another comprehensive review of the AT&T price cap regime, resulting in proposed revisions to the rules that were still pending in late 1994.

A formal FCC proceeding should not be required for every step in the process of deregulating a market. The regulatory structure should include its own form of entropy. To prevent a constant escalation of regulatory complexity, particularly as the local exchange is opened to competition, a

9. *In re Competition in the Interstate Interexchange Marketplace, Report and Order*, 6 FCC Rcd. 5880, paras. 72, 74, *modified on reconsideration by Memorandum Opinion and Order*, 6 FCC Rcd. 7569, para. 7 (1991), *modified on further reconsideration by Memorandum Opinion and Order*, 7 FCC Rcd. 2677, para. 32 (1992).

new approach is required. Transitional regulations should expire automatically, either at a certain date established when they are adopted, or when certain empirically measurable conditions have been met in the affected market.

THE ROLE OF REGULATION IN COMPETITIVE MARKETS

There nonetheless is a clear need for at least some forms of regulation, even in a world without market barriers. The border patrol function of regulators will continue as multiple new competitors enter the market. Regulation will continue to be essential, for instance, in ensuring unfettered access to and use of carriers' facilities because of the possible existence of externalities.

Meeting the objective of preventing the abuse of consumers who are still served on a monopoly basis does not require the imposition of regulatory complexity through burdensome cost allocation schemes and reporting requirements. The best solution is to impose price regulation on carriers' regulated service offerings. By divorcing the rate a carrier can charge for a service from the cost of providing the service, price caps remove any incentive for cross-subsidy. Where possible, market-based solutions should be used to address ongoing problems that arise in a market opened to competition.

Second, regulations will be needed to ensure access to certain carriers' network facilities. In a sense, the telecommunications industry is moving "back to the future"—back to the existence of "full-service carriers" that provide bundled local, long-distance, and ancillary services. The effect of lifting all remaining barriers to entry likely will be the emergence of multiple full-service network operators and resellers.

Different segments of the telecommunications services market will, for an indefinite period, experience differing degrees of competition. For example, while several competing interexchange carriers currently offer ubiquitous network coverage, competitive local loop providers may not achieve comparable coverage in the near future. As interexchange carriers and local exchange carriers enter one another's markets or, conceivably, merge their operations, access rules will be needed to ensure that these carriers do not use their "bottleneck" local transport facilities to block other carriers from accessing their customers. Otherwise, conditions in the less competitive market—local loop provision—will determine how competitive the other market segments will be.

Third, regulation must continue to serve its essential role in addressing externalities and ensuring that "public goods" are not lost in competitive telecommunications service markets. For example, rules will be needed to

ensure that the multiple networks that will emerge in a market without entry barriers interconnect with each other. In some circumstances, a network operator's private, profit-maximizing interest may lie in refusing to interconnect to other networks, but this may be inconsistent with the general welfare. Interconnection of networks is a public good, arising from the critical role of the communications infrastructure as the central nervous system of the national economy and society. These networks serve vital social, cultural, political, and economic functions that extend far beyond the private interest of their shareholders.

CONCLUSION

There is little doubt that the view that the full benefits of competition can be secured merely by the immediate and total removal of regulations (including entry limits) is both overly simplistic and wrong. Such an approach is not, however, considered to be a viable option within the realm of public policy debate. At the same time, it is equally simplistic for policymakers to believe that a pervasive and perpetual layer of "playing field leveling" regulations is needed to ensure competitive markets.

This deeply held (but infrequently voiced) assumption regarding the role of regulation in competitive markets poses the most serious challenge to the achievement of the true market-oriented competitive environment—which is a necessary, if not sufficient, precondition for the development of the information society. Developing a deregulatory mechanism which avoids the pitfalls of this approach is the most important task facing our regulators today.

Reflections on the Sixtieth Anniversary of the Communications Act of 1934

Stanley S. Hubbard*

Television first came to the public's attention in the United States in 1938, after RCA demonstrated television at the Chicago World's Fair. Mr. S.E. Hubbard, my dear dad, who was a great broadcast pioneer, having built his first radio station in 1923,¹ was very taken by the concept of television, and he prevailed upon his friend, David Sarnoff, to sell to KSTP—our radio station in St. Paul, Minnesota—a television camera, which we believe was the first such commercial sale, at least to a non-RCA owned station. In the summer of 1938, KSTP arranged a live downtown demonstration of television in downtown Minneapolis. Six mirror reflector television sets were installed at the Radisson Hotel and an American Legion parade could be viewed by interested persons on television monitors located inside the hotel.

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1. We believe that S.E. Hubbard's first radio station, WAMD in Minneapolis, Minnesota, was the first successful radio station built and operated to rely solely on the sale of advertising. Mr. S.E. Hubbard's thought was, in his own words, "If you put something on the radio other than a fat lady singing opera to the accompaniment of a piano, then perhaps you could get enough people to listen so you could sell advertising." At that time, radio stations were owned by companies such as Westinghouse Electric, some newspapers, and in one instance, a grain company General Mills, which was known as the Washburn Crosby Company (WCCO). There was not much thought about popular programming, and it was very common to have portly ladies, such as opera performers, sing to the accompaniment of the piano—obviously not a very popular program option for the great majority of people. (I am *sure* that today my dear dad would not have talked about the "fat lady.") Further, in 1923, it was not technologically possible to pick up recorded music from a stylus, transmit it directly to a transmitter, and then directly over the air. The only music available for radio broadcast was live music. In those days, all sizeable cities had ballrooms. Popular dance bands would travel the country and play at the ballrooms. My dad made an agreement with the Marigold Ballroom in Minneapolis whereby, if they would give him studio space, he would broadcast their bands live every night. Thus, he called the station WAMD—Where All Minneapolis Dances.

In 1941, the United States entered World War II and the further development of television was postponed. After the war, as soon as the Federal Communications Commission (FCC or Commission) commenced receiving applications, my dad filed for a construction permit to build a television station on Channel 5 in St. Paul, Minnesota. To put my dad's bold action in filing the application in perspective, the attitude towards television and the economics thereof in 1947-49 should be considered. In 1947-48, very few people had any interest in investing in television. Television was considered by those in the "know" to be nothing more than a foolhardy attempt to compete with movie theaters. I can remember going to school and being told by schoolmates whose fathers were bankers, or otherwise prominent in business, that my dad was "crazy and foolish," and he was certain to lose any money he put into television. An example very close to home, which has been related to me by my dear wife Karen, was that her father, who was an M.D., refused for many years to buy a television set because, in his words, "Television was going to be nothing more than a fad."

My dad's first big problem with starting a television station was twofold: to obtain the money necessary to build the station and to receive a construction permit from the FCC. Getting the financing was difficult because the radio station with its comparatively limited revenues was our sole means of livelihood and provided insufficient income for the construction of a television station. Also, we did not have access to the \$1 million which was required to finance the proposed television operation. For many years, my dad had transacted business with the First National Bank in St. Paul, and when he asked the bank to assist him with the money required to build the only television station allocated to St. Paul, Minnesota, the bank refused. Moreover, I well remember now disappointed my dear dad was when a group of officers of the First National Bank² "filed on top" of his application and sought the construction permit for Channel 5 themselves. This occurrence made the funding appear to be impossible because, if your hometown bank will not help you, and if indeed such "movers and shakers" of the city's largest bank were going to compete with you for the construction permit, you obviously had a monumental problem. Thus, an atmosphere was created which further discouraged people from investing in a business which was generally considered to be gimmicky and a fad. What to do? My dad, who did not himself have the money and who

2. The First National Bank of St. Paul has changed owners more than once since that time, and today we enjoy very good relations with the ethical and fine First National Bank Corporation, headquartered in Minneapolis.

could not borrow from the local major bank—using the radio station as collateral—was truly in a bind. But being extremely honest, smart, tough, and creative, my dad developed a course of action.

He decided to go to Washington to talk to anyone who could be helpful to him. Also, he was tipped off by a friend that the Mellon Bank of Pittsburgh was a forward-looking bank that might be willing to listen to his proposal. Being a radio pioneer, my dad was not unfamiliar with Washington as there had been many long train trips to Washington in connection with the building of KSTP radio. So off my dad went to his favorite hotel, the Mayflower. In Washington, he became totally frustrated because, other than his Minnesota Senators, he could not find anyone willing to help him. While sitting in his room at the Mayflower Hotel late one afternoon, he recalled when then Vice President Harry S. Truman came to St. Paul. Some of us remember the War Bond Drives, and my dad led a War Bond Drive in St. Paul. A park in downtown St. Paul was renamed “Victory Park” and a pole, much like ones currently in used in the United Way drives, was erected. As people purchased bonds, the red line on the pole climbed towards the goal. At that time, Vice President Truman had come to St. Paul to speak at a breakfast arranged by my dad and other civic leaders on behalf of the Bond Drive, and Mr. S.E. Hubbard met the then Vice President. When my dad recalled this meeting, on the spur of the moment, he picked up the phone and called the White House and asked to speak to the President. The President’s secretary answered and said, “Just a moment.” President Truman came on the line, and said, “I remeber you, Stan. We had breakfast at the St. Paul Athletic Club when I was there for the Bond Drive. What can I do for you?” My dad began to relay his problem to the President, and the President said, “Stan, what are you doing right now?” My dad said, “Nothing,” and the President said, “Can you come over to The White House?” My dad said, “I sure can,” and immediately went!

Anyone who knew President Truman or who has studied him knows that he did not look kindly upon wealthy entrenched interests picking on a little guy. After listening to my dad, the President picked up the phone and called the Chairman of the FCC and said, “I am here with my friend, Stanley Hubbard, and we have to have a hearing so he can get his license issue settled.” The Chairman of the FCC, Lawrence Fly, said to the President, “Mr. President, we can’t schedule a hearing soon because we are backed up for months.” Whereupon the President said, “then have a night hearing.” Of course, while such political intervention with the FCC might not be tolerated today; at that time, the FCC held what I believe was the first and only night hearing in the history of the development of television.

At that hearing, my dear dad espoused his beliefs—a belief in the importance of public service, which he also passed on to me, my sister, and brother on an almost daily basis during our growing years and later in my years of business with him. Subsequently, I did the same with my children. My dad summed up his approach to the broadcast business with the following statement: “If you provide public service, then profit will take care of itself.” We received the license and my dad was able to conclude a deal with the Mellon Bank whereby he borrowed \$1 million. My now deceased brother Richard and I went with my dad and mother to Pittsburgh to complete the million dollar deal. I remember how happy and excited my dad was when he came out of the bank with a check for \$1 million. He said that Mr. Ralph Euler, who was the Mellon official in charge of this transaction, said to him, “Stan, we would much rather bet on people than on horses.”

Even though we now had the money to build the station, the business atmosphere and general opinion about the prospects for the success of television remained as earlier. People thought my dad and others like him were “nuts” to try to build a TV station without the resources of a newspaper or a Westinghouse Electric and that it was tantamount to business suicide. I remember as a young man of thirteen, fourteen, and fifteen years old, traveling with my dad to NAB conventions in Chicago, and hearing prominent radio people refer to my dad as a “traitor” to the radio industry because he was going into television. I remember my dad telling these same people, “Get into television. Do it now before it is too late.” And I also remember seeing many of these same people, years later, when they had become disgruntled and bitter old men because they did not get into television. In that connection, I remember going to a meeting in Minneapolis in 1947 or 1948 when my dad hosted a group of western Wisconsin, Minnesota, North Dakota, South Dakota, and Iowa broadcasters at a gathering where the then Chairman of the FCC, Lawrence Fly, made an impassioned plea to those present “to get into television.” My dad and Lawrence Fly told these radio broadcasters of their belief that television was going to be a great thing for the American people and that it would also become a great business. Few heeded the call.

In the early high-risk days when television was young, I always felt that applying for a license was similar to people “staking a claim in the old West.” The spectrum was there, but no one really wanted it. No one knew what to do with it; and without truly courageous people such as my dear dad who risked everything that he and our family had to develop television, there would not be any television. Anyone who was there to see the beginning of television and who might look back will realize that it was

only because of the courageous people that we have our great television service. It is interesting to note that unlike other “natural resources,” broadcasters are not depleting the earth of something precious. We are not reducing the reserves of oil, gas, coal, iron, or gold, or the reserves of any other precious resource. Through their risk taking, broadcasters are creating a valuable resource that otherwise would be nothing but vacant ether.

As the issues of today, such as spectrum fees and the Social Compact, are reexamined, I believe it would be prudent to recall the early history of the development of television, the business risks assumed by those early entrants and the public service they provided that led to making television so successful.

It has been a fun forty-seven years, and I think it should be clear to everyone that television is here to stay.

Toward Regulation That Fosters Competition

Chairman Reed Hundt*

As the Communications Act of 1934 turns sixty, the communications community is in the midst of a number of dramatic changes. Some of the networks comprising the “information highway,” such as the wireless communications network, are developing at a rapid pace. Other communications networks are converging. For example, cable companies may soon offer telephone service and wireline telephone companies may soon offer cable service.

With development and convergence comes the opportunity for competition throughout the communications industry. From my perspective as Chairman of the Federal Communications Commission (FCC or Commission), I consider no goal to be more important than fostering competition within and between the communications networks. Although the Act has served the country well, many of its key provisions date from an era in which there was no competition in the communications industry and no realistic prospect for its introduction.

The organizers of this special issue have asked us to address how the law should be changed to respond to the challenges facing the communications industry. I favor the enactment of a statutory provision granting the Commission broad authority to waive or adapt the other provisions of the Act in order to promote competition. Analysis of the issues raised by four recent cases shows the need for such a provision.

In *Bell Atlantic Telephone Companies v. FCC*, the U.S. Court of Appeals for the D.C. Circuit struck down the Commission’s “physical collocation” rule, which required the local exchange companies (LECs) to set aside part of their central offices for use by competitive access providers (CAPs).¹ The purpose of the rule was to promote competition in a portion

* Chairman, Federal Communications Commission.

1. *Bell Atlantic Tel.*, 24 F.3d 1441 (D.C. Cir. 1994).

of the local telecommunications market, which—unlike the long-distance market—remains largely uncompetitive.

The CAPs offer a service that allows businesses to bypass part of the local exchange system when making long-distance calls. In order to allow the CAPs to connect their transmission facilities to their customers' lines most efficiently, the Commission determined that it was necessary to allow the CAPs to install equipment in the LECs' offices and to string their cables into those offices.²

The Commission found the authority to order physical collocation in Section 201(a) of the Act,³ which provides that the Commission may order telephone companies "to establish physical connections with other carriers."⁴ The D.C. Circuit Court of Appeals disagreed. In its view, "[t]he Commission's power to order 'physical connections,' undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices."⁵

It is not my purpose here to quarrel with the court's construction of Section 201(a), although I believe the court of appeals should have deferred to the Commission's interpretation of the statute. The point I want to make is that no one contended that the FCC's policy was not procompetitive or that it was not desirable to introduce a measure of competition into this part of the telecommunications field. What the court of appeals held was that the relevant provision of the Act did not authorize the Commission to introduce competition into that part of the market in the most efficient manner possible.

The Commission is committed to introducing competition into the local exchange market and announced the adoption of a "virtual collocation" policy forty-five days after the D.C. Circuit handed down its decision.⁶ However, it should not have been necessary for the Commission to formulate a fall-back position. The Act ought to provide, in terms that no court will dispute, that the Commission has broad authority to take the steps necessary to introduce competition throughout the communications industry in the most effective manner possible.

That lesson may also be drawn from the Supreme Court's recent decision in the "permissive detariffing" case, *MCI Telecommunications*

2. *Id.* at 1444.

3. 47 U.S.C. § 201(a) (1988).

4. *Bell Atlantic Tel.*, 24 F.3d at 1444-45.

5. *Id.* at 1446.

6. Expanded Interconnection with Local Tel. Co. Facilities, *Memorandum Opinion and Order*, in CC Dkt. No. 91-141, FCC 94-190 (July 14, 1994).

*Corp. v. AT&T.*⁷ The provision of the Act requiring telephone companies to file tariffs listing their rates⁸ remains on the statute books unchanged despite the introduction of competition into the long-distance market in the 1970s. The tariff requirement was enacted to help the Commission police AT&T's predecessor, the Bell System, which had a monopoly in 1934, by providing evidence showing whether the Bell System was charging unreasonable or unduly discriminatory rates. However, by 1979 the Commission became concerned that the tariffing requirement was having the perverse effect of assisting AT&T in resisting competition. The Commission initiated rulemaking proceedings and subsequently determined that the tariffing requirement induced noncompetitive pricing.

Tariffs had that effect because they made public any discounts that AT&T's new competitors were offering, which allowed AT&T to match those discounts immediately and, in turn, discouraged the new long-distance companies from offering discounts in the first place. In addition, the cumbersome regulatory apparatus implementing the tariffing requirement allowed AT&T to delay price cuts by others and to impose substantial legal costs on competitors attempting to offer discounts.⁹

The Commission responded by providing that long-distance companies lacking market power—i.e., all but AT&T—were not required to file tariffs. The Commission based its decision on a provision of the Act which authorizes the Commission to “modify any requirement” of Section 203 of the Act.¹⁰ Once again, no one argued that this was bad policy. AT&T complained, but only because it also wanted to be relieved from filing tariffs on the ground that the long-distance market was sufficiently competitive that it could no longer discriminate unreasonably. But when the Commission decided that AT&T should not be relieved from the tariff-filing requirement because it still controlled 60 percent of the long-distance market, AT&T sued, contending that the Commission had exceeded its authority. The Supreme Court ultimately agreed with AT&T, holding that the elimination of the tariff-filing requirement “for forty percent of a major sector of the industry is much too extensive to be considered a ‘modification.’”¹¹

7. *MCI Telecomm. Corp.*, 114 S. Ct. 2223 (1994).

8. 47 U.S.C. § 203(a) (Supp. IV 1992).

9. *In re Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facils. Authorizations Therefor, Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, paras. 24-26 (1981).

10. 47 U.S.C. § 203(b)(2) (Supp. IV 1992).

11. *MCI Telecomm. Corp.*, 114 S. Ct. at 2232.

A properly deferential Court would not have reached that result. One commonly used dictionary defines "modify" to mean, among other things, "to make a basic or important change in," which plainly encompasses relieving some telephone companies of the tariff-filing requirement.¹² In addition, all dictionaries define "modify" to mean "change." Thus, the statute is most reasonably interpreted as granting the Commission authority to *change* "any requirement," including the tariff-filing requirement. Again, my purpose here is not to quarrel with the Court's construction, but to acknowledge that the Act did not provide the Commission with authority to take a step that plainly was procompetitive in terms that were sufficiently clear to persuade the judicial branch.

The Act ought to provide explicitly and clearly that the Commission may change any provision of the Act in order to promote competition. There is no good reason to require compliance with provisions, like the tariff-filing requirement, that made sense in another era, but ought to be modified today.

The conclusion that a statute may outlive its useful life also is shown by *Chesapeake and Potomac Telephone Co. v. United States*.¹³ In that case, the district court addressed the constitutionality of 47 U.S.C. § 533(b), which was enacted in 1984 and codified a long-standing Commission rule barring the LECs from providing cable service in areas where they have a monopoly on local telephone service. The Commission's rule dated from a time when cable television service reached only 9 percent of American homes and had been maintained in part out of fear that the LECs would use their telephone revenues to cross-subsidize cable operations and cripple the smaller and newer cable operators.¹⁴

By 1992, however, enormous changes had occurred in both the cable industry and the telecommunications industry. The cable industry had grown considerably, reaching 60 percent of American homes. In addition, in the wake of the 1983 judgment dispersing the Bell System, the LECs were starting to enter lines of business beyond the traditional local telephone business, and their entry into other fields was promoting more vigorous competition in those fields.

More important changes were on the horizon, but were being stifled by Section 533(b). In the "video dialtone" order, the Commission anticipated that telephone companies could offer multi-channel video

12. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1452 (1976)).

13. *Chesapeake and Potomac Tel. Co.*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, No. 93-2340 (4th Cir. Nov. 21, 1994).

14. *Id.* at 912-13.

transmission services.¹⁵ Under the Commission's plan, the programmers using the transmission service would compete with each other and the existing cable monopolist (less than 1 percent of cable operators faced head-to-head competition from another cable operator in 1992) under rules designed to ensure that the LEC offered nondiscriminatory access to programmers.

The Commission's plan plainly was superior to the status quo under which consumers have only one choice. But telephone companies have been reluctant to enter the video dialtone market if they may not provide video programming, and legislation is needed to authorize telephone companies to provide programming service on account of the enactment of Section 533(b), even though both the cable and telephone industries have changed dramatically since 1984. Moreover, a number of courts have concluded that Section 533(b) unconstitutionally restricts telephone companies' free speech rights, even though it may be that Section 533(b) would have passed constitutional muster when it was enacted.¹⁶ A statutory provision giving the Commission broad and explicit authority to waive and adapt any provision of the Act to foster competition would allow the Commission to permit telephone companies to provide video programming, thus advancing consumers' interests and avoiding a difficult constitutional issue.

The "must-carry" rules that were at issue in *Turner Broadcasting System, Inc. v. FCC*,¹⁷ also illustrate the need for flexibility. Those rules were enacted against the background of the pervasive cable monopoly that currently exists and the resulting incentive to cable operators to treat broadcasters unfairly. As the Supreme Court recognized, "[w]hen an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."¹⁸

Because cable operators compete with broadcasters for advertisers and currently view broadcasters as their primary competitors, it is predictable that cable operators with bottleneck control will drop marginal broadcast

15. *In re Telephone Co.-Cable TV Cross-Ownership Rules*, §§ 63.54-63.58, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 5781 (1992), *aff'd*, *National Cable TV Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

16. *Ameritech Corp. v. United States*, No. 93-C-6642, slip. op. at 30 (N.D. Ill. Oct. 27, 1994).

17. *Turner Brdcst.*, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994).

18. *Id.* at 2466.

stations wherever possible. Congress attempted to ensure fair competition between cable operators and broadcasters by enacting the must-carry rules, which require cable operators to devote slightly more than one-third of their channel capacity to broadcast stations.¹⁹

However, the relationship between broadcasters and cable operators will change dramatically if true head-to-head competition between cable operators and telephone companies becomes a reality. If, for example, more than one video programming provider was competing to serve the same household, then it would be difficult for a cable operator to discriminate against broadcasters. In fact, in such an environment video programming providers might bid against each other for the rights to carry network affiliates and other popular broadcasters. Perhaps special rules would be needed to ensure that each video programming provider was able to carry certain broadcast stations, since a video programming provider might not provide realistic competition if it did not carry, for example, programming provided by local network affiliates. At the same time, there would seem to be little need for the must-carry rules.

The sort of statutory provision that I envision would grant the Commission authority to ensure that the competition between the cable operators was conducted fairly. For example, if such a step were warranted to promote competition, the Commission might prohibit exclusive agreements locking popular broadcasters into only one of the competing video programming providers. At the same time, the statutory provision I envision would allow the Commission to retire the must-carry rules when they no longer serve the purpose for which they were enacted.

CONCLUSION

The principles underlying my proposal provide a useful framework, I believe, for judging the other proposals advanced in this special issue of the *Federal Communications Law Journal*. Does the proposal foster competition? Does it recognize that change is proceeding at such a rapid pace that the basis for the proposal may change before the proposal is implemented? In my view, proposals for legislative change must meet those two tests in order to respond adequately to the challenges facing the communications community on the sixtieth anniversary of the enactment of the Communications Act of 1934.

19. See 47 U.S.C. §§ 534-35 (Supp. IV 1992).

Steps Toward a Global Information Infrastructure

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I. INTRODUCTION

Many of the technologies that either exist or are being developed today—computers, cellular telephones, video telephones, personal communications systems, and fiber-optic cables—were unknown and unanticipated when the Communications Act was enacted. Today, approximately 5 million computer users in the United States have e-mail addresses, and Internet is used worldwide by 15-20 million users.¹ These changes in technology and the marketplace have been spurred by a number of developments. First, the emergence of information as a vital economic resource and the related need to communicate, manage, and use information have encouraged the creation of new products and services.² Second, the

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1. *The Third Age: The Computer Industry*, ECONOMIST, Sept. 17, 1994 (special survey section), at 1, 15.

2. In 1991, U.S. companies for the first time spent more money on computer and communications equipment than on industrial, mining, farming, and manufacturing machinery. Thomas A. Stewart, *The Information Age in Charts*, FORTUNE, Apr. 4, 1994, at

increasingly multinational nature of business operations has created a demand for seamless telecommunications services that traverse national boundaries.³ Finally, liberalized policies governing the provision of international telecommunications services have inspired expansion of these services.⁴

The Clinton administration, recognizing that in an information-driven world access to information and communications technologies is essential to the United States's economic and social development, considers continued telecommunications development to be among this country's highest priorities. Reform of telecommunications laws constitutes a critical step in addressing the technological advances and convergences that are occurring.⁵ Consequently, the administration is pursuing a two-pronged approach to telecommunications reform. On the federal level, we support legislative proposals that remove outdated regulatory structures and promote the development of a National Information Infrastructure. In addition, a number of states are already at the forefront of the movement to advance their information infrastructures and have served as active testbeds for telecommunications reform. The administration is working closely with state officials to develop models for reform that can be implemented at both federal and state levels. It is our belief that initially addressing technological changes through legislative and regulatory reform will facilitate further U.S. development of a National Information Infrastructure and result in greater U.S. participation in the emerging Global Information Infrastructure. At the same time, we also are aware of the need to encourage other countries to recognize the importance of telecommunications and facilitate its development through appropriate policies.

75, 75.

3. Keith Bernard, *New Global Network Arrangements—Regulatory and Trade Considerations*, 18 TELECOMMUNICATIONS POL'Y 378, 378 (1994).

4. *Id.*

5. Despite the revolutionary technological changes occurring in the world of telecommunications, the fundamental laws governing telecommunications in the United States have not been revised in a comprehensive manner since the Communications Act of 1934 was enacted. As is well recognized, over the last 60 years, piecemeal revisions to the Act have been made to accommodate the emergence of new technologies. For example, the Communications Satellite Act of 1962 gave the FCC additional authority to regulate satellite technology. Pub. L. No. 87-624, 76 Stat. 419 (codified as amended in scattered sections of 47 U.S.C. §§ 701-57 (1988 & Supp. IV 1992)). The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C. (1988)), imposed a number of restraints on local government regulation of cable. Finally, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. §§ 521-611 (Supp. IV 1992)), increased consumer protection and competition in the cable television and related markets.

This Essay examines the principles underlying the National and Global Information Infrastructure initiatives and describes how the administration's policies seek to implement these principles, with the goal of ensuring that the domestic networks of individual countries will be easily accessible to the global information highways of the future. In particular, this Essay discusses how the administration is trying to implement these principles on both a national level through its policies regarding modification of the Communications Act, and on a global level through participation in a number of international activities.

II. NECESSARY STEPS FOR CREATION OF A GLOBAL INFORMATION INFRASTRUCTURE

The Clinton administration has articulated five principles for developing our own National Information Infrastructure. These principles are: (1) encouraging private investment; (2) promoting competition; (3) creating a flexible regulatory framework that can keep pace with rapid technological and market changes; (4) providing open access to telecommunications networks for all information providers; and (5) ensuring universal service. As Vice President Gore stated at the First World Telecommunication Development Conference held by the International Telecommunication Union (ITU), these same five principles are equally applicable in the international community and are necessary elements to realizing a Global Information Infrastructure.⁶ As discussed below, the United States and other members of the international community are making specific concerted efforts to promote these principles.

A. *Encouraging Private Investment and Competition*

Taken together, private investment and competition form the foundation for the development of our National Information Infrastructure, as well as the Global Information Infrastructure. The ultimate success of both initiatives depends on the participation of the private sector, which will include the principal investors, builders, operators, and owners of these infrastructures. Increased private sector participation at the national level will spur telecommunications development and enhance competition, thereby making the telecommunications sector more efficient and innovative globally.

6. Vice President Al Gore, Inaugural Speech at the International Telecommunication Union World Telecommunication Development Conference (Mar. 21, 1994) (copy on file with Author).

With the break-up of AT&T in 1984 and the introduction of competition in the U.S. long-distance market, the number of long-distance providers has grown to over 500 and long-distance prices have decreased approximately 60 percent.⁷ The administration expects that certain legislative reform proposals would create similar benefits by encouraging further private investment and promoting competition in the local telephony market. Such proposals include provisions that would remove barriers to entry for new competitors and impose affirmative requirements that effectuate interconnection and interoperability of telecommunications systems. Furthermore, removal of the current restrictions on cable-telco cross-ownership, subject to certain conditions, also would promote competition in multimedia services markets.

Many states have already adopted measures to spur competition. Currently, thirty-two states allow interLATA competition and thirty-four states permit competition within LATAs.⁸ In addition, many states have authorized competitive access providers (CAPs) to provide local services.⁹ The administration is eager to explore the opportunities such testbeds for reform have created and work with the states to ensure that the advantages stemming from such reform can be shared by all.

In the international community, developed and developing countries alike also are recognizing that private investment and competition are crucial to telecommunications development. Over the last decade, more than twelve countries have undergone privatization efforts, and it is anticipated that at least as many will begin similar initiatives during the next five years.¹⁰ These endeavors offer substantial social and economic benefits. In Chile, for example, prior to privatization the number of main telephone lines increased at a rate of 7.5 percent per year; since privatization, the number of main telephone lines has increased at a rate of more than 25 percent per year. The United Kingdom also has indicated that the introduction of competition has increased the number of households using telephone service from 78 percent in 1984 to 90 percent in 1994.¹¹

7. See Letter from Gerald J. Kovach, MCI, to Clarence L. Irving, Jr., NTIA (June 9, 1994) (copy on file with Author).

8. VIVIAN WITKIND DAVIS ET AL., STATUS OF ALTERNATIVE REGULATION IN TELECOMMUNICATIONS 4 (1994).

9. CAPs presently hold state certification to provide some or all local phone services in 46 % of the states. 1994 STATE TELEPHONE REGULATION REPORT 1 (Herb Kirchhoff, ed.).

10. INTERNATIONAL TELECOMMUNICATION UNION, WORLD TELECOMMUNICATIONS DEV. REPORT 71 (1994) [hereinafter ITU].

11. See J.M. Hammond, Submitted Statement for the International Telecommunications Hearings (Aug. 12, 1994) (copy on file with Author).

The administration encourages more commitment to competition and private investment. Internationally, we recognize that as a result of anticompetitive policies and monopolistic regimes, our U.S. companies continue to encounter numerous obstacles that impede access to foreign markets. During the past year, the administration has participated in a number of international activities, including bilateral meetings and international conferences for the purpose of encouraging other countries to adopt procompetitive policies and eliminate the roadblocks to the development of a Global Information Infrastructure.

B. Promoting a Flexible Regulatory Framework

The Clinton administration believes that only a flexible regulatory environment capable of promoting competition, investment, innovation, and consumer interests will—on a technology-neutral basis—encourage private sector investment and optimize open market initiatives. The administration therefore supports amendments to the Communications Act that will ensure that regulation facilitates or supplements, rather than hampers, the workings of the marketplace and as the marketplace evolves, outmoded and unnecessary forms of regulation do not hinder its growth. In addition, the administration supports statutory reform designed to ensure that competing federal and state regulations do not impose conflicting or duplicative regulatory obligations on telecommunications providers.

Many states have already implemented innovative regulatory frameworks in an effort to accommodate the changing marketplace. California, Michigan, Kansas, and others have adopted incentive regulatory plans in an effort to promote the goals of network modernization and economic development. Under these plans, regulated telephone companies agree to upgrade their networks and constrain rate increases to some level below inflation in return for being freed from the profit constraints of traditional rate-of-return regulation.¹² Some states are also eliminating or streamlining regulation of certain services deemed competitive. Currently, commissions in thirty states and the District of Columbia allow local exchange carriers to price certain services to meet competition.¹³ The administration intends to work in concert with state regulators to expand and improve upon flexible regulatory models for implementation at both the federal and state levels.

12. NATIONAL TELECOMMUNICATIONS AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, THE NTIA INFRASTRUCTURE REPORT: TELECOMMUNICATIONS IN THE AGE OF INFORMATION 38 (1991) [hereinafter *INFRASTRUCTURE REPORT*].

13. WITKIND DAVIS ET AL., *supra* note 8, at 3.

We recognize that in the international community, countries are at different stages of telecommunications development and have varying levels of experience with regulatory reforms. Countries currently pursuing national information infrastructure initiatives include the twelve European Union nations, as well as Canada, Australia, Japan, Korea, Malaysia, and the Philippines. Other countries are just beginning to introduce competition and are being confronted with the need to reform their monopoly structures.¹⁴ Although there is no perfect blueprint approach to regulatory reform, it is critical that these countries adopt regulatory structures that can accommodate modifications as well as respond to changes in the marketplace.¹⁵

The administration is committed to participating in international activities through international and regional organizations such as the Organization for Economic Development, Comisión Interamericana de Telecomunicaciones, the International Telecommunication Union, the Asia-Pacific Economic Cooperation, and through bilateral meetings. The administration anticipates using these fora to advance the view that the development of national infrastructure initiatives should be promoted through effective regulations that contain appropriate safeguards to protect competition and provide assurances that new entrants can participate in the marketplace. Likewise, we are eager to share our regulatory experiences with those countries that are beginning to revamp their telecommunications regimes and thus join in the development of the Global Information Infrastructure.

C. *Providing Open Access to Telecommunications Networks*

The administration recognizes that to create truly seamless networks throughout the global community, information providers must be able to obtain access to all networks free of unwarranted barriers. Open access will ensure that both the networks and the information provided over the networks are open and accessible to all—service providers as well as consumers. Potentially, every network user will one day be able to use thousands of different sources of information—from every country and in every language.

Several legislative reform proposals contain provisions to promote open access, including conditions to promote standards for interconnection and interoperability, as well as requirements for nondiscriminatory access

14. Leslie Helm, *Battling for a Piece of the Global Pie*, L.A. TIMES, July 26, 1994, at C2.

15. See Richard D. Stern, *Alternatives for the Future*, in RESTRUCTURING AND MANAGING THE TELECOMMUNICATIONS SECTOR 125 (Björn Wellenius et al. eds., 1989).

to network facilities, services, functions, and information on an unbundled basis.¹⁶ The notion of open access is steadily gaining support around the nation, as evidenced by numerous interconnection initiatives at the state level. For example, in 1989, the New York Public Service Commission ordered New York Telephone to interconnect with competing local exchange carriers (LECs) in New York City.¹⁷ Furthermore, LECs themselves have become more willing to allow interconnection into their local networks. Bell Atlantic in New Jersey, United Telecommunications in Florida, NYNEX in New England, Ameritech in Illinois, and Pacific Telesis in Los Angeles and San Francisco all have allowed interconnection by alternative providers.¹⁸ These steps toward interconnection represent an effort to ensure that our own National Information Infrastructure will do its part to function seamlessly in an interconnected world.

In addition to national efforts, it is equally critical that other countries encourage open access by all information providers and for all consumers on reasonable and nondiscriminatory terms. Today, the international arena is beset with a multiplicity of different technical standards, formats, and requirements that make interconnection and interoperability, and therefore communications, very difficult. One of the administration's goals is to continue our active participation in international standard-setting activities and encourage other countries to ensure that interoperability of networks—among countries, networks, and individual users and information providers—is afforded the highest priority. The United States has played a leadership role in the international standardization process developed through the ITU, the International Electrotechnical Commission, and the International Organization for Standardization. It also has illustrated its commitment to global telecommunications standardization through the establishment of Committee T1, which develops national telecommunications network standards for the United States and drafts and proposes U.S. technical contributions to the ITU.¹⁹

D. Ensuring Universal Service

The administration considers it critical that telecommunications not be solely available to the “haves” of the world. Although the definition of

16. See generally S. 1822, 103d Cong., 2d Sess. (1994); H.R. 3626, 103d Cong., 1st Sess. (1993).

17. INFRASTRUCTURE REPORT, *supra* note 12, at 275.

18. *Id.* at 275-76.

19. See Arthur K. Reilly, Statement at Panel One of the International Telecommunications Hearings, Component Technologies of the NII/GII (July 27, 1994) (copy on file with Author).

universal service may vary from country to country, the administration has a vision of universal service for the United States that will make essential services available at affordable prices to persons of all income levels, regardless of geographic location, disability, or other restrictions. To promote a truly Global Information Infrastructure, universal service goals must ensure that the infrastructure and the services it transmits are available to all members of our society.

Currently, Section 1 of the Communications Act, which requires the Federal Communications Commission to regulate interstate and foreign communications "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,"²⁰ has long provided the underpinnings for U.S. universal service policies. Achievement and expansion of universal service should now become a more explicit and more clearly articulated goal of U.S. policy and legislation.

Some states are leading the way toward attaining this goal through creative policymaking within their own boundaries. For example, New York has developed a program that enables low-income households to receive basic service for as little as one dollar per month plus usage charges, with installation charges as low as ten dollars. A proposal to require all providers (including some cable systems) to contribute toward universal service expenses also is being considered in New York.²¹ California has established a fund to provide telecommunications equipment and services for the deaf and others with disabilities. California also requires telephone companies to contribute toward a fund that helps low-income households receive telephone service.²²

In many countries outside the United States, universal service remains an important but difficult goal to attain. At the end of 1992, more than fifty countries across the globe had less than one telephone per 100 people.²³ In addition, approximately fifty million people are on "official" waiting lists for telephone lines.²⁴ For many countries, the concept of universal service is a lofty goal that is virtually unattainable in the near term. We recognize that different countries are at different stages of development and may have more pressing basic needs and priorities.

20. 47 U.S.C. § 151 (1988).

21. NATIONAL REG. RESEARCH INST., UNIVERSAL SERVICE IN THE UNITED STATES: DIMENSIONS OF THE DEBATE 92, 94 (1994).

22. *Id.* at 89-90.

23. ITU, *supra* note 10, at 73.

24. *Id.* at 72.

III. CONCLUSION

As we celebrate the sixtieth anniversary of the Communications Act of 1934, we commend the efforts of all those who have been responsible for a flexible statutory framework that has allowed innovation to flourish in the telecommunications industry. It is now time, however, to reform the Act to eliminate outmoded regulatory distinctions and to add greater regulatory flexibility needed in today's communications marketplace—both domestically and internationally. Legislative and regulatory telecommunications reforms will better position us to effectuate the five principles set forth in our National and Global Information Infrastructure initiatives. Given that the Global Information Infrastructure will best succeed with the cooperation of each country, it is equally important that we advocate these principles internationally through bilateral meetings, regional and international organizations, international conferences, and various other international activities. The administration is fully committed to undertaking both the domestic and international steps necessary to ensure the successful evolution of a network of networks; these steps are critical to achieving worldwide economic, social, and telecommunications development for the betterment of all.

Jefferson on the Internet

Nicholas Johnson*

Were Thomas Jefferson with us today, I am confident we would have “Jefferson on the Internet” in both senses.

Surely someone with his intellectual curiosity and inventive genius—everything from pens to plows—would have owned and used a computer and modem. Jefferson would be “on the Internet,” with pithy comments scattered throughout a number of newsgroups.

But it would also be true in the sense that we would have an essay, if not a full length desktop-published volume, called “Jefferson on the Internet.” In it, this advocate of free libraries, free education, and free speech would expound on the First Amendment requirements for Internet users: free and easy entry of their own information and ideas, along with access to those of others.

Of course, Jefferson is not on the Internet, and I am no longer on the Federal Communications Commission (FCC or Commission). But having spent seven years writing dissenting opinions as an FCC commissioner twenty years ago, the readers of this *Journal* should not be stunned to find me still at it—and still calling on Thomas Jefferson for support.

Communications technology has gone through some revolutionary changes during the intervening years, and the need for “regulation” has sometimes been altered thereby. But the basic themes and values remain, for me, unchanged.¹

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1. Those “themes and values” are, quite simply, the underlying purposes, or consequences of the First Amendment: a robust “marketplace of ideas,” facilitating a

THE ISSUE: FREE SPEECH FOR ALL?

With the page limit on this Essay it is impossible to, as the old college essay exam question put it, “define the universe and give two examples.”

So I will skip the definition, and provide only one example. It is, from my perspective, the single most important telecommunications policy challenge confronting our country: preserving the freedom of speech for *all* our citizens, not just those who have \$200 million or more in spare pocket change to buy their own newspaper, broadcast station, or telephone company.

Let me pose the issue as a two-tiered multiple choice question: “Should telephone companies be (a) encouraged, (b) permitted, or (c) forbidden to either (1) offer conduits for information services owned and provided by others, or (2) offer information and services, which they own, through conduits which they own, in competition with the other suppliers?”

To save the reader the trouble of skipping to something called “Conclusion” (there is none) to find my answer, I will open with the conclusion, and then undertake the task of trying to persuade a skeptical, if not hostile, readership of its correctness.

I am untroubled by the first possibility: that information services over “telephone lines” may cause cable monopolists to cut rates and improve services. I am equally untroubled that cable companies—now providing a service best described as one Dixie cup and a string—are trying to enter what has been traditionally thought of as “the telephone business.” I am untroubled at the prospect of *others* offering a continuously updated, flexibly searchable database combining what we today think of as telephone book “yellow pages” with what are now newspapers’ “classified ads”—notwithstanding its modest adverse economic impact on the newspaper and telephone industries.

But I am very troubled by the second possibility: that telephone companies may soon be permitted to distribute information which they *own* through their own conduits.

“search for truth,” by a citizenry thereby empowered to engage in “self governing,” while encouraged, through opportunities for self-expression, to “self-actualization,” as they, and the more conventional media, provide a “checking value” on government and other large institutions, and a “safety valve” for those who, if denied a forum, might have chosen to express their frustrations through violence. *See, e.g.,* Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-9 (1970).

I think it is fraudulent to argue—as the phone companies have in full page ads—that unless they *own* the information, then our hospitals, schools, and homes will be deprived of access to it. Almost all of the information services they hype not only *can* be offered by others, but *are now* being offered by others such as Mead Data Central, CompuServe, and Dialog, along with the free resources of the global Internet and the thousands of private bulletin board systems.² What concerns me about the common ownership of content and conduit, of course, is the telephone company's natural desire to censor and engage in anticompetitive practices.

THE NATURAL DESIRE TO CENSOR

There is a natural and almost inevitable desire to censor or otherwise use the media to support one's interests. Children are told they should be "seen and not heard." In the workplace, Peter Senge asks, "When was the last time someone was rewarded in your organization for raising difficult questions about the company's current policies . . . ?"³ Governments are not the only powerful institutions that try to serve their own interests through media manipulation and censorship.

My baptism by fire on this issue was ITT's proposed acquisition of ABC back in 1965-66.⁴ Question: "Would ITT ever try to control ABC's coverage of the news to favor ITT's other business interests?" "Oh, no," ITT's executives would testify at hearings, and while testifying, at that very moment, their senior vice president for public relations was calling executives of the Associated Press, the *New York Times*, and the *Washington Post*, trying to change the content of the stories being filed by their reporters *about that hearing!* Efforts to manipulate media to serve one's other institutional interests is the most natural thing in the world.

2. A classroom may not have a phone line. That's a problem. But with a computer, modem, and phone line, every student can have access to the Library of Congress and everything else publicly available to a government official or academic scientist. *See, e.g.,* Edward A. Gargon, *The Media Business*, N.Y. TIMES, Oct. 6, 1994, at D20.

3. PETER SENGE, THE FIFTH DISCIPLINE 25 (1990). Those denied opportunities for speech may find alternative means of expression. As Dr. Martin Luther King once said, "Having been denied access to radio and television we have had to write our most persuasive essays with the blunt pen of marching ranks." Dr. King believed in nonviolent solutions to grievances, but it is amazing how revolution, terrorism, or hostage-taking involves, in large part, a frustration at being silenced.

4. Compared to today's galloping global media mergers, the ABC-ITT merger looks like small potatoes indeed. But it was a big deal at the time. *See In re Applications by ABC, Inc., Memorandum Order and Opinion*, 7 F.C.C.2d 245, 278 (1966) (Johnson, Comm'r, dissenting), *modified by Order on Petition for Reconsideration*, 7 F.C.C.2d 336, 343 (Johnson, Comm'r, concurring), *modified by Opinion and Order of Petition for Reconsideration*, 9 F.C.C.2d 546, 581 (1967) (Johnson, Comm'r, dissenting).

“WHAT ARE YOU GOING TO SAY ON THE PHONE?”

Imagine that we're still back in the days when AT&T owned it all. You walk into the local phone company's office and ask, “Do you have any phones? I'm new in town and I'd like a phone and a line.”

The clerk says, “Well, yeah, we've got some phones.”

“Can I have one?”

You get a quizzical look. “Well, just a minute now,” says the clerk. “Suppose, I mean just suppose, I were to go back there and get you a phone, and get you set up with a line. What kind of things might you be planning to say over the phone?”

We either laugh or cry at that because it is so totally unimaginable. It would have been illegal, contrary to custom and experience. The phone company made lines available to anybody who wanted them.⁵ And you could say anything over the phone you wanted to say. There was absolutely no censorship from the telephone company.⁶

FREEDOM TO SPEAK MEANS FREEDOM TO CENSOR

Readers of this *Journal* are well familiar with the *Tornillo* case.⁷ The Florida legislature had passed a law that said, in effect, that newspapers can attack politicians all they want, but when they do, they have to give the politician attacked an opportunity to respond. The *Miami Herald* attacked candidate Pat Tornillo; he sought to reply under the terms of the act; the paper refused; he took the paper to court; he won; the paper's appeals ultimately brought the case to the Supreme Court.

The Court found the statute unconstitutional, even though the paper enjoyed a dominance, if not near-monopoly, throughout its circulation area, and even though the act imposed virtually no limitation whatsoever on a newspaper owner's right to speak her or his mind.⁸ Not only is a right of reply not constitutionally compelled, according to the Court's interpretation, but a state legislature's provision of such a right is constitutionally forbidden.⁹ First Amendment rights belong only to those who *own* the

5. Unlike the limited number of channels provided by today's cable companies, the phone company was required to build a new switching station whenever it came close to running out of phone lines.

6. Limitations on harassing phone calls, criminal transactions, disclosure of national security secrets, defamation, or obscenity were generally imposed and enforced by others.

7. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

8. Although the act provided for free access to the paper's pages, the Court's opinion does not hold that the result would have been different had the law provided for paid access.

9. *Tornillo*, 418 U.S. at 257-58.

media. *Their* freedom to speak comes complete with a censor's tool kit, which is certified as constitutional by no less an authority than the Supreme Court itself. Needless to say, that interpretation rather effectively excludes all but a relative handful of America's 260 million citizens from *meaningful* participation in a "marketplace of ideas."¹⁰

But this is neither the time nor the place to search for a court to which one could appeal a Supreme Court decision, nor to draft the brief to file once such a forum was found. *Tornillo* is the law. Moreover, it is the law not only for newspapers, but for radio and television stations,¹¹ cable television systems¹²—and even the billing envelopes of public utilities.¹³

FREEDOM'S LAST FRONTIER: FREE SPEECH BY PHONE

Today, the *only* remaining constitutionally protected free speech mass media for ordinary citizens are telephone networks and the postal service. Everything else has been taken from them. And once the phone companies start providing "cable television," or other information services they own, over the conduits they own, it is going to be very difficult to explain why *they* should be denied the very same censorship rights the Supreme Court has given to all other mass media.

Should the continuation of freedom's last frontier be left to the good intentions of phone companies? History suggests that would be dangerously naive.

Even the post office has not been immune from the natural human inclination to abuse the competitive advantages enjoyed by owners of both

10. Of course, it is true that thousands of citizens are heard as guests (or call-in participants) on radio and television programs, and appear in print in newspaper and magazines' "op-ed" and letters columns. As a result, at least some small proportion of the information and ideas from the general public that are supportive of the economic and political interests of media owners and advertisers will receive widespread distribution by the media. The issue is not how much of this diversity, and entry, are permitted as a matter of grace. The issue is what happens to the information and ideas of those whom media owners wish to silence. How much confrontational and controversial diversity can be distributed via the mass media over the objection of the owners as a matter of legal right? With rare exception, the answer is none.

11. *CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973).

12. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *see also Turner Brcdst. Sys., Inc. v. FCC*, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994).

13. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1 (overturning rule requiring a utility to include in the billing envelope a consumer newsletter), *reh'g denied*, 475 U.S. 1133 (1986). Note that, unlike advertising-paid space, which is paid for by the speaker only if used, utility customers pay for the postage and billing envelope sent them by the utility (with its paid-for but unused space and weight) regardless of whether they are granted or denied the opportunity to use it for their own speech.

content and conduit. The early post offices delivered newspapers, and some of the first individuals to become local postmasters were newspaper publishers. Undoubtedly, they assured those concerned about this combination by saying: "Oh, we'll provide carriage to our competitors. Of course, we will." But it turned out they often did so at a higher rate, while delivering their own papers for free.

Next came the telegraph company. When the Associated Press was formed around the middle of the nineteenth century, there was not yet a submerged transatlantic cable. If an American newspaper wanted news from Europe, it would have to get it from Halifax, Canada, where it was obtained from ships' passengers. The New York City newspapers decided to run a telegraph line from Halifax to New York. To do that they had to use the lines of a telegraph company that served the east coast of the United States. Whereupon that telegraph owner developed a sudden desire to get into the newsgathering business himself, and refused to make his facilities available to the Associated Press.¹⁴

This is not a matter of ideology. It's a matter of an anticompetitive, self-serving, profit-maximizing strategy. Early in the twentieth century newspaper publishers became frightened that radio news promised to become a substantial competitor. At that point, the same newspaper owners who complained so loudly when excluded from the telegraph network saw nothing inconsistent in using all the anticompetitive political muscle at their command to keep the radio stations from broadcasting news.¹⁵

When motion picture production houses were permitted to own theater chains in which their own movies were shown, the anticompetitive abuses became so severe that an antitrust action was brought by the United States and sustained by the Supreme Court.¹⁶

Not surprisingly, when there is common ownership of both satellite programming services and the cable systems on which such programming is shown, it turns out that the cable company tends to use the jointly-owned programming and to lock out programming of competitors. In fact, the cable industry is as determined to stop the growth of home satellite

14. See OLIVER GRAMLING, *AP: THE STORY OF NEWS* 20-30 (1940).

15. See, e.g., ERIK BARNOUW, *A TOWER IN BABEL* 278 (1966); SYDNEY W. HEAD & CHRISTOPHER H. STERLING, *BROADCASTING IN AMERICA* 160-61 (4th ed. 1982); CHRISTOPHER H. STERLING & JOHN M. KITROSS, *STAY TUNED: A CONCISE HISTORY OF AMERICAN BROADCASTING* 122-23 (1978). With the upper hand, the newspaper publishers (normally advocates of the First Amendment's guarantees) were able to exact an agreement with the radio networks that exchanged a morsel of news from the papers for the stations' agreement to cease any newsgathering operations whatsoever.

16. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

receiving dishes as the broadcasting industry had earlier been to stop the development of subscription television (STV) and cable.¹⁷

The point is simply that abuses have occurred, are occurring, and will continue to occur when a single firm is permitted to own both the conduit through which information flows and the information itself—in competition with others also using its conduit.

The general proposition is so intuitive, and the evidence so overwhelming, that examples from within the telephone industry itself are not really necessary. Traditionally, the phone company was not in the information business, so precise precedents are hard to come by.¹⁸ Nonetheless, the analogous abuses that have occurred reinforce the point.

Many years ago, AT&T was fighting vigorously to prevent a little microwave company from running a line from St. Louis to Chicago.¹⁹ AT&T felt it owned it all.²⁰ Today that little company goes by the name of MCI.

Neither AT&T nor MCI were then providing information over their networks of the kind at issue. But the analogy was that AT&T was both providing lines to its own individual customers and also providing connections and bulk lines to MCI, which MCI then resold to customers. AT&T was both MCI's conduit and its competitor, and the anticompetitive abuses in which AT&T engaged led to the largest antitrust judgment in history—\$1.8 billion.²¹

It is not enough to say, "Ah, but we will require the conduit provider to make service available to those firms competing with it in the information business." It turns out that there are 10,000 ways to disadvantage one's competitor regardless of what the rules may be.²² The opportunities are

17. HEAD & STERLING, *supra* note 15, at 297-99, 318.

18. But see Judge Harold H. Greene's analysis of the First Amendment and other risks involved in AT&T's potential entry into electronic publishing. *United States v. AT&T*, 552 F. Supp. 131, 180-86 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

19. *Microwave Comm., Inc.*, 18 F.C.C.2d 953, 976 (1969) (concurring opinion).

20. It was this attitude that was made famous by comedian Lily Tomlin's great line: "We don't care. We don't have to. We're the telephone company." AT&T forbade customers to attach equipment to the telephone network if supplied by other firms. *See, e.g., In re Carterphone, Decision*, 13 F.C.C.2d 420, *modified by Memorandum Opinion and Order*, 14 F.C.C.2d 571 (1968). It even went so far as to argue that a plastic protective cover over a phone book was a "foreign attachment" with the potential to harm the quality of network service.

21. *See, e.g., P. L. CANTELON, THE HISTORY OF MCI: THE EARLY YEARS* 304-09 (1993); *\$1.8 Billion AT&T Defeat*, L.A. TIMES, June 14, 1980, at 1.

22. We don't have time or space for the 10,000 examples, but here are some illustrations. The conduit provider has the lines up and operating that serve its customers, but it's going to take another six weeks before lines will be available for the competitor.

limited only by human imagination. We have seen it in the postal service, telegraph, radio and television, cable television, and telephone industries.

And even if the FCC wanted to regulate such abuses—which it doesn't—it wouldn't be able to. It has neither the will nor the resources. And if it had, Congress would quickly tell it to stop. So the *only* way to ensure fair competition and a diverse marketplace of ideas, in my judgment, is to prevent the merger of content and conduit in the first place.²³

Such limitations should not be much of an economic sacrifice. Isn't it enough that telcos can suck money out of both ends of the cable—charging both information providers and recipients? In fact, I believe the case can be made that shareholders will be *better off* if their management is prohibited from combining conduit and content.

“COP KILLER” TELCOS

Sadly, few seem to care about the concerns of public interest advocates and consumers: the fear of price hikes as telcos' monopoly services are drained to subsidize competitive businesses; the frustration over an FCC that can't, or won't, regulate; and the worries over the discouragement of innovation, censorship of content, and conflicts of interest from heavy-handed, anticompetitive telcos.

Once phone companies start exercising their First Amendment rights to speak through their own conduits, there's no reason the Supreme Court won't give them the same right to censor as newspapers and broadcasters. And at that point, the only mass medium left for those 260 million Americans who do not own their own newspaper or broadcast facility will be expensive, and relatively ineffective, direct mail via the postal service.

Given the general lack of interest in the public interest in an age of greed, and the growing gap between rich and poor, perhaps a focus on shareholder interests would be more effective in making my case.

The provider's lines are functioning, but the competitor's lines went down. Everybody's lines are down, but the conduit provider's are back up in 45 minutes and it takes a day for the competitor, "Because we didn't have the parts on hand." Customers can get access to the conduit provider's information in a fraction of a second, but they have to wait 20 seconds to activate the competitor's line. To connect them, the conduit provider necessarily has to be told the name and address of all the competitor's customers. What is the first thing the conduit provider's marketing department wants to do? It wants to call up the competitor's customers and try to get them to sign up, or switch.

23. Such a limitation does not, of course, prevent an individual investor from owning a small amount of stock in two separate businesses, one providing conduits and another providing the content. The limitation only applies to a single business that is engaged in both or that controls subsidiaries so engaged.

Telco managements' interests are both clear and understandable. Adding the information business means a greater span of control and increases in executive pay and perks. It brings the excitement and glamour of socializing in Hollywood to bored, middle-aged executives.

But it turns out that *shareholders* may well have more in common with the creative community and consumers than with management.

Time Warner experienced enormous grief from rapper Ice-T's *Cop Killer* song. There were nationwide boycotts of the company's subsidiaries, bomb and death threats to corporate officers, the likes of Charlton Heston attacking management at shareholders' meetings. There was talk of criminal prosecutions. The creative community and the American Civil Liberties Union were equally outraged at the prospect of "censorship." And this was all from one song, on one CD, by one artist, with one record company, well down on the organization chart of this media conglomerate. A few little lyrics suddenly became a very big deal.²⁴

There are thousands of such land mines lying about out there for a large corporation in the information business. Yet, controversies such as *Cop Killer* will go with the shareholders' territory once telcos provide content as well as conduit. Suddenly telcos will confront threats of defamation suits, copyright controversies, objections to obscenity—or anything thought "controversial"—and charges of censorship.

So long as telcos' shareholders insist that management stick to conduits—cables, fiber, and satellites—management can properly dismiss critics by saying, "We're just a common carrier; take your content concerns to providers, courts or legislatures. We won't oppose you or support you. We will comply with the law." In the process, shareholders will get rich beyond their wildest dreams or avarice.

But devastating and diverting adverse public relations is only the beginning.

(1) Does telco management really have the expertise, and time, to focus on information service businesses? One study reported non-phone operations were losing telcos \$1.7 billion annually not long ago.²⁵ Do shareholders really want more of these losses? How about a return to shareholders on telecommunications—what management *is* supposed to

24. See ICE-T, *Cop Killer*, on BODY COUNT (Rhyme Syndicate Music/Emkneesea Music 1992) ("I got my twelve gauge sawed off/I got my headlights turned off/I'm 'bout to bust some shots off/I'm 'bout to dust some cops off." Chorus: "Cop Killer, it's better you than me/Cop Killer, fuck police brutality!/Cop Killer, I know your family's grievin'/(Fuck 'em!)/Cop Killer, but tonight we get even.").

25. See Steve Sazegari, *The Shape of Competition in the Local Loop*, BUS. COMM. REV., Mar. 1992, at 47.

know? Adding information services makes telco executives' jobs as difficult (and senseless) as assigning one manager responsibility for administering both a virtuoso violinist and a steel mill.

(2) Are shareholders willing to take the financial bath the information businesses may offer? Motion pictures can lose, as well as make, tens of millions of dollars—even for those who know the business. More videotext and interactive businesses have gone under than prospered. Why give shareholders those headaches—and losses?

(3) Getting into the information business only heightens the risk of more antitrust grief. Is this what shareholders are looking for? Is it really worth jeopardizing the solid profits from local, long distance, and cellular data and voice telephone businesses to flirt with the risks in information?

(4) Finally, shareholders' profits are maximized by expanding capacity, and filling it with as many independent information providers as possible. With a skilled sales force, and myopic focus on that goal, profits are virtually unlimited. When telcos also sell information there's an inherent conflict. Will they make more money by selling conduit space to more providers, or by hindering them and selling the telco's own information service? Resolving that confusion only slows response time and invites antitrust suits—while reducing conduit revenues, rates of expansion, and business opportunities.

There is every reason to encourage telco provision of conduits for information providers. Everyone benefits from the competitive marketplace of ideas it creates: providers, customers, and telco shareholders.

There is every reason to oppose telco provision of information services. Everyone loses, especially the shareholders.

If telco shareholders don't want their investment to chill, while being portrayed as a *Cop Killer*, it's time they told management to take a sip of Time Warner's Ice-T.

Yes, however you look at it—from Thomas Jefferson's perspective, or the purposes of the First Amendment, or the needs of 260 million First Amendment-deprived citizens, or the profit opportunities of telco shareholders—separating content and conduit not only makes lots of sense, it can make lots of dollars as well.

The FCC Plus Sixty

Larry King*

I'm a year older than the Federal Communications Commission (FCC or Commission) and will admit right now that I wasn't paying a lot of attention to its creation or its mission in 1934. In fact, my initial view of its work was from a neighbor's living room floor in Brooklyn where we'd gather to watch test patterns on the only television set in town and bet on when a picture would appear. Back then Channel Four was Milton Berle, Channel Five was Jackie Gleason, and there wasn't anything after that. But when there was nothing to begin with, you didn't notice the vacuum.

Today we talk a lot about vacuums. Television is either too dull or too repetitive or too liberal or too violent or filled with too many commercials. It has more than we need in one area and not enough in another. Newton Minow (who can be found elsewhere in this *Journal* and who was, perhaps, the best FCC Chairman to date) warned about the "vast wasteland" on television. Now, with 500-channel cable systems and satellite reception of programs, with all-news and all-sports and all-music and all-shopping, I have no problem saying the wasteland has become even more vast. We have more channels to waste.

The FCC has gone through too many chairmen who have wanted the industry to regulate itself rather than the government regulate it. Their argument has always been that standards can be set and maintained within the marketplace. As a result, the Fairness Doctrine, which was born in 1959, was killed in 1987 by Ronald Reagan. As a result, women managers of television and radio stations are few. As a result, minority ownership, by everyone's standards, is still rare. As a result, promises are made by broadcast outlets on a daily basis and then ignored. As a result, radio stations are identified as "J-26" rather than W-whatever or K-whatever. The inmates are running the asylum.

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Here is an example of what is happening in the business. I own Larry Airlines. But I can't fly my planes to Miami anytime I want at any altitude; even assuming I can find Miami, I just can't land my plane on any runway I want. Somebody has to set the rules or, if that word is too offensive, at least establish some guidelines. And Larry ain't gonna sit down with Moe and Curly, who also own airlines, to talk about what more can be done to benefit the public. More importantly, Larry, Moe, and Curly may be good pilots, but that has nothing to do with having good or healthy ideas.

We learn in Journalism 101 that the airwaves are "owned" by the public. Unlike a newspaper or a cable television system, anything going from a transmitter through the air to our homes carries with it (hopefully) an implied standard set by the public. If it's in the air, we all have a stake in it, even if we don't listen to the radio or watch television. Those who carry the argument that the industry will meet the standard by itself are fooling themselves, and more importantly, they are fooling you. While I've never heard a host or a producer say, "Larry, I'm going out there today to be unfair," that doesn't mean it can't happen. I've got no problem with Senator Hollings trying to pull a Lazarus on the Fairness Doctrine. If we agree fairness is a goal, then we have to agree the industry will be fairer with a doctrine than without.

This becomes critical as talk radio becomes even more popular (don't worry, country music is still by far the most popular format). The public continues to sense a distance from government and, consequently, a disengagement from government attempts to do something right. But because an element of optimism remains, we are attracted by the opportunity to express our displeasure to a host on an open phone line, as well as the chance to tell a government official he or she is an idiot, or ask them a tough question that thus far has been ignored by the media. Ross Perot picked up on this in the 1992 presidential election, chose to bypass the traveling media assigned to his campaign, and instead, talked directly to voters through radio and television interviews. Soon George Bush and Bill Clinton were doing two-hour interviews with phone calls on *Today* and *CBS Morning News*. Don't think for a minute this was a one-shot deal. The 1996 campaign will be fought through interactive television and radio, using town forums connected by satellite. We will be seeing, and hearing, debate on specific issues and referenda in much the same way. We are beginning teledemocracy. Bottom Line: I hope the FCC, rather than the industry, will be involved in seeing that the structure is fair and workable.

While not written in its charter, the driving force of the FCC is to keep tabs on voices that cannot speak but have as much right as anyone else to be heard. The "playing field" has to be level and this is something

you can be certain won't occur if the "marketplace" is running the show. Television and radio stations owe the owners of the airwaves programs that can entertain as well as educate. Moreover, ownership of these broadcast outlets has to be available (read possible) to minorities. I think we can all agree white men don't have a mortal lock on the truth, much less knowing the problems and concerns and the subsequent solutions from the other side of the tracks. Knowledge is power. I rest my case.

Despite the constant attempts to derail, water down, get Washington out of our hair, or otherwise "liquidate," the FCC is still a good idea. When the day comes that the airwaves are taken over by special interests, political forces, wealth, religion, and/or a single way of thinking, then you will find me arguing the other side. I'll have to because there will be no other choice.

Up with the FCC: An Essay of Esteem for the Commission on Its Sixtieth Birthday

Abner J. Mikva*

I would like to have been a fly on the wall in the Capitol Building when the Communications Act of 1934 was passed. Better yet, I would like that 1934 fly's-eye observation to have been a follow-up to a similar observation when the Radio Act of 1927 was passed. I would like to have heard the off-the-record comments made by members of Congress as they tried to diminish the chaos of all those new-fangled radio stations that were cluttering up the airwaves and making it impossible for anyone to be heard. Since Congress was trying to solve a problem that seemed similar to the "natural monopoly" problem of the electric utilities, it seemed natural to charge the newly created Federal Communications Commission (the Federal Radio Commission, as it was known in the 1927 Act) with responsibility for regulating in "the public interest, convenience, or necessity."¹

When I look at how hard the industry rails against many of the current regulatory efforts, it is difficult to believe that in 1927, the industry and its conservative leaders were asking a conservative administration and Congress to adopt the broadest of regulatory standards. Indeed, the Commission, in one of its earliest decisions, said that broadcasting stations were "licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience or necessity means nothing if it does not mean this."² The universal enthusiasm for broad regulation of the broadcast industry had many forces driving it. I am sure that one of the strongest forces was the total disorder that existed prior to the 1927 Act.

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1. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064.

2. *In re* Application of Great Lakes Brdcast. Co., 3 F.R.C. Ann. Rep. 32 (1929), *rev'd in part on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

The new industry was about to choke on the plethora of stations that were jumping onto the airwaves without regard for those already trying to be heard. But another force that drove the broad regulation engine had to be the universal certainty that the opportunity to be heard was very limited. Scarcity of the broadcast spectrum was uppermost in the policymakers' minds. As Justice Frankfurter said in his seminal opinion in *NBC v. United States*, "The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; . . . the radio spectrum simply is not large enough to accommodate everybody."³

The laws of physics have not changed in the sixty or more years since Congress first acted, but the ways in which humans have applied those laws to produce widespread electronic communication are wondrous. I cannot imagine anyone bold enough today to predict an absolute limit on the different ways in which the spectrum can be used to accommodate still more users in still more ways. Television, cable, satellites, cellular, transponders—these are only a few of the new ways that communications are made under the general auspices of the Federal Radio Act of 1927 and the administrative agency that the Act spawned.

Not everyone loves the FCC as much as its congressional sponsors anticipated. Even sixty years ago, not everybody loved the regulators. Congressman Beck of Pennsylvania, a former Solicitor General of the United States, expressed his opposition to the Commission having such broad powers as follows:

[L]et us not extend something that diminishes the prestige of the courts, that robs them of what is a judicial function, and that turns over to a bureau such absolute power over property and property rights, a power exercised too often in the spirit with which the great poet said:

But man, proud man!
Drest in a little brief authority,—
Most ignorant of what he's most assured,
His glassy essence—like an angry ape,
Plays such fantastic tricks before high heaven
As make angels weep.⁴

The Congressional Record of February 10, 1932 shows that Congressman Beck sat down to applause for his poetic opposition.⁵ Congressman Beck would be much in demand today to speak to various parts of the communications industry—assuming he were willing to complain about the

3. *NBC v. United States*, 319 U.S. 190, 213 (1942).

4. 75 CONG. REC. 3680, 3685 (1932); see A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 788 (Max. D. Paglin ed., 1989).

5. 75 CONG. REC. 3680, 3685 (1932).

unnecessary regulation of those who invited him and about the need for continued regulation of those who competed with his inviters. Most of the fights on the Hill today deal with internecine strife between those who benefit from regulation and those who want to loosen the strings. The “must-carry” controversy, which pits the small cable operators against the broadcast networks (and many of the large cable operators), is a case in point. The cable opponents see no reason why they should be required to carry the local and network television stations, usually without charge, when there are all sorts of other money-making opportunities available. The television broadcasters think that the “must-carry” regulations are completely in the public interest, very convenient for the consumers, and absolutely necessary to the broadcasters’ financial well-being. The FCC must swim among those sharks and survive.

The fight between the Baby Bells and Ma Bell is another case in point. In any given situation, these protagonists will find themselves very much favoring regulation or very much opposing it. The Commission’s charge is to find where the public interest lies. As if matters aren’t complicated enough, the stakes in all of these battles are very high—high enough to get the best lawyers, the best lobbyists, and the best public relations experts to make the case for or against a particular regulatory policy at issue before the Commission, Congress, or the courts. It should not surprise us, then, that a career as an FCC commissioner is not a good stepping stone for elective office (the few who tried to move in that direction failed), nor is it given to longevity and a popular following. Those Commissioners who survive for any length of time usually have learned to keep their heads down, and aspire to as much anonymity as possible.

So on its sixtieth birthday, at least if you start counting from 1934, I offer my regards and felicitations to the Federal Communications Commission. It has not had an easy life, and it has matured with some grace. Compared to its peers, like the Interstate Commerce Commission, the much younger agencies, like the Nuclear Regulatory Commission and the Federal Trade Commission, and all of those alphabet soup agencies that are now only history, the FCC looks pretty good. Whatever those congressional sires thought that they were creating, their handiwork has done a pretty good job of furthering the public interest, convenience, and necessity.

Second Chance

Newton N. Minow*

“Vast wasteland.”

Those were the words I used to describe television in 1961, shortly after President Kennedy appointed me Chairman of the Federal Communications Commission (FCC or Commission). The description was given to a meeting of the nation’s broadcasters—the people who in those days ran the television business—and they did not like my comment. Almost overnight, “vast wasteland” entered the public lexicon, and it is still being used to describe television. I see those two words, or permutations of them, in newspaper headlines, in book titles, in magazine articles, in *Bartlett’s Familiar Quotations*.¹ My wife and my three daughters threaten to inscribe “on to a vaster wasteland” on my tombstone.

But I realize now that many people misunderstood what I tried to say in 1961. The realization came a few years ago when our daughter Mary showed me a multiple-choice question that used the vast wasteland speech in the Law School Aptitude Test (LSAT) reading comprehension section for prospective law students—and I got the answer wrong!

Looking back, I wish people were much more interested in two other words in that speech: public interest. The law governing broadcasting, the Communications Act of 1934, gives broadcasters free and exclusive use of broadcast channels on the theory that they will serve the public interest. What I meant by “vast wasteland” is that we do not serve the public interest if we continue to waste television’s precious potential to educate,

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1. JOHN BARTLETT, *BARTLETT’S FAMILIAR QUOTATIONS* 757 (Justin Kaplan ed., 16th ed. 1992).

inform, and entertain our children. Even skeptics who believe the public interest is beyond definition know that it lies in the hearts and minds of children. If as a nation we cannot figure out what the public interest means with respect to those who are too young to vote, who are barely literate, who are financially and emotionally and even physically dependent on adults, then we will never figure out what it means anywhere else. Our children *are* the public interest, living and breathing.

And yet, remarkably, when Congress wrote the Communications Act sixty years ago, it gave “equal time” only to politicians. Congress did not see fit to mention children at all, nor did it extend the protection of the law to children until 1990, when it passed the Children’s Television Act.²

Increasingly, however, both of these laws seem antiquated. The Communications Act, certainly, was written before we ever heard of television, satellites, cable, computers, fax machines, cellular phones, cyberspace, or the information superhighway. In the midst of the current technological revolution, Congress now has a second chance to define what we mean by the public interest as we build new communications capacity undreamed of in human history. Second chances are rare, and remind me of Samuel Johnson’s assessment of a second marriage: a triumph of hope over experience.

If we are to succeed where our ancestors failed, we must ensure that our children have the full benefits of the information age. And yet, so far, the public debate about the information superhighway has been remarkably like the one that surrounded the Communications Act, and before that, the 1927 Radio Act.³ The bills that have been introduced in Congress talk about “access,” about antitrust exemptions and “universal service,” and about the virtues of competition. These are all important questions, just as they were in the 1920s and 1930s. But if there is any lesson we should take from the past, it is that these things alone do not comprise the public interest. James Madison, the founder who wrote the First Amendment, wrote in *Federalist Number 10* that competition between private interests was not enough to serve the public interest, but in fact was adverse to it.⁴ The public interest was something else, Madison wrote, and it depended on the ability of an informed people to deliberate on the fundamentally moral questions that confront a democracy.⁵ Madison and the founders gave us

2. Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303(a)-303(b), 393(a), 394 (1988 & Supp. IV 1992)).

3. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064.

4. THE FEDERALIST NO. 10 (James Madison).

5. *Id.*

the First Amendment not to turn away from those questions, but so we could talk, as a free people, about how best to secure the blessings of freedom for future generations.

It is time, then, we used the First Amendment to protect and nurture our children rather than as an excuse to ignore them. This, above all, is the principle Congress should keep in mind as it rewrites the Communications Act for the twenty-first century. Where children are concerned, it will not be enough, nor has it ever been enough, to rely exclusively on the marketplace. Today we read and hear of the great promises of the information superhighway—glowing scenarios of wired classrooms, of an education revolution, of a world in which any child can, electronically, wander the Smithsonian, visit a fourteenth-century Incan temple, or roam the floor of the Pacific Ocean—and forget that these are the same hopes Americans once had for television. In the late 1930s, RCA President David Sarnoff predicted that television would usher in a “new age of electrical entertainment, which will bring the artist to the public, the lecturer to his audience, and the educator to his student body.”⁶ In 1949, an industry trade journal offered its prediction that, “With the combination of motion picture film and the television camera, coupled with the television receiver in the American home, John Q. America is about to receive the greatest treasury of enlightenment and education that has ever before been given to a free man.”⁷

Indeed, television has many fine moments, many great accomplishments. It has also had many great failures, and none greater than its neglect of children. Now, unless Congress acts to make explicit provisions for what the public interest means with respect to children on the information superhighway, we will repeat our worst mistakes. In 2054, some future FCC Chairman will look back at us from the vantage point of a much vaster wasteland and wonder why, when we had a second chance, we failed to seize it.

Few people are as lucky as I am to have been given a ringside seat at the center of the communications revolution. Over four decades, I’ve served our government, public television, commercial broadcasting, advertising, telephone, publishing and cable companies; helped organize presidential debates; taught students who now are leaders in communications and law; and directed think tanks and foundations that deal with communications policy.

6. EUGENE LYONS, DAVID SARNOFF: A BIOGRAPHY 279 (1966).

7. *Television's Impact*, RADIO & TELEVISION NEWS, July 1949.

It all started one autumn afternoon in 1956 in Springfield, Illinois, where Robert Kennedy and I were traveling together as members of Adlai Stevenson's 1956 Presidential campaign staff. Bob and I had a lot in common, especially because my wife Jo and I have three children the same ages as three of Bob and Ethel's children. When the Stevenson campaign reached Springfield, Bob asked if I could take him to visit Abraham Lincoln's home. On the way, Bob said something that I never forgot. He said that when he grew up, the three great influences on children were home, school, and church. In observing his own children, he believed that there was now a fourth major influence: television.

Five years later, on my first day at the FCC, and at my first Commission meeting, we voted on the policy the Commission would recommend to Congress for educational television. Six Commissioners voted to advise Congress that educational television was not the Commission's business, and that the FCC had no recommendation for Congress. I dissented and testified in favor of the legislation, which was passed in 1962. The second important event that first day was a visit from one of the senior commissioners, Tam Craven, a crusty ex-Navy veteran engineer who had been appointed by President Eisenhower. Commissioner Craven asked, "Young man, do you know what a communications satellite is?" I said no. He groaned, "I was afraid of that." I said that I'd like to learn.

Craven then told me of his unsuccessful efforts to get the FCC to approve a test launch of Telstar, an experimental communications satellite developed by AT&T with the encouragement of NASA. He convinced me that Telstar was the one part of the space race with the Soviet Union where we were far ahead, but that our own government was standing in the way. We quickly approved the Telstar experiment, and to this day I treasure a picture of Craven with me in Bangor, Maine, where Telstar was successfully launched on July 10, 1962.

So much of what has happened in the past thirty years was set on course that first day on the job. Under the auspices of the Corporation for Public Broadcasting and the Public Broadcasting Service, educational television became a national service called public television that reached virtually all of America's 94 million homes. The deployment of communications satellites led to the development of CNN, C-SPAN, HBO, and countless other cable networks, cheaper long-distance telephone rates, and the explosion of global communications. Through communications satellites, we learned that modern technology respects no political boundaries—the Berlin Wall, Tiananmen Square, or dictators in Iraq.

The things we did a generation ago have helped create another communications revolution, this one fueled by the technologies not only of

satellites, but of digitization and fiber-optic cable. That revolution is going on around the world. In most countries this revolution is proving particularly vexing for the public, not-for-profit telecommunications systems, such as the BBC in Great Britain or the CBC in Canada, that were established in the early days of broadcasting. All of these systems are having to meet the challenge of new competition, and many are giving serious thought to what their role should be as public servants in a multichannel marketplace.

Those who direct many of these systems recognize that some of the traditional pillars of public service broadcasting will have to adapt to a new communications environment in which viewers will not only have many more choices, but may someday be producing and distributing programs themselves. There are few points of firm agreement on how this new communications environment should be structured, or who it should serve, but one of them is this: left to the marketplace, children will receive either very bad service or none at all. Policymakers in every country know that this is true from the example of American broadcast television, and all are working to make special provisions for children in their national communications policies.

Now, after sixty years of missed opportunities, Congress should seize this opportunity to do the same. Our choice is not between free speech and the marketplace on one hand and governmental censorship and bureaucracy on the other. The choice is how to serve the needs of children and how to use the opportunities presented by the superhighway to enrich the lives of every child. Let us do for our children today what we should have done long ago.

The challenge that faces us reminds me of a story President Kennedy told a week before he was killed. The story was about French Marshall Lyautey, who walked one morning through his garden with his gardener. He stopped at a certain point and asked the gardener to plant a tree there the next morning. The gardener said, "But the tree will not bloom for one hundred years." The marshal looked at the gardener and replied, "In that case, you had better plant it this afternoon."

Reflections on the Sixtieth Anniversary of the Communications Act

Senator Carol Moseley-Braun*

“They could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in the darkness, every moment scrutinized.”¹

In the literary classic *1984*, George Orwell warned of a society where one’s every move was monitored; a society where nothing was private or sacred. “Big Brother,” the watchful eye of the government, peered down over everything and everyone, knew the citizenry’s innermost thoughts, and destroyed their very spirits.

As we move toward the twenty-first century, Orwell’s vision of the future—a future devoid of privacy—is increasingly nearer to reality. Contrary to Orwell’s forecast, however, the greatest threat to individual privacy comes not from the government, but from technology in the private sector. Through the use of computer databases and direct-mail marketing lists, individuals and companies throughout the country have access to some of the most intimate and detailed personal information that, if asked, you might decline to give to anyone. The failure of the government to draft comprehensive privacy legislation has greatly contributed to this growing problem.

An example of a typical day which illuminates the issue recently appeared in the *Los Angeles Times*. You drive to work along the highway, where toll booths electronically register which cars are passing by, and park at the garage across from your office, under the watchful eye of the garage’s security camera. When you arrive at work, your employer reads your electronic mail messages, listens in on your phone conversations, and records progress on your computer by registering the number of key strokes

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1. GEORGE ORWELL, 1984, at 2 (Harcourt Brace Jovanovich 1977).

you hit per minute, or by viewing the actual document you are working on. Of course, your employer has already accessed insurance company databases to retrieve detailed information on your health background and credit databases to uncover your personal financial history.

After lunch—which you bought with a credit card, thereby creating a permanent record of your dining tastes that will be sold to direct marketers—you stop at the ATM, where the machine records how much money you withdrew, while a hidden security camera takes your picture. The cash you withdrew is used to buy groceries at the local supermarket, where the cashier scans your electronic discount card, allowing the store to compile a detailed record of your shopping preferences.

Finally, upon arriving home, you call a clothing store catalog and order merchandise with your credit card. Again, the retailer and credit card company compile detailed information on your likes and dislikes. Of course, let us not forget that the phone company makes a record of every phone number you have called and the duration of that call.² That is just a typical day in the life of the average American. It is not fiction, but today's reality.

Numerous examples exist to demonstrate just how widespread the decline of privacy has become. To cite just one, a recent survey of 301 businesses found that 22 percent of the companies surveyed had searched employees' computer files, voice mail, e-mail, and other electronic data systems. Those percentages were even higher among larger corporations.³ While I could cite many other examples, this one demonstrates that, while Orwell was right about the erosion of personal privacy, he was wrong about the government being the only source of danger to our privacy. The truth is that, while we have to be on guard against governmental actions that undermine our right to privacy, we also need government to help protect us from nongovernmental erosion of that fundamental right.

Some individuals, particularly those who make the profits, see no danger in the collection of such "innocuous" private data. I disagree. Consider the words of Professor Paul Schwartz, a noted expert on privacy regulation, "Personal information, when disclosed to family and friends, helps form the basis of trust; in the hands of strangers, this information can have a corrosive effect on individual autonomy."⁴

2. Thomas B. Rosenstiel, *Someone May Be Watching*, L.A. TIMES, May 18, 1994, at A1.

3. *Snooping at Work: Electronic Privacy in the Workplace Remains a Fuzzy Area*, CLEVELAND PLAIN DEALER, Jan. 16, 1994, at E1.

4. Paul Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 HASTINGS L.J. 1321, 1322 (1992).

Protection of individual autonomy has far reaching implications. In the past twenty years, battles over the right to privacy have focused primarily on reproductive freedom and a woman's right to choose. In fact, the terms "right to privacy" and "right to choose" have become virtually synonymous.

However, while reproductive freedom is certainly one important area of individual freedom, the right of privacy encompasses much more. As Justice Louis Brandeis stated in his now-famous dissent:

The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.⁵

There are, of course, competing views over where the "right to privacy" contained in the Constitution is found. Justice Blackmun wrote in *Roe v. Wade* that the Fourteenth Amendment's concept of ordered liberty and restrictions on state action implied a right to privacy.⁶ Justice Goldberg stated in a concurring opinion in *Griswold v. Connecticut*: "The Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."⁷ Others have argued that the right to privacy is contained in the Tenth Amendment's reservation of powers for the state, the Fourth Amendment's protection from unreasonable searches and seizures, or the Third Amendment's prohibition on forcing individuals to house soldiers in their home. But the pressing question facing those of us in Congress is not necessarily where the right to privacy arises. Rather, it is how we protect that right in light of advancing communications.

Technology is increasing at such a rapid pace in this country that our laws simply have not caught up. Twenty years ago, Congress created the United States Privacy Protection Study Commission to conduct an extensive examination of privacy in the information age. Few, if any, of its recommendations have actually been implemented. We tend to be so enthusiastic about the capabilities of the new technology—the novelty of paying our bills over the phone or sending instantaneous electronic mail

5. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

6. *Roe*, 410 U.S. 13, 153 (1973).

7. *Griswold*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring).

messages across the continents—that we forget to examine the underlying implications of the technology. The few laws governing data protection that exist today are ad hoc protections enacted to address unique concerns specific to one industry or another, but they do not provide the kind of general, comprehensive protection that many Americans desire. As we embrace emerging communications technologies, therefore, we must work to ensure that privacy concerns are given as much weight as concerns about commerce and regulation.

For example, consider the issue of privacy of medical records. Much like the principle of lawyer-client confidentiality, each patient has an expectation that information given to his or her physician will stay with his or her physician, or will be distributed only to those who have an absolute need to know. Without such expectations, the intimacy of the doctor-patient relationship could become meaningless. Who would be completely honest with their physician—who would admit they had a drug problem or previously had an abortion or had been exposed to the virus that causes AIDS—if they knew that information would be accessible to their employer or their next-door neighbor? Yet such information is vital if a physician is to properly treat a patient. If our health care system cannot adequately guarantee privacy, then it may provide substantial disincentives for Americans to speak honestly with their doctors, a result that could seriously undermine individual treatment and the public health. Despite this, there are virtually no federal laws regulating the confidentiality of medical records.

By way of contrast, in 1987, when a list of videos rented by Robert Bork was made public during his ultimately unsuccessful confirmation hearings, disclosure of video rental information was made illegal.⁸ This example demonstrates the absurdity that can result from ad hoc privacy policymaking. Medical records, containing the most intimate and private information imaginable, do not receive as much protection as the movies checked out from Blockbuster last Friday. Anyone who doubts how painful this discrepancy is need only check with the family of the late Arthur Ashe, whose medical records indicating he was afflicted with HIV, the virus that causes AIDS, were made public long before he and his family were ready to disclose this information. As more and more health information is stored “on-line,” the problem can only get worse. Clearly, a consistent legislative policy in this area is long overdue.

The development of a policy to address this problem cannot happen overnight. Sale of personal information has ballooned into a multi-billion

8. See Video Privacy Protection Act of 1988, Pub. L. No. 99-508, 100 Stat. 1860 (codified at 18 U.S.C. § 2701 (1988)).

dollar industry, one that is certain to resist regulatory efforts. But without basic guarantees of privacy, the information superhighway may be as risky as a narrow two-lane mountain road without guardrails. Logging on to a nameless, faceless network can be a very risky activity without the right kind of assurance that the information voluntarily given out will be used only by the person to whom it was given, and only for the purpose for which it was provided. It is up to Congress to provide these assurances. And Congress is beginning to do just that.

Sen. Patrick Leahy (D-Vt.) has introduced S. 2129, a bill that will establish guidelines for protected health information and provide for criminal penalties for those who release such information.⁹ Sen. Paul Simon (D-Ill.) has introduced S. 1735, the Privacy Protection Act of 1993, which would establish a Privacy Protection Commission to provide guidance to the federal government in the areas of privacy and data protection.¹⁰ The Commission would be able to recommend model standards and guidelines for federal, state, and local agencies to follow in carrying out current privacy protections, as well as to recommend to Congress any necessary legislative changes. In addition, Sen. Simon's bill to prevent abuses of electronic monitoring will outline in what context, and to what extent, employers may monitor their workers.¹¹

The Telephone Privacy Act of 1993, introduced by Sen. Bumpers (D-Ark.), would require telephone companies that offer caller ID (a service that displays the phone number of the person calling before the phone has been answered) to give callers the option of per call blocking.¹² The option would allow consumers to block display of their telephone numbers on a per call basis without an extra charge. Sen. Murray (D-Wash.) has proposed a bill that will direct the Secretary of Commerce to study the issue of exportation of encryption technology, currently prohibited, that will allow American companies overseas to safeguard the same level of privacy that is currently enjoyed by companies on American soil.¹³

The fact underscored by each of these bills is that Congress can no longer afford to ignore the privacy implications of pending legislation. The communications and computer revolutions have made it possible to compile huge amounts of information and to access it almost instantaneously. However, our ability to handle all of this information with due concern for people's privacy has not kept pace with technological advancements. The

9. S. 2129, 103d Cong., 2d Sess. (1994).

10. S. 1735, 103d Cong., 1st Sess. (1993).

11. S. 984, 103d Cong., 1st Sess. (1993).

12. S. 311, 103d Cong., 1st Sess. (1993).

13. S. 2203, 103d Cong., 2d Sess. (1994).

future offers many exciting opportunities, but it also offers real dangers if we fail to protect our privacy. As we move forward, privacy must receive a more heightened level of protection. After all, if the freedoms we possess as Americans do not encompass the right to control the information we disseminate about ourselves, and to whom we disseminate it, then how free are we?

Reflections on the Sixtieth Anniversary of the Communications Act

Commissioner Susan Ness*

The sixty years since passage of the Communications Act of 1934 are filled with accomplishment.¹ On an anniversary such as this, it is timely to survey our present circumstances and to explore the foundations of the statute whose passage we celebrate. Today's circumstances are happy, indeed. In radio, television, telephony, cable, and satellite services, we enjoy a menu of offerings unmatched anywhere else in the world.

Every citizen has the opportunity to receive multiple, real-time, electronic transmissions of words, music, and pictures. From our homes, we can engage in two-way voice communication through the miracle of telephony, both the traditional kind connected by wire or fiber and, increasingly, through the airwaves. Our businesses routinely access and transmit computer data by wire and by radio. The networks that permit these communications integrate both wire and wireless segments seamlessly to provide a far-reaching, end-to-end system with seemingly transparent technology. Throughout each day, our lives are touched by the technologies of the communications industries wherever we are—in our factories, our offices, our stores, and our homes.

The multitude and accessibility of services and technologies available to us today owe much to the wisdom embodied in the provisions of the Communications Act. The drafters of that statute met in the early days of the New Deal to consolidate responsibility for both wire and wireless

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1. Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C. (1988 and Supp. IV 1992)).

communication in a single regulatory body, the Federal Communications Commission (FCC or Commission). The authors established enduring goals—among them ubiquity, affordability, localism, fairness, and consumer protection—that have served us well.

In drafting the statute, Congress did not write on a clean slate. The roots of some of the central principles of the Act extend back to the earliest days of wire and radio communication, and some even back to English common law. The drafters' genius was in selecting the mix of provisions that provided the necessary degree of specific guidance, but also maintained the flexibility essential to allow for application to new developments, technologies, and services.

Provisions governing common carriers are clear descendants of the Interstate Commerce Act of 1887 and amendments to that Act in 1910 and 1920.² These provisions themselves were derived from common carrier principles developed in early English common law. Similarly, significant portions of the Act's radio provisions derive directly from the Radio Act of 1927,³ before that from the Radio Act of 1912,⁴ and the Wireless Ship Act of 1910.⁵

For me, the touchstone of the 1934 Act is its directive, repeated throughout, that the Commission be guided by the public interest, convenience, and necessity.⁶ This standard, carried over from earlier statutes, has two parents. Some state common carrier laws in the nineteenth century required issuance of a certificate of convenience and necessity before railroad and street railway service could be provided. The "public interest," by contrast, was an earlier concept, already the subject of a Supreme Court case in 1876, that generally served as a standard by which some states limited maximum charges to the public for certain services.⁷

The concept of applying a "public interest" standard to use of the airwaves appears to have come out of the Fourth National Radio Conference convened by the Secretary of Commerce in 1925 to deliberate on the future regulation of radio. At that conference, Secretary of Commerce Herbert Hoover, in the context of discussing competing claims to radio licenses, expressed the opinion that "[t]he ether is a public medium, and its

2. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 10101-11917 (1988 and Supp. IV 1992)); *see also* 36 Stat. 539 (1910).

3. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064.

4. Act of Aug. 13, 1912, ch. 287, 37 Stat. 302, *repealed by* Radio Act of 1927, ch. 169, 44 Stat. 1162.

5. Wireless Ship Act of 1910, ch. 379, 36 Stat. 629.

6. 47 U.S.C. §§ 151, 214(a), 310(d) (1988).

7. *See Munn v. Illinois*, 94 U.S. 113 (1876).

use must be for public benefit. The use of a radio channel is justified only if there is public benefit The greatest public interest must be the deciding factor.”⁸

Representative Wallace White, the author of the 1927 radio legislation (substantial portions of which were largely reenacted as part of the Communications Act of 1934) expressed his agreement with the public interest principle during legislative debate on the Act. He observed:

[The Fourth National Radio Conference] . . . recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.⁹

Later, Louis Caldwell, an early General Counsel of the Federal Radio Commission, presciently commented that the underlying theory of the public interest, convenience, or necessity standard is “perfectly sound; only an indefinite and very elastic standard should be prescribed for the regulation of an art and a field of human endeavor which is progressing and changing at so rapid a pace as is radio communication.”¹⁰

Reflecting upon the origins of the Communications Act is as useful, I think, in our deliberations regarding the future, as in our thoughts of the past. I am particularly interested in ensuring that “the public interest, convenience and necessity” standard is appropriately applied to today’s and tomorrow’s technologies and the services they make possible. The authors of the Communications Act gave us the “supple instrument” that enables us to do that.¹¹ Regulating in the public interest means deleting or updating unneeded and outdated regulations as much as it means implementing new regulations to govern new services and technologies.

I recently perused the Commission’s January 1936 report to Congress on its first year of operations under the Communications Act. Viewed through the prism of time, some aspects of the report seem distinctly quaint. Others have a much more familiar feel and illustrate ways in which the Commission was faced with challenges much like those presented today.

8. PROCEEDINGS OF THE FOURTH NATIONAL RADIO CONFERENCE 7-8 (1926).

9. 67 CONG. REC. 5479 (1926).

10. Louis Caldwell, 1 AIR L. REV. 295, 296 (1930).

11. See *FCC v. Pottsville Brdcast. Co.*, 309 U.S. 134, 138 (1940).

One section of the report addresses television broadcast technology in terms analogous to those we might use today with respect to high-definition television (HDTV):

The several companies carrying on the television experiments in the United States have not yet standardized the several essential elements of transmission. . . . No commercial receivers are at present available to receive such [high quality television] programs. In order to give television service it is necessary for the different manufacturing companies to standardize their transmissions and produce receivers which can receive all programs transmitted. In short, from a laboratory standpoint television programs can be satisfactorily transmitted and received locally at the present development of the art but before it is finally useful to the public there are many commercial problems to be solved.¹²

The Commission and industry surmounted these problems and launched a new service which transformed our nation and the world.

It is a triumph that the standard they created has provided such an opportune mixture of constancy and change. The basic transmission parameters have held firm, avoiding disruption to consumers, but over the intervening years, enhancements such as color, stereo sound, and captioning have considerably enhanced the quality and utility of the service.

The report of the first year also reminds us that the Commission's tasks often involve highly technical or arcane matters, far removed from the marvels of new technologies. The first-year report mentions the investigation of affiliate relationships within telephone holding companies, an issue that has persisted through the years.¹³ It also refers to cost allocations for telephone plant, noting that "[t]his problem is greatly complicated by the use in common of telephone plant for combinations of local exchange and toll service and the use in common of toll plant for rendering both intrastate and interstate toll service."¹⁴ This issue arises today in our consideration of video dialtone—a new common carrier service that will provide a platform for telephone companies to deliver video and interactive programming to consumers. Though the service is new, the guiding principle for our decision making is not.

To reflect on the origins and early administration of the Communications Act of 1934 is to reaffirm the connection between earlier eras and the present. Far from being ancient history, the 1934 experience remains intensely relevant today.

12. 1 FCC ANN. REP. 27 (1936).

13. *Id.* at 49-50.

14. *Id.* at 55.

As a member of the Federal Communications Commission, I try to honor the “public interest, convenience, and necessity,” and the principles these words represent, in every vote I cast. My fellow Commissioners and I strive to be as successful in our guardianship of public interest responsibilities as were the many distinguished public servants who preceded us. That is a humbling task, but a worthy endeavor.

Principles for the Communications Act of 2034: The Superstructure of Infrastructure

Eli M. Noam *

In the past, the regulation of telecommunications had been essential, partly to protect against the various forms of network monopoly, partly to protect monopolists themselves. In the transition to competition, what regulation was left was seen as temporary, as shrinking reciprocally with the growth of competition.

But can we expect the future “network of networks” to be totally self-regulating, with no rules by government? On the one hand, the more complex and advanced any network system becomes, the less one can guide it centrally. On the other hand, diversity does not assure optimality when different participants pursue different strategies and private and public objectives diverge. Some traditional subjects of regulation, such as price and entry controls will become unnecessary. But issues involving free flow of information, interconnectivity, universality of service, and international asymmetry will not vanish with competition.¹ Thus, rules and regulations will change, but not disappear entirely. Liberalization does not mean libertarianism. Therefore, what kind of rules should we expect to provide in the emerging “network of networks” interconnecting presently widely disparate types of communications systems?

In the world of computers, a hierarchy of control instructions exists—assembly language, machine language, and programming languages. When it comes to societal rules, we similarly think in terms of a hierarchy. In telecommunications there are *regulations of detail*; for example, what price can be charged for a local call after five o'clock. Then there are

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1. This is analyzed in Eli M. Noam, *Beyond Liberalization: From the Network of Networks to the System of Systems*, 18 TELECOMMUNICATIONS POL'Y 286 (1994).

fundamental societal tenets, such as freedom of speech or property rights. In between are the intermediate *rules of public policy*, usually codified by statutes of varying specificity.

The United States has been fairly successful in framing regulations of detail. Although participants in the American regulatory system tend to castigate it, the positives need to also be acknowledged, especially in contrast to the alternatives practiced elsewhere. Regulations in America tend to be developed and practiced openly, with opportunity for the public and for contending stakeholders to contribute their views and challenges. Due process and rights of appeal exist. The independent and bipartisan system of regulatory commissions helps to create some political insulation and policy continuity, without a total separation from the democratic and economic forces in society. The process is capable of adapting to changing circumstances, as the shift in telecommunications from promonopoly to procompetition regulation demonstrates.

The fundamental rules of governance have also been quite successfully drafted, a legacy from brief but creative historic periods when big-picture issues were taken seriously. But the weak link in the American hierarchy of rules, at least for telecommunications, is the intermediate range of rules of public policy. Here, the basic documents are the creaky 1934 Communications Act, the controversial 1984 and 1992 Cable Acts, and a motley collection of state utility laws.

The basic 1934 Communications Act was written before TV was out of the labs; before microwave transmission; before satellites; before microelectronics; before computers; before digital data communications; and before transatlantic telephone cables. Some of its rules are even older than the New Deal era enactment date suggests, going back to 1910 Mann-Elkins Act provisions that applied to telephony principles of railroad regulation, which in turn date back to 1887 on the federal level and even further for some states.

Given the dynamic telecommunications environment, the 1934 Act is at its best when its provisions are fairly general, with details provided by the regulations of the specialized Federal Communications Commission (FCC or Commission) that the Act created. It is least effective where it is overly specific, almost assuring problems a few years later, since it is usually more difficult to change a law than to modify a regulation.²

2. Thus, few of the main changes in telecommunications policy that in the aggregate broke the monopoly system over the past two decades have originated in congressional legislation.

In telecommunications, Congress is at its legitimate best when it sets national rules of public policy. It has been at its procedural worst when it assumes the role of a quasi-regulatory agency and writes into law numerous rules of detail. This happens when it distrusts an agency controlled by another party, when a transitional leadership vacuum exists at an agency, or when it is enticed to closely arbitrate nettlesome power struggles among stakeholders.

THE NEED FOR NEW PRINCIPLES

But what should these broad principles of telecommunications be? In the past decade, policy was correctly focused on creating competitive openness by reducing barriers and permitting entry. But now, with the fragmentation of the monopoly telecommunications environment proceeding apace, the primary policy responsibility is to assure an *integration* that permits the functioning of the emerging “network of networks.”

On the conduit side of networks, such integration involves interconnectivity, interoperability, privacy protection, financial compensation, and network universality. On the content side, different approaches govern the different segments of the communications system, such as common and private carriage. The difference in regulatory status is sustainable only as long as the underlying transmission media are kept apart. As these grow together and interconnect, the differing rules of content status come into conflict.

One of the 1934 Act’s major problems, from tomorrow’s perspective, is that it deals with separate transmission media differently. It is not transmission-path neutral. This was workable in the past, but is not where technology and applications are taking us.³

Let us therefore think of ourselves as an electronic legislative convention for the Communications Act of 2034. What might its principles look like?

1. *Preamble*

Congress, in order to create a more perfect union of various transmission and content media, establishes principles by which all electronic communications should be governed, with the goals of

3. Partly for that reason, the Clinton administration proposed in 1994 a new and voluntary regulatory classification (a new “Title VII” of the Communications Act) for switched interactive digital broadband transmission. This proposal, too, is not technology-neutral. Administration White Paper on Communications Act Reforms 5 (Jan. 27, 1994) (copy on file with the *Federal Communications Law Journal*).

encouraging the production of information of many types, sources, and destinations; assuring the existence of multiple pathways of information; encouraging their spread across society, the economy, and the world; and enhancing social and economic well-being, technology, and education.

2. *Free Flow of Information*

All electronic bits are created equal, and freedom of speech is technology-neutral. Government shall not prohibit the exercise of communications nor abridge electronic speech, content provided by the electronic press, nor the right of the people to peaceably assemble electronically.

Freedom of speech, as applied to telecommunications, must assure a legal parity of electronic speech with traditional forms of communication. The First Amendment protects speech against governmental restrictions but not against private constraints. To account for private constraints, the legal institution of common carriage established a free flow of information over some telecommunications networks. Common carriage is a frequently misunderstood concept. It means nondiscriminatory conduit service by a carrier, neutral as to content, users, and usage.⁴ It does not mean universal service, regulated monopoly, or rate-of-return regulation.

Common carriage is not only a free speech matter. The reason for common carriage, whether in transportation or communication, is generally to reduce transaction costs in the use of infrastructure and hence to benefit its development. Information travels across numerous subnetworks until it reaches its destination. If each of these networks sets its own rules about which information is carried and which is not, information cannot flow easily. While it may be in the interest of every carrier to maintain full control over "its" segment, in the aggregate, this would be as dysfunctional as if each commercial bank issued and used its own money rather than a common legal tender.

At present, who is a common carrier? Basically, it is a provider of a public switched telecommunications network. Other carriers operate as private contract carriers, subject to their own discretion on access and use. With competition, it is distortive to designate some networks as common carriers and not others. One alternative is to abolish all private carriage, but

4. The FCC's concept of the video dialtone has such a common carrier orientation. In the Clinton administration's 1994 Title VII proposal, "open access" was substituted as a term for common carriage and defined to permit "anyone, including end users and information service providers . . . , to transmit information including voice, data, and video programming, on a non-discriminatory basis."

that would violate principles of property and freedom of association. The alternative is to abolish all common carrier obligations of nondiscrimination. This may be, in the long run, the outcome of head-to-head competition between common and private carriers.⁵ The ability of a private carrier to price differentiate, to select customers, and to use its rival's conduits whenever it needs to, will all make it superior in head-to-head competition with common carriage. Hence, the latter will fade away as common carriers are increasingly permitted to enter into customer-specific contracts and deals. The last alternative—hybrid solutions that try to assure the coexistence of common and private carriage—will not be stable in a dynamic environment.

What is needed, therefore, is to reconcile an essentially private carrier-based communications system with the free flow of information. One way to do this is by replacing the principle of common carriage by a new principle of *third-party neutral interconnection*. A carrier can elect to be private by running its own end-to-end infrastructure, thus having full control over its content, use, and access. However, if it interconnects into other networks and accepts transmission traffic from them, it cannot screen the traffic and pick some bits over other bits. This means that while a private carrier can be selective in its choice of its direct customers—whether end-users, content providers, or carriers—it cannot differentiate among its customers' customers. For example, if some content *A* is carried by a carrier *B* that is interconnected into carrier *C*, *C* cannot screen out that content, nor can any other carrier do so that is interconnected to *C* and to which *A* is being passed. To exclude *A* would require that not a single carrier of type *B* would be willing to accept it, and that such a carrier would not be granted interconnection by any other carrier type *C*. While such containment is possible, it is not particularly likely. Such a principle is similar to arrangements in commercial paper, sales, and legal tender, where the law discourages restraints on alienation.

The common carriage goals of informational free-flow and low transaction cost are preserved by such a system of third-party neutral traffic interconnection. This principle does not require transmission on economically equal terms, as in the case of common carriage, but does establish the possibility of arbitrage if differentiated pricing occurs.

Competitive transmission segments need not be common carriers, but among interconnected carriers, no carrier can selectively transmit traffic passed on to it by another carrier based on content, uses, or usage.

5. Eli Noam, *The Impending Doom of Common Carriage*, 18 TELECOMMUNICATIONS POL'Y 435 (1994).

Where no competition exists in an essential conduit, service must be offered on a common carrier basis on at least part of the capacity. Any interconnectivity requirements and charges must be symmetrical.

3. *Market Structure and Prices*

In the past, control over entry and prices was the major tool of regulation. For a network of networks these restrictions are obsolete.

Government shall make no regulation establishing a network privileged in terms of territory, function, or national origin. Nor shall it burden any network more than its competitors, except with compensation.

Entry by any content or conduit provider is open. Competitive conduits and all content shall be priced freely. Price or profit regulated segments must be separated in some fashion from unregulated ones.

4. *Reliability and Security*

Interconnected networks affect each other negatively if one of them inadequately protects security and privacy. Market forces can play an important role, but only if users and networks have information about foreseeable dangers.

Interconnected carriers in a chain of transmission must disclose foreseeable jeopardies to privacy and security.

5. *Universality of Networks*

At present, redistribution operates within the public network across customers. This system cannot be stable in a competitive environment. Instead, these subsidies that are to be maintained need to be explicit and neutrally distributed across competitors.

Where Congress mandates to support some users or usages for social and economic reasons, such support must be generated and allocated explicitly, and any burden must be placed neutrally on all market competitors.

Where a new service is subscribed to by a wide majority of the population at market prices, a rebuttable presumption is created to affordably connect to such a service the remainder of the population desiring it.

6. *Jurisdiction*

The traditional notion of jurisdictional separation was based on a linear, spatial concept of networks. Networks were configured to minimize transmission distance. But as transmission costs decline, telecommunica-

tions becomes distance-insensitive, and definitions of interstate, intrastate, and national services become increasingly irrelevant. Networks become relational, not locational.

Information should move freely across interstate and international borders, without unreasonable burdens by state or national jurisdictions. No content or carrier from abroad should be treated more restrictively than domestic providers, provided meaningful reciprocity is given.

The federal jurisdiction sets basic national telecommunications policy where it can demonstrate that national solutions are necessary. Application and implementation may lie with lower-level governmental bodies, which may also set policy for functions of clearly local or regional nature.

CONCLUSION

These principles, in the aggregate, provide a framework that provides an integration of common and private carriage, of narrow and broadband networks, and of domestic and international providers. Furthermore, they do so without the prerequisite of an official “public” network.

To return to the original question, whether or not telecommunications will operate effectively under the guidance of an invisible hand mechanism—the answer is, to a large extent, yes—but only on a foundation of basic rules of the road, with less of a “retail approach” of detailed legislation and more of the “wholesale approach” of policy principles. As communications media converge, the invisible hand must be ultimately connected to a body of law. Ritualistically invoking competition is not enough. We need a principled superstructure for the technical infrastructure.

The Unfinished Task of Spectrum Policy Reform

Janice Obuchowski*

In a landmark event worthy of the sixtieth anniversary of the Communications Act, the Federal Communications Commission (FCC or Commission) in 1994 began using competitive bidding to assign certain radio frequency spectrum licenses. As a longtime advocate of spectrum auctions, I was heartened by this development stemming from the Omnibus Budget Reconciliation Act of 1993, which authorized the FCC to use auctions. As the National Telecommunications and Information Administration (NTIA) concluded in a report issued during my tenure there, “greater reliance on market principles in distributing spectrum, particularly in the assignment process, [is] a superior way to apportion this scarce resource among competing and often incompatible users.”¹

Based on the outcome of the initial auctions, the FCC deserves praise for developing a successful auction process. The Commission’s competitive bidding rules ensure that the winning bids reflect the value of the licenses being auctioned and that the licenses are assigned to those who value them most. The introduction of spectrum auctions is an important step toward applying market principles in the management of the U.S. spectrum resource. But as NTIA noted in the report, *U.S. Spectrum Management Policy: An Agenda for the Future*, another critical set of spectrum management policy reforms also is needed to ensure the efficient use of spectrum: greater flexibility must be allowed in the offering of services

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1. NATIONAL TELECOMM. AND INFO. ADMIN., U.S. DEP’T OF COMMERCE, SPECIAL PUBLICATION NO. 91-23, *U.S. SPECTRUM MANAGEMENT POLICY: AN AGENDA FOR THE FUTURE 1* (1991) [hereinafter *SPECTRUM REPORT*].

within the existing spectrum block allocation scheme.² Flexibility in spectrum use and auctions is an equally crucial component in ensuring that spectrum is used in a manner that maximizes consumer welfare.

My purpose in this article is to sound a warning. There is a very real risk that single-minded focus on the first reform—the introduction of auctions—could undermine achievement of the second objective—increased flexibility in spectrum use. The ongoing auction process at the FCC could create new institutional forces, both within the Commission and in the telecommunications industry, that are opposed to granting substantial new flexibility within previously allocated spectrum blocks.

The prospect of generating large amounts of revenue from auctioning newly allocated spectrum blocks may create unintended incentives for the FCC to go slowly in granting greater flexibility in existing blocks. When the FCC does move to allow increased flexibility, auction winners will cry injustice if the value of their licenses falls as a result. But the FCC should not be in the business of creating spectrum scarcity through unnecessary or obsolete regulatory restrictions. By implementing auctions and flexibility in spectrum use with equal ardor, the FCC will ensure that all spectrum is put to the uses that are most valued.

When the NTIA Spectrum Report was published in 1991, the odds that its recommendation concerning spectrum auctions would be adopted did not look favorable. A *Newsweek* columnist put the odds at “less than 50-50.”³ The FCC lacked authority under the Communications Act of 1934 (Communications Act) as amended to use spectrum auctions instead of lotteries or comparative hearings to select licensees, and key members of the Democratic majorities in both houses of Congress remained implacably opposed to amending the Act to grant the FCC such authority. In March 1991, one month after the Spectrum Report was published, Congressman Edward J. Markey (D-Mass.), then Chairman of the House Telecommunications Subcommittee, restated his opposition to competitive bidding and his preference for comparative hearings to select licensees. He referred to the auction concept as my “pet rock.”⁴

But by mid-1993, the budget deficit imperatives facing the new Clinton administration and Congress, and possibly a public policy conversion, had prompted a change of heart. Seeking additional revenues

2. *Id.*

3. Robert J. Samuelson, *The Quiet Giveaway*, NEWSWEEK, May 13, 1991, at 52, 52.

4. *A Bill to Establish Procedures to Improve the Allocation and Assignment to the Electromagnetic Spectrum: Hearings on H.R. 531 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess., 87 (1991) (statement of Congressman Edward J. Markey (D-Mass.)).

needed to meet the deficit targets of the 1993 budget deal, Congress amended the Communications Act, granting the FCC authority to use auctions.⁵ The administration estimated at the time that auctions for personal communications service licenses alone would generate about \$10 billion in revenues for the U.S. Treasury. Although Congress's approval of auctions was driven substantially by this revenue imperative, the amendments to the Communications Act sought to insulate the FCC from relying on a revenue-raising rationale in managing spectrum assigned through auctions.⁶ Acting on its newfound authority, the FCC adopted generic and service-specific auction rules in its general docket 93-253 proceeding, and in July 1994, the Commission conducted the first ever spectrum auctions in the United States.

In the area of spectrum flexibility, the NTIA Spectrum Report focused on ways to eliminate inefficiencies caused by the rigid service distinctions in the existing spectrum block allocation regime. While acknowledging the benefits of the block allocation system, the report suggested ways to break down arbitrary and inefficient boundaries among spectrum users. Specifically, it recommended that:

- Service definitions be made more flexible, in order to accommodate a wider range of potential uses within a given block of frequencies;
- The FCC reduce the number of spectrum blocks that are subdivided or "suballocated" among specific groups of users based on those users' identity or purpose. Suballocations create demand inefficiencies by artificially excluding similar services from one another's spectrum, the report found;
- Innovation in the various radio-based services be promoted by allowing greater "technical flexibility" through the use of adaptable technical standards for services within a frequency block; and
- "User flexibility" be promoted by granting licensees more discretion to determine the most valuable use for assigned spectrum and the right to use spectrum flexibly.

As NTIA noted in the Spectrum Report, the FCC had already taken initiatives in several services to allow greater user flexibility.⁷ In the mid-

5. 47 U.S.C.A. §§ 308, 309 (West Supp. 1994).

6. 47 U.S.C.A. § 309(j)(7) (West Supp. 1994) (prohibiting Commission from basing allocation decisions on revenue expectations, and limiting Commission in basing design of auction procedures on revenue expectations).

7. SPECTRUM REPORT, *supra* note 1, at 60; Douglas W. Webbink, *Radio Licenses and Frequency Spectrum Use Property Rights*, COMM. AND THE LAW, June 1987, at 3, 3.

1970s, for instance, when the FCC established the Specialized Mobile Radio Service (SMRS) in the 800-900 MHz bands, it defined SMRS to serve a wide range of users.⁸ This contrasted with the approach taken before 1974 in the Private Land Mobile Radio Service (PLMRS), where most allocations were made for specific categories of users, such as police, taxicab, and business radio services. In 1984, the Commission acted to eliminate artificial service barriers in the spectrum bands allocated for public land mobile services other than cellular radio by eliminating the separate allocations for wireline and nonwireline common carriers.⁹ This change allowed either type of common carrier to use those spectrum bands.

In another action, the FCC in 1990 granted in part a waiver allowing FleetCall, Inc. (now Nextel Corp.) to develop its digital "Enhanced Specialized Mobile Radio" system, which Nextel is using to offer commercial mobile services similar to cellular telephony.¹⁰ The Spectrum Report recommended that a more comprehensive approach be adopted to extend the benefits of increased flexibility across the regulated spectrum bands.

In the almost four years since the Spectrum Report was released, the Commission has continued to take specific steps to allow greater flexibility in spectrum use, although its approach has not been as comprehensive as one might have hoped. In 1991, for instance, the FCC began the private radio docket 91-170 proceeding to identify ways to "reform" or reapportion PLMRS frequencies below 470 MHz, with the goal of providing for their more efficient use. The FCC later issued a rulemaking notice proposing specific changes that would allow greater flexibility in the PLMRS frequencies, although it has yet to adopt an order implementing the proposed rule changes.

The FCC should replicate the process undertaken in the PLMRS spectrum reforming proceeding by identifying opportunities to allow greater spectrum use flexibility in all of its existing frequency allocations. Efficient use of the spectrum will be maximized only if licensees are given the

8. *In re Future Use of the Frequency Band 806-960 MHz, Second Report and Order*, 46 F.C.C.2d 752, para. 29-43 (1974), *Memorandum Opinion and Order*, 51 F.C.C.2d 945, para. 2 (1975); see also *National Ass'n of Regulatory Util. Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir.), cert. denied sub. nom. *National Ass'n of Radiotelephone Sys. v. FCC*, 425 U.S. 942 (1976).

9. *In re Elimination of the Separate Frequency Allocation Structure in Public Land Mobile Services, Report and Order on Reconsideration*, 57 Rad. Reg. 2d (P & F) 547, para. 1 (1984).

10. *In re Request of FleetCall, Inc., for Waiver and Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, Memorandum Opinion and Order*, 6 FCC Rcd. 1533, reconsideration denied, 6 FCC Rcd. 6989 (1991).

widest possible latitude in determining which services to offer within their assigned frequencies. In principle, the flexibility granted to licensees should be limited only to the extent necessary to prevent radio frequency signal interference with other users.

To the extent possible, a key objective should be to eliminate suballocations within frequency blocks and otherwise aggregate spectrum into larger blocks. The Spectrum Report noted the development of broadband radio transmission technologies and the opportunities they afford to achieve greater efficiency in the use of spectrum through sharing.¹¹ Technological advances have continued in these broadband transmission systems, including code division multiple access, and in frequency agile radio receivers. These advances have made the use of spread-spectrum transmission techniques more cost effective.¹² The spectrum efficiency gains achieved by these systems can be exploited fully only if they can be used to transmit signals over a wide band of frequencies. This fact argues strongly in favor of allocating new spectrum for radio services in relatively large blocks and, where possible, aggregating previously allocated spectrum into larger blocks.

Generally, rules the FCC has adopted or proposed in the 1990s to govern the provision of services in newly allocated spectrum blocks are model implementations of the flexibility principles I am advocating. In allocating 120 MHz of spectrum for personal communications services (PCS), the FCC deliberately adopted a broad definition of the service in order to give future licensees the maximum possible flexibility in developing new mobile communications services.¹³

Similarly, in the FCC's rulemaking proposal to make 18 Gigahertz of spectrum in the "millimeter wave" frequency bands above 40 GHz available for the introduction and development of new commercial communications services, allowing flexibility appears to be a priority for the Commission.¹⁴ Under the proposed rules, the eventual licensees in those frequencies would have wide latitude in selecting the types of services to offer via millimeter wave technologies. Also, given the interference characteristics of radio signals transmitted above 40 GHz, the

11. SPECTRUM REPORT, *supra* note 1, at 1, 62.

12. See George Gilder, *Auctioning the Airways*, FORBES, Apr. 11, 1994, at 99, 100; George Gilder, *The New Rule of Wireless*, FORBES, Mar. 29, 1993, at 96, 96; George Gilder, *What Spectrum Shortage?*, FORBES, May 27, 1991, at 324, 324.

13. *In re* Amendment of Commission's Rules to Establish New Narrowband Personal Communicating Services, *First Report and Order*, 8 FCC Rcd. 7162, 7163 (1993).

14. New Rules Proposed to Increase the Amount of Spectrum Available for Commercial Use, *Notice of Proposed Rulemaking* in ET Dkt. No. 94-124 (Oct. 20, 1994).

Commission proposed to allow additional flexibility by permitting the use of unlicensed radio devices in 8.5 GHz of the proposed spectrum allocation. These proposals are consistent with the Spectrum Report's recommendation that the FCC experiment with greater user flexibility in frequencies above 10 GHz that are not heavily used.¹⁵

The PCS rules and the proposed rules to govern millimeter wave communications services can and should serve as models for increasing flexibility in previously allocated spectrum bands. The most significant fact about the PCS and millimeter wave rules, however, is that they will apply to services for which the licenses will be auctioned. It is no coincidence that the FCC incorporated substantial flexibility into the rules for these services. The greater the flexibility allowed in the use of the spectrum, the higher the value of the spectrum to potential licensees. Higher-value licenses will fetch higher prices at auction.

Conversely, however, granting greater flexibility to spectrum licensees in other services will reduce the value of licenses sold at auction, particularly if the flexibility is sufficient to allow a licensee to offer services that compete with the auction winner's offerings. Given these trade-offs, I see a danger that the introduction of auctions to assign licenses in the PCS, millimeter wave, and other newly allocated spectrum blocks could have the unintended consequence of hindering the extension of flexibility in previously allocated spectrum blocks.

First, increased flexibility in other services is inimical to the interests of the successful bidders in the auctions. Having paid large sums of money to win the right to offer mobile services, for instance, the new PCS licensees are likely to oppose proposals to allow the provision of similar services in spectrum bands previously limited to nonmobile applications. The PCS licensees will argue that it is unfair to grant existing licensees in other services the right, free of charge, to compete with PCS. Auction winners also will argue that increased flexibility in other services will devalue their licenses. Indeed, such arguments were made in the 103d Congress by parties opposed to legislative provisions that would have allowed broadcasters to use new technologies to provide additional radio-based services over their broadcast frequencies. In summary, the auction winners likely will form a significant interest group opposed to allowing increased flexibility in spectrum use.

Second, and of greater concern to me, the auction may create perverse incentives for the FCC itself to slow or halt progress in granting flexibility within existing spectrum allocations. Despite the statutory prohibition that

15. SPECTRUM REPORT, *supra* note 1, at 7.

bars the FCC from taking potential auction revenues into account in its allocation decisions, political realities are likely to intrude. Implicitly, the “success” of the auctions is being judged, in part, by how much money they raise for the U.S. Treasury.

The value of the licenses assigned through competitive bidding, and hence the prices bidders are willing to pay, are determined by several factors, including the total amount of spectrum available for use in providing comparable services. License values also will be affected by perceptions of the extent to which the FCC is committed to allowing flexibility in the use of other parts of the spectrum. Just as the substantial flexibility allowed under the PCS rules increases the value of PCS licenses to prospective bidders, increased flexibility in other services will depress the value of PCS licenses. Unless it is checked, the FCC’s instinct may be to seek to maximize revenues from the auctions, rather than overall consumer welfare.

What should be done? The FCC’s spectrum management duty is to ensure the efficient use of the U.S. spectrum resource. Allowing greater flexibility in spectrum use is consistent with this responsibility. Thus, even as the auctions unfold, the FCC should give clear and consistent signals of its commitment to spectrum use flexibility. It can do so in many ways, such as by completing the long-pending private radio docket 91-170, the PLMRS spectrum refarming proceeding.

In order to value the spectrum being offered at the auctions, potential bidders have the right and the need to know the FCC’s intentions regarding spectrum use flexibility. The FCC should meet their needs by committing itself to the systematic implementation of the flexibility recommendations contained in the NTIA Spectrum Report.

Information Superhighway Or Technological Sewer: What Will It Be?

Robert W. Peters*

Several years ago the host of a radio talk show asked me whether I was an expert “on the media” or just on the subject of indecency in the media. I responded without hesitation that my expertise was the latter. In recent years, I have become interested in a broader range of media issues, but my focus—and that of *Morality in Media*—is still very much the subject of indecency in the media. It is also, in good measure, the focus of this Essay.

I was brought up in the 1950s and 1960s, during what some refer to as television’s golden years, and our family certainly watched a lot of television. Thinking back, however, I can’t remember much, if anything, other than perhaps too much violence, that I saw on TV that I would now consider morally objectionable.

Glorification and promotion of sexual immorality, vulgarity, nudity, and sexually explicit scenes just weren’t part of the programming, as I remember it. The television industry, for whatever reasons, had high regard for standards of decency and, generally speaking, for the Judeo-Christian moral and family ethic.

I agree with those who say that real life for many if not most Americans in the 1950s and 1960s had little to do with “life” on primetime TV.¹ The real-life problems were often bigger and not so easily solved, and most real-life American families weren’t so well-off financially. Nor did all live in “lily-white” suburbs.

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1. See Marianne Means, *Political Nostalgia for 1950s Ignores an Ugly Reality*, ORLANDO SENTINEL, Sept. 22, 1994, at A11.

But the "domestic environment" presented on television in the 1950s and 1960s was, on the whole, constructive, well-mannered, and likeable, and television was a source of entertainment that the vast majority of Americans could enjoy, with or without their children, and that did not offend their most cherished values.

Today, opinion polls show that Americans are no longer comfortable with much TV programming. For example, according to a Family Channel/Gallup Survey released in July 1993, an almost two-to-one majority of viewers said that TV depicts negative values over positive ones, and an even larger percentage felt that TV programming does not represent their own values.² According to a survey from the Corporation for Public Broadcasting, released in January 1994, 82 percent of adults think TV is too violent and 70 percent think there is too much sex and offensive language.³

More recently, a June 1994 *Newsweek* poll reported that, in response to the question "Who is to blame for the problem of low morals and personal character in this country?" 67 percent "blame" TV and other popular entertainment "a lot."⁴ Both the President and First Lady have expressed their concern about the level of violence and explicit sex on TV,⁵ which should help dispel any notion that the concern is limited to constituents of the "religious right."

These and other evidence of widespread concern about exploitive, gratuitous sex, vulgarity, and violence on TV and in other media should also put to rest the notion that the entertainment media are giving the American people what they want. As a dear friend once put it: "It is preposterous to suggest that TV viewers are bombarding the TV producers with demands for more sexual dysfunctionals on talk shows, or more graphic depictions of sex and violence in TV movies, or more four-letter words in sitcoms and dramas."⁶ A 1992 Gallup Poll showed that 71 percent of Americans say that objectionable content influences them to watch less TV.⁷

I would add that it is a mistake to assume that because viewers regularly watch a program, they must enjoy or approve of all of it. For

2. *Alternative TV Ratings: TV Programming Is Too Negative, Detrimental to Family, Viewers Say*, RES. ALERT, Sept. 3, 1993.

3. Shauna Snow, *Morning Report*, L.A. TIMES, Feb. 2, 1994, at F2.

4. Howard Fineman, *The Virtuecrats*, NEWSWEEK, June 13, 1994, at 31, 36.

5. See Paul Bedard, *Clinton Slams Film Violence*, WASH. TIMES, Dec. 5, 1993, at A1.

6. TV: THE WORLD'S GREATEST MIND-BENDER 15 (Betty Wein ed., *Morality in Media* 1993).

7. *Discontent Growing: Gallup Poll Finds "Public Outcry" Against TV and Cable Programming*, COMM. DAILY, Aug. 25, 1992, at A5.

example, I still very much enjoy a good football game. I don't, however, enjoy watching players get knocked unconscious or seriously injured, and if the sport continues to get more and more violent, I will stop watching it.

I point out the above because the moguls of the communications industry must make policymaking decisions, not just in regard to technology, but also in regard to program content. The financially profitable, as well as socially responsible, decision would be to provide more and more uplifting, wholesome entertainment—not more and more indecent, violent fare.

Undoubtedly, prurience, sleaze, vulgarity, reality-turned-sensationalism, and gut-wrenching violence do sell, at least in the short run. They sell because a segment of the population, many of whom are youths, find them “entertaining.” They sell because a segment of the population is vulnerable to crass appeals to the baser instincts, particularly where explicit sex and violence are concerned. But what the large majority of the American people want and will demand is high quality entertainment.

I would also point out that these content decisions involve both programming produced by the mainstream entertainment media and programming produced by “others”—e.g., the hardcore pornographers who seek to distribute their wares on channels of communication owned by the mainstream media.

I recently wrote an article for *Religious Broadcasting* magazine, the thrust of which was that prior to the 1970s, there was a distinct line between “adults only” businesses and mainstream businesses, and that back then mainstream businesses didn't distribute hardcore pornographic materials.⁸ Today, the line has blurred to the point where for many “mainstream businesses” (which include cable TV companies, on-line computer services, computer magazines, and newspapers), the only difference between them and “adults only” businesses is that the mainstreamers separate the porn from other goods or services by the word “adult” or the letter “X.”

These companies attempt to justify their decision to carry hardcore pornographic materials by saying that they are not in the business of “censorship” or that market demand must be the final arbiter. As a CEO of one mainstream hotel chain recently put it: “We believe it is more practical to have a system available through a wider variety and to allow our guests to make their own selections.”⁹

8. Robert Peters, *The Blurring Line Between Pornography and Mainstream Business*, RELIGIOUS BROADCASTING, July-Aug. 1994, at 52, 52.

9. Letter from J.W. Marriott, Jr., Chairman of the Board and President, Marriott International, Inc., to Robert W. Peters, President, Morality in Media, Inc. (July 29, 1994)

All mainstream companies, however, engage in self-censorship, act as final arbiters, and limit consumer choice. For example, to their credit, there isn't a mainstream company in America that is doing business with the Ku Klux Klan or neo-Nazi groups.

A TV critic once said to me that it is ludicrous to compare hate propaganda with pornography. My purpose in doing so is to make the point that mainstream companies do not choose to provide pornographic material because *on principle* they are opposed to "censorship," but rather because it is profitable to do so and, in many cases, because pornography is not offensive to the individuals who control these companies.

I also do not accept the argument that pornography is "harmless entertainment."¹⁰ It is not!¹¹ Individuals injured by pornography include children sexually abused by pedophiles who use so-called "adult" pornography to allure or instruct the children; children who are sexually abused by other children who copy what they have viewed in hardcore pornography; adults and youth who become addicted to pornography; wives who are sexually abused or abandoned by porn-addicted husbands; men and women who are raped, tortured, and murdered by porn-addicted perpetrators; men who contract sexually transmitted diseases, including AIDS, in the backrooms of "adult bookstores;" and "performers" who are abused, or who contract AIDS, in the production of hardcore pornography.

There is also a "social aspect" to the distribution of pornography that was aptly described by the Supreme Court in *Paris Adult Theatre I v. Slaton*:

We categorically disapprove the theory . . . that obscene, pornographic films acquire constitutional immunity . . . simply because they are exhibited for consenting adults only. . . . In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. . . . Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel: "It concerns the tone of society, the mode . . . the style and quality of life, now and in the future." . . . As

(copy on file with the *Federal Communications Law Journal*).

10. See, e.g., THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 32 (Bantam 1970).

11. See, e.g., THE FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (July 1986).

Mr. Chief Justice Warren stated, there is a “right of the Nation and of the States to maintain a decent society.”¹²

I would add that the First Amendment places restrictions on government, not private companies, and the private companies, with few exceptions, are not required to provide a forum for hate propaganda or appeals to the prurient interests—and should not be.

It is our earnest desire that the leaders of the mainstream communications industry will once again make decisions about program content, not on the basis of what is profitable in the short run, but on the basis of what is profitable *and* socially beneficial—or, at the very least, not socially destructive.

Unfortunately, however, not everyone has a social conscience. That is why we have laws, and at *Morality in Media*, we don’t agree that the information superhighway should be exempt from laws prohibiting obscenity or indecency. There are already laws prohibiting or restricting obscene or indecent matter in the broadcast media, on cable/satellite TV, and by means of telephone.¹³ To the extent that new technologies have created “loopholes,” laws should be enacted to plug them. For example, the current federal obscenity laws may be inadequate to address the growing problem of noncommercial computer “bulletin boards” that provide hardcore pornographic material. We have prepared a proposed law to address this problem.

At *Morality in Media*, we also don’t agree that the obscenity laws should only be enforced against sleazy “adults only” businesses, but not against “mainstream” businesses that choose to profit from hardcore pornography—which includes so-called “cable versions” of hardcore material. According to a June 1994 WSJ/NBC News Poll, 78 percent of the American people agree that there should be “stricter laws to control pornography,”¹⁴ and a major part of the concern can be directly tied to the decision of mainstream companies to promote and/or serve as distribution channels for hardcore pornography.

We also read *FCC v. Pacifica Foundation*¹⁵ as allowing the government to prohibit non-obscene but “indecent” material on the information superhighway in circumstances where unwilling adults would be assaulted in the privacy of their home and/or children would have easy access to it.

12. *Paris I*, 413 U.S. 49, 57-60 (1973) (quoting Alexander Bickel, *On Pornography: Dissenting and Concurring Opinions*, PUB. INTEREST, Winter 1971, at 25, 25-26 (emphasis omitted) and *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, J., dissenting)).

13. See, e.g., 47 U.S.C. § 223 (1988); 18 U.S.C. § 1464 (1988).

14. Rich Jaroslovsky, *Washington Wire*, WALL ST. J., June 17, 1994, at A1.

15. *Pacifica*, 438 U.S. 726 (1978).

The rationale for our position was aptly described by our current General Counsel, Paul J. McGeady:

Does not the Supreme Court opinion [in *Miller v. California*] mean that you can present explicit hard-core sex . . . on TV if the “play” or “film” or “live performance” [when taken as a whole] has literary or artistic value? It would appear that most Americans . . . would not tolerate the concept that they must switch the dial to avoid such performances on TV or radio or that they must be concerned that their minor children may be exposed. . . . Television and radio communications . . . partake of the nature of a public access thoroughfare (albeit an electromagnetic one), and what may be prohibited on the public street should be equally prohibited on TV and radio. This includes undoubtedly all soft-core or hard-core sexually explicit conduct as well as nudity. . . . What is the quality in public nudity that permits the law to inhibit it without proof of obscenity? . . . We suggest that the quality involved is “Intrusiveness” Just as a citizen is entitled to walk down the public street without the necessity of having to avert his eyes to avoid a public nude performance, so too he [or she] is entitled to “flip the dial” without viewing intrusive nudity or explicit hard-core sex.¹⁶

Enforcing laws against obscene or indecent material over the information superhighway will not prevent the discussion of human sexuality or the presentation of any viewpoint pertaining thereto. As the Supreme Court pointed out in *FCC v. Pacifica Foundation*, “[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication.”¹⁷

The time of day and other factors are also important in determining whether a particular depiction or description is “indecent.” Under the holding of *Sable Communications v. FCC*, indecent but non-obscene communications by means of telephone are protected in circumstances where they are restricted to adults who seek them.¹⁸

As for the “communicative content” of obscene expression, the Supreme Court in its *Miller v. California* decision stated aptly:

The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or the majority of the people approve of the ideas these works represent. “The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people.” . . . But

16. PAUL J. MCGEADY, WHERE DO YOU DRAW THE LINE? 102-03 (Victor B. Cline ed., 1974).

17. *Pacifica*, 438 U.S. at 743 n.18.

18. *Sable*, 492 U.S. 115 (1989).

the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.¹⁹

Enforcing laws against obscenity or indecency, however, will help ensure that the information superhighway will enhance our lives, rather than transforming our cultural environment into a toxic, technological sewer—or, perhaps more accurately, a public nuisance. Law enforcement will help discourage the “permissiveness” which can only “tend further to erode public confidence in the law—that subtle but indispensable ingredient of ordered liberty.”²⁰

19. *Miller*, 413 U.S. 15, 34-35 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

20. *Rosenfeld v New Jersey*, 408 U.S. 901, 902 (1972) (Burger, C.J., dissenting).

Q's World: The Future of Broadcast Regulation

Commissioner James H. Quello*

In the past sixty years, since the passage of the Communications Act of 1934, the field of communications has grown from one where telephone, telegraph, and radio defined the field to one where television, cable, cellular, and satellite only scratch the surface of modern digital telecommunications. The next sixty years promise to further transform the field and make it a centerpiece of not only the national economy, but also the lives of all Americans. These changes, often driven by technological innovations, have brought tremendous competition to the business of communications that has required, and will continue to require, a modernization of the regulatory framework under which the entire telecommunications sector operates.

Broadcasting in particular has seen a remarkable change from the days when the scarcity argument reinforced the need for heavy governmental regulation. The current proliferation of programming channels in America and the oncoming multichannel, multifaceted communications superhighway create a dynamic new environment that calls for a comprehensive review of communications regulation by Congress and the FCC. A new regulatory approach must be explored in the current climate of mega-mergers, joint ventures, and converging technologies.

The major industries affected by the development of a multichannel, multimedia environment and by the convergence of broadcast and information technologies are broadcast radio and television. My most important public policy objective as a Commissioner has been, and continues to be, the preservation of free over-the-air broadcasting for all the public. Notwithstanding the proliferation of cable and computers and the

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day not too far in the future when television, computers, and telephones will be one and the same, broadcasting in the U.S. remains the principal means whereby Americans receive the information and entertainment that constitutes such a vital part of our daily lives. More than any other medium, broadcasting not only reflects, but also helps shape our culture.

The vital role broadcasting plays in defining our American identity sets up an important set of issues for public policymakers who must establish ground rules for the coming of the new National Information Infrastructure. As the most important component of the current information infrastructure, which includes cable, satellite, and wired and wireless communications, broadcasting must still be viewed as an industry whose operations are guided by a trusteeship requirement. Because of the unique place broadcasting holds and the importance of the service it provides, broadcasters have a special obligation to serve the needs and interests of their communities, one that has historically distinguished them from nonbroadcast service providers. Broadcasters themselves recognize this, and they take this obligation seriously. And yet, the world is clearly changing. Although broadcast news and entertainment programming remain the most-watched programming in America, cable television systems now reach most American homes and continue to make substantial inroads into the audiences broadcasters rely upon to survive. Also, direct broadcast satellite (DBS) will further compete for audience share. The general appeal programming which broadcasters are forced to present, by the demands of mass advertising, is being subtly, and sometimes not so subtly, changed by the flood of specialized cable programming and cable channels. Cable's technology allows it to be a purveyor of a wide variety of nonvideo services. Broadcasters, at least today, cannot say the same. And in radio, the coming day of satellite radio services calls into question whether or not broadcast radio stations, those most local of all local broadcast services, can continue to function in the changing market as they have in the past.

These coming changes amply demonstrate that the time has come for the Federal Communications Commission (FCC or Commission) to do some serious revisionist thinking about the rules we apply to broadcasting and perhaps even fundamentally change our current regulatory approach. But, this demands that we abandon decades-old principles and notions about broadcasting and adjust our focus so that we see it no longer as the centerpiece of the American communications infrastructure, but rather as one component of a much larger, radically different, infinitely more complex infrastructure now emerging. Abandoning set notions about anything, much less something as historically critical to our regulatory mission as broadcasting, is never easy, but as a Commission we have, for

the past year, “talked the talk” of changing the communications environment to favor competition. It is now time for us also to “walk the walk” by changing the rules that were formulated in a broadcasting environment that is drastically changing.

It is important to elaborate a bit about what is meant when I say we must adjust our regulatory approach to broadcasting in light of the new multichannel, multimedia environment. Because of the critical role broadcasting plays in defining our American way of life, the Commission has traditionally sought to make sure that broadcast programming reflects the diversity of tastes and viewpoints that have become so prominent a part of our American way of life. The public policy question central to regulating broadcasting has always been: What regulatory approach best assures that broadcasters will, in fact, meet this obligation in their day-to-day operations? In addressing this question, the Commission is constrained not only by the principles of the First Amendment, but also by the provisions of the Communications Act itself, which specifies that “no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”¹

These specific prohibitions against the Commission’s prescribing what type of programming broadcasters must broadcast has led us to rely on structural and behavioral regulation, rather than on content regulation, as the best means of assuring that broadcast programming caters to the diverse needs of the local audience. Thus, by increasing the number of broadcast stations and by limiting the number of stations one entity can own, we have tried to maximize the availability of a diverse cross section of programs and viewpoints. By vigorously enforcing rules requiring that minorities and women be given equal employment opportunities in the broadcast industry, we are attempting to increase the amount of diverse programming by diversifying the corps of industry executives who select, produce, and air it.

This truce between structural and behavioral regulation on the one hand and content regulation on the other has always been an uneasy one. From time to time, the Commission has attempted to add some forms of content regulation on top of structural and behavioral regulation in order to achieve some real or perceived statutory goal. Thus, for example, the Fairness Doctrine remained on the books for years, notwithstanding the limitations on ownership and the dramatic increase in the number of

1. Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064, 1091 (codified as amended at 47 U.S.C. § 326 (1988)).

broadcast, cable, and nonbroadcast media outlets in which varying viewpoints on important public issues could be voiced and accessed. And “programming processing guidelines,” a euphemistic term for Commission-approved quotas of certain programming types, were a part of regulatory life, notwithstanding the fact that the Commission also required broadcast licensees to engage in a very detailed and exacting process of identifying the concerns of the local community, so that they could be sure their broadcast programming was tailored to meet them.

What adjustments to this traditional approach to broadcast regulation do the convergence of technologies and the emergence of multichannel, multimedia competition call for? One might think that the explosive and continuing growth in the number of broadcast and nonbroadcast programming sources would lead to two conclusions: first, that stringent structural and behavioral rules are no longer necessary (and, in fact, have a chilling affect that may harm more than help); and, second, that content regulation becomes virtually a dead issue with the proliferation of outlets for different types of programming and viewpoints.

Over the course of the next few months, the Commission will either launch or conclude rulemaking proceedings that will go to the heart of the structural and behavioral rules I have touched upon today. We will, for example, look at both the radio and television ownership rules. The radio multiple ownership rules have already been relaxed with additional provisions for minority owned stations. This is very appropriate in my view given the massive increase in the number of competing radio outlets that exists today. The same needs to be done regarding the television multiple ownership rules, in order to give television licensees the ability to profit from operational economies of scale without meaningfully diminishing either diversity in ownership or diversity in viewpoint. On the behavioral side of the house, we will look at the broadcast equal employment opportunity rules and see if they need fine-tuning and, if so, to what extent. And on the content front, we will consider the volatile issue of what, if anything, the Commission can or should do to increase the amount of children’s programming on broadcast television.

As a general matter relating to children’s television, one might think that the proliferation of program options that has accompanied the growth in the number of both broadcast and nonbroadcast channels would have abated the calls for generic rules that attempt either to require the broadcast of certain types of desired programming or to prohibit the broadcast of certain types of undesired programming. Nevertheless, despite the increase in the number of hours of children’s programming available on broadcast television and the tremendous expansion in nonbroadcast entertainment,

educational, and informational programming available on cable channels, videotape, or interactive computers, some continue to complain that “good” children’s broadcast programming is lacking and, presumably, otherwise unavailable.

In my view, any additional enforcement of the Children’s Television Act should only be carried out with an eye toward recent court rulings which sent strong messages to the FCC on “indecentcy” and “must-carry.” In particular, the Supreme Court ruling on must-carry this summer, although not rejecting the principle of must-carry, stated:

The FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although “the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.”²

The Supreme Court’s statement in the must-carry case must be considered by both the FCC and Congress when contemplating content-related issues such as children’s TV, violence, indecentcy, and probably the Fairness Doctrine. As a longtime advocate of indecentcy enforcement and violence regulation, my legal, if not personal, position has been influenced by the Court’s statement.

Another issue of importance in this area is the television ownership rules, which should be liberalized. The same competitive forces that so amply warranted loosening the radio ownership rules apply just as cogently, and perhaps even more so, to television. There is little justification for artificially restricting the number of television stations one entity can own in a multichannel, superhighway world. The only remaining requirement should be the establishment of national and local percentage audience caps to obviate antitrust problems. Also, we must make sure that minorities are given a fair chance to acquire radio and television stations in whatever rule changes we make, but in this regard it seems to me that the lessons we have been learning in the context of our auctions of spectrum for narrowband PCS and IVDS services are instructive. The first and perhaps most important lesson is that, unlike thirty years ago when the only practical means available for new entrants to break into the communications business were radio and television stations, the proliferation of entirely new broadcast and nonbroadcast services available for investment and acquisition has rendered this former focus artificially narrow. While it may be true

2. *Turner Brdcast. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2463 (quoting *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed. Reg. 7293 (1960)), *reh’g denied*, 115 S. Ct. 30 (1994).

that radio and television stations remain the most desirable and readily cognizable telecommunications properties, it seems to me we cannot totally ignore the fact that nothing—particularly communications markets—remains static. Those who understand new services and the expanded opportunities of digital services and who perceive new opportunities and new niches to fill are likely, in the long run, to be the industry leaders of tomorrow.

Regardless of whether the investment opportunity is in one of the traditional broadcast or newer nonbroadcast services, in the final analysis minority ownership is most effectively furthered by taking reasonable steps to assure that capital flows to potential minority buyers. I would hope that in setting its new ownership rules the Commission will try to achieve this goal in more effective ways than by being overly stringent in setting limits on the number of stations that can be commonly owned.

Similarly, while the growth in the number of programming sources has not appeared to vitiate the need for certain types of behavioral rules, I believe it does justify a different approach to their enforcement. Perhaps chief among these are the equal employment opportunity (EEO) rules I spoke of earlier. With the immense increase in the number of outlets, both broadcast and nonbroadcast, that offer employment opportunities has come a problematic heightened EEO enforcement effort by the Commission. This enforcement program is typified by hefty fines usually well into five figures, often for comparatively minor recordkeeping and procedural infractions rather than for serious underemployment of minorities and women, much less for actual discrimination against them.

Do our broadcast equal employment opportunity rules need to be further reviewed? My concern is that our current approach, which involves levying heavy fines for procedural and recordkeeping infractions even when the station's employment profile looks fairly good, is becoming an exercise wherein the means are being mistaken for the end. We must not lose sight of the fact that the end we seek to achieve is the employment of women and minorities in numbers commensurate with their presence in the local workforce and the continued growth of those numbers. If a broadcaster is honestly achieving these ends, I see no point whatsoever in levying heavy fines merely because the way the ends were achieved somehow deviated from our employment search requirements.

I mention all these concerns not out of a lack of sympathy with the objectives of good children's programming, ownership diversity, and equal and fair employment opportunities for all Americans. They are, and will always be, among the capstones of a successful regulatory environment for the broadcast media. Rather, my concern is prompted by the proposition

that it is counterproductive to pursue these goals in a multichannel world using outdated tools and philosophies.

In conclusion, today's multichannel, multimedia environment challenges regulators to depart from traditional notions of broadcast regulation. I think it is fair to say that this is not a process that many regulators, more used to traditional, activist types of regulatory intervention, are very comfortable with. But for years the Commission has stated, in rulemaking after rulemaking, that one of the principal benefits of technological development and increased competition is that it eventually renders most extrinsic regulation unnecessary. Now, as the Commission is poised to reevaluate some of its principal rules governing broadcasting, it is time to make sure that, when the regulatory rubber meets the road, our new rules reflect the emerging nonscarce, multichannel communications reality of today and tomorrow.

After all, industry entrepreneurship and investment, not government underwriting and regulation, made the American system of broadcasting the best in the world. Government regulation is necessary to protect the public against the predation of monopolists and those with market power. In the multichannel environment of today and tomorrow, broadcasters are not a monopoly. Nor are they scarce, either in absolute number of broadcast outlets or as one component of a mind-boggling plethora of electronic and print media. They simply do not require continued rigid government monopoly-type oversight. And policymakers need to consider carefully the implications of this exploding multichannel and multimedia competition on broadcasters' incentives to continue to provide universal, free television service. TV broadcasting, the most influential and pervasive of all news and information media, is ready for a different, more marketplace-oriented regulatory approach appropriate for an entirely competitive industry.

In the Battle Over TV Violence, The Communications Act Should Be Cheered, Not Changed!

Carl R. Ramey*

In reflecting upon the sixtieth anniversary of the Communications Act of 1934, I am reminded of one of the first public policy issues I encountered in the practice of communications law. That issue was television violence, a subject that has continued to confound policymakers ever since.

My first brush with the issue came against the backdrop of the Vietnam War. It was in a senate hearing room and the fiery Senator from Rhode Island, John O. Pastore, was castigating the television networks (then only ABC, CBS, and NBC) for allowing the portrayal of violence to permeate so much of their programming.

This was not the first time Congress, exercising its constitutional role under the Communications Act, had cajoled television broadcasters on this topic. The issue, in fact, is almost as old as the medium itself. In 1952, a House subcommittee held hearings on television violence prompted, in part, by the fear of copycat behavior by children arising from the original TV *Superman* series. In 1954, a Senate subcommittee on juvenile delinquency chaired by Senator Estes Kefauver began exploring possible links between juvenile crime and violence shown on television. And a decade later in 1964, the same issue was revisited by the same subcommittee, then chaired by Senator Thomas Dodd.

But the hearings before Senator Pastore in 1969 seemed to intensify the issue as never before. This was an especially urgent time in American history. The Vietnam War had been America's first military engagement where the violence of war was so vividly displayed on daily television newscasts. Also, as chronicled that year by a National Commission on the Causes and Prevention of Violence, it was a time when many other violent strains in our society had bubbled to the surface. The assassinations of Dr.

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Martin Luther King, Jr. and Robert Kennedy, and the anti-war and civil rights disturbances that filled the streets and America's television screens—including rioting at the 1968 Democratic National Convention in Chicago—set an ugly tone. The country and its elected officials were upset and looking to find causes and ready to place blame. Television was a natural, almost inevitable, target.

Television had become a compelling, continuous presence in the lives of most Americans, and as a licensed medium, it was expected to be responsive to social changes and public criticism. Congress, on the other hand, provided the perfect bully pulpit for the ventilation of these volatile issues. Then, as now, few could resist or would deny the political dynamic fueled by the headline potential of being opposed to violence, a champion of children, and tough on a regulated industry.

Ultimately, however, it was the regulatory framework established by the Communications Act of 1934 and a belief and trust in the strong private broadcasting system that has been allowed to evolve within that framework that proved most crucial. Section 326 of the Communications Act provides the abiding standard. In matters of content, “[n]othing in this chapter shall be understood or construed to give the [Federal Communications] Commission the power of censorship over the radio communications or signals transmitted by any radio [or television] station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”¹

The series of hearings initiated by Senator Pastore and duplicated in the House in the late 1960s and early 1970s represented a stern, practical test of this standard. Societal events and escalating political pressure put the established communications system on the defensive. But when the debate subsided, the public interest was served by the kind of accommodation and responsiveness that is unique to our governmental system. Yes, threats were made—some of them fairly ominous—but certain lines, ultimately, were not crossed. A study by the U.S. Surgeon General to further explore the causes of violence was initiated and, in the ensuing years, the television industry undertook a number of significant self-regulatory measures. While important questions remained, the public was heard and the medium responded—all without any fundamental changes in the governing law.

The tension over potential content regulation that filled the air in the late 1960s and early 1970s, however, remains with us in the 1990s as we celebrate the sixtieth anniversary of the Communications Act. While more hearings and reports littered the landscape throughout the 1970s and into

1. 47 U.S.C. § 326 (1988).

the 1980s, Congress assiduously avoided any acts that smacked of direct content regulation.² In 1990, however, this began to change as Congress took two significant steps that threaten to alter drastically the delicate balance previously maintained in this area. First, Congress passed the Children's Television Act of 1990, which not only sets advertising limits in children's programming but requires the FCC, for the first time, to consider the extent to which a TV licensee has served the educational and informational needs of children when reviewing that station's application for renewal of license.³ While not directed toward violence or intended to restrict any form of children's programming, this important recent addition to our communications laws clearly is intended to influence a certain kind of program content directed towards children.

Second, Congress passed the Television Program Improvement Act of 1990 which granted a specific temporary exemption from the antitrust laws relative to "any joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material."⁴ Thus, after many years of a relatively healthy interplay between industry and government that always stopped short of legislation, Congress enacted a measure effectively demanding action on the violent content of television programs. While this first legislative step only targeted voluntary self-regulation, it still poses a new, more menacing threat to the no-censorship standard of the Communications Act.

Predictably, enactment of the Television Program Improvement Act of 1990 led almost immediately to increased public pressure on the television industry to institute voluntary measures, followed by a series of hearings in both the House and Senate designed to assess the industry's progress and performance.⁵ Moreover, unlike past deliberations, these most

2. See, e.g., SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REPORT ON VIOLENCE AND TELEVISION I (Comm. Print 1977).

3. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 393a, 394 (Supp. IV 1992)).

4. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 501(c), 104 Stat. 5089, 5127 (codified at 47 U.S.C. § 303c (Supp. IV 1992)).

5. See *Implementation of the Television Program Improvement Act of 1990: Joint Hearings Before the Subcomm. on the Constitution and the Subcomm. on Juvenile Justice of the Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993); *Violence on Television: Hearings Before the Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce*, 103d Cong., 1st Sess. (1993); *Hearings on Bills to Regulate TV Violence Before the Comm. on Commerce, Science, and Transportation*, 103d Cong., 1st Sess. (1993).

recent hearings were peppered with a number of specific legislative proposals. Included were measures that would, among other things, make it unlawful to distribute any “violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience,”⁶ require the FCC to issue quarterly “violence television report cards” ranking both programs and sponsors according to violence,⁷ require all television programming deemed violent to carry video and audio “warning labels,”⁸ and require all new television sets sold in the United States to be equipped with a so-called “V-chip” that would enable viewers to block the display of channels, programs, and time slots containing material previously rated or labeled by the television industry as to violent content.⁹

As the 1993 Senate hearings drew to a close, an illuminating exchange took place. The committee chairman, Senator Earnest Hollings (D-S.C.), after hearing witnesses from the major television networks, sought to discredit their position by playing a video tape, in the hearing room, of a short clip from the half-hour situation comedy *Love and War*. The clip was from an episode in which the cast of male and female actors, departing from their usual comedic repartee in a restaurant that serves as the show’s regular set, engaged in a short slapstick “barroom brawl” scene. Senator Hollings seemed appalled, strongly suggesting that this type of prime-time “violence” was indefensible. Senator Conrad Burns (R-Mont.), sitting on the same panel, expressed a different view—he thought the scene was funny.

Thus, although the debate has waged for more than forty years, the most troublesome aspect of any form of government regulation of violence remains the overwhelming problem of definition. Social scientists, the creative community, broadcasters, and, as illustrated above, members of Congress, have never been able to agree on what constitutes violence—of any sort. The problem is compounded by the fact that virtually everyone concedes that some violence is “good” or “acceptable” simply because it is essential to a story line, necessary to depicting human conflict, or vital to reporting history and showing reality. No one would seriously regulate

6. S. 1383, 103d Cong., 1st Sess. § 3 (1993) (introduced by Sens. Earnest F. Hollings (D-S.C.) and Daniel K. Inouye (D-Haw.)).

7. S. 973, 103d Cong., 1st Sess. (1993) (introduced by Sens. Byron L. Dorgan (D-N.D.) and Kent Conrad (D-N.D.)); H.R. 2159, 103d Cong., 1st Sess. (1993) (introduced by Rep. Richard J. Durbin (D-Ill.)).

8. S. 943, 103d Cong., 1st Sess. (1993) (introduced by Sen. David Durenberger (R-Minn.)).

9. H.R. 2888, 103d Cong., 1st Sess. (1993) (introduced by Rep. Edward J. Markey (D-Mass.)).

violence on news or sporting events or movies centered on the Holocaust or the Civil War. Even so-called “objective” criteria would not help. How many punches or bullets are too many? Does it matter whether the specific program is a serious drama, a situation comedy, or an action/adventure? Or should the “criteria” be applied indiscriminately to all programs as long as they are likely to be viewed by significant numbers of children comprising a certain age group? Many of the legislative proposals that began to surface in 1993 have been justified on the ground that since Congress can regulate “indecent,” it should also be able to regulate violence. But the depiction of violence, some of which is found in many of our finest creative works, is clearly not the equivalent of indecent material. Any governmental effort to sanitize, channel, or otherwise direct the depiction of violence on television would undoubtedly be so overbroad as to have a severe chilling effect on all entertainment programming.

The continuing controversy over violence on television has largely been spurred and shaped by members of Congress and not the expert agency on communications. The FCC, in fact, over its long history, has rather steadfastly avoided becoming a national censorship board on any topic—especially one so illusive and complicated as violence. Even after coming under intense congressional pressure in the mid-1970s to study and possibly step into this policy quagmire, the Commission pointedly rejected any direct governmental role in overseeing television violence: “As a practical matter, it would be difficult to construct rules which would take into account all of the subjective considerations involved in making such judgments.”¹⁰ Just as importantly, any “attempt at drafting such rules could lead to extreme results which would be unacceptable to the American public.”¹¹ In sum, “violence” laws would represent the worst possible form of content regulation—engaging those entrusted to administer such laws in a process destined to highlight both the harm and the futility of government action.

Therefore, on this sixtieth anniversary of the Communications Act, and after decades of probing the issue in one congressional committee after another, it is time to acknowledge, emphatically, that the simple choice is between censorship and responsible voluntary conduct. There is, on this topic, no middle ground. While the government can cajole the industry—even talk over the industry directly to the American public—it is ultimately the public that must decide whether to watch, protest against, or

10. Report on the Brdcast. of Violent, Indecent, and Obscene Material, *Report*, 51 F.C.C.2d 418, 419 (1975).

11. *Id.*

turn off particular violent programming. It cannot be legislated on a program-by-program basis.

We face a far more diverse information and entertainment marketplace than existed when Senator Pastore squared-off with three over-the-air television networks which then controlled more than 90 percent of prime-time viewing. Policymakers must recognize this reality in their continuing efforts to monitor and influence a program content issue such as television violence. Indeed, with rapidly advancing communications technologies capable of spreading more sources of information and entertainment to a larger audience, the role of government in such matters should be diminished, not strengthened.

Violence will not and should not disappear from America's television screens. There will always be stories worth telling that contain conflict and violence. Our founding fathers had the wisdom to recognize the importance of freedom of expression to a democratic society. The architects of the Communications Act had the foresight to incorporate that fundamental principle into the body of the 1934 Act when they specifically denied the government the power of censorship over broadcast content. And, those who have been entrusted with the responsibility for overseeing and administering the Act for the past sixty years have displayed similar wisdom in guarding this principle.

The almost continuous forty-year record of congressional investigations, culminating in the 1993 violence hearings and numerous new concrete legislative proposals, provides compelling evidence that this principle cannot be taken for granted. However strong our common concern with violence on television, it is essential that the industry continue to police itself in response to legitimate criticism from viewers and their elected officials.

Legislation is not the answer. The solution, rather, lies in a continuation of the admittedly untidy, slow, and somewhat cumbersome process called public debate. The process should include: (1) more and continuous consciousness-raising by government officials and citizen groups; (2) expanded efforts by broadcasters to employ appropriate advisories in promotions and programs (including better methods for communicating such warnings to print media for inclusion in advance program listings); (3) increased development of children's programs with positive messages and information, offering both an alternative and counterbalance to programs containing violence; (4) public service announcements designed to educate and inform parents and children about the portrayal of violence and conflict in television programming; and (5) an increased focus by policymakers and

others on entertainment and program sources beyond the major networks and local stations.

We live in a communications world that is constantly changing. There is a steady swirl of activity to recast the Communications Act so as to reflect such marketplace changes. Nothing has changed, however, to warrant a reexamination of the bedrock principle of no censorship found in the Act. Indeed, on the sixtieth anniversary of the Communications Act, with continuing incidents of societal violence providing ongoing fodder for attacking violence on television, it is more important than ever that this one vital aspect of the governing statute remain totally unchanged. In this battle, as with all battles over broadcast content, Section 326 and the First Amendment precepts that support it should be cheered, not changed.

Reinventing FCC Adjudication

Sidney White Rhyne*

This issue of the *Federal Communications Law Journal* adds a scholarly encore to other commemorative activities¹ of its co-sponsor, the Federal Communications Bar Association (FCBA), marking the sixtieth anniversary of the Communications Act of 1934² and the Federal Communications Commission (FCC or Commission).

EXPANSION OF COMMISSION RESPONSIBILITIES

In 1934 the Commission regulated telephone, telegraph, and fewer than 600 broadcast stations—all AM.³ Today the Commission regulates a vastly larger and more advanced system of telephone communications⁴ and more than 21,000 broadcast stations, including AM, FM, TV, and LPTV.⁵ Its regulatory responsibilities now include cable television, microwave, land mobile services, private and citizens band radio, cellular, satellite, personal communications, fiber-optic communications, computers, and other

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1. On October 6, 1994, a gala anniversary reception in Washington, D.C. addressed by the FCBA President and FCC Chairman was attended by more than 500 persons. The FCBA announced at the reception an outreach program sponsoring small-group tours of communications facilities for Washington, D.C., high school students as part of an annual Career Day. More than 75 students toured four facilities on that day.

2. Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064.

3. Richard Wiley, Remarks at the FCBA-hosted 40th Anniversary Dinner I (Nov. 15, 1974) (copy on file with the *Federal Communications Law Journal*). Mr. Wiley, who was FCC Chairman in 1974, and the first Chairman, Eugene O. Sykes, are the only FCC Chairmen to have served also as Presidents of the FCBA (Sykes in 1942, and Wiley in 1986-87).

4. In 1934, there were 17 million telephones in the United States. See FCC, 25TH ANNUAL REPORT/FISCAL YEAR 57 (1959). Today there are more than 127 million. 1992 U.N. Stat. Y.B. 719 (based on a 1990 figure).

5. *Broadcast Station Totals As of Aug. 31, 1994* (Mimeo. No. 44901), FCC News, Sept. 27, 1994, at 1.

technologies that were either unheard of or only in early experimental stages in 1934. The Commission has acquired major responsibilities under acts in addition to or amendment of the Communications Act of 1934.⁶ In the agency's first year, it had 233 employees and a budget of \$1 million. Today, it has more than 1900 employees and a budget of \$160 million.⁷ Yet the number of Commissioners has decreased, from seven in 1934 to five today.⁸

FUNCTIONS OF COMMISSIONERS

Members of the Commission serve many functions. They determine communications policy for the nation, consistent with congressional directives. They interrelate with foreign governments and their regulatory bodies in seeking to facilitate and standardize the development of global communications.⁹ They provide an audience to representatives of regulated industries, companies, and consumers about specific concerns.¹⁰ They address the more general concerns of such parties through speeches and other personal appearances.¹¹ They seek to inform themselves about matters for which they have responsibility through travel and field

6. See, e.g., Omnibus Budget Reconciliation Act of 1993, 47 U.S.C.A. § 309(j) (West Supp. 1994); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. §§ 521-611 (Supp. 1992)); Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 393a, 394 (1992)); and Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 421 (codified at 47 U.S.C. § 721(a) (1988))

7. *FCC Celebrates 60th Birthday*, FCC News, Sept. 30, 1994. The budget for fiscal year 1995 is \$185 million. Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies 1995 Appropriations and 1994 Supplemental Appropriations, Pub. L. No. 103-317, 108 Stat. 1724, 1737 (1994).

8. Communications Act of 1934, ch. 652, § 4(a), 48 Stat. 1064, *as amended by* Pub. L. No. 97-253, § 501(b)(1), 96 Stat. 805 (1982) (reducing the number of Commissioners to five).

9. For example, Commissioners attended the World Telecommunication Development Conference in Buenos Aires, Argentina, in March 1994, and the International Telecommunication Union (ITU) Plenipotentiary Conference in Kyoto, Japan, in September 1994.

10. The Commissioners often remark publicly about the frequency of such appearances, commonly referred to as "lobbying." See Rachele B. Chong, FCC Commissioner, Comments at Broadcasting & Cable/FCBA Interface conference (Oct. 4, 1994); Susan Ness, FCC Commissioner, Remarks to Federal Communications Bar Association (Sept. 22, 1994) (copy on file with the *Federal Communications Law Journal*). The Commission regularly publishes public notices of oral presentations in nonrestricted proceedings. See, e.g., *Ex Parte Presentations and Post-Reply Comment Period Filings in Non-Restricted Proceedings*, Public Notice (Oct. 6, 1994).

11. FCC News Releases reflect ten speeches by the Chairman during September-October 1994, nine speeches by the other Commissioners, and eight appearances by one or more Commissioners on panels.

observation.¹² They prepare reports and recommendations to Congress¹³ and the executive branch.¹⁴ They continually evaluate and reevaluate their procedural and substantive regulations.¹⁵ And they adjudicate disputes.

THE COMMISSION'S ADJUDICATIVE FUNCTION

It is to the Commission's adjudicative function that this article is addressed. In resolving disputes, the Commissioners act as appellate judges. Yet they face demands on their time that appellate judges do not face, they perform functions that appellate judges do not perform, and they operate in an environment that provides less time for quiet contemplation than that in which appellate judges operate. An immense number of adjudicative matters wind their way through the Commission processes and ultimately to the five Commissioners. The result can be considerable delay in disposition.¹⁶

The thesis of this Essay is that the Commission should reform its adjudicative process so that the five Commissioners can maximize the effectiveness of the time they are able to spend on adjudication. They could do this by acting as the highest court in a two-tier appellate system, with a lower tribunal such as the existing Review Board adjudicating most

12. FCC releases also show that during September-October 1994, Commissioners attended official functions in New York, Connecticut, Michigan, California, the State of Washington, Ireland, Russia, and Japan.

13. See, e.g., *In re* Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992; Inquiry into Sports Programming Migration, 9 FCC Rcd. 3440 (1994).

14. See, e.g., *In re* Report to Ronald H. Brown, Secretary, U.S. Dept. of Commerce, Regarding the Preliminary Spectrum Reallocation Report, 75 Rad. Reg. 2d (P & F) 1141 (1994).

15. See, e.g., *In re* Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Services, *Notice of Proposed Rule Making and Order*, 9 FCC Rcd. 2578 (1994).

16. See, e.g., *In Re* Application of Quinipiac College for Construction Permit to Modify the Facilities of Noncommercial Educational FM Station WQAQ, *Memorandum Opinion and Order*, 8 FCC Rcd. 6285 (1993) (decision more than four years after application for review); *In Re* Applications of Charisma Broadcasting Corp. et al., *Memorandum Opinion and Order*, 8 FCC Rcd. 864 (1993) (decision 19 months after application for review).

On June 8, 1989, the FCBA filed at the FCC a study of 39 adjudicatory matters decided in the period from October 1986 to May 1989. It found that the average time between the filing of an application for review and release of a decision by the Commission was 13.5 months. Four cases cited in that study involved delays at the Commission level of more than 30 months. Supplement to the Comments of the Federal Communications Bar Association to *In re* Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM and TV Stations by Random Selection (Lottery) in MM Dkt. No. 89-15 (June 8, 1989).

disputes while the Commissioners select for themselves only those cases that they consider of greatest precedential importance. The Commission should also provide for a formal record of pleadings and correspondence in all disputes, not just those that result in docketed proceedings. And it should keep and publish statistics each year on the time it takes for adjudicative matters to pass through the various stages of the administrative process, thereby providing accountability within the agency for delay and information on which to base procedural reform.

1. Discretionary Review

Of the fifty states, thirty-nine have permanent intermediate appellate courts.¹⁷ That is the structural solution to docket overload and its attendant delay recommended by the American Bar Association (ABA)¹⁸ and the National Center for State Courts.¹⁹

The ABA has set a standard of 280 days, slightly over nine months, for the issuance of a judicial opinion after the filing of a notice of appeal.²⁰ The Communications Act sets a more ambitious standard for the Commission: a final decision is to be rendered within three months from the filing of an application that does not go to hearing, or within six months from the final date of hearing in all cases that do go to hearing.²¹

That is simply not achievable, and has largely not been achieved, in disputes where the Commissioners themselves perform the adjudicative function. To alleviate that problem, the Commission should, instead, delegate to the Review Board the task of deciding most disputes, following the appellate structure recommended for courts by the ABA and in effect in most states.²² The lower adjudicative body would sit in panels rather than en banc, and its membership could be expanded or contracted as necessary to service its caseload.

17. All but Delaware, Maine, Montana, North Dakota, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming have intermediate appellate courts. See 1993 D.C. CTS. ANN. REP. 17; 1990 ST. CT. CASELOAD STAT. ANN. REP. 50, 186-237.

18. 1 STANDARDS RELATING TO COURT ORGANIZATION § 1.13 commentary at 40 (ABA Judicial Admin. Div. 1990).

19. JAMES R. JAMES ET AL., 1 APPELLATE DELAY IN THE D.C. COURT OF APPEALS 28 (July 1986) (study by National Center for State Courts).

20. STANDARDS RELATING TO APPELLATE DELAY REDUCTION § 3.52 commentary at 11 (ABA Judicial Admin. Div. 1988).

21. 47 U.S.C. § 155(d) (1988).

22. This is also the structure of the federal courts, where there is a right to mandatory review by the courts of appeals but in most cases only a right to discretionary review by the U.S. Supreme Court. 28 U.S.C. §§ 1254, 1291 (1988).

While an analysis of whether the reforms proposed in this Essay are wholly achievable without new legislation or rulemaking is beyond the scope of the Essay,²³ there is ample authority in the existing Act for discretionary Commission review. Section 5(c) of the Act²⁴ permits the Commission to delegate its adjudicative functions within the agency,²⁵ with any decision made by delegates to have the same effect as if made by the Commission unless further review is undertaken by the Commission. Section 5 also provides for review by the Commission of decisions by delegated authority. But it provides that the Commission may deny any applications for review without specifying reasons for the denial.²⁶ Thus, the Commission has authority under the Act to exercise only a “certiorari” type jurisdiction if it so chooses. That is in fact the type of review that the Act seems to contemplate.²⁷

The most effective system of discretionary review by a state court of last resort with an intermediate appellate court is the “cert first” system employed in Massachusetts and Maryland.²⁸ In that system, the highest court reaches down and takes for review cases pending in the intermediate court that it considers of greatest importance before they are ever decided by the intermediate court. There is ordinarily only one appellate review.

If the Commission adopted that system, it could concentrate on the “law declaring” function while leaving to the lower adjudicative body the “error correcting” function in most cases.²⁹ Failure of the Commission to review, like failure of the Supreme Court to grant certiorari, would not connote endorsement of the result reached by the lower adjudicative body. It would indicate only that the case was not then deemed of sufficient importance to warrant Commission review. The Commission should also

23. See *In re* Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases, *Report and Order*, 6 FCC Rcd. 157, para. 44 n.27 (1990) (where the Commission may have suggested, though without analysis, that legislation would be required).

24. 47 U.S.C. § 155(c) (1988).

25. Indeed, the Commission performs most of its duties by delegation. See, e.g., 47 C.F.R. § 0.283 (1993); see also 47 C.F.R. § 0.365 (1993).

26. 47 U.S.C. § 155(c)(4), (5) (1988).

27. Comments of the Federal Communications Bar Association to *In re* Proposals to Reform the Commission’s Comparative Hearing Process in Gen. Dkt. No. 90-264, at 42 (Sept. 14, 1990) (where the FCBA advocated this type of review).

28. See MASS. ANN. LAWS ch. 211A, §§ 10-12 (Law Co-op. 1994); see also MASS. R. APP. P. 27.1; 1993 ANN. REP. OF THE MD. JUDICIARY 24-25 (“A monthly review of appellants’ briefs from cases pending in the Court of Special Appeals [the intermediate court] is conducted by the Court of Appeals to identify cases suitable for consideration by the higher court.”).

29. STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 4 (ABA Comm’n on Standards of Jud. Admin., Approved Draft 1977).

provide by rule a specific time period, e.g., sixty days after any application for review that follows a Review Board decision, during which it must pass on any such application.³⁰

2. Adjudicative Record

The Commission maintains a formal docket and record in all cases that have been designated for hearing.³¹ But in cases involving disputes that are never designated for hearing, the applications, amendments, pleadings, and correspondence that form the basis on which the Commission makes its decision are never listed on a docket nor placed in an official record.

The result is that in a disputed case a Commission decision declining to designate an application for hearing can go to the court of appeals without a docket or contemporaneously maintained official record. Indeed, the record sent to the court of appeals may have to be compiled from the files of counsel.³² If a hearing has been held, the Commission may have to deal with conflicting claims as to facts that were documented in the pre-hearing stage of a proceeding but somehow omitted from the hearing record.³³

Since many disputes are adjudicated by the Commission without ever going to hearing, a formal record of filings by the parties with whatever officer or appellate body is delegated the power to adjudicate the dispute should be maintained from the time the existence of a dispute is identified. That would bring together in one place the record that the Commissioners and their staff need to make a judgment as to exercise of discretionary review, whether before or after the single mandatory appellate adjudication.

3. Case Management Statistics

A docket of all filings in disputes adjudicated or to be adjudicated by the Commission would enable it to quantify the number of such disputes pending at the end of each year and the average length of time they have

30. This should be feasible with only a certiorari-type review, particularly if the case has already been rejected for "cert first" review. The Commission should also impose on itself a discipline like that of the Supreme Court's "term" system. The Court's policy is to decide all cases argued in any term before the term ends, which requires that the Court not take more cases than it can decide in a timely fashion.

31. See 47 C.F.R. § 1.203 (1993).

32. This was the method used to send the record in *Tele-Media Corp. v. FCC*, 697 F.2d 402 (D.C. Cir. 1983).

33. See generally *In Re Applications of Charisma Broadcasting Corp. et al.*, 8 FCC Rcd. 864 (1993).

been pending. It would also enable the Commission to identify and deal with delays at various stages of the adjudicative process.

Many courts compile and publish annual statistics on their backlogs, average times for disposition, and average times at various stages of adjudication.³⁴ This enables the courts to identify yearly trends, both overall and at particular stages of the adjudicative process. If the FCC were to implement such record-keeping and annual reporting, it would provide the data necessary to determine how long it takes to obtain adjudication of disputes, whether the trend is toward greater or less delay, and at what points in the process steps need to be taken to try to reduce delay.

CONCLUSION

This Essay suggests adoption, for the FCC's adjudicative function, of procedures that recognized authorities in the field of judicial administration recommend for expediting the adjudicative process. Those procedures, if adapted by the Commission to its own processes, would "reinvent" FCC adjudication. They would free the Commissioners from routine adjudications, enable them to devote their limited time and resources to those adjudications of greatest relative importance, speed the adjudicative process, provide accountability to the public for delay, and provide data to the Commission with which to address and combat unnecessary delay.

34. *See, e.g.*, 1993 D.C. CTS. ANN. REP. 38-39; *see also* 1990 W. VA. SUP. CT. OF APPEALS STAT. ACTIVITY 3, 10-11.

On the Sixtieth Anniversary of the Communications Act of 1934

Joel Rosenbloom*

To celebrate an event's anniversary, as we do here, is to assert its continuing importance. One might well ask, however, what this celebration is about. It is quite arguable that the 1934 Act was an event of only passing importance in the history of communications law and regulation. The chief substantive provisions of the statute were taken, lightly adapted, from earlier statutes. Title II's scheme for the regulation of common carriers came from the Interstate Commerce Act of 1887 (by way of the Mann-Elkins Act of 1910); Title III's provisions for the regulation of broadcast and other users of the electromagnetic spectrum came from the Radio Act of 1927.¹

The argument could be extended. Fundamental innovations in any field of human endeavor are few and far between. The "public trustee" concept of broadcasting created in 1927 is with us still, despite the deregulatory movement of the eighties and the demise of the Fairness Doctrine.² Moreover, basic innovations need not stem from legislation. The FCC substituted "price cap" for "rate base/rate of return" regulation of rates charged by major telecommunications carriers without any change in the 1934 Act.³ The notion that maximum "diversification" in the ownership

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1. See Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 3-5 (Max D. Paglin ed., 1989).

2. The "public trustee" obligations emphasized by the Federal Communications Commission (FCC or Commission) have varied markedly over time. The FCC no longer stresses programming and commercial promises or the ascertainment of community needs. It focuses instead on the commercial and programming requirements of the Children's Television Act, as well as equal employment and the avoidance of "actionable" indecency. But the basic concept remains. Indeed, the FCC's new Chairman recently proposed to "redefine, restate and renew the social compact between the public and the broadcasting industry." Kim McAvoy, *Hundt's New Deal*, BROADCASTING & CABLE, Aug. 1, 1994, at 6, 6.

3. See *In re Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rulemaking*, 3 FCC Rcd. 3195 (1988), *Report and Order and Second Further*

and control of broadcasting and other mass media is an important public interest objective was invented by the FCC, not by Congress.⁴

There remains, nonetheless, reason for this anniversary celebration. The principal innovation of the 1934 Act was its creation of the FCC as the unitary regulator of both telecommunications common carriage and the use of the radio spectrum.⁵ “[T]he two regulatory functions did not have that much in common, then or now,”⁶ but the merger of functions itself has had significant consequences (or so I would argue).

One such effect is easily demonstrable. When Congress merged the two regulatory schemes, it inserted in its definition of the term “common carrier” the statement that “a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”⁷ Whether other transmitters of interstate communications by wire or radio would be subject to regulation under Title II of the Act was left to depend on the uncertain application of traditional notions of what constitutes “common carriage.”⁸ Broadcasters were given a blanket exemption.

In taking this step, Congress resolved a live controversy. Because broadcasters occupied what were then thought to be highly limited radio frequencies, there was major concern that they would deny access to their facilities altogether or discriminate unfairly among those who sought a

Notice of Proposed Rulemaking, 4 FCC Rcd. 2873 (1989), *Second Report and Order*, 5 FCC Rcd. 6786 (1990), *Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd. 2637 (1991), *aff'd sub nom.* National Rural Telecomm. Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

4. The roots of the notion, of course, lie in antitrust thought (in its Brandeis/Jefferson version). But the “diversification” concept goes well beyond any requirements that might be imposed under antitrust statutes. It was clearly articulated, moreover, well before Justice Black’s dictum in *Associated Press v. United States* that the antitrust laws serve the First Amendment by promoting “the widest possible dissemination of information from diverse and antagonistic sources.” *Associated Press*, 326 U.S. 1, 20 (1945); see, e.g., *In re Radio Corp. of Am.*, 10 F.C.C. 212, 213 (1943) (“[T]he mechanism of free speech can operate freely only when the controls of public access to the means for the dissemination of news and issues are in as many responsible ownerships as possible and each exercises its own independent judgment.”).

5. See Robinson, *supra* note 1, at 3.

6. *Id.* at 4.

7. Communications Act of 1934, ch. 652, § 3, 48 Stat. 1064, 1065 (codified as amended at 47 U.S.C. § 153(h) (1988)).

8. See, e.g., *In re Amendment of § 64.702 of the Commission’s Rules and Regs.* (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384, paras. 121-22, *modified by Memorandum Opinion and Order*, 84 F.C.C.2d 50 (1980), *aff'd and clarified by Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer and Comm. Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, *Memorandum Opinion and Order*, 56 Rad. Reg. 2d (P & F) 301 (1984).

radio microphone.⁹ The Senate committee on the 1927 radio legislation reported out a provision that would have classified as “a common carrier in interstate commerce” any broadcaster who sold time for any purpose or who allowed the use of his facilities either by political candidates or for the discussion of “any question affecting the public.”¹⁰ Although that proposal was rejected on the floor of the Senate,¹¹ the statute as enacted authorized the new Radio Commission to revoke any station license if the Interstate Commerce Commission (ICC) (or “any other Federal body in the exercise of authority conferred upon it by law”) found that a licensee properly subject to traditional common carrier obligations (e.g., to “provide reasonable facilities” and avoid “discrimination”) had violated those obligations.¹²

As was predicted at the time, that provision turned out to be ineffective because the ICC disclaimed jurisdiction over radio.¹³ But the notion that broadcasters should be regulated as common carriers was included in a bill, which would have created an agency exercising jurisdiction over both “wire and wireless” communication, on which there were extensive hearings in 1929 and 1930.¹⁴ That idea, moreover, had the support of the Radio Commission’s Chairman.¹⁵ The opponents of common carrier regulation for broadcasters (who included the majority of the Radio Commission and Senator Dill, one of the co-authors of the Radio Act) did not talk of broadcaster rights or editorial freedom. Instead, they emphasized the practical need that broadcasters retain editorial discretion over the use made of the limited broadcast time at their disposal.¹⁶ Louis

9. See, e.g., 69 CONG. REC. 5558 (1926) (“If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations.”).

10. S. REP. NO. 772, 69th Cong., 1st Sess. 4 (1926); see also 69 CONG. REC. 12,503 (1926).

11. See 69 CONG. REC. 12,501-02 (1926).

12. Radio Act of 1927, ch. 169, 44 Stat. 1162, 1168, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102.

13. See 69 CONG. REC. 2567 (1927); see also *Sta-Shine Prod. Co. v. Station WGBB*, 188 I.C.C. 271 (1932).

14. *Commission on Communications: Hearings on S. 6 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 1st and 2d Sess. 1-2 (1929-30) [hereinafter *Hearings on S. 6*].

15. See *id.* at 189-95, 1614-17.

16. See *id.* at 75, 87-89, 104, 241, 1715, 1757. See also the remark of Senator Dill in the congressional debates on the 1927 Act concerning the undesirability of putting the broadcaster “under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid.” 69 CONG. REC. 12,502 (1926); and see his remark in 1929:

Caldwell, who had been the first General Counsel of the Federal Radio Commission, opposed common carrier status as follows:

If the broadcasting station which ordinarily has to rely on advertisers for its income has to receive every advertiser on an equal basis, it, and its listening public may be the prey to all sorts of quack advertising, and it is felt that it is safer to allow the station owner the same discretion which a newspaper or magazine has—that of rejecting or accepting advertising, and relying on his self-interest to see to it that no unfairness is done.¹⁷

Whatever their arguments, the supporters of broadcaster discretion prevailed. Their victory, sealed in Section 3(h) of the 1934 Act, cast a long shadow into the future. Almost four decades later, the country was torn by internal divisions concerning the war in Vietnam, as well as those of race, class, generation, and ideology. The impartiality and integrity of broadcast journalists was sharply questioned by avatars of both the right and the left. The Fairness Doctrine had been the FCC's traditional answer to fears on this score, but its requirement that broadcasters provide reasonable opportunity for the expression of conflicting views left broadcasters with broad editorial discretion—too much to satisfy the passions then abroad in the land. Moreover, in affirming the constitutionality of the Fairness Doctrine, *Red Lion Broadcasting Co. v. FCC*, had strongly hinted that more stringent intrusions could be justified.¹⁸

In this context, an activist court of appeals found in the First Amendment a requirement that broadcasters must accept paid advertisements in which the proponents of views on controversial issues could express those views, select the issues to be discussed, and control the manner of the overall presentation.¹⁹ In *CBS, Inc. v. Democratic National*

[I]n theory I have agreed for a long time with the idea that all broadcasting stations should be common carriers, but in practice I have never been able to convince myself that it could be worked out without seriously breaking down the radio service, and that is why I have never insisted upon it.

Hearings on S. 6, supra note 14, at 193.

17. *Hearings on S. 6, supra* note 14, at 87-88. Caldwell did not rely solely on the broadcaster's self-interest. He responded to a request for his opinion with respect to broadcast advertising of cigarettes and "the broad subject of going into the home with the creation of a habit which, if not deleterious, is at least not beneficial" by asserting that the Commission could take the broadcast of such advertising into account when passing on the broadcaster's license renewal. *Id.* at 88-89.

18. *Red Lion*, 395 U.S. 367 (1969). The Court said, "[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." *Id.* at 389. Further, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

19. *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 646 (D.C. Cir. 1971).

Committee, the Supreme Court rejected that holding.²⁰ In doing so, it relied on Section 3(h), which it read (in light of its history) as reflecting “Congress’ flat refusal to impose a ‘common carrier’ right of access for all persons wishing to speak out on public issues.”²¹ The Court went well beyond the discussion of practicalities that had dominated the pre-1934 debate on this subject:

Nor can we accept the Court of Appeals’ view that every potential speaker is “the best judge” of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or for worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided.²²

This passage represents, I believe, the first instance in which any court found the screening editorial function performed by mass media worthy of protection under the First Amendment.²³ To be sure, the Court’s recognition of broadcaster editorial rights was nowhere near as sweeping as the protection it soon thereafter gave to print editors.²⁴ It relied heavily on the constraints imposed on broadcasters by the Fairness Doctrine,²⁵ and left room for the creation of limited rights of access to the facilities of broadcasters.²⁶ But *CBS, Inc. v. Democratic National Committee* established the proposition that the constitutional need to preserve broadcasters’ editorial discretion imposes a limit on the scope and nature of any obligations that the government may impose.

This is not the only effect that Section 3(h) has had on media regulation. The belief that it is undesirable for media editors to stand as filters between would-be speakers and the public has had strong appeal in

20. *CBS, Inc. v. Democratic Nat’l Committee*, 412 U.S. 94 (1973).

21. *Id.* at 110; *see also id.* at 132, 137 (Stewart, J., concurring). While resolving a constitutional rather than statutory question, the Court gave “great weight to the decisions of Congress.” *Id.* at 102.

22. *Id.* at 124-25.

23. The right of an editor to reject proffered material is sometimes viewed as part of the broader right of any speaker to remain silent. Even on this view, *CBS, Inc. v. Democratic National Committee* antedated *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) and *Schnapper v. Foley*, 667 F.2d 102, 113-15 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). It was anticipated only by *Estate of Hemingway v. Random House*, 244 N.E.2d 250, 253 (1968) and, if read broadly, *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943).

24. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

25. *CBS, Inc. v. Democratic Nat’l Committee*, 412 U.S. at 130-32.

26. *See id.* at 131-32; *see also CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (upholding a statutory right of access to broadcaster facilities for candidates for federal office).

a variety of contexts. That appeal increases when there appears to be little constraint on a medium's capacity to deliver the messages of multiple speakers. When the FCC first recognized that cable television offered a potential "economy of abundance" in the channels of video service that the public might receive,²⁷ the agency toyed with the idea of imposing "common carrier" status, at least as to some channels.²⁸ In 1972, it imposed "access" requirements for the benefit of government, educational institutions, and would-be speakers via cable generally, both commercial and noncommercial.²⁹

The agency's authority over cable, however, then rested on the holding in *United States v. Southwestern Cable Co.* that Section 2(a) of the 1934 Act granted jurisdiction over cable television "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."³⁰ In *FCC v. Midwest Video Corp.*, the Supreme Court struck down the Commission's cable access rules on the ground that: (i) "[Section] 3(h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common carrier obligations on broadcast systems,"³¹ and (ii) Congress could not be deemed to have authorized the imposition on cable operators of restrictions that it had sternly forbidden in the case of broadcasters.³²

The statutory ban on Commission attempts to constrain the programming discretion of cable operators was limited to intrusions which were so severe as to amount to the imposition of common carrier status.³³

27. *In re* Amendment of Subpart K of Part 74 of the Commission's Rules and Regs. with Respect to Tech'l Stds. for Community Antenna TV Sys., *Notice of Proposed Rule Making*, 25 F.C.C.2d 38, para. 6 (1970). The Commission had in fact perceived this possibility at least two years earlier. See generally *In re* Amendment of Part 74, Subpart K, of the Commission's Rules and Regs. Relative to Community Antenna TV Sys., *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C.2d 417, para. 4 (1968) [hereinafter *CATV Rulemaking*].

28. *CATV Rulemaking*, *supra* note 27, para. 26.

29. *Cable Television Report and Order*, 36 F.C.C.2d 143, paras. 122-25, 130-48, 240-42 app. (1972). Two years later, a committee of the President's cabinet proposed that cable operators be generally divorced from any control over the content they distributed, i.e., that they be subjected to full common carrier regulation. THE CABINET COMMITTEE ON CABLE COMMUNICATIONS, OFFICE OF TELECOMMUNICATIONS POLICY, REPORT TO THE PRESIDENT (1974).

30. *Southwestern Cable*, 392 U.S. 157, 178 (1968).

31. *Midwest Video*, 440 U.S. 689, 705 (1979).

32. *Id.* at 708.

33. *Id.* at 706-07 n.16 (distinguishing the Commission's then-existing rules requiring cable operators to carry the signals of local TV broadcasters, on the ground that they "did not compel cable operators to function as common carriers," were "limited to remedying a

Moreover, *Midwest Video* was far from the final word on the subject. The access requirements stricken by the Court in 1979 were substantially restored by the Cable Communications Policy Act of 1984.³⁴ But the idea that the programming discretion of cable operators is entitled to respect was given a powerful boost by *Midwest Video*. That discretion has since been given First Amendment protection, most recently and authoritatively in *Turner Broadcasting System, Inc. v. FCC*.³⁵

We seem today on the cusp of an era marked by the convergence of technologies (and players) in telecommunications carriage, data processing, cable television, and broadcasting. In an era in which channels of communication to the public will be, as a practical matter, infinite, television viewing will become increasingly interactive, and “systems integrators” will play as large a role as the purveyors of content or the providers of transport services.³⁶ But there is no indication that fears of media power and fascination with its presumed ability to shape our society for good or ill will disappear. Nor is there much evidence that Congress or the courts will reject all rationales for the use of regulatory power to constrain the editorial choices of the electronic media. It is a matter of some moment, then, that any form of such regulation will have to leave electronic media editors with “abundant discretion over programming choices.”³⁷ We owe that feature of our jurisprudence in no small part to one of the decisions made in 1934.

specific perceived evil,” and “involved a balance of considerations not addressed by § 3(h).”

34. Cable Communications Policy Act of 1984, § 2, 47 U.S.C. § 532 (1988). This section, dealing with commercial leased access, was significantly broadened by the Cable Television Consumer Protection and Competition Act of 1992, §§ 9, 10(a)-(b), 47 U.S.C. § 532 (Supp. IV 1992).

35. *Turner Brdcst.*, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994). The protection afforded by *Turner* fell well short of the cable industry's hopes. But it remains unclear whether the broadcast signal carriage requirements imposed by the Cable Television Consumer Protection and Competition Act of 1992, which are plainly not threatened by anything in *Midwest Video*, will ultimately survive the further scrutiny that *Turner* mandates.

36. See, e.g., Eli Noam, *Beyond Liberalization: From the Network of Networks to the System of Systems*, 18 TELECOMMUNICATIONS POL'Y 286-94 (May/June, 1994).

37. *Turner Brdcst.*, 114 S. Ct. at 2464.

Independent Audits and Self-Regulation—Not Legislation—Is Best Answer to TV Violence

Senator Paul Simon*

The sharp focus on television violence in the last two years has brought some fledgling improvements that offer the best hope ever for sustained progress in curbing glamorized violence on television.

The television industry has adopted an advance parental advisory system, the first ever joint standards on violence by the broadcast networks, formal and informal discussions and working groups in the creative community, and, most significantly, systems developed by both the cable and broadcast networks for annual independent audits of television violence.

The industry's response to public and congressional concern about media violence—a dramatic departure from its response just a decade ago—offers the best hope ever for sustained progress in curbing glamorized violence without government censorship.

Though I've worked a great deal on issues affecting children, mostly in education policy, my entry in the television violence debate happened mostly by accident. Ten years ago, while traveling across Illinois, I checked into my hotel room one night in LaSalle County. I switched on the TV and there, in living color, a movie was showing someone being ripped in half by a chain saw. That scene disturbed me that night. If it could have that effect on an adult, I wondered to myself, what would it do to a seven-year-old or a ten-year-old?

The next day I asked my staff to find out what researchers have concluded about the effects of television violence on children. I learned that concerns about television violence had been around almost as long as television itself. This concern had spawned a wealth of research into the effects of television violence on children and its contribution to the

* The Author (D-Ill.) has led congressional scrutiny of TV violence since 1985. All quotes and sources cited in this Essay are on file with the Author.

violence in society. The studies were clear: Television violence contributes to violence in our society.

Appraisals such as the 1972 Surgeon General's report, the 1982 National Institute of Mental Health's ten-year review of the literature, and the 1984 Attorney General's Task Force on Family and Violence report helped document a correlation between television violence and violence in our society. In fact, the 1982 assessment concluded that the findings reached by the 1972 report were only strengthened by the findings of the more recent studies, observing that, "In magnitude, television violence is as strongly correlated with aggressive behavior as any other behavioral variable which has been measured."

Frankly, the studies serve to bolster what is to many of us plain common sense. Children imitate what they see and hear. That is how they learn. I can see this with my four-year-old granddaughter. Violence on television is absorbed and imitated—particularly by children—into our lives and into our culture. One estimate found that by the time youngsters graduate from high school, many of them will have watched television for 22,000 hours, compared to only half that number for hours spent in school. By age eighteen, young people will have been exposed to as many as 18,000 televised murders and 800 suicides, according to a 1992 study by Fred Hechinger of the Carnegie Council on Adolescent Development. The evidence is overwhelming that the impact of being bombarded with violent images ranges from an overall desensitization, to consequent acceptance of violence, to increasingly violent behavior.

No one suggests that television violence is the sole cause of violence and crime in our society. We have, as a society and a government, largely ducked the problem of handgun proliferation and we concentrate the poor into our central cities and then ignore their problems. But one of the contributing factors is violence on the entertainment screen. And just as thirty seconds of the attractive portrayal of a bar of soap sells soap, and thirty seconds of the attractive portrayal of a car sells that car, twenty-five minutes of the attractive portrayal of violence sells violence. Television, like political leaders, can appeal to the best in each of us or to our worst impulses and weaknesses.

As Howard Stringer of CBS frankly observed:

If you argue that we [the entertainment industry] have no moral responsibility to sustain values, then perhaps we have an artistic responsibility. Death stings, pain hurts, loss devastates, fear terrifies. If we still insist that television merely mirrors reality, then let us reflect our reality more skillfully and honestly. Murder, even fighting, is not poetic or balletic. It is ugly and clumsy. Violence is vile.

No one suggests that there should be no violence on television. A film on the Civil War or on the Holocaust is likely to have violence, but I would not suggest that those shows not be aired, though sensitivity to timing is important. There should, however, be less violence on the screen, and, more important, it should not be glamorized. When we watch a news program from Bosnia showing the tragedy of violence, we understand the pain, the anguish, and the senselessness of violence.

It has been a long struggle to gather leaders of the entertainment industry to a consensus on this matter. In 1986, I asked representatives from the television industry to voluntarily establish standards on violence. They told me they could not do that—work together as an industry—because of antitrust laws.

To eliminate this antitrust claim as a reason for inaction, I introduced legislation in 1986 to grant a three-year antitrust exemption to allow joint action on TV violence. Representative Dan Glickman (D-Kan.) introduced the companion measure in the House of Representatives. There was much resistance to even this relatively innocuous measure. The industry and the American Civil Liberties Union (ACLU) spent almost four years bottling it up in the House. Finally, in 1990, Congress passed the Television Violence Act, and President Bush signed it into law on December 1, 1990.

With the antitrust issue—or excuse—resolved, the industry still balked at taking action. Midway through the three-year antitrust exemption, the industry had taken no meaningful steps to regulate itself. At that point, I began calling public attention to the fact that this window of opportunity for self-regulation was beginning to close. On December 11, 1992, the broadcast networks adopted joint standards that they had developed for the depiction of violence in television programs. These standards signified the first substantial use of the Television Violence Act and were first used beginning with the 1993-94 television season.

In May and June of 1993, I held two hearings on television violence. These hearings showcased the overwhelming evidence on television violence and gave the leaders of the industry a chance to discuss their views and intentions on reducing violence on television.

At the hearings, concerns were raised about the First Amendment implications of any legislation on this issue. As Chairman of the Senate Subcommittee on the Constitution, as a former journalist, and as a “card-carrying” member of the ACLU, I’ve always been sensitive to these concerns. I have always strongly favored industry self-regulation over any congressional action, because no matter how carefully constructed, legislation to deal with television violence risks constitutional infringements. Nonetheless, I warned the industry that sentiment in public opinion

and in the Congress meant that if more progress wasn't made, there might well be an effort to pass legislation.

After the hearings, as more and more members of Congress and the public began to call for change, in June of 1993, the industry announced a new parental advisory policy. This advisory would precede any violent shows to assist parents in screening their children's television viewing. There is nothing wrong with parental advisories, but they alone are not the answer. Too many children do not have parental supervision. I was looking for an overall reduction in the level of violence on television.

In August of 1993, I addressed the first-ever industry-wide conference on television violence in Los Angeles. In that address, I called for the creative community to accept responsibility and to police itself. Although there had been significant strides by then in addressing this problem, I urged a lasting commitment to sustain this effort. I called for independent monitoring for both the broadcast and cable networks. This monitoring would examine and assess the levels of television violence and make annual reports to the public.

After much negotiation and hard work, in January of 1994, the industry leaders announced their decision to implement monitoring systems. That spring, they announced their picks for independent monitors. In May, the cable networks selected MediaScope, a nonprofit foundation that specializes in television issues, to head their new monitoring program, which will involve four universities and several noted researchers. In June, the broadcast networks, after their own extensive search, tapped the UCLA Center for Communications Policy, headed by Jeffrey Cole, to oversee their effort.

Independent monitoring should keep us from slipping back into old patterns. It's a way to clarify understanding of this issue, to pinpoint responsibility, and to give the industry itself both a baseline and a feedback loop for continuing improvement.

We're turning a corner in our culture. Ten years ago when this effort began, few believed we would ever reach this point. All along, cynics have claimed that societal attitudes are not easily changed and these efforts would bear no fruit. But societal attitudes do change. Cigarette smoking was the norm not long ago. Just watch the movie *Laura* and it's easy to see how pervasive smoking was in our society. Today we don't see many movies where people are chainsmoking, and the reality is today fewer and fewer people smoke. The progress is unprecedented.

A review of the networks' fall schedules show that progress in the reduction of television violence is already being made. The networks' new independent assessment processes are a promising and unprecedented

experiment that deserve a chance to achieve progress on an equally challenging issue, the glamorization of violence. I believe the networks, as well as the industry at-large and the viewing public, will give it a chance to work.

The New Realities of the Communications Marketplace

Raymond W. Smith*

It is time for the United States to reinvent communications policy for the digital age.

The convergence of digital technologies is quickly and irrevocably redrawing the map of our industry. It also has altered fundamentally the assumptions that underlie the Communications Act of 1934. Sixty years ago, it was reasonable to assume that, because telephone companies were essentially monopolistic in nature, government regulation was needed to act as a surrogate for market forces in assuring universal telephone service and maintaining reasonable prices.

Today, the phenomenon of convergence has made the notion of a “natural monopoly” obsolete, and has ushered in an era in which competition, not regulation, will be the best protector of the public good. The elaborate system of barriers erected by government between one segment of the industry and another has been overwhelmed by the onslaught of competitive pressures from telephone, cable, and long- distance companies straining against what they perceive to be artificial constraints on their ability to serve their customers. What was once a framework for ensuring the widest possible access to the communications network has become a serious impediment to the development of an open and competitive marketplace.

Therefore, we must have a Communications Act for the *next* sixty years—not one that simply patches up an obsolete system, but rather an entirely new approach to regulation that recognizes the new realities of the communications marketplace. Only a new regulatory paradigm can accommodate the sweeping changes in technology, industry structure, and

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customer requirements that are transforming the face of communications in the United States:

- Advances in fiber optics, microprocessors, digital servers, and operating systems have expanded capacity, lowered processing costs, and permitted the manipulation of huge amounts of data. Bandwidth available for use in the home is doubling every year or two, making the ideas of “scarcity” and “natural monopoly” things of the past.
- The boundaries between once separate businesses are being swept away by the logic of digital technologies. Legal and regulatory distinctions between cable and telephone, long-distance and local exchange companies, are increasingly being recognized as unnecessary barriers to competitive entry that can bring true consumer choice in historically restricted markets.
- We face a newly emerging set of market demands, which reflect the astonishing speed with which consumers and businesses all over the world are embracing new social patterns and modes of communication. Customers want not only “plain old telephone service,” they want information at their fingertips, video on demand, a telephone number that follows them wherever they go, and an on-line connection to their bank, their favorite retailer, their video store, and their office. These new customer requirements will dominate the marketplace by the year 2000, but are already driving consumer choices and consumer spending today.

The key point is customer requirements no longer conform to old industry structures. Any communications company that wants to succeed in the next decade is rapidly redefining itself so it can serve the whole range of emerging customer requirements. In fact, this view of the marketplace is driving the new partnerships, joint ventures, and alliances that are reshaping the communications industry. The problem is regulatory structures have not kept pace—outmoded legal definitions and restrictions are introducing layer upon layer of economic inefficiencies into the system and are seriously impeding the speed with which new services reach the American consumer.

So how do we draw a new regulatory blueprint for an industry whose basic products, technologies, and customers are changing daily?

First, let us join the Vice President of the United States and the Chairman of the Federal Communications Commission (FCC or Commission) in stipulating that new technology platforms, declining cost curves, and lower entry barriers have overridden the notion of telephone companies being a “natural monopoly.” Let us also agree with Messrs. Gore and Hundt that the goal of federal legislation should be to promote competition,

access, and universal service. Finally, let us endorse the worthwhile objective of streamlining governmental processes and minimizing regulatory intervention in the operating of market forces.

Given these conditions, I respectfully submit that the public interest would be best served by a public policy based on four basic principles:

- (1) *Promote innovation.* Technology advances faster in a single year in the 1990s than it did in an entire decade for most of the duration of the 1934 Communications Act. But, new products and services are often held up for months—even years—because of regulatory delays and procedural snares. Paradoxically, simplicity is the best way to regulate a complex industry. Policymakers should concentrate on removing every possible barrier between a technological advance and its commercial application, thereby putting a premium on innovation and ensuring that American consumers are the first to benefit from rapid advances in technology.
- (2) *Permit competition.* Erecting walls between telephone and cable companies, or between local service and long-distance providers, defies the logic of converging digital technologies and denies consumers the benefits of some of this country's strongest and most innovative companies going head-to-head in communications markets. As FCC Chairman Hundt remarks, only when competing networks offer competing products will consumers reap the benefits of the information age. Therefore, barriers to entry that limit competition in local telephone, long-distance, and cable markets should be lifted at more or less the same time. Likewise, market forces should be the ultimate regulator of prices, not government agencies.
- (3) *Encourage capital investment.* The private sector will build the infrastructure for the twenty-first century—if communications companies have access to the revenue streams that will support the necessary capital investment. By opening markets to competition, permitting market-based pricing, and allowing companies to invest according to market demands, policymakers will ensure the speediest and most efficient deployment of a modern communications infrastructure.
- (4) *Redefine universal service.* The decades-old public policy of “universal service” was predicated on a delicate system of internal subsidies that could only be sustained in a monopoly environment. We need a new definition of universal service suitable for a robustly competitive era, one that spreads the costs of providing subsidies across the whole spectrum of service providers.

It's time to recognize that the biggest threat to the public interest is not *competition*, but stricter *regulation*, which acts as a barrier to investment, innovation, and choice.

It is also worth reminding ourselves that the Communications Act of 1934 was not about arcane economic theories or Byzantine regulatory structures. Its objective was elegantly simple: "to make available . . . to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communications service with adequate facilities at reasonable charges." At the time, fewer than half of American households had telephone service. Today, penetration is more than 96 percent. The mission of the sixty-year-old communications policy has been magnificently fulfilled.

Now it is time to recast the objectives of the 1934 Act for the twenty-first century. We stand at very much the same historical moment in the digital age as the framers of the 1934 Act did in the telephone age. And while our methods must be much different, our aim—to promote "rapid, efficient" service with "adequate facilities and reasonable charges"—is just as important to the economic future of the United States and the well-being of its citizens.

Broadcast Licensees and Localism: At Home in the “Communications Revolution”

Gigi B. Sohn*

Andrew Jay Schwartzman**

“The Revolution is Coming! The Revolution is Coming!”

The sound you hear is not Paul Revere, on horseback, shouting about the impending arrival of the Redcoats. In 1995, the shouting is coming from the public, policymakers, and communications industry representatives (most likely riding sport utility vehicles and seven passenger vans), touting the coming of the “communications revolution.”

At best, this “revolution” promises the so-called “information superhighway”—a fully interactive global electronic marketplace of ideas, in which people speak to each other, receive and transmit video and text, renew driver’s and business licenses, vote, shop, and order dinner. At the very least, we could end up with 500 channels or less of old network reruns, multiplexed movies, music channels, and home shopping, fed passively through cable and/or some other wire to our television sets.¹

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Media Access Project is a twenty-one-year-old non-profit telecommunications law firm that represents the rights of the public to speak and to receive information over the electronic media before the Federal Communications Commission (FCC or Commission) and the courts.

1. No less a communications giant than Viacom International CEO Sumner Redstone expressed his skepticism about the future of the information superhighway in a recent speech at the National Press Club. He stated, “I am far from clear on what constitutes an information superhighway. And I have considerable doubt as to its emergence, at least in the near term. As I have said before, I will believe the 500-channel world only when I see it and when someone explains to me what’s going to be on it.” Sumner Redstone, *The Information Superhighway: False Mile Markers but Real Destinations*, Speech at the National Press Club Luncheon (Oct. 19, 1994), available in LEXIS, Nexis Library, Cumwvs File.

Whatever the changes, few dispute that they are of a magnitude far beyond the comprehension of the authors of the Communications Act of 1934.

The 103d Congress nearly enacted the most comprehensive telecommunications legislation of the last sixty years. This represented a recognition by many lawmakers that new rules were needed to facilitate the deployment of the telecommunications networks of the future. Both bills, H.R. 3636, which passed in the House, and S. 1822, which failed in the Senate, would have lifted prohibitions which keep the Regional Bell Operating Companies (BOCs) from providing video services in their service areas and permitted competition in local and long-distance telephone service, paving the way for the building of a seamless national telecommunications network. Similar legislation will be introduced early in the 104th Congress.

But even these monumental changes would have left much of the Communications Act of 1934 intact. The laws governing television, radio, and other wireless technologies under Title III of the Communications Act, remained largely unaltered. These telecommunications providers, unlike cable, telephone, or any others, are granted licenses by the FCC to serve "the public interest, convenience and necessity." This has required an FCC licensee to be of good character and, in the case of mass media services like broadcasting, generally ascertain and serve the needs of the local communities it is licensed to serve. This latter concept is commonly known as "localism."

What does the communications revolution hold for these broadcast licensees? Will they have a lane on the information superhighway, or will they simply be run over by the communications behemoths who will build this infrastructure and are making plans to program it as well?² Is there a need for localism in the global community of tomorrow?

We believe that broadcast licensees and localism can comfortably coexist within the global network of the future. The unique characteristics of broadcast services, including their universality and local focus, set them

2. As Congress found when it passed the 1992 Cable Act, the cable industry is highly vertically integrated, that is, many cable operators own all or part of many of the program networks on their systems. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(4)-(5), 106 Stat. 1460 (codified at 47 U.S.C. § 521 (Supp. IV 1992)). And, in the face of several court decisions invalidating restrictions on telephone companies' provision of video services, and, in anticipation of future regulatory relief, many local telephone companies have taken steps to develop video programming of their own. Three of these companies have recently hired Hollywood super agent Michael Ovitz to build relationships with video producers for entertainment, information, and interactive programming. *NYNEX, Bell Atlantic and Pacific Telesis Plunge into Video Programming*, COMM. DAILY, Nov. 1, 1994, at 1.

apart from the other prospective telecommunications providers on the information superhighway.

I. WHAT IT MEANS TO BE A BROADCAST LICENSEE

Section 309(a) of the Communications Act of 1934 instructs the FCC to determine whether the grant of a license to use broadcast spectrum is in “the public interest, convenience and necessity.”³ When several applicants have applied for the same license, that determination includes a number of factors—whether an applicant is of good character, whether it owns other licenses, whether the applicant is financially qualified, and whether the applicant is a minority. Even when there is only one applicant for a license, the Commission must determine that the applicant is of good character and financially qualified, and whether grant of the license would transgress the Commission’s ownership regulations.

For sixty years, the notion of the licensee as “trustee” for the public has survived, bringing with it certain duties that flowed from the licensee to the community it is licensed to serve. Over these past sixty years, in broadcasting, this duty has variously included ascertaining community needs, providing programming to meet community needs, providing programming to meet the needs of children, and providing fair and balanced overall programming on controversial issues of public importance.

Inevitably, over these sixty years, the FCC’s interpretation of what a licensee is and what its responsibilities are has changed. For example, the Commission no longer enforces the duty of broadcasters to present overall balance in its programming on controversial issues of public importance, and no longer requires broadcasters to limit the amount of commercials in programming other than that intended for children.

But perhaps the most marked example of the FCC redefining the role of broadcast licensees is the increasingly common phenomenon of local marketing agreements (LMAs). LMAs permit a radio or television licensee to “lease” its station to others, often another licensee. The Commission has recently reaffirmed a series of staff rulings that held that the only responsibilities of the lessor licensees are to maintain the main studio and public files and insure adherence to the political programming law.⁴

3. 47 U.S.C.A. § 309(a) (West Supp. 1994).

4. See *In re* Revision of Radio Rules and Policies, in FCC 94-267, paras. 50-59 (Nov. 8, 1994). The FCC’s “attribution” rules have similarly modified what it means to be a broadcast licensee. These rules now permit an entity to provide up to 100% of the financing for a license and not be deemed the licensee so long as it owns less than 50% of the voting stock where there is one single holder of more than 50% of the voting stock, or less than 5% of the voting stock where there is no single holder of more than 50% of the voting

Despite these modifications, however, there has been no fundamental change in the notion that there is a public benefit when an entity uses public spectrum for the good of the local community, and it remains, for the most part, not only in theory, but in practice as well.

II. THE LICENSEE CONCEPT CAN, AND WILL, THRIVE IN THE NETWORK OF THE FUTURE

What, then, will become of broadcast licensees and the notion of "localism" in the world of advanced telecommunications networks? Some, including broadcasters seeking regulatory relief,⁵ have questioned the continuing utility of these obligations. Others, including the current FCC Chairman Reed Hundt, believe that there is a lane on the "information superhighway" for broadcast licensees.⁶

There is good reason to believe that licensees will not only survive, but thrive, in the global network of tomorrow. This is in large part because they have inherent strengths not shared by those vying to build the information superhighway. Even though we cannot predict with specificity whether this highway will be a multimedia, switched broadband network that allows one to speak, write, receive, and send video, or a passive system of movies, national programming, and home shopping, or even something in between, we can comfortably compare broadcast licensees with those technologies vying to build the information superhighway.⁷

Broadcast licensees are distinctly different from other telecommunications providers in that they provide universally obtainable, real time services that are inherently locally based. And, even as our culture, and

stock. See 47 C.F.R. § 73.3555 n.2(a)-(b) (1993). Under those rules, then, the Commission considers the licensee to be the party with a majority of voting stock and "actual working control in whatever manner exercised." See 47 C.F.R. § 73.3555 n.1 (1993).

5. The National Association of Broadcasters and the Association of Independent Television Stations have argued that they will be unable to compete in multimedia markets unless they are permitted to provide data, wireless telephone, and other nonbroadcast services over the extra channel originally granted to them to provide High Definition Television services. See, e.g., *The Communications Act of 1994: Hearings on S.1822 Before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 304-15 (1994) (statement of Edward O. Fritts, President and CEO, National Association of Broadcasters).

6. In recent speeches and radio appearances, the Chairman has repeatedly spoken of a place for broadcasting as one of "the five lanes on the information superhighway: broadcast, cable, wire, wireless, and satellite." FCC Chairman Reed E. Hundt, Address Before the International Radio and Television Society (Oct. 19, 1994) (copy on file with Authors).

7. These technologies include cable, video dialtone, and direct broadcast satellite (DBS).

thus the nature of mass media, become more uniform throughout the nation, there will still be a need for such services in this country.

A. *Universality*

Unlike any other communications technology, broadcasting is universally available to 100 percent of American homes. Although over 80 percent of the American households are theoretically capable of subscribing to cable, only slightly more than 60 percent do.⁸ Direct broadcast satellite and other nascent wireless services reach only a fraction of that amount. And plans for video dialtone services that have been submitted to the FCC indicate that they will reach only a small portion of several metropolitan areas.⁹

Even though cable, satellite, and telephone video services may be more widely available in the future, none will likely ever reach the ubiquity of broadcasting. There are several reasons for this. Unlike satellite, cable, or other wired services, broadcasting is a mobile service; just about every car has a radio, and some even have television sets. One can bring a radio or television to the beach or to work. Other services are simply not that flexible.

In addition, broadcasting is a free, advertiser supported service, costing no more than the price of the receiver, which can cost as little as \$10 for a transistor radio. Although no one yet knows what the public will have to pay to become part of the future multimedia universe, the debate over the previously mentioned telecommunications legislation made it clear that access to, and services provided by, the network will generally not be free.¹⁰ Certainly, the current players in the communications game are not cheap: for example, cable can cost between \$20 and \$40 per month, plus installation and equipment charges; direct broadcast satellite has a similar monthly fee, and the receiving equipment costs approximately \$700.

8. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460, 1463 (codified as amended at 47 U.S.C. § 521 (Supp. IV 1992)).

9. In contrast to broadcasters, the FCC has not thus far required telecommunications providers to serve their communities on a nondiscriminatory basis. Indeed, the Authors served as co-counsel in filing a complaint that alleges that the plans for these video dialtone services are discriminatory because they would be made available mostly to wealthier, white neighborhoods. See *Petition for Relief* of Center for Media Education, RM 8491 (May 23, 1994).

10. There has been a consensus among most policymakers and industry leaders that hospitals and schools should have free or low-cost access to advanced telecommunications networks. However, questions remain as to whether such "free" service will include a mere hookup, or will include the provision of video and data services as well.

B. Local Service

Broadcasting also has a unique capability to serve local communities. Because the notion of localism is rooted in the licensee concept, broadcasting has developed as the only technology that provides a universal, real time programming service based on the specific needs and interests of all members of a community.

With few exceptions, the technologies most likely to form the infrastructure of the information superhighway have inherent economic and technological limitations that make them ill-suited to provide local service. Despite the welcome development of all-news cable channels in some of the largest cities, and public access channels, cable's 60 percent penetration (less in some communities) restrains its effectiveness as a provider of local programming. Video dialtone has similar penetration problems, and there has been little indication so far from local or long-distance telephone companies (entities which have no experience in programming at *any* level) that they are interested in providing locally based service. And direct broadcast satellite, by its nature, provides only national programming. Since locally based programming tends to be more expensive and labor intensive, it is a safe bet that none of these providers will be rushing to provide increased local service any time soon.

Still, there are those that believe that a truly "local" service is unnecessary in the global world of the future. They assert that nationally and internationally-based communications technologies will not ignore Americans' need to be part of a community, but that they will simply re-define the meaning of "community."

But such a claim ignores recent trends in local communities all over this country. Despite the growing push towards uniformity in our business, political, and mass media cultures, there has at the same time been a backlash against this trend. As the events leading up to the 1994 elections evidenced, many Americans are giving renewed attention to what happens in their local communities. They are battling over school curricula and library materials. They are taking greater stock in who runs for school and library boards. Involvement in local places of worship, political organizations, and other community based organizations has increased. Many Americans have rejected the "melting pot" idea of America and have opted instead to take pride in the individuality of their communities and cultures.

Underlying this resistance to uniformity are several very basic human needs. These needs have not been changed by communications revolutions of the past, and likely will not be changed by the coming communications revolution. People have a need to care and to have pride in the places they

have chosen to live in and become a part of. They have a need to not only know their neighbors, but to have some thread of commonality with them. And they have a need to insure that they do not become just another faceless name in a faceless society.

These are precisely the needs that broadcast licensees can, and will, meet. Broadcasters will report school closings on snow days, the result of the local marathon, the opening of a new church on Main Street, and the local race for city council. Broadcasters will ascertain what the community's needs are and will try to provide programming that meets those needs. And, as long as broadcasters continue to provide the universally available local services that the other telecommunications providers do not, they will likely have a long and comfortable ride on the information superhighway.

Reflections on the Sixtieth Anniversary of the Communications Act

Ed Turner*

In August 1991, President George Bush was in the White House, watching the attempted take over of the Russian government as telecast on CNN. According to press secretary Marlin Fitzwater, Bush called Russian President Boris Yeltsin after he saw the beleaguered chief of state on a tank in Parliament Square near the Kremlin. Yeltsin was urging the crowd to support his opposition to the coup. When he got Yeltsin on the phone, President Bush asked what he could do to help. Yeltsin told him to go on CNN and ask other western leaders to speak out against this attempt to overthrow the government. Shortly, I received a call from Fitzwater asking for time on CNN. Of course I gave the go ahead—not because of some wish to please the White House, but because the appearance would be news. Big news. Subsequently, Bush appeared, made his appeal, and the support from many heads of government around the globe was soon made known.

Anecdotes such as this and empirical observations by colleagues at CNN and elsewhere in the news industry, have convinced those of us in the global news business that we have begun to play a role in creating a world agenda for use by political leaders, governments, and heads of institutions of all kinds. CNN has become a common denominator, a reference point

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Among his major accomplishments as executive vice president are the network's coverage of the 1991 Soviet coup, the war in the Persian Gulf, and the 1989 crisis in China. He was also responsible for the network's dramatic coverage of the explosion of the space shuttle Challenger and subsequent hearings, and gavel-to-gavel coverage of the Iran-Contra hearings.

of shared experiences and observations as they talk, fax, memo, and communicate with one another.

More important than being some form of international intercom, I think, is the role CNN and other supranational television news services play in reducing the dark places on earth. It is increasingly difficult for a tyrant to operate free from public scrutiny and the opprobrium of his fellow man.

From the old Russia to the new Haiti, and from the seeping of capitalism in China, the ever present and growing influence of the ubiquitous uplink, the INMARSAT telephone, the portable television equipment, the tiny high-8 amateur camera, the omnipresent radio, and the fax machine have now combined as a kind of political technology to deny dictators their need for secrecy. Only a few nations on earth remain truly isolated, for example, North Korea, some parts of China, western Siberia and a few others.

It is my belief that historians may well agree that one of the most important contributions of our time was to make available to the world a flow of information, news, entertainment, and advertising that forced other societies to attempt to match the freedom of the West and of the United States in particular.

During the decades since World War II, the export-import ledger was often weighted against the United States because of our relentless appetite for foreign goods, notably autos and home entertainment equipment. Ironically, the one export area in which the United States has surpassed all others in terms of demand, quality, and quantity is news and entertainment. These are the same news programs, television programs, and movies that many worried would destroy the national cultures of other consumer nations, a practice labeled "cultural imperialism." We quickly learned, if any doubts existed, that this was foolish nonsense. For example, it seemed highly unlikely that any series of situation comedies from Hollywood would destroy the French character. Nor could the news from the United States lessen a Brit's appetite for his or her own nine o'clock news bulletins. How could they? For example, we in the United States paid precious little attention to the beloved minutia of British politics, while the BBC or ITN dwelled with loving care over the latest scandal.

It is true that many local stories have national and international implications; that a ripple here can cause a wave over there. Yet, none of the national services will ever replicate the local flavor of a good television newscast or an aggressive local newspaper.

The coming explosion of technology in my industry will only lead to more and not fewer CNNs. The question is not whether we should permit such an invasion, but how responsibly will this news service be managed,

not to mention all the many niche services to come? Satellites and the compression of signals and digitalization of the picture will not be dis-invented. Presently there are an estimated 300 networks providing news, sports, entertainment, and informational programming to the globe. But for now, only CNN has the satellite configuration that permits an instant transmission of a single signal around the globe (save for a few spots not covered by our satellite footprint). This temporary hold will be eclipsed in time as other news organizations develop the will and resources to compete on a global scale.

One of the most significant changes from English-only programming will be the creation of national language all-news services or regional networks that pay no attention to national borders. NTV/Germany is a good example, serving as it does the German-speaking audience in Europe, particularly the home country, Switzerland, Austria, and some in Poland.

However, there can be little doubt that these services will reach—for the most part—only the elite of the country because of either the language skills necessary (English in most cases) and access to equipment, the home computer, or the specially wired television set. Of course, in time, the hardware will become more universally available. That will not be for the next decade, according to most who are predicting this kind of thing.

But I return to the great change: The ocean of words sloshing back and forth across the world, spewing out flotsam and facts, news and opinion, entertainment and information. What seems enormously difficult, logistically impossible, and educationally daunting today will be as matter of fact as turning on a light switch.

One is reminded of the great trauma that swept the old-line network newsrooms in the late 1950s and early 1960s when serious planning began on expanding their network evening news programs from fifteen minutes to thirty minutes. “How will we fill it?” was a commonly asked question. “What will we do on slow news days?” was the worry. Well, today, the following paragraph from a recent story in the *Chicago Tribune* fairly sums up the present and gives us a peek at the future:

This is the way the world works today—in a Swiss airliner somewhere over France, a German businessman picks up the phone and buys American dollars with Japanese yen on the London financial market while watching CNN from Atlanta.¹

1. R.C. Longworth, *Vanishing Borders: Trade in the 1990s*, CHI. TRIB., Apr. 23, 1989, at 1.

Telecommunications and the Competitive Advantage of Massachusetts

Governor William F. Weld*

I. INTRODUCTION

The Commonwealth of Massachusetts has a strong interest in resolution of the challenges facing communications policymakers. In comparison with most other states or the nation as a whole, the significance of telecommunications to Massachusetts is enormous. Our economy is based on information-intensive industries such as financial services, medical care, technology, and education. As the telecommunications industry undergoes a fundamental and welcome transformation from monopoly to competitive markets, the challenge of communications policymaking is to encourage the deployment of advanced infrastructure for the benefit of all citizens as control of pricing shifts from government to the competitive marketplace.

State governments should regulate in a manner consistent with the goal of fostering effective competition in all telecommunications markets. Competitive markets will improve the economic efficiency of the industry and ensure development of sophisticated networks that are cost-effective and responsive to customer demand. Moreover, the development of competitive markets will allow government to reduce its traditional role of overseeing the telecommunications industry and regulating its prices. In addition to the goal of full competition in telecommunications, we must retain the goal of universal service. However, federal and state policymakers, working together, must develop methods for achieving universal service that can coexist with competitive markets.

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II. THE IMPORTANCE OF TELECOMMUNICATIONS TO MASSACHUSETTS

It would be difficult to overstate the importance of the telecommunications industry to the economic well-being of Massachusetts. Telecommunications networks will be as important to Massachusetts in the coming years as roads, bridges, railroads, canals, and harbors were to Massachusetts when our economy was dominated by basic manufacturing industries such as textiles and leather.

In his 1991 study *The Competitive Advantage of Massachusetts*, Harvard Business School Professor Michael Porter outlined four important clusters of interrelated industries in which Massachusetts has a competitive advantage over other states and nations:

Health Care: Hospitals, medical laboratories, physicians' offices, nursing facilities, medical instruments manufacturing, biomedical technology, medical research, and pharmaceuticals.

Knowledge Creation Services: Research and development laboratories, educational institutions, basic research institutions, think tanks, engineering firms, consulting firms, legal firms, and printing and publishing companies.

Financial Services: Banking, venture capital, asset management, insurance, and real estate.

Information Technology: Computer and peripheral manufacturing, software development, information technology professional services, information retrieval services, telecommunications, precision instrument manufacturing, and electronic components manufacturing.¹

These four industries trade primarily in information—products that do not require transportation, but do require reliable and sophisticated telecommunications networks. Success in each of these industries depends on the creation, dissemination, and analysis of knowledge, and this process is becoming increasingly reliant on sophisticated telecommunications networks, capable of rapid transmission of large amounts of data. The transmission of X-rays from one hospital to another, the ability of a professor at one college to conduct a seminar for students at several colleges, the transmission of financial data from a start-up company to a venture capitalist, and the sharing of research on new software programs between engineers at different company locations all depend on telecommunications. If telecommunications networks in Massachusetts are not

1. MICHAEL PORTER, *THE COMPETITIVE ADVANTAGE OF MASSACHUSETTS* 15-18 (Monitor Co. Inc. and Harvard Business School (1991)).

comparable—or even superior—to networks in other states and countries, the competitive advantage in these four key industries will be at risk.

In addition to its telecommunications infrastructure, Massachusetts has the highest concentration of telecommunications manufacturing employment in the country.² This concentration of expertise will help Massachusetts telecommunications companies capitalize on burgeoning worldwide demand for sophisticated telecommunications networks.

Government policies for the telecommunications industry will be a significant factor in determining whether Massachusetts reaps the benefit of its competitive advantage in information-based industries, such as those identified by Dr. Porter. It is therefore crucial that we successfully address the current challenges of communications policymaking, and foremost among these challenges is the transition from a monopoly environment to competitive markets.

III. TRANSITION TO A COMPETITIVE ENVIRONMENT

A. *Advantages of Competitive Markets*

As Congress considers changes to the Communications Act of 1934 and states adopt new regulatory policies, we should focus on the goal of opening all telecommunications markets to effective competition. Competitive markets will increase the industry's economic efficiency, provide more choices for consumers, and encourage innovative development of new telecommunications services. Subsequent to the divestiture of AT&T in 1984, Massachusetts utility regulators were among the first state regulators to determine that promoting competition in telecommunications markets is the optimal way to achieve public policy goals for the industry.³ Our regulators have allowed competition in all communications markets, approved interconnection and collocation arrangements between competing network providers, enhanced NYNEX's ability to compete by rebalancing its rates, and reduced regulatory barriers to market entry. This favorable

2. 1992 REPORT OF THE GOVERNOR'S COUNCIL ON ECONOMIC GROWTH AND TECHNOLOGY, COMMITTEE ON TELECOMMUNICATIONS DEVELOPMENT I. According to the report, the Massachusetts telecommunications industry employs over 75,000 people, accounting for approximately 17% of high technology manufacturing jobs in Massachusetts. *Id.*

3. The Massachusetts Department of Public Utilities stated, "[W]e conclude that there are benefits inherent in a competitive marketplace that encourage greater levels of economic efficiency and fairness than does a regulated monopoly environment. These benefits have the clear potential of encouraging the development of a more efficient and modern telecommunications network in Massachusetts." *IntraLATA Competition*, 1731 MASS. DEP'T PUB. UTIL. 26 (1985).

regulatory climate, coupled with significant demand for sophisticated telecommunications services, makes Massachusetts one of the most competitive environments in the country for telecommunications. Dial tone is available from a multiplicity of vendors in many of our commercial centers.

Studies suggest that competitive telecommunications markets offer significant benefits to the national economy. For example, a 1993 Brookings Institution study estimated that limited deregulation in the telecommunications industry has already resulted in benefits of as much as \$0.7 to \$1.6 billion nationally.⁴ That study also estimated that potential economic gains from additional deregulation of the telecommunications industry could be as high as \$11.8 billion, an amount greater than the combined benefits that would result from additional deregulation of airlines, railways, road freight, cable television, stock-brokering, and natural gas.

B. Infrastructure Development

Telecommunications networks will be the transport media for the industries that provide Massachusetts with a competitive advantage. However, unlike transport infrastructure such as roads and bridges, telecommunications infrastructure does not necessarily require government funding. Nor is it necessary for government to determine which technologies are best, how fast investment should be made, or what geographic areas should be targeted for investment. For the development of an information superhighway that will serve customers' needs in the most efficient and cost-effective manner, the best incentive that government can provide is to ensure competition and free markets.

Because telecommunications networks can spur economic development, some who believe that demand will not develop until infrastructure is in place argue that government should take a more active role in funding or determining the proper level of telecommunications network investment. This is the "Field of Dreams" approach to telecommunications network development: "If you build the network, customer demand will come." But customer demand in Massachusetts, in the form of key industries that require sophisticated telecommunications networks, is already in place. Thus, policymakers in Massachusetts have no need to actively manage network development to create demand for services, the demand is already here. As long as policymakers in Massachusetts continue to ensure effective

4. *Heavens! Deregulation Works*, ECONOMIST, Nov. 6, 1993, at 96, 96 (citing Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LITERATURE 1263, 1284 (1993)).

competition, private telecommunications companies, secure in the knowledge that they will be allowed to freely compete for these customers, will build networks to satisfy demand in the most efficient and responsive manner.

Similarly, policymakers in other states and in the federal government have come to the realization that competition will encourage development of the information superhighway in the most efficient manner. Even Japan's Ministry of International Trade and Industry, which has been the primary practitioner of government industrial policy, is now trying to get its government out of the way of private enterprise in constructing Japan's fiber-optic network.⁵ The Japanese are beginning to understand that network modernization will benefit from what Austrian economist Joseph Schumpeter referred to as the "creative destruction" of the marketplace, more than it will from bureaucratic micro-managing and fine-tuning. Centralized command and control structures simply will not be as effective as decentralized market forces in developing the telecommunications network of the future.

C. *Universal Service*

Although development of competitive markets in telecommunications will improve economic efficiency and responsiveness to customer demand, it will impede policymakers' efforts to achieve universal service through the use of telecommunications rate regulation. Hence, an additional challenge for communications policymakers will be to develop new ways to achieve or maintain universal service in a competitive environment.

Universal service has been an important goal of policymakers since passage of the Communications Act. We have been particularly sensitive to this issue in Massachusetts, and, we are one of the country's leaders in household penetration of telephone service.⁶ Throughout the country, policymakers currently use a variety of techniques to ensure that basic telephone service remains affordable. Most of these techniques involve cross-subsidies between classes of consumers. However, cross-subsidies can only be enforced in a heavily regulated environment, predicated on the existence of an industry monopoly. If universal service is to remain a

5. David P. Hamilton, *Big Fiber-Optic Project is Private Sector's Job, Japan's Reformers Say*, WALL ST. J., Aug. 15, 1994, at A1.

6. Data compiled from the 1990 Census place Massachusetts first in the nation, with telephone service in 97.9% of households. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL BRIEF NO. 94-16 (1994). The Federal Communications Commission places Massachusetts third in the nation, with telephone service in 96.2% of households. FCC, TELEPHONE SUBSCRIBERSHIP IN THE UNITED STATES (Mar. 17, 1994).

policy goal, as it should, new methods to achieve universal service that work in harmony with competition must be developed. These new methods must not disproportionately burden some network providers while giving others a competitive advantage. Effective competition will occur only when the responsibility for universal service is distributed equitably among all network providers.

IV. CONCLUSION

Competition is already present to some degree in most telecommunications markets in this country, and the Commonwealth of Massachusetts welcomes competitive markets as the best way to achieve our policy goals for the industry. The presence of significant demand for advanced telecommunications services, coupled with a favorable regulatory climate, serve to create an environment in Massachusetts where consumers and efficient service providers will benefit from increasing competition. Deployment of advanced telecommunications infrastructure will contribute to Massachusetts's ability to maintain and extend its competitive advantage in knowledge-based industries.

Changes to the Communications Act and state regulatory policies should focus on the promotion of free markets for telecommunications. While we must also continue to pursue the goal of universal service, policymakers must develop new methods of achieving universal service that will not impede the development of free markets in telecommunications. Free markets in which firms are disciplined primarily by market forces and not by government regulation will serve to increase economic efficiency and responsiveness to customer demand. Given the importance of the telecommunications industry to the health of our economy, we should entrust its development not to politicians and bureaucrats, but to entrepreneurs and the marketplace.

The Challenge of Choice

Richard E. Wiley*

Imagine organizing a league of multisport athletes like Deion Sanders, Bo Jackson, and Michael Jordan. You would have great competition, but it would be difficult to decide what game to play. With today's new and extraordinarily flexible communications technologies, a similar challenge of choice is facing the Federal Communications Commission (FCC or Commission) today. Indeed, at age sixty, the Commission is in the unfamiliar position of being able to choose, or not choose, among myriad services that could be offered in the same spectrum. The quintessential example of this technological dilemma is the technology developed in the United States for advanced television (ATV) service, including high-definition television (HDTV).

As recently as 1987, the United States was not a major force in ATV technology. The FCC recognized, however, that developments in advanced television technology in Japan and Europe could affect U.S. broadcasting. Accordingly, the Commission set aside spectrum within the existing broadcast bands to give licensees a "second channel" on which to offer ATV and established an all-industry Advisory Committee on Advanced Television Service (which I have been honored to chair) to assist it in establishing a new television standard for the country.

Japan, led by its broadcasting company NHK, already had built and demonstrated HDTV equipment. Japanese concerns had been working for nearly twenty years on a high quality system to replace existing National Television Systems Committee (NTSC) television technology, which was designed in the United States in the late 1930s and early 1940s, and improved, also in the United States, with color about a decade later. Western European governments and companies also were moving rapidly with their well-funded HDTV projects which, as in Japan, were focused on simply replacing current TV with much higher quality satellite-based technology. The Advisory Committee was charged with finding and

* The Author, a former Chairman of the Federal Communications Commission, is a partner in the Washington, D.C., firm of Wiley, Rein & Fielding. His associate Paul E. Misener assisted in writing this Essay.

recommending ATV technology that was appropriate for the more challenging terrestrial broadcasting environment.

Initially, the Committee received twenty-three ATV system proposals, all of which featured analog transmission techniques similar to those being developed in Japan and Europe. Through proponent mergers and attrition, this number soon was reduced to a handful. In April 1990, the Commission decided that the new, higher quality, terrestrial ATV service would be HDTV, not some sort of enhanced NTSC service. However, available HDTV technology at that time was not flexible; it could provide advanced pictures and sound, but little else. Shortly thereafter, one of the remaining system proponents, General Instrument Corporation, modified its proposal to incorporate all-digital transmission. Three of the other four remaining systems quickly adopted this technological advance, with only NHK retaining its original analog transmission format. All five systems then were subjected to an exacting program of laboratory tests conducted under Advisory Committee supervision at sophisticated technical facilities.

Based on the results of these tests, the Committee decided that the four digital transmission systems were superior to the NHK proposal, which thereafter was eliminated from consideration. In just a few years, the United States had progressed from a non-player to a potential world leader in advanced television technology. Despite the success of the four all-digital systems, it was clear that all of them had technical shortcomings that required further development. The Advisory Committee then gave the proponents a critical choice: to undergo an expensive second round of testing focusing on improvements that each system had proposed or, alternatively, to merge their proposals into a single, unified system.

The latter option was preferable from three standpoints. First, the systems were becoming more alike as they learned from each other's technical advances, making the Advisory Committee's eventual task of selecting between them both more problematic and more likely subject to challenge and resulting delay. Second, the process of retesting was certain to be expensive and time-consuming for all concerned. Finally, and most significantly, a single system encompassing the best features of various proposals might lead to the development of a truly superior technology. Accordingly, the Advisory Committee encouraged talks between the proponents which, in May 1993, resulted in the formation of a so-called "Grand Alliance."

At the time, I made clear to the Alliance members that they should not present the Advisory Committee with an inflexible, technical *fait accompli* and that the Committee's work had been, and must remain, a public process. After detailed discussions between the Committee and the

Alliance extending over a number of months, a modified (and, I believe, considerably enhanced) system proposal was developed.

One of the most significant outcomes of this Advisory Committee-Grand Alliance dialogue was an agreement on a packetized data transport system, which allows the transmission of virtually any combination of video, audio, and data. The transport system arranges digital data into discrete groups called packets and labels each packet before transmission. At the receiver, packets are routed to specific desired applications according to the instructions in their labels. This highly flexible HDTV system has capabilities that extend far beyond what the FCC could have envisioned in 1990.

With a capability sometimes called “dynamic allocability,” the Grand Alliance HDTV system can take advantage of the packet-based flexibility to transmit prodigious amounts of data *during* an HDTV program. The Alliance video compression subsystem sends only the picture information that is necessary to define the changes from one frame to the next. Thus, scenes with limited motion require little of the system’s roughly twenty megabits per second payload data capacity. More data can be transmitted during lulls in the main video action. The packets containing such information simply are labelled as data, not HDTV video.

For example, while watching a baseball game, a fan could choose to have the set simultaneously display the statistics of the batter, the results of other games, stock market reports, or a local weather report. Such options could be controlled via on-screen interfaces. Other uses of the dynamic allocability feature could be completely unrelated to the television aspect of the broadcast. For example, at the same time that an HDTV program is being shown, a grocery store chain could broadcast data describing new inventory or price lists of all of its local outlets in a matter of a few seconds. Alternatively, a kind of paging service could be established that would transmit messages while HDTV is being broadcast.

In addition, utilizing a so-called “dynamic scalability” feature, the Grand Alliance HDTV system is capable of simultaneously offering several standard-definition, NTSC-quality television programs. Some broadcasters believe that the additional revenues—which could be generated from multiple programs shown during limited times of the day or from shows where high quality pictures are less important (for example, talk shows)—could help finance the introduction of HDTV for sports, prime-time programming, and movies.

These kinds of flexibility—dynamic allocability (ancillary or unrelated data) or dynamic scalability (multiple lower-resolution programs)—are not possible without a digital HDTV system operating on the second channel.

The current NTSC analog television system cannot support such flexible use of the spectrum.

The Commission's options in this area are varied but perplexing. It could decide to give broadcasters total flexibility in the use of the second channel. If so, the question arises: given the FCC's new-found affinity for spectrum auctions, would the agency demand some payment by the industry for the additional frequencies? Currently, the Commission's policy is that making a second channel available to existing broadcasters would be in the public interest in order to maintain current NTSC service on the first channel while allowing the transition to higher quality advanced television on the second channel. Complete flexibility, including the possible elimination of HDTV service in favor of more revenue-producing alternative services, might dictate a different result.¹

Alternatively, the Commission could opt to require that a certain portion of the broadcast day be devoted initially to HDTV programming. After a fair trial period, if the public demonstrates little interest in such a new service, this requirement could be eliminated.

My own judgment is that broadcasters should be granted some flexibility in the use of the second channel. By so doing, the government would be promoting new service to the consumer and also giving licensees the opportunity to earn revenues to support what clearly will be an expensive transition to digital broadcasting. However, I believe that such flexibility should not preclude HDTV broadcasting. This would be an abandonment of the Commission's principal justification for reserving the additional channel for over-the-air service against myriad other possible uses. It also would deprive the American television viewers of an opportunity to decide whether they really want higher quality reception.²

Digital transmission technology provides the FCC with the flexibility to make crucial public interest determinations. In this instance, the agency's spectrum choice can facilitate the public's service choice.

1. The technology for flexible service use is not free, of course; it will be just as expensive as meeting the FCC's HDTV implementation requirements. Indeed, broadcasters must invest in HDTV technology to obtain this flexibility.

2. This is especially true for larger screen television sets, which are the fastest-growing segment of the receiver market.

A Call for Collaboration

Michael J. Zpevak*

*In ages of change affecting many,
many must change to effect a new age.*

At precisely the time we most need to work together to give birth to the mammoth child we call the “National Information Infrastructure” (NII), why does it seem that so often we are working at cross purposes? Instead of repeatedly straining to prove that “the pen is mightier than the sword,” we, the drafters of the Information Age, should be co-authoring this critical chapter of American industry with an unprecedented level of cooperation. We should be writing, shoulder to shoulder, with free-flowing ideas exchanged in a sincere and enthusiastic spirit. This Article is a “call for collaboration” to all those currently immersed in the daunting task of penning the tome that is the future of telecommunications.

If the first step in solving any problem is recognition that a problem exists, then we should already be at the second step, which is determining *why* the problem exists. Why, then, do we find ourselves almost always working against, rather than with, one another these days?

The easy target for blame is competition. In today’s increasingly competitive communications market, or so the argument goes, what could one possibly expect but constant, vigorous rivalry among market participants before regulatory and legislative bodies charged with the ultimate establishment of national policy? Easy targets are often the wrong ones, however, and such is the case here.

To be sure, heightened levels of competition in recent years have not facilitated the solidarity and cooperation we clearly need to move the communications industry forward at the optimal pace. In some instances, a by-product of competition admittedly has been the opposite phenomenon.

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But it is simply not logical—and, therefore, not justifiable—to place blame on a traditional facet of American enterprise.

To the contrary, magnified competition has only caused market participants to intensify what would naturally be their “knee jerk” reactions to various regulatory proposals under any circumstances. It has not, this writer respectfully submits, caused the lack of accordance that currently impedes our collective progress. More likely, the impediment has been the result of the manner in which regulatory proceedings have recently come to be handled, *beyond* the initial reactions of docket participants and much nearer the point where actual decisions are reached.

Not too many years ago, when the Federal Communications Commission (FCC or Commission) was beginning to draft an order in any important proceeding, its common practice was to invite major players on both sides of the issues to offer *ex parte* presentations with a very specific purpose. Parties were advised to come into the meetings with the Commission staff fully prepared to identify clearly and document persuasively all of their *genuine* “lines in the sand.” No sabre rattling, war talk, or chest beating—just the bottom line: “What can you absolutely not live with in this order and why?”

In the great majority of cases, parties experienced in the ways of the FCC knew at that point they had better be forthright, and so they were. Furthermore, in cases where Commission personnel sensed that a party might not have told the entire story regarding what it could and could not live with in the forthcoming order, they exercised sound judgment and drew their own conclusions with almost uncanny accuracy. Usually, no one was completely satisfied with the Commission’s action, but neither was anyone so completely dissatisfied that a court appeal ensued.

Contrast that approach with what seems to have become the new standard operating procedure at the Commission in recent years. Sometimes parties are asked about bottom-line acceptability of specific potential rulings and sometimes they are not. Sometimes compromises are sought and adopted, but too often the Commission comes down squarely on one side with seemingly little attempt at compromise. Sometimes there is sensitivity to the parties’ “lines in the sand,” but often there is not. Consequently, court appeals are almost assured from one sector or another.

This is by no means intended to suggest that the FCC should be castigated for its motivation in adopting this new approach. On the contrary, we can all be assured that the motivation was eminently admirable—the desire to accelerate needed accomplishments for our industry and our nation. Compromise, after all, consumes time. But honorable motivations alone do not guarantee desired results. And, in the

regulatory world, time invested in compromise pays big dividends in time saved by avoiding the potentially endless cycle of appeal, reversal, and remand.

Neither does this Article seek to condemn the FCC if indeed it has consciously moved away from the more compromise-oriented approach. On occasion, courts have been quite derogatory about good-faith attempts at compromise in FCC orders.¹ Under such circumstances, it is certainly not hard to see how a regulatory commission may wish to avoid judicial chastising for allegedly avoiding a decision placed within its discretion by the law.

However, this Article advocates no such avoidance. Rather, it merely suggests that the public interest is unlikely to be served when regulators fail to discern and avoid, to the greatest degree possible, the affected parties' breaking points while crafting important policy orders—despite the added time it may take to do so. The unhappy fact of the matter is that writing massive, multifaceted, extraordinarily complex regulatory orders of the type frequently needed from the FCC, in such a manner that *no* affected party has *any* colorable legal ground for appeal, is probably not humanly possible. Therefore, the most effective course may well be writing such orders so that, although parties can perhaps find some basis for appeal, few if any will be motivated to do so.²

Authors solicited for this publication were invited to address the challenges posed and faced by communications policymakers today and the extent to which the law should respond to these challenges. Most assuredly, the law does need to be changed in several important respects. Specifically, it has become clear that certain legal/regulatory restrictions (such as the Modification of Final Judgment³ and certain baseless tariff inflexibilities) imposed upon incumbents have become more harmful than helpful to

1.

The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated The possibility of resolving a conflict in favor of the party with the stronger case, as distinct from throwing up one's hands and splitting the difference, was overlooked.

Schurz Comm., Inc. v. FCC, 982 F.2d 1043, 1050 (D.C. Cir. 1992).

2. To substantiate the points being made herein, one could list the recent string of cases in which the FCC has been reversed by courts of appeals, and could contrast that record with the one the Commission enjoyed for many years prior. However, this phenomenon is already of public record, and thus a formal accounting at this point would serve only to cast the Commission in a negative light, which is *not* the intent of this Article.

3. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. U.S., 460 U.S. 1001 (1983).

competition. But those topics will be left to the many other fine contributors to this special edition of this *Journal*.

Instead, this writer chooses to leave readers with one final thought: No matter what the law may say, invariably it is the manner in which the law is carried out that has the most profound effect. For the FCC to avoid time-devouring appellate detours and return to the fastest road to the NII, it should reengage its prior approach of seeking out the limits of tolerance among the affected parties before issuing its orders, and take the time to strike reasonable compromises wherever possible. Of course, where compromise is impossible or not in the public interest, the FCC can and should make the final decision. However, diligence by everyone involved should greatly limit the number of instances in which parties feel they have no recourse other than to appeal a Commission order.

For our part, as the affected parties, we should be actively involved in working earnestly with one another on such compromises. We should be striving to show the FCC that common ground can be established without losing ground. We must write the forthcoming pages of communications history together, rather than trying to tear one another's proposed pages out of the book.

We must collaborate.

Privacy vs. Convenience: The Benefits and Drawbacks of Tax System Modernization

E. Maria Grace*

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INTRODUCTION

The federal government's most massive information processor, the Internal Revenue Service (IRS or Service), has embarked on a \$23 billion project through the year 2008 to modernize its computer and information systems. Termed "Tax System Modernization" (TSM), the program is the most all-inclusive and costly civilian agency effort since President Kennedy's challenge to NASA to put a man on the moon and is "the largest computer system upgrade ever."¹ It is also, however, an endeavor that risks compromising the personal privacy of taxpayers and offending minimum security measures required by law.

The current privacy and security standards to which the IRS and its employees must adhere are provided in the Privacy Act of 1974,² the Computer Security Act of 1987,³ and the Internal Revenue Code.⁴ Privacy and security are two distinct concepts. To a taxpayer, privacy means "freedom from intrusion and the right to have control over information" entrusted to the IRS.⁵ For the IRS, "privacy is protecting the taxpayer from unwarranted intrusion."⁶ The confidentiality expectations of taxpayers also factor into the determinations of what kinds of, and to whom, return

1. IRS, *IRPAC Materials from May 19-20 Meeting*, 93 TAX NOTES TODAY 110-107, May 24, 1993, available in LEXIS, Fedtax Library, TNT File.

2. Privacy Act of 1974, 5 U.S.C. § 552a (1988 & Supp. V 1993).

3. Computer Security Act of 1987, 15 U.S.C. § 278g-3 (1988).

4. The Internal Revenue Code provisions include: I.R.C. §§ 6103, 7213 (1988 & Supp. V 1993), 7431 (1988). Other laws also restrict the disclosure of taxpayer information. The Freedom of Information Act requires the government to provide citizens with information relevant to the public's self-governing purposes. Not only must the information requested be necessary to self-governance, but it also must not fall within the nine categories of exemptions designed to protect the privacy rights of individual citizens. 5 U.S.C. § 552a (1988 & Supp. V 1993). More recently, Congress has enacted the Computer Matching and Privacy Protection Act of 1988, an amendment to the Privacy Act of 1974, which regulates the procedures by which information obtained by a federal agency may be shared with another federal agency. Pub. L. No. 100-503, 102 Stat. 2507-14 (codified as amended at 5 U.S.C. § 552a (1988 & Supp. V 1993)).

5. General Accounting Office (GAO), *GAO Audit of IRS Finds "Management Problems,"* 94 TAX NOTES TODAY 135-36, July 13, 1994, available in LEXIS, Fedtax Library, TNT File.

6. *Id.*

information is shared.⁷ To many, privacy includes more than the legal gathering of information; it includes notions of ethics and fairness. Although security may serve to promote privacy, the two concepts are distinguishable. Security involves the physical safeguarding of existing data and assets. It also includes “procedures for signatures and access” that influence the degree of data integrity a system may possess.⁸

This Note questions the extent to which the IRS’s Tax System Modernization effort will be able to incorporate into its data storage and telecommunications facilities the confidentiality and record security standards required by Congress. Also questioned is whether the current regulatory codes will provide sufficient protection to taxpayers as the Service expands information transmission mechanisms to allow greater public interaction. As has been recently reported, “[S]ecurity risks to federal computers and telecommunications systems are worse than ever. Every day the confidentiality, integrity and availability of government information is being threatened by amateur hackers, [viruses], professional eavesdroppers, power outages, natural disasters and human error.”⁹ Given the sensitive nature of tax returns, which reveal information ranging from income, occupation, and employment to medical problems, savings, and home address, safeguarding such information should be paramount in the minds of both the public and the IRS alike.¹⁰

In Part I, this Note will review the legal framework that presently regulates IRS information collection and storage. Following a summary of the modernization efforts that have begun to take place, Part II will offer several recommendations for identifying areas of particular security and privacy weakness that require immediate attention. This Note concludes that the IRS must match the innovations it uses to facilitate tax collection with innovations to protect the privacy of taxpayers.

I. INFORMATION PRIVACY AND SECURITY

Concern about information privacy is not new. Over a century ago, Samuel Warren and Louis Brandeis wrote a renowned article advocating a right of privacy and warning that innovations in technology and business procedures would diminish the personal dignity of the individual if

7. *Id.*

8. *Id.*

9. *Security: New Products Are Making It Easier to Safeguard Computers and Telecommunications Equipment*, GOV’T EXECUTIVE, Apr. 1993 (Information Technology Guide supplement), at 19.

10. *Unofficial Transcript of Senate Governmental Affairs Hearing*, 93 TAX NOTES TODAY 171-67, Aug. 17, 1993, available in LEXIS, Fedtax Library, TNT File.

protection was not provided.¹¹ The common law doctrine of personal privacy that developed from the Warren and Brandeis article has since been supplemented with legislative action, particularly when the judiciary has been reluctant to extend protection. Courts generally have limited protection to those instances where the individual has had a reasonable expectation of privacy. When dissatisfied with the level of protection afforded by courts, legislatures have sometimes provided individuals with privacy rights without requiring them to prove that a reasonable expectation existed. The proliferation of new computer and information technologies in the last two decades has rendered some areas of legislative protection obsolete. Other areas of protection have had to be revised or removed to eliminate a negative impact on technological progress. Changes in information and communication technology have left the legislative branch barely able to keep pace with the privacy protection needs of the public. Three pieces of legislation provide the privacy and security standards for the IRS: the Privacy Act; the Computer Security Act; and the Internal Revenue Code.

A. *The Privacy Act*

The Privacy Act is Congress's attempt to strike a balance between the government's need to gather, store, analyze, and disseminate information, and the right of the individual to prevent personal information from being publicly disclosed or disclosed in error within the government. The Privacy Act of 1974 prevents government agencies from divulging or sharing citizens' personal information without proper authorization. The Act also regulates the type of information that an agency may gather, the means used to gather such information, and the degree of integrity of the information storage system.¹² Under the Act, each federal agency is required to maintain a system of records with the highest degree of accuracy, relevance, timeliness, and completeness.¹³ In addition, each government agency must establish appropriate administrative, technical, and physical safeguards to ensure the security and confidentiality of records. It must also protect records against anticipated threats or hazards to their security or integrity.¹⁴ The Act mandates that rules of conduct be established and provided to each person involved in the design, development, operation, or maintenance of the agency's system of records.¹⁵ Where an

11. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

12. 5 U.S.C. § 552a (1988 & Supp. V 1993).

13. 5 U.S.C. § 552a(e)(5) (1988).

14. 5 U.S.C. § 552a(e)(10) (1988).

15. 5 U.S.C. § 552a(e)(9) (1988).

agency's records are inaccurate, the Act provides citizens with procedural guidance on how to amend the errors.¹⁶ Additionally, the Act provides civil remedies when an agency has violated the Act and, in cases of an agency's willful violation of the Act, criminal and stiffer civil penalties.¹⁷

B. The Computer Security Act

The Computer Security Act of 1987 is an additional device by which confidentiality, integrity, and access to information are regulated in the public realm. Congress recognized that standardization of communication protocols, data structures, and interfaces in telecommunications and computer systems was essential to the future functioning and competitiveness of the federal government. The National Institute of Standards and Technology (NIST), under the National Security Agency (NSA), promulgates technical, management, physical, and administrative standards, as well as security and privacy guidelines for federal computer systems.¹⁸ NIST, in carrying out its duties, may draw upon the NSA guidelines where information is considered sensitive.¹⁹ The Secretary of Commerce, on the basis of the standards and guidelines developed by NIST, has the authority to make the standards compulsory and binding on federal government agencies when the Secretary determines standards are necessary to improve the security and privacy of federal computer systems.²⁰ To assist the Secretary, the Computer Security Act provides for the establishment of a Computer System Security and Privacy Advisory Board.²¹ The Board must (1) identify emerging managerial, technical, administrative, and physical safeguard issues relative to computer systems' security and privacy; (2) advise NIST and the Secretary on security and privacy issues pertaining to federal computer systems; and (3) report findings to the Secretary, the Office of Management and Budget (OMB), the NSA, and congressional committees.²²

16. 5 U.S.C. § 552a(f) (1988 & Supp. V 1993).

17. Civil remedies may consist of: a court order to amend the individual's record, a court order to enjoin an agency from withholding records, a court order to produce records improperly withheld, and attorneys' fees. Where the action has been willful, actual damages and attorney's fees may be awarded. 5 U.S.C. § 552a(g), (i) (1988).

18. 15 U.S.C. § 278g-3(a)(2)-(3) (1988).

19. 15 U.S.C. § 278g-3(c) (1988). Sensitive information is defined as "any information . . . which could adversely affect . . . the privacy to which individuals are entitled under [the Privacy Act]." 15 U.S.C. § 278g-3(d)(4) (1988).

20. 15 U.S.C. § 278g-3(a)(4) (1988); *see* 40 U.S.C. § 759(d) (1988).

21. 15 U.S.C. § 278g-4(a) (1988).

22. 15 U.S.C. § 278g-4(b) (1988).

C. *The Internal Revenue Code*

Section 6103 of the Internal Revenue Code, originally codified in the Tax Reform Act of 1976, generally prohibits the disclosure of any federal return.²³ However, where a federal, state, or local agency meets stringent requirements, such as adequate safeguards over return material and a proper purpose for use of information, it may examine a return's contents. The public policy underlying Section 6103 legislation is the protection of the taxpayer's right to privacy and is designed to prevent the use of taxpayer information for purposes unrelated to tax administration, such as intelligence gathering.²⁴

The Internal Revenue Code specifically covers employees of the IRS, subjecting them to discipline and/or penalties for noncompliance with Code mandates. Criminal penalties may be imposed upon federal and state employees, and others who make unauthorized disclosure of return information under Section 7213 of the Code.²⁵ In addition, the Code prescribes civil damages for confidentiality breaches in violation of the Code under Section 7431.²⁶

II. THE INTERNAL REVENUE SERVICE

The mainstay of the federal government is its revenue source, without which it cannot function. The IRS is the federal agency charged with the task of collecting revenue. One could argue that the very role the IRS must fulfill should warrant the use of broad powers to guarantee that it carry out its mission. However, like other federal agencies, the IRS must adhere to constraints imposed by the Privacy Act and the Computer Security Act, but must additionally comply with the security sections of the Internal Revenue Code. Under the auspices of the Department of the Treasury, the IRS must maintain accurate, relevant, timely, and complete records on all of the entities, including individuals, required under the tax law to report and pay taxes. The IRS must demonstrate to Congress and other government bodies that it has established and presently follows the appropriate administrative, technical, and physical safeguards which ensure the security and confidentiality of taxpayer records.

23. I.R.C. § 6103 (1988 & Supp. V 1993).

24. *Id.*; R. Tracy Sprouls, *Civil Remedies for Abusive Practices by the IRS*, 93 TAX NOTES TODAY 240-34, Nov. 24, 1993, available in LEXIS, Fedtax Library, TNT file.

25. I.R.C. § 7213 (1988 & Supp. V 1993).

26. I.R.C. § 7431 (1988).

The IRS's TSM effort has great implications for the agency's ability to comply with legislative mandates. In general, TSM, when fully operational, will permit taxpayer information to be "retrieved, delivered and used electronically through an enhanced nationwide telecommunications network," and will be "available on automated workstations where authorized IRS employees will have on-line access to current tax account information."²⁷ Improvements in the methods by which the IRS conducts business have been a long time coming. A review of the historical background and the new developments in tax administration adds some perspective to understanding how the IRS has come to so desperately need a technical and organizational restructuring.

A. Background

The evolution of an internal tax system administration is largely intertwined with the history of the United States. The colonial government met its need for revenue through tariffs, customs duties, and land sales, allowing the government to function without an internal agency devoted to that purpose. With the government's intermittent use of excise taxes in the 1790s and during the War of 1812, an internal tax administration was essential but not always effective. The result was usually an administration that lacked effective enforcement mechanisms or was the subject of popular protest. The Civil War introduced the nation's first income tax and the brief existence of the Office of the Commissioner of Internal Revenue. Income taxation during the 1800s, which only truly affected the nation's wealthiest citizens, seemed to occur only when the government's need for funds was dire. After a bitter struggle over the constitutionality of the income tax in 1894, and after the Sixteenth Amendment to the Constitution—permitting the income tax—was ratified in 1913, an internal tax administration finally achieved permanence in the federal government.²⁸

The year 1914 was a milestone for the government as the first 350,000 Form 1040s were processed, generating \$28.3 million in tax revenue.²⁹ Although there has been an exponential increase in the number

27. Michael P. Dolan, *IRS Acting Commissioner's Testimony at Ways and Means Oversight Panel Hearing on IRS Modernization*, 93 TAX NOTES TODAY 72-49, Mar. 30, 1993, available in LEXIS, Fedtax Library, TNT File (statement of Michael P. Dolan, Acting Commissioner, Internal Revenue Service).

28. WILLIAM A. KLEIN & JOSEPH BANKMAN, *FEDERAL INCOME TAXATION* 4-15 (1993).

29. IRS, *Overview Document Explaining IRS Initiatives*, 93 TAX NOTES TODAY 31-38, Feb. 9, 1993, available in LEXIS, Fedtax Library, TNT File. In 1993, over 204 million tax returns were processed, generating over \$1 trillion in revenue. Margaret Milner Richardson, *IRS Commissioner's Testimony on "Reinventing the IRS,"* 93 TAX NOTES TODAY 236-50, Nov. 18, 1993, available in LEXIS, Fedtax Library, TNT File (testimony of Margaret

of returns that must be processed and revenue that must be accounted for, the IRS has experienced only one significant organizational restructuring (in 1952) and one period of technological restructuring (in the 1960s).³⁰

In the 1960s, an overhaul provided IRS employees with data-processing equipment that would store only 40 percent of the information originally contained in the tax form which had to first be manually keypunched by employees into the system.³¹ The information storage system was, and still is, paper- and tape-based, labor intensive, and highly inefficient, but, it was an improvement over the earlier method of collection accounting. When advancements in information storage technology began in the 1970s, Congress stubbornly refused to allocate funding for the purpose of modernization; instead, Congress permitted the IRS to procure equipment that could be characterized only as a replacement, not as an advancement in technology. In order to meet frequent changes in tax law, workload growth, and reporting demands, the Service added subsystems on a piecemeal basis, resulting in the generation and storage of redundant data.³² Although there has been a proliferation of supplemental information systems over the years, the IRS's basic system has never changed and continues to be based on a 1950s file structure and individual ledger-card concept.³³

The turning point for the IRS came in 1985 when a new replacement computer system overloaded during the 1985 processing season at the Philadelphia Service Center. This caused the postponement of return processing and cost \$15.5 million in interest payments on delayed refunds, making Congress finally take notice of the inadequacies of the system.³⁴ Funding and support for the TSM effort has been a direct result of belated congressional recognition that mere replacement of processing equipment is not sufficient and that a complete upgrade and reorganization of the current system is in order.³⁵

The inefficient means by which the IRS processes returns is not the only deficiency that has attracted the attention of Congress. The integrity

Milner Richardson, Commissioner, IRS).

30. IRS, *supra* note 29.

31. Dolan, *supra* note 27.

32. Robert Gibson, *Future of Information Technology in Federal Tax Administration—The IRS Plan*, 93 STATE TAX NOTES 203-22, Oct. 21, 1993, available in LEXIS, Taxana Library, Taxtxt File (Companion to FTA Research Report 100 (July 1985)).

33. *Id.*

34. Dolan, *supra* note 27.

35. Congress, throughout the mid-1970s, refused to provide funding for more than replacement systems, such as the Service Center Replacement System (SCRS), which failed in 1985. IRS, *supra* note 29.

of the Service's procedures has been scrutinized since the 1940s. The 1952 reorganization was spurred by the hundreds of IRS employee convictions for "crimes ranging from accepting bribes to not filing personal tax returns."³⁶ In the mid-seventies, privacy concerns escalated. In fact, it was in the wake of the Nixon administration's Watergate scandal that Congress refused to allocate funding to the IRS, fearing that the agency could not implement a processing system that would protect taxpayer information from unauthorized use and disclosure.³⁷ Prior to the Privacy Act and the Tax Reform Act of 1976, virtually every federal agency could access information on private citizens, while government employees were subject only to minimum penalties for inappropriate disclosures.³⁸ Although accessibility has been curtailed and penalties have become more harsh, compliance with sections of the Internal Revenue Code has always required attention. As recently as August 1993, hundreds of IRS employees were found to have "exploited ineffective security controls to snoop through computerized tax accounts."³⁹ In fact, some employees altered files, generated false returns, and one collected thousands of dollars in fraudulent tax refunds.⁴⁰

While TSM fosters hope that such breaches of security and privacy will be a thing of the past, there is actually now even greater reason for concern. The TSM will expose information to more employees and, with greater telecommunications technology, to third-party businesses, practitioners, and individuals. While the Service diligently reports its efforts and programs for the implementation of advanced telecommunications and computer technology to Congress, it has virtually ignored plans for the incorporation of security and privacy safeguards.⁴¹ Oversight agencies

36. Milner Richardson, *supra* note 29.

37. IRS, *supra* note 29.

38. Income tax returns were considered public records subject to inspection on orders of the president and under president-approved Treasury rules. "Return information was also available to congressional committees, the White House staff, the Justice Department, state and local governments and to individuals with a material interest in specific return information." Allan Karnes & Roger Lirely, *Striking Back at the IRS: Using Internal Revenue Code Provisions to Redress Unauthorized Disclosures of Tax Returns or Return Information*, 23 SETON HALL L. REV. 924, 926 (1993). Congress limited access to taxpayer information in the Act of Oct. 4, 1976, Pub. L. No. 94-455, 90 Stat. 1667 (current version at I.R.C. § 6103(a) (1988 & Supp. V 1993)).

39. Gary H. Anthes, *IRS Uncovers Bogus Access to Tax Records*, COMPUTERWORLD, Aug. 9, 1993, at 15, 15 (quoting Sen. John Glenn (D-Ohio)).

40. *Id.*; Stephanie Stahl, *Internal Revenue Snoops*, INFORMATIONWEEK, Aug. 9, 1993, at 12, 12.

41. The National Research Council's (NRC) review from August 1990 through May 1992 identified a lack of integration of privacy principles and techniques in TSM system designs. With regard to security, the NRC further found weaknesses in integration in the

repeatedly report that the TSM effort has been slow to address design weaknesses and carelessness in the systems that have actually been implemented. The plan that initially guided the TSM effort, the 1991 Design Master Plan, was based on unfinished business operations studies, and lacked what the new plan calls the "Business Vision."⁴² The IRS now contends that no longer will technology alone drive the modernization effort, but that other business needs, such as privacy, security, telecommunications requirements, human resources, and physical facility considerations will also play a role.

B. *The Business Vision*

The new vision requires that (1) the agency shift from paper-based processing to an electronic tax-processing system, (2) a database become fully operational with all account information accessible to employees to assist taxpayers, and (3) all telephone communications be consolidated into a few, centrally located areas. In order to achieve these goals, the IRS will salvage some of its preexisting system plans. Conceptually, these plans can be broken down into interim and long-term systems. Interim systems are comprised of stand-alone workstations that do not share data with other systems and are designed to support the current, overloaded tape-based systems.⁴³ Long-term designs will eventually replace the interim systems and "form an integrated electronic environment in which all systems share data automatically."⁴⁴ Many of the interim systems are currently serving as pilots for planned long-term systems, such as the Electronic Filing program (ELF) and TeleFile, spotting problem areas and drawing attention

TSM's security architecture and a lack of accountability. H.R. Rep. No. 102-1058, 102d Cong., 2d Sess. (1992). In August 1993, the NRC said that the IRS had "shown little progress" in addressing concerns about taxpayer confidentiality. Stephen Barr, *IRS Computer Revamp Faulted by Study Panel*, WASH. POST, Aug. 20, 1993, at A21.

42. *Tax Systems Modernization Program Status and Comments on IRS' Portion of President's Request for Fiscal Year 1993 Supplemental Funds: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 37 (1993) (statement of Howard G. Rhile, Director, General Government Information Systems Information Management and Technology Division). The Design Master Plan provides a road map of project schedules and budgets. Shirley D. Peterson, *Testimony Before the Senate Committee on Governmental Affairs*, 92 TAX NOTES TODAY 72-32, Apr. 3, 1992, available in LEXIS, Fedtax Library, TNT File (testimony of Shirley D. Peterson, Commissioner, IRS).

43. Jennie Stathis, *Tax Administration Status of Tax Systems Modernization, Tax Delinquencies, and the Tax Gap*, Subcomm. on Treasury, Postal Service, and General Gov't of the House Comm. on Appropriations, 93 TAX NOTES TODAY 26-44, Feb. 4, 1993, available in LEXIS, Fedtax Library, TNT File (statement of Jennie Stathis, Director, Tax Policy and Administration Issues, Gen. Gov't Div., U.S. GAO).

44. *Id.*

to potential market expansion opportunities. The interim systems have generated mixed reviews, primarily because of privacy questions and security-control weaknesses. Some projects that have left the prototype stage are beginning to reap marginal cost and efficiency benefits. Other interim systems, however, are still in the prototype stage or are experiencing procurement schedule delays that will prolong the implementation and ultimate benefits of the long-term TSM designs. The delay may be somewhat of a blessing, since the IRS is continuing to stall on plans for processing, security, and data standards necessary for integration. Still, delay in implementation of the long-term system has caused the IRS to expand the capacity of existing interim projects, perpetuating the lack of proper controls and generating needless expense.⁴⁵

The following sections review some of the current interim systems that have emerged from the prototype stage or that are being evaluated as potential pilot projects. Each section addresses the advances that have been achieved and each project's respective privacy and security weaknesses.

C. Tax Processing System

The IRS decision to shift from paper-based processing to electronic processing is consistent with private sector developments in data transfer. Various prototypes and pilots have been working since 1986 and have spawned several filing options and refund payment and receipt alternatives to paper.

An individual may use ELF and TeleFile as a filing alternative, while businesses required to make federal tax deposits (FTDs) may use TAX-LINK to meet their filing obligations.⁴⁶ The Service is also piloting joint state and federal tax returns via ELF for individuals and is presently considering a similar effort for businesses. Electronic refund and payment options are less numerous. Direct bank deposits and refund anticipation loans are two refund alternatives. For a business or individual with a balance due, the credit card may be the preferred payment means in the near future. There is little doubt that a transition to electronic processing will reap many benefits. It will reduce costs for processing, storing, and

45. Additional electronic filing service centers have been added to handle current capacity problems. The IRS has asserted that questions of capacity will not exist when the permanent Electronic Management System (EMS) replaces the present system. GAO, *GAO Optimistic That Electronic Filing Will Increase*, 93 TAX NOTES TODAY 24-26, Feb. 2, 1993, available in LEXIS, Fedtax Library, TNT File.

46. Harriet Hanlon, *CAG Discusses IRS's New 'TAXLINK' System*, 94 TAX NOTES TODAY 181-4, Sept. 14, 1994, available in LEXIS, Fedtax Library, TNT File.

retrieving returns. It will also improve the speed and accuracy of returns and refunds.

1. Electronic Filing

Electronic filing involves the transmission of refund information over communication lines to an IRS service center where the information is then processed, edited, and stored. ELF first became available nationwide in 1990 and has since attracted numerous taxpayers.⁴⁷ The primary benefit to the taxpayer is that refunds become available within three days of transmission via a financial institution or two to three weeks by mail directly to the taxpayer. Where financial institutions are the intermediary, taxpayers may receive their refunds as a direct bank deposit or in the form of a refund anticipation loan (RAL).⁴⁸ The IRS derives a benefit because electronic filing has a 2.8 percent error rate, as compared to an 18 percent error rate with paper returns.⁴⁹ Errors are reduced because not only does the transmitting computer perform checks to catch errors, but after submission, there is no opportunity for manual processing mistakes, in contrast to paper returns.⁵⁰

Electronic filing, however, is not yet completely paperless and is not without costs to the taxpayer. The IRS requires the taxpayer to have an IRS-approved third party prepare and/or transmit the return, usually at a fee in addition to preparation fees.⁵¹ There is another fee if the taxpayer wants to obtain an expedited refund through a financial institution.⁵² Those most attracted to electronic filing are people who need a refund quickly and are typically the ones least able to afford its additional cost.⁵³ Once the information is communicated to the IRS service center via electronic transfer, the preparer is required to send additional documents, including Forms W-2 and a Form 8453 with the taxpayer's signature.⁵⁴ Not only does the preparer have the burden of making two submissions, one

47. During the 1993 filing season, 12 million returns were filed electronically, reflecting a 13% increase over 1992. The IRS vision is to increase the number filed to 80 million in 2001. Jennie Stathis, *GAO's Testimony, "IRS's New Business Vision," at House Government Panel Hearing on IRS Reorganization*, 93 TAX NOTES TODAY 236-52, Nov. 17, 1993, available in LEXIS, Fedtax Library, TNT File.

48. GAO, *supra* note 45.

49. *Id.*

50. *Id.*

51. The median fee for manually preparing a Form 1040 is \$70, and the median fee for electronically filing the return is \$22. *Id.*

52. The median fee for getting a refund anticipation loan for a Form 1040 is \$35. *Id.*

53. *Id.*

54. *Id.* Additional documents, such as Form 2120 (Multiple Support Declaration) and Form 2848 (Power of Attorney), may also be required. *Id.*

electronic and one paper, but when a change or error is discovered, the preparer must file an amended return and IRS employees must update two different systems.⁵⁵ The IRS, therefore, still incurs costs associated with paper transport and storage. The IRS still engages in manual delivery of the paper documents and is compelled in some cases to make and store printouts of electronically filed returns. The steps requiring mailing and storage of documents after the electronic transmission greatly diminish the value of electronic filing.

An additional and more serious drawback to electronic filing has been the proliferation of fraudulent returns submitted by transmitters and IRS employees alike. For the 1993 filing season, the IRS detected \$115 million in fraudulent returns, but only 66 percent of the errors were detected before refund checks had already been mailed.⁵⁶ “No one knows how many other false refunds are going undetected,” but estimates range from \$1 billion to \$9 billion.⁵⁷ The IRS has attempted to reduce fraud by prescreening return transmitters with suitability checks. These checks investigate applicants for infractions involving tax law violations, breaches of trust, or convictions for embezzlement, money laundering, or stock fraud.⁵⁸ The checks will be expanded for the 1994 filing season to include fingerprinting and credit reports.⁵⁹ Attempts to conduct some checks have been unsuccessful since IRS employees conducting them are prevented by interagency memorandum agreement from accessing the National Crime Information Center database and, in some states, are prevented from accessing the National Law

55. According to the IRS, a one-step error correction process was expected to be available in 1994. *Id.*

56. George Guttman, *Filing Fraud Prompts Taxwriters to Go Over IRS's Head for Help*, 94 TAX NOTES TODAY 74-4, Apr. 18, 1994, available in LEXIS, Fedtax Library, TNT File; Glenn Says IRS Employees “Snoop” on Taxpayers, 94 TAX NOTES TODAY 139-39, July 19, 1994, available in LEXIS, Fedtax Library, TNT File. In the first ten months of 1993, there were 25,633 fraudulent returns, resulting in a net loss of approximately \$25 million. This may be compared with 12,488 fraudulent returns for the same period of 1992. Jennie Stathis, *GAO's Testimony Includes Recommendations for Stopping Electronic Filing Fraud at W&M Oversight Hearing*, 94 TAX NOTES TODAY 29-44, Feb. 11, 1994, available in LEXIS, Fedtax Library, TNT File. Compare this with only 411 electronic returns identified as fraudulent in 1990. GAO, *GAO Says IRS Can Improve Electronic Filing Controls*, 93 TAX NOTES TODAY 7-71, Jan. 11, 1993, available in LEXIS, Fedtax Library, TNT File.

57. GAO, *supra* note 56; Glenn Says IRS Employees “Snoop” on Taxpayers, *supra* note 56.

58. GAO, *supra* note 56.

59. IRS, *IRS Announces New Procedures to Combat Refund Fraud*, 94 TAX NOTES TODAY 140-84, July 20, 1994, available in LEXIS, Fedtax Library, TNT File.

Enforcement Telecommunications System.⁶⁰ Employees who conduct the suitability checks are also often responsible for promoting ELF and, therefore, lack the incentive to deny approval to an applicant.

The IRS also tries to stymie fraud attempts at the service centers where the mailed documents are first received. Unfortunately, by the time IRS employees receive the follow-up documents and make the necessary checks to detect fraud, the refund has already been deposited in a financial institution or received through the mail.⁶¹ Since the IRS employee has released the refund without a valid signature on the return, legal redress against the return filer who has received a payment is more difficult.⁶² The IRS has decided against waiting to determine whether the return is fraudulent before paying the refund since a delay negates the incentive of taxpayers to file in the first place.⁶³

To counter some of the drawbacks of electronic filing, the IRS has initiated legislative proposals to eliminate the follow-up mailing of refund documents. This effort has involved the submission of legislation that would eliminate the need for paper signatures.⁶⁴ Electronic signatures would provide the IRS with a means to assess taxes and penalties, and prosecute for tax fraud since the return would be rendered complete upon filing.⁶⁵ In addition, the IRS has stated its intent to enhance its questionable refund-detection program and more closely scrutinize first-time filer

60. The FBI maintains the National Crime Information Center database which stores information on federal, state, and local crime convictions. The Assistant Chief Counsel for Criminal Tax determined, through discussion with the FBI, that access to the database by the IRS for suitability checks would require legislative endorsement or an executive order. A legislative proposal draft is thought to be in the works. See Stathis, *supra* note 56.

61. During the first seven months of 1992 alone, the IRS identified but was not able to stop \$8.5 million in fraudulent refunds. In 1991, 5% of all identified fraudulent refunds were stopped before issuance; in the first seven months of 1992, 71%, or \$21 million, were stopped. (Compare the 96% stoppage rate for paper returns in the first seven months of 1992.) Even so, one IRS district director has said that "between five (5) and ten (10) fictitious [electronic] returns are successfully filed and refunded to perpetrators for every one return detected and stopped." See GAO, *supra* note 56.

62. *Id.*

63. *Id.*

64. H.R. 3419, 103d Cong., 2d Sess. (1994). The recent resolution of a patent dispute over the digital signature algorithm (DSA) has been a relief for many federal agencies interested in using the technology. DSA will serve as the standard for verifying sender identity and message content when information is electronically transmitted. The remaining issue is how federal agencies will facilitate the operability of the Digital Signature Standard (DSS) between the public and private sectors. Kevin Power, *With Patent Dispute Finally Over, Feds Can Use Digital Signatures*, GOV'T COMPUTER NEWS, June 21, 1993, at 1, 1.

65. H.R. 11, 102d Cong., 2d Sess. (1992) (passed by Congress in 1992 but vetoed for reasons unrelated to the provision. It has not been resubmitted.).

returns.⁶⁶ While these measures are necessary and commendable, IRS procedure continues to compromise the security of the system by failing to implement more immediate controls to identify and investigate perpetrators and the returns they submit. More must be done not only to screen external return transmitters, but to incorporate security checks into existing interim systems. The IRS has promised that the long-term system, the Electronic Management System, which will replace the ELF system, will remedy the lack of security controls in the existing system. In fact, in anticipation of a fully operational TSM, the IRS encouraged employers, military installations, colleges and universities, and financial institutions to provide electronic filing services to their employees and customers.⁶⁷ Security and privacy safeguards surrounding third-party data sharing have yet to be addressed. Several interested parties have raised questions regarding the methods for detecting and preventing unauthorized use or disclosure of taxpayer information by third-party electronic filers—especially by employer electronic filers—and the kinds of encryption protocols available or required for taxpayers who file electronically.⁶⁸ Additionally, the IRS is considering another legislative proposal that would give the Secretary of the Treasury the authority to mandate that, under certain conditions, returns must be filed electronically, further expanding the pool of potential problems, with or without a third-party intermediary.⁶⁹

2. Joint Federal and State Tax Returns

Twenty-three states, to varying degrees, have joined the IRS in testing the joint electronic filing of state and federal tax returns.⁷⁰ This program is essentially an extension of the ELF process. The taxpayer may file a joint state and federal return by providing a qualified preparer or transmitter proper identification and financial information. The preparer collects the

66. Within the group of first-time filer returns are many returns that simply possess false social security numbers and false amounts indicating a refund due. Refund anticipation loans are no longer available to first-time filers. H.J. Cummins, *The Taxman Is Pushing for Automation*, NEWSDAY, July 29, 1993, at 41.

67. See GAO, *supra* note 45.

68. Robert Clagett, *National Research Council Report on TSM*, 93 TAX NOTES TODAY 174-26, Aug. 20, 1993, available in LEXIS, Fedtax Library, TNT File.

69. As an alternative to mandating that returns be electronically filed, the IRS has suggested that a small tax credit be granted. Rep. Douglas Barnard (D-Ga.), *House Government Operations Committee Report on Tax Systems Modernization*, 92 TAX NOTES TODAY 229-72, Nov. 16, 1992, available in LEXIS, Fedtax Library, TNT File.

70. IRS, *Return Filing Remains Behind 1993 Pace; Record Number of Returns Filed Electronically*, 94 TAX NOTES TODAY 67-44, Apr. 7, 1994, available in LEXIS, Fedtax Library, TNT File. As of early April 1994, over one million electronic filings were combined federal and state returns. *Id.*

data into one electronic record and transmits it to the IRS and, after the IRS checks the information, it provides the preparer with an acknowledgment of receipt. The taxpayer's state then receives the information that it requires to process the taxpayer's state return via the IRS. Rather than filing two separate returns and submitting them to two different places, the taxpayer's information is automatically routed to its proper destination.⁷¹

Since the joint federal-state filing project processes are essentially the same as the ELF program, they are subject to the same criticisms. In addition, because federal agency information is being provided to a state agency, the Privacy Act is even further implicated. The IRS has tried to prepare for some foreseeable privacy infringements. A provision is pending in Congress that would permit the IRS to engage in cooperative agreements with state tax authorities, a proposition normally disallowed.⁷² The IRS is not permitted to use Federal Tax Administration funds for nonfederal services, even if reimbursement is contemplated. With congressional authorization, however, the Treasury Secretary could enter into agreements with the states on issues involving joint electronic filing information, payment exchange, and other joint tax administration endeavors. To participate, states must agree to comply with federal privacy guidelines.⁷³

3. TeleFile

TeleFile is another option the IRS is exploring to encourage electronic filing. This alternative permits a select group of Form 1040EZ filers to file using a touch-tone phone. A filing taxpayer will first be required to enter an identification number and then the amounts of wages, withholding, and interest generated throughout the year. The computer immediately performs the necessary calculations, indicates to the taxpayer the amount of tax liability, and discloses either the amount of refund or balance due. The computer will then ask the taxpayer whether she or he wishes to file.

Originally tested in Ohio in 1992 and 1993, and still in the pilot stage, TeleFile is now available in seven states.⁷⁴ A major step in paperless

71. Several states have joined as participants in a new service offered by TaxNet Government Communication Corp., a division of the Federation of Tax Administrators. With the TaxNet service, which uses standard electronic data interchange (EDI) transaction sets approved by the American National Standards Institute X.12 (ANSI X.12) committee and a standardized format, corporate taxpayers can electronically file with participating states, minimizing mailing costs and errors. Lynda Radosevich, *States to Plug in EDI*, *COMPUTER-WORLD*, Oct. 18, 1993, at 1, 1.

72. H.R. 3419, 103d Cong., 2d Sess. (1994).

73. IRS, *supra* note 29; Milner Richardson, *supra* note 29.

74. Through the first four months of the 1994 filing season there was a 248% increase in returns received using TeleFile as compared to the same period the previous year. IRS,

returns, TeleFile will test in a limited area of Ohio the voice signature technology that will eventually eliminate the need for a follow-up signature form. The states that joined Ohio for the pilot test in 1994 still require taxpayers to submit a Form 1040-Tel as evidence of their signature and as confirmation of the amounts given over the phone. TeleFilers receive a confirmation number from the computer at the end of the filing.

TeleFile is an attractive alternative for 1040EZ filers. Because neither a fee nor a third party is involved, refunds could be expected in about three weeks. Some taxpayers may be discouraged from using this form since the option is available to 1040EZ filers only and, where a balance is due, a document or check has to be mailed anyway. For the IRS, the jury is still out on the effectiveness of the voice signature, but the option lends itself well to ensuring completeness and accuracy in taxpayer records. At issue, however, is the ability of the IRS to detect fraudulent filings without prior checks on the transmitter or on the authenticity of the filer placing the call. Expansion of the TeleFile system to include other form types and, therefore, other market segments will involve increased risks. However, the IRS would likely take the position that it is not responsible for the privacy of data transmitted over public communications networks.

4. TAXLINK

Also in the prototype stage is TAXLINK, an electronic filing system for FTDs. Three southern states—South Carolina, Florida, and Georgia—have participated in the program since June 1992 and the IRS plans to expand the prototype to include other states in 1994. Although the program is limited to businesses for now, the IRS is testing TAXLINK with the Bureau of Financial Management Services and the Federal Reserve Bank of Atlanta. Three forms of the test exist: the Cash Concentration, the Central Processor, and the Federal Reserve Bank test.⁷⁵ The FTDs presently being tested are employment, unemployment, corporate income, and excise taxes.

IRS Reports on Filing Season Statistics, 94 TAX NOTES TODAY 84-6, May 2, 1994, available in LEXIS, Fedtax Library, TNT File.

75. The Cash Concentration test system requires the taxpayer to provide payment information to a depository which then relays via phone or computer to another depository, the cash concentrator that provides the information to the IRS. On the tax due date, taxpayer funds are transferred to the Treasury's account at a Federal Reserve Bank. The Centralized Processor system allows the taxpayer to contact the cash concentrator directly. The Federal Reserve Bank test allows the taxpayer to contact the Federal Reserve Bank directly so that the Federal Reserve Bank acts as the cash concentrator. GAO, *GAO Recommends Improvements in Federal Tax Deposit System*, 93 TAX NOTES TODAY 93-57, Apr. 29, 1993, available in LEXIS, Fedtax Library, TNT File.

Under a paper system, employers are required to fill out FTD coupons that are remitted with their company checks. These coupons provide essential information, including company address, tax period, and to which account the payment must be applied. The coupons are prone to errors, first, when originally filled out by the taxpayer due to the awkwardness of the filing dates, and, second, when manually key-punched at an IRS service center. Under an electronic system, tax deposits can be made by phone, computer, or electronic transfer to a designated financial institution "which will, among other things, (1) receive tax payment information; (2) initiate the transfer of tax payment funds between a taxpayer's account and Treasury's general account for a debit payment transaction; (3) receive information from an automated clearinghouse for a credit payment transaction; and (4) transmit related tax payment information to the IRS."⁷⁶ Without the additional time required to process the paper coupon, the IRS receives its payments faster and realizes greater business taxpayer account posting accuracy. The system will eventually be expanded to include individual estimated income tax payments and a greater variety of other business tax payments. Electronic Funds Transfer (EFT) will be adopted as the long-term system to integrate the TAXLINK concept into the comprehensive IRS database. Included in NAFTA legislation is a provision on EFT that permits the Secretary of the Treasury to make mandatory electronic transmission of FTDs.⁷⁷ This will be phased in through 1998.⁷⁸

D. *Electronic Payment and Refund Options*

Separate from the filing issue are the issues surrounding the method of tax payment and refund. Several payment alternatives are still on the IRS drawing board, including payment by either credit or debit card as opposed to mailing a check. Already in place for refunds are RALs and direct deposit alternatives.

76. IRS, *IRS Explains Rules for Participating in Electronic Deposit Program*, 93 TAX NOTES TODAY 116-16, June 2, 1993, available in LEXIS, Fedtax Library, TNT File. One alternative which the IRS has instituted since 1989 is the lockbox. Payments and paper coupon forms are remitted to a commercial bank by taxpayers. The bank deposits the payment to the IRS's general account, and mails payment information to an IRS service center so that the taxpayer's account can be credited. The process still involves the risk of errors associated with manual processing and would still entail inefficient labor. GAO, *Critical of IRS's Timeliness in Depositing Tax Receipts*, 93 TAX NOTES TODAY 65-40, Mar. 23, 1993, available in LEXIS, Fedtax Library, TNT File.

77. Milner Richardson, *supra* note 29.

78. *Id.*

1. Credit Card or Debit Card Payment Options

Under present laws, the IRS cannot accept a credit card as a means of payment for taxpayer liability.⁷⁹ If Congress passes the proposed legislative initiative to allow credit card payments, use of electronic filing will become a more attractive option for a taxpayer who has a balance due. Several implementation issues must first be addressed before such a payment option can become reality.

One issue involves the treatment of transaction fees that are normally paid by the merchant accepting a credit card. Credit card issuers, such as Visa and MasterCard, do not permit merchants to pass these fees on to their customers, and the IRS is not willing to discount taxes for credit card taxpayers.⁸⁰ Several states already accept tax payments by credit card.⁸¹ These states have engaged in contracts with intermediary companies that accept the credit card payment. The states are paid the entire amount of the tax and the taxpayer agrees to pay the transaction fee incurred by the intermediary. One option for the IRS is to join the Financial Management Service's (FMS) Credit Card Collection Network. The IRS would not be the first federal agency to participate in such an arrangement. Through the FMS, an agreement could be made with banks where the IRS would be permitted to accept credit cards without incurring a transaction fee if it maintains a non-interest-bearing account at the participating banks.⁸²

Another issue that must be resolved is the question of how federal taxes paid with a credit or debit card will be treated in the event of a bankruptcy proceeding. Generally, federal taxes are not permitted to be discharged in a bankruptcy proceeding. Visa and MasterCard representatives have been less than enthusiastic about permitting credit or debit card tax payments unless the amounts remain nondischargeable in bankruptcy.⁸³ The IRS has noted, however, that cash advances and credit card conve-

79. I.R.C. § 6311 (1988). Included in H.R. 3419 is a provision for permitting payment of taxes by credit card, which would amend I.R.C. § 6311. H.R. 3419, 103d Cong., 2d Sess. (1994). The provision "excludes credit card [and debit card] issuers and processing mechanisms from the resolution of tax liability, but makes IRS subject to the Truth-in-Lending [and Electronic Fund Transfer Act] provisions insofar as those provisions impose obligations and responsibilities with regard to the 'billing error' resolution process." *Ways and Means Committee Report on H.R. 3419*, 93 TAX NOTES TODAY 235-4, Nov. 17, 1993, available in LEXIS, Fedtax Library, TNT File. The intent is not to provide "consumers [using credit or debit cards] with additional ways to dispute the merits of their tax liabilities." *Id.*

80. Stathis, *supra* note 47, app. II.

81. *Id.*

82. *Id.*

83. *Id.*

nience checks are currently available for cardholders to use to pay their taxes.⁸⁴ Any concern by the major credit card companies regarding increased payment risk is not very well grounded, according to the IRS.⁸⁵

Resolution of billing errors remains an issue. The Truth in Lending Act⁸⁶ and state laws⁸⁷ govern the procedure for credit card billing, while the Electronic Funds Transfer Act provides guidance for debit cards.⁸⁸ The IRS has not fully addressed these concerns, particularly if error resolution requires the cardholder to explain personal tax matters to third parties. In addition, the IRS has expressed an interest in using private collection agencies to perform various functions.⁸⁹ The IRS is currently prevented from using private collection agencies to collect taxpayer debt.⁹⁰

Privacy issues arise because the credit card companies, banks, and now possibly private collection agencies, will become an integral part in the tax payment process. At minimum, the IRS will have to disclose the amount charged to the taxpayer in order to obtain payment from the cardholder's financial institution or to engage a collection agency.⁹¹ Problems of privacy are further compounded by problems that could occur if credit card companies, tax preparers, and others engage in marketing efforts that would divulge, among other things, who pays taxes with credit cards. This issue has been raised in particular by the consumer group Bankcard Holders of America, a group also concerned that a credit card campaign would further encourage credit card use among those individuals unable to pay.⁹² While some federal legislation governs the behavior of collection agencies, privacy constraints still face problems of uniformity throughout the states.⁹³

2. Direct Deposit Refunds and Refund Anticipation Loans

The primary appeal of electronic filing for taxpayers is a faster refund. Electronic filers have the option of receiving payment by (1) the traditional bank check in about three weeks (as opposed to six weeks when a paper return is originally filed), (2) a direct deposit to an account at a financial

84. *Id.*

85. *Id.*

86. 15 U.S.C. § 1666 (1988).

87. Stathis, *supra* note 47, app. II.

88. 15 U.S.C. § 1693f (1988).

89. *Gore's NPR Panel Recommends Ways to Improve Tax Law Administration*, Daily Tax Rep. (BNA) No. 172, at D-12 (Sept. 8, 1993).

90. *Id.*

91. *See Ways and Means Committee Report on H.R. 3419*, *supra* note 79.

92. Stathis, *supra* note 47, app. II.

93. IRS, *supra* note 1.

institution in two weeks, or (3) a commercial RAL in as little as three days.⁹⁴ The third option is the most controversial because of the cost involved and the fraud with which it has been associated.

An RAL is obtained from a private lender who charges the taxpayer a fee for the extension of a loan in the amount of the expected tax refund.⁹⁵ The IRS sends the taxpayer's refund directly to the lender, who then applies it to the taxpayer's debt. Both lenders and preparers benefit. The lender captures a fee for a loan and the preparer can, with the approval of the lender, arrange to have preparation fees deducted from the refund, ensuring collection.⁹⁶ A taxpayer must pay a disproportionately high premium to receive a faster refund.

Due to the proliferation of fraud in the electronic filing process in 1994, the IRS stopped providing what is called a "direct deposit indicator" on RALs. Previously, an indicator was evidence that the taxpayer was due a refund. Financial institutions, however, were making loans based not on risk factors, but on the deposit indicator as assurance that the taxpayer was due a refund. Fraud perpetrators could obtain a RAL in two or three days and, when the IRS would later detect the scheme and stop the refund, the lender would be left bearing the loss. The difficulty of this payment process has its roots in the control failures associated with electronic filing. While not all fraud can be eliminated, regardless of how many controls are in place, this step seems to be a positive preventive measure in protecting a useful and convenient benefit for taxpayers.

E. Remaining Return Filing Options and Processing Systems

1. 1040PC Filing

The notion that electronic transfer principles could be applied to electronic filing of tax returns first came to the attention of IRS management when it realized that many individuals were using their personal

94. GAO, *supra* note 45.

95. *Id.*

96. The New York City Department of Consumer Affairs conducted a study of RAL marketing practices and found that interest rates being charged were deceptively represented and were probably usurious. Many individuals are unaware that when they receive their refund checks in two or three days they have incurred a loan in the process. Some individuals have reported that some preparation firms *require* that a loan be taken out in order to file electronically. *Id.*; see also Margot Saunders & Kathleen Keest, *Consumer Law Center Testimony on Problems with Tax Refund Anticipation Loans*, 94 TAX NOTES TODAY 73-41, Apr. 15, 1994, available in LEXIS, Fedtax Library, TNT File.

computers to compute returns.⁹⁷ Electronic filing with a home computer is not yet widely available. For most taxpayers, this option has progressed only to allow persons to use IRS-approved commercial software to produce a tax return in an answer-sheet format.⁹⁸ The benefit is that the answer sheet is one or two pages long, compared to the twelve pages in traditional format. The return, however, must still be mailed to the IRS where it is manually processed.⁹⁹

In 1994, a newly launched experiment permitted taxpayers to file using CompuServe, a commercial on-line service. Available in nine states, this option also required taxpayers to follow up with supporting documentation including wage and signature forms. The taxpayer received immediate confirmation of receipt by the IRS via e-mail.¹⁰⁰

PC filing, while in its infancy, is likely to be the next area to produce a dramatic shift in the way information is exchanged between the IRS and the general public. In February 1994, the IRS held a meeting for all parties interested in establishing a consortium to fund, design, build, and maintain an electronic communications network for public use.¹⁰¹ The primary concern expressed by the group was whether, and to what extent, such a facility would permit the public to provide information to as well as access information from the IRS in light of privacy and security limitations.¹⁰²

2. Return Free Filing

Another filing choice, Return Free Filing, is still being evaluated as a filing option. Originally tested in Texas in 1991 and later expanded to Rhode Island and Washington, this initiative permits taxpayers to report their interest income and W-2 Forms to the IRS.¹⁰³ The IRS will then prepare returns for individuals and send them a bill or refund. Designated as the 1040EZ-1 test, this option is easy for the taxpayer and results in a computation with no errors—nor need for IRS follow-up. As the predeces-

97. In June 1992, Syracuse University Maxwell School of Citizenship and Public Affairs completed a study to determine the potential market for home filers of electronic tax returns. The IRS will use this information in determining the feasibility of 1040PC home filing. GAO, *supra* note 45.

98. For the first four months of 1994, use of the 1040PC format by taxpayers declined by 6% as compared to the same period in 1993. IRS, *supra* note 74.

99. GAO, *supra* note 45.

100. Rita L. Zeidner, *TSM: Now the IRS Plans to Move Into the 21st Century*, 94 TAX NOTES TODAY 108-11, June 6, 1994, available in LEXIS, Fedtax Library, TNT File.

101. See Rita L. Zeidner, *Tax Industry Prepares for Electronic Filing*, 94 TAX NOTES TODAY 34-4, Feb. 18, 1994, available in LEXIS, Fedtax Library, TNT File.

102. *Id.*

103. Rita Zeidner, *House Government Operations Panel Ponder Return Free Filing*, 92 TAX NOTES TODAY 102-7, May 14, 1992, available in LEXIS, Fedtax Library, TNT File.

sor project to TeleFile, however, Return Free Filing is a less efficient alternative to TeleFile because the taxpayer must still mail the documents to the IRS.¹⁰⁴

3. Paper Returns

The IRS contemplates that there will remain quite a number of paper filers, at least until the modernization effort is complete.¹⁰⁵ In addition, some paper taxpayer correspondence will always exist. To facilitate the gathering of information into what will be the Integrated Case Processing (ICP) database, the IRS will use two new systems, a character recognition system for simple documents (called the Service Center Recognition Input Processing System (SCRIPS)), and a Document Processing System (DPS) that will optically scan the paper information, rather than require an IRS employee to manually transcribe the return into the database.¹⁰⁶ The IRS is presently devising Answer Sheet Returns to improve the accuracy of the scanning process. SCRIPS is currently operational, while the recently awarded DPS contract is now under development in Austin, Texas, and is scheduled to pilot in 1995.¹⁰⁷ The IRS has proposed legislation that would permit returns stored in digital image format to qualify as originals, reducing storage and retrieval costs and enhancing security.¹⁰⁸ Digital images are not easily altered, and the encryption process would limit access to unauthorized parties.¹⁰⁹

F. Account Information Database

Through the use of Corporate Files On-Line (CFOL), IRS employees and taxpayers alike are experiencing a taste of a fully operational TSM.¹¹⁰ With CFOL, information from existing tape-based master files is accessible on-line to IRS employees. This system allows the employees to respond

104. Even simpler than Return Free Filing is the Reduce Unnecessary Filings program. Piloted during 1991 and 1992, the IRS now mails letters nationwide to taxpayers who filed unnecessary returns two years in a row advising them not to file. The IRS believes many of these taxpayers are elderly, and have paid to have the unnecessary returns prepared. IRS, *The IRS Research Bulletin 1500*, 93 TAX NOTES TODAY 92-26, Apr. 28, 1993, available in LEXIS, Fedtax Library, TNT File.

105. Currently, decedent returns, amended and corrected returns, returns for taxpayers residing in a foreign country, returns with other than year-end tax periods, and returns with a power of attorney which require that the refund be mailed to a third party cannot be filed electronically. GAO, *supra* note 45.

106. See Zeidner, *supra* note 103.

107. See Milner Richardson, *supra* note 29.

108. *Id.*

109. See Power, *supra* note 64.

110. Peterson, *supra* note 42.

immediately to taxpayer inquiries, and change name and address errors. Originally launched as read-only with limited information on-line, the system continues to be enhanced to allow for data storage and retrieval. CFOL will eventually support the Electronic and Magnetic Inputs and Outputs/Electronic Filing System (EMS/EFS).¹¹¹

While still in prototype, EMS/EFS will integrate many of the interim electronic processing capabilities, and under the ICP system, it will become the primary database to which all taxpayers—practitioners, businesses, and the general public—will forward tax return information. EMS/EFS will facilitate the transfer of all electronic tax returns, including return information to be forwarded to a state, electronic tax payments, federal/state data exchange, and information returns.¹¹² In conjunction with Workload Management and the Case Processing System, the database will provide all account information and will be accessible to employees to assist taxpayers. Other systems, also not yet operational, will interact with the EMS/EFS system to facilitate taxpayer correspondence, compliance, and criminal investigation efforts.¹¹³

G. Telephone Communications

The IRS has recently dedicated itself to providing “one-stop” service to taxpayers and intends to fulfill this promise by using telephone communications rather than paper correspondence. The goal is to resolve 95 percent of taxpayer questions during the first contact.¹¹⁴ Currently, through the Tele-Tax System, representatives provide refund information and answers to basic tax questions. A new system, Telephone Routing Interactive System (TRIS), however, will use Voice Response Unit (VRU) capabilities.¹¹⁵ This feature permits callers to self-route to specialized customer service representatives or to a basic system of interactive services. The service has already experienced positive feedback from the TRIS pilot projects, due in part to improvement in IRS telephone accuracy rates,¹¹⁶

111. *Id.*

112. Information returns are documents such as Form W-2, Form 1099, and information reports of mortgage interest.

113. These other systems are Issue Detection, Automated Underreporter (AUR), Automated Inventory Control System (AICS), Integrated Collection System (ICS), Totally Integrated Examination System (TIES), and Automated Criminal Investigation (ACI). *Id.*

114. See *GAO Says One-Stop Service Could Improve IRS's Service*, 94 TAX NOTES TODAY 170-17, Aug. 30, 1994, available in LEXIS, Fedtax Library, TNT File.

115. See Milner Richardson, *supra* note 29.

116. The present accuracy rate for telephone inquiries is 89%. IRS, *IRS 1992 Annual Report*, 93 TAX NOTES TODAY 210-31, Oct. 13, 1993, available in LEXIS, Fedtax Library, TNT File.

and it continues to be implemented in various sections of the nation. Complementing the use of telephone communications will be the on-line database, ICP, which will greatly enhance taxpayer interactions with the IRS. As previously discussed, it is this interface between telephone operators and the database which, if not properly controlled, has great potential to put taxpayer privacy at risk.

III. ANALYSIS AND RECOMMENDATIONS

The foregoing review provides the basis upon which several recommendations may be made. Five areas in particular merit immediate attention and cause for concern: access controls, software controls, disaster recovery plans, privacy standards, and plans to maintain technological competitiveness. The long-run solution, however, lies in the ability of the IRS to draft a systems security architecture that addresses all controls and, in particular, the weak control areas. Interim systems must be thoroughly reevaluated and long-term plans assessed broadly enough to address issues involving third-party data and information sharing. Cost, of course, is a consideration in every attempt to address a weakness and eliminate information leakage or security failure. Every new procedural implementation requires an investment which, ideally, should not exceed the potential benefits the procedure is designed to reap. Some benefits, however, such as taxpayer confidence and utility value of privacy, are difficult to quantify. The IRS now has the challenge of addressing both its internal and external weaknesses and objectives in a manner that is both effective and cost-efficient.

A. Access Controls

In September 1993, and again in July 1994, the Comptroller General's Office issued a report on the most significant deficiencies in present access controls.¹¹⁷ This is not surprising given the large number of IRS employees that have been caught browsing and manipulating taxpayer records without authorization in the past year.¹¹⁸ The Comptroller General's report found that the IRS did not adequately restrict access to computer programs and data files, or monitor the use of these resources by

117. GAO, *GAO Identifies Weak Areas in IRS's Computerized Information Systems*, 93 TAX NOTES TODAY 198-18, Sept. 24, 1993, available in LEXIS, Fedtax Library, TNT File; see also Gene L. Dodaro, *IRS Fails to Notify JCT of \$1 Million Refund Situations*, GAO Says, 94 TAX NOTES TODAY 149-28, Aug. 1, 1994, available in LEXIS, Fedtax Library, TNT File.

118. Since 1989, more than 1300 employees have been investigated for browsing return files. Glenn Says IRS Employees "Snoop" on Taxpayer, *supra* note 56.

computer support staff and users in accordance with procedures and the law.¹¹⁹ Access controls will continue to be an issue at the IRS as the TSM becomes fully operational. With TSM, the IRS will be required to safeguard taxpayer information not only from employees but also from hackers, professional wiretappers, and curious employers. Even former IRS Commissioner Donald Alexander is skeptical: "The idea of having one-stop service is incompatible with the idea that you have complete privacy and that no one is going to know about you and your tax returns."¹²⁰ Already, third-party electronic filing transmissions have resulted in numerous fraudulent refunds, even though the IRS claims that none of the third-party transmitters has perpetrated fraud through accessing the master files.¹²¹ The IRS has only recently disclosed its preliminary TSM plans for implementing audit trails, its policies for detecting unauthorized use or disclosure, and its third-party encryption protocols that will be used during transmission.¹²²

B. Software Controls

In comparison to access controls, software controls have greater implications on system security and privacy, since the failure to ensure the security of software can create more systemic problems. Without correctly implemented software controls to ensure that the proper software versions are being used or that unauthorized software changes have not been made, destruction of programs and data, and the creation of errors can be introduced into the system. In addition, software changes can generate fraudulent refunds and, even worse, leave no trail if security detection devices are disengaged. Software control weaknesses were also identified during the annual review.¹²³ The issue will become more prevalent as the traditional and interim systems are converted into long-term TSM. As required by congressional mandate, the new systems must be brought on-line in such a way as to retain the accuracy and completeness of existing files. In addition, IRS management must begin now to enforce

119. See generally GAO, *supra* note 117.

120. Sen. John H. Chaffee (R-R.I.), *Senate Passes Amendment to Ensure Its Confidentiality*, 93 TAX NOTES TODAY 171-41, Aug. 17, 1993, available in LEXIS, Fedtax Library, TNT File.

121. See generally GAO, *supra* note 56. The IRS also notes that, since most fraudulent returns likely go undetected, the vehicles for these frauds are unknown. *Id.*

122. See Margaret Milner Richardson, *IRS Has Made Progress in Protecting Confidentiality of Taxpayer Information*, 94 TAX NOTES TODAY 140-18, July 20, 1994, available in LEXIS, Fedtax Library, TNT File (statement before the Senate Committee on Governmental Affairs); see also Clagett, *supra* note 68.

123. GAO, *supra* note 5.

security policies and procedures that provide both physical and technical safeguards, since changes in procedure, particularly, do not occur overnight.¹²⁴ With the introduction of third parties, the risk that viruses will be introduced, intentionally or unintentionally, to contaminate the TSM system is a very real problem. Steps to insulate the system may require rigid security procedures (like those implemented by the Department of Defense), which would likely hamper the flexibility of TSM but would not subject the system to potential ruin. The IRS must evaluate the impact of slippages on the ability to meet capacity, update its disaster recovery plans for the present system, and formulate its TSM plans.

C. Disaster Recovery Plans

As required by the Privacy Act (and indirectly by the Computer Security Act), the IRS must protect records against any anticipated threats or hazards to their security or integrity.¹²⁵ The IRS has been adding interim systems to the traditional systems in order to meet capacity while procurement slippages catch up with the Design Plan. While such a recommendation may at first appear trivial, one must recall the system crash at the Philadelphia Service Center resulted in serious delays and breaches of integrity.¹²⁶ Power outages and natural disasters present risks of equal magnitude, which the IRS has yet to address with both its present systems and with TSM.

D. Uniform Privacy Standards

The time has come for the integration of federal and state filing for both businesses and individuals. The Privacy Act and Computer Security Act, as they read today, are not applicable to the states.¹²⁷ It would be beneficial for both federal and state governments if the cooperative agreement proposal currently being considered by Congress was enacted. For the safeguarding of privacy rights, however, it is imperative that the states be required to abide by standards similar to those established in the Privacy Act. Ignoring such a gap in legislation would put taxpayer rights

124. Security experts agree that privacy and security cannot depend on technology alone and that management must follow up on reviewing audit trails and enforce security checks. Stahl, *supra* note 40, at 13.

125. 5 U.S.C. § 552a(e)(10) (1988).

126. Dolan, *supra* note 27. In a panic during the 1985 filing season, employees dumped many tax forms in the garbage when they could not meet processing demands due to system failure. Craig Webb, *IRS More Efficient but Taxpayers Aren't*, UPI, Apr. 12, 1987, available in LEXIS, News Library, ARCNEWS File.

127. George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. ILL. U. L. REV. 521, 530 (1990).

at risk and compromise the IRS's ability to function within its legislative constraints. As in the computer matching amendments to the Privacy Act,¹²⁸ which provided regulatory guidance on the procedures by which information obtained by one federal agency may be shared with another federal agency, information sharing between the state and federal governments must be subject to storage and disclosure restrictions.

The privacy standards that regulate the private sector and, to a lesser degree, the regulations that govern the public sector are scattered throughout the U.S. Code, making it difficult for businesses and taxpayers to grasp their responsibilities.¹²⁹ In the interest of protecting public privacy rights and facilitating a smooth transition to a fully operational TSM, the rights and obligations of third-party transmitters and information accessors must be made abundantly clear. Consolidation of privacy legislation would not only facilitate such an understanding and improve taxpayer compliance, but would also relieve some taxpayer burden.

E. Maintenance of Technological Competitiveness

The TSM effort is currently scheduled to be fully operational in the year 2008 at a total estimated cost of \$23 billion, with \$19 billion in development costs and \$4 billion for phasing out current systems.¹³⁰ The investment cost has been estimated at \$8 billion, the same figure reported last year.¹³¹ A report by the GAO in its annual audit found that approximately \$4 billion in estimated phase-out costs are "not budgeted, recorded or reported as TSM costs."¹³² With no system in place at the IRS capable of accurately estimating the costs and benefits of the TSM effort, decisions to go forward, avoid, or scrap a project could be erroneous.

Assuming the IRS's cost figures for the purchase of all the equipment by the year 2008 is accurate, implementation delays noted earlier will have the effect of shifting the cost to taxpayers who suffer inconvenience and added uncertainty. A more devastating consequence of delay is the potential for obsolescence. The possibility of the operational and security aspects of

128. Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, §§ 6(a), 7, 8, 102 Stat. 2507-14 (codified as amended at 5 U.S.C. § 552a (1988 & Supp. V 1993)).

129. Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 201 (1992).

130. GAO, *supra* note 5.

131. *IRS Outlines its Efficiency Reports*, 93 TAX NOTES TODAY 192-9, Sept. 15, 1993, available in LEXIS, Fedtax Library, TNT File. This amount does not include the \$15 billion to operate the old system in conjunction with the new system until TSM is complete.

132. GAO, *supra* note 5.

the system becoming obsolete in thirteen years is quite high.¹³³ Computer programmers have a difficult enough time inoculating and securing state-of-the-art software and data from sophisticated hackers. Antiquated models do not have a chance.

CONCLUSION

The implementation of security and privacy controls bears directly on the regard an institution has for its respective customers. Even without legislative or judicial constraints, the privacy of an individual deserves to be respected and dignity preserved. Whether the IRS will be able to incorporate into its data storage and telecommunications facilities the confidentiality and record security standards—which it is required by law to do—will be a reflection of its dedication to serving the public interest. The IRS appears to be genuinely interested in improving the processes by which it operates, but if it merely implements the technology without the necessary organizational structure, control procedures, and management reinforcement, the IRS will not earn the confidence and support of the taxpayers. By focusing on the trouble areas touched upon in this Note—access, software, disaster recovery controls, privacy standards, and maintenance of technological competitiveness—the IRS will be on a more productive course. However, the long-run solution lies in the ability of the IRS to implement and maintain strong procedural protocols and a systems security architecture that addresses all present and anticipated control weaknesses.

133. Security experts have commented that “the bad guys are only going to get more sophisticated.” Stahl, *supra* note 40, at 13 (quoting Winn Schwartz, Executive Director of Interpact).

Missed Connections: One Failed Attempt to Ease Restrictions on Bell Operating Companies

Jeffrey Walker*

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INTRODUCTION

The American public is being tantalized by the promise of being able to use the television to call up movies and other forms of entertainment on demand in the near future. Through the television, the consumer will also be able to access a spectrum of on-line information or benefit from consumer services, all without ever leaving home.¹ Government officials have heralded communications advances as an opportunity to foster economic development, create jobs, improve health care, advance educational goals, and enhance quality of life.² Businesses are scrambling to diversify and merge with communications entities to secure a share in the developing multimedia market.³

Everyone seems to want a piece of the evolving information superhighway, but many observers wonder what part competition will play in the new communications structure. Many critics already disagree on what role government should play in promoting and regulating competition among developing and expanding telecommunications industries.⁴ President Bill Clinton's administration has pushed for legislation to ease regulations which currently restrict telecommunications-service providers, allowing them to participate in further development of an information superhighway.⁵

Technological advances and changes in the marketplace, coupled with an outdated regulatory scheme based on restrictions laid down with the divestiture of AT&T, are hindering local telephone companies' opportuni-

1. See generally Joshua Quittner, *Online to a Revolution*, *NEWSDAY*, July 18, 1993, at 4; Jolie Solomon, *Big Brother's Holding Company*, *NEWSWEEK*, Oct. 25, 1993, at 38; *The New Communications Era*, *S.F. CHRON.*, Oct. 14, 1993, at B1; Mortimer B. Zuckerman, *Welcome to Communicopia*, *U.S. NEWS & WORLD REP.*, Nov. 1, 1993, at 116.

2. See NATIONAL TELECOMM. AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, *THE NTIA INFRASTRUCTURE REPORT: TELECOMMUNICATIONS IN THE AGE OF INFORMATION* 34 (1991) [hereinafter *INFRASTRUCTURE REPORT*].

3. Kent Gibbons, *A War on Hold: Newspapers, Phone Companies Edge Closer to Info-Truce*, *WASH. TIMES*, June 6, 1993, at A12; William Glaberson, *The Baby Bells Are Finding an Unlikely Ally in the Information-Services War: Newspapers*, *N.Y. TIMES*, July 5, 1993, § 1, at 41. For a detailed discussion of recent mergers and alliances, see Andrew C. Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 *FED. COMM. L.J.* 39 (1993).

4. See Ronald E. Yates, *Regulation Clogs Information Superhighway*, *CHI. TRIB.*, Jan. 3, 1994, § 4, at 1.

5. National Information Infrastructure: Agenda for Action, 58 *Fed. Reg.* 49,025 (1993) [hereinafter *Agenda for Action*]. *Agenda for Action* describes the administration's intended role for government in promoting and developing a telecommunications and information infrastructure. See also Debra Gersh Hernandez, *Telecommunications and the Clinton Administration*, *EDITOR & PUBLISHER*, Jan. 15, 1994, at 11.

ties to participate in the telecommunications revolution and compete with other communication-service providers. Lifting regulations will help ensure that local telephone-service providers can competitively participate in advances and remain market players. One piece of legislation overwhelmingly passed by the House of Representatives in the 103d Congress, House Bill 3626, would have eased such restrictions on local telephone companies.⁶

Part I of this Note will review how local telephone companies have been regulated since the AT&T divestiture and subsequent judicial actions. Part II will discuss the advantages of a competitive communications marketplace. Part III will examine House Bill 3626 (the Antitrust Reform Act of 1993), which would gradually lift regulations that currently prevent local telephone-service providers from competing in many communications markets. Part IV will look at the benefits of allowing local telephone companies to compete free of current restrictions. This Note concludes that enactment of House Bill 3626 or a significantly similar measure in the next Congress would further the development of the national telecommunications infrastructure, benefit consumers, and allow Bell Operating Companies to protect their business interests by expanding into developing markets.

I. REGULATION OF LOCAL TELEPHONE COMPANIES SINCE DIVESTITURE OF AT&T

Many analysts mark the AT&T divestiture as the beginning of the current telecommunications revolution. According to telecommunications analyst Blake Bath, "The divestiture has to get a lot of credit for creating the pre-eminent telecommunications market in the world."⁷ The Supreme Court has recognized the "revolution in telecommunications occasioned by the federal policy of increasing competition in the industry."⁸ Therefore, any examination of current local and long-distance telephone service regulation must start with at least a surface understanding of the divestiture of AT&T.⁹

6. H.R. 3626, 103d Cong., 1st Ses. (1993); see William J. Eaton & Leslie Helm, *House Rewrites Phone, Cable Rules*, L.A. TIMES, June 29, 1994, at A1; Carolyn Lochhead, *Historic Reform of Telephone, Cable OKd; House Votes by Landslide to Boost Telecommunications Competition*, S.F. CHRON., June 29, 1994, at A1; *Vote Shows Wide Support*, COMM. DAILY, June 29, 1994, at 1.

7. Paul Carranza & Colleen M. McElroy, *A Decade of Revolution in Telecommunications; Breakup of AT&T Brought Lower Prices, New Services, Vast Potential*, BUFF. NEWS, Jan. 1, 1994, at A13.

8. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 358 (1986).

9. For more detailed sources concerning the history of the divestiture action, see generally STEVE COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1986);

A. *Effect of the Modification of Final Judgment*

In *United States v. AT&T*, the United States District Court for the District of Columbia (decree court) ended an antitrust action suit brought by the Department of Justice against AT&T, Western Electric, and Bell Telephone Laboratories by approving a consent decree reached by the parties.¹⁰ The consent decree mandated the divestiture of AT&T and the reorganization of local telephone service into Regional Bell Operating Companies (BOCs or Baby Bells) which oversee local operating companies.¹¹ This decision and subsequent actions have become commonly known as the Modification of Final Judgment (MFJ).¹² Before the breakup, AT&T, which had built a nationwide telecommunications network as a regulated monopoly, was restricted to offering common carrier telephone services.¹³ In *AT&T*, the court found that divestiture was necessary because AT&T had used its monopoly control over local markets to preclude competition in those markets.¹⁴

The MFJ granted a monopoly over local service areas to the newly-formed operating companies, provided they gave equal access to all telephone service carriers, especially AT&T's competitors.¹⁵ Other terms of the MFJ imposed line-of-business restrictions, which limited the range of services the Baby Bells could provide, specifically prohibiting the operating companies from engaging in "(1) the provision of interexchange [or *interLATA*] services;¹⁶ (2) the provision of information services; (3) the manufacture of telecommunications products and customer premises equipment; (4) the marketing of such equipment and (5) directory advertising."¹⁷ The court justified the restrictions as necessary to prevent

PETER TEMIN, *THE FALL OF THE BELL SYSTEM* (1987).

10. *AT&T*, 552 F. Supp. 131, 178-79 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

11. *Id.* at 141. Seven BOCs manage the individual local telephone systems. The regional companies and their geographical areas include: NYNEX Corp. (New York and New England), Bell Atlantic Corp. (Mid-Atlantic), BellSouth Corp. (South), Ameritech (Midwest), Southwestern Bell Corp. (Southwest), and PacTel (California and Nevada).

12. Richard A. Hindman, *The Diversity Principle and the MFJ Information Services Restriction: Applying Time-Worn First Amendment Assumptions to New Technologies*, 38 CATH. U. L. REV. 471, 472 n.3 (1989).

13. *Id.* at 497. A common carrier "means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." 47 U.S.C. §153(h) (1988).

14. *AT&T*, 552 F. Supp. at 161-62.

15. *Id.* at 142-43, 227.

16. To avoid confusion, the court adopted the term LATA, or "local access transport area," in place of "exchange" when referring to the MFJ.

17. *AT&T*, 552 F. Supp. at 186 (footnote added).

the newly formed operating companies from subsidizing prices in competitive markets with profits earned in monopoly markets and from hindering competitors by restricting access.¹⁸

The judgment included a provision for removing restrictions on the BOCs “upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter,”¹⁹ putting a substantial burden of proof on the BOC. The decision also included a provision for judicial review of the MFJ by the decree court every three years to consider lifting restrictions on BOCs.²⁰

The AT&T reorganization plan divided the country into 164 exchange areas, or LATAs.²¹ Each local operating company includes several LATAs, but is only allowed to provide transmissions within a single LATA, providing what is commonly known as local telephone service.²² Local telephone companies derive their revenue by providing *intra*LATA services.²³ When a call is placed from one LATA to another, even if it is within the same BOC region, the call must be transmitted to an inter-exchange carrier, such as AT&T or one of its long-distance competitors, and be transmitted across LATA boundaries and picked up by the BOC serving that LATA.²⁴ Thus, the MFJ prevents Baby Bells from offering any interexchange transmissions across LATA boundaries—whether it is a telephone conversation or a stream of information—even within their own region.

B. Attempts to Lift Restrictions on BOCs

In 1987, as part of the first three-year review of the MFJ, the Department of Justice recommended that the court modify the *inter*LATA services restriction and remove other line-of-business restrictions. “[S]ubsequent technological, economic and regulatory changes have sufficiently reduced the competitive danger of BOC entry into any of these fields,” said one report at the time.²⁵ The court maintained manufacturing

18. *Id.* at 187.

19. *Id.* at 231.

20. *Id.* at 195.

21. Christy Cornell Kunin, *Unilateral Exculpation in the Era of Competitive Telecommunications*, 41 CATH. U. L. REV. 907, 917 (1993).

22. *United States v. Western Elec. Co.*, 569 F. Supp. 990, 994-95 (D.D.C. 1983).

23. Kunin, *supra* note 21, at 917.

24. *Id.*

25. *See* Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment at 6-7, *United States v. Western Elec. Co.*, 673 F. Supp. 525 (D.D.C. 1987)

and *interLATA* restrictions, but lifted the catch-all restriction and modified the information-services ban.²⁶ The court of appeals reversed the decision to remove the information-services restriction, and maintained that the decree court should have analyzed the recommendation under a "public interest" standard implicit in Section VII of the decree,²⁷ rather than under the monopoly power test detailed in Section VIII(C).²⁸ In July 1991, the decree court issued an order staying the information-services ban, pending appeal.²⁹ The court of appeals affirmed the modification lifting the ban, explaining that the public interest standard included "probable effects of competition within the relevant market."³⁰

The *AT&T* case and subsequent reviews, appeals, and modifications have created a mishmash of opinions, regulations, and standards for review. A search of the appellate history of the original case outlining the MFJ restrictions yields more than 100 subsequent actions. Trying to make any sense of current telecommunications and telephone service policy from these scattered sources is burdensome, if not impossible.

At present, BOCs are free to offer information services, but it is unclear whether they can transport those services across LATA lines. The bans on manufacturing and offering long-distance services still stand, with little clarity on which standards should be used to decide whether to lift these restrictions. For now, BOCs want a modification allowing them to seek entry into a new market. But they must wait for the next triennial review and then make their case for lifting a restriction.

II. BENEFITS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY

There seems to be agreement that, for most industries, competition in some form is good for consumers and for furthering public policy.³¹ The telecommunications industry is no different. Analysis of the effects of the *AT&T* divestiture shows that allowing BOCs to compete in telecommunications markets will help prevent any one entity from controlling too much

(No. 81-0192), *aff'd in part and rev'd and remanded in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied sub nom.*, *MCI Comm. Corp. v. United States*, 498 U.S. 911 (1990).

26. *Id.* at 540-562.

27. *United States v. AT&T*, 552 F. Supp. 131, 186 (D.D.C. 1982) (describing the "public interest" standard applied by the court), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

28. *See id.* at 231.

29. *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991).

30. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1579 (D.C. Cir. 1993).

31. *See TEMIN, supra* note 9, at 344.

of the market share, keep costs for communications services low, spur technological innovations, and further public policy.

A. Market Share

Competition helps prevent any one service from holding too much power over the telecommunications market. Immediately after divestiture in 1985, AT&T enjoyed 80 percent of the market share for long-distance services.³² Eight years later, AT&T's share had dropped to 60 percent due to competition by some 400 competing interexchange carriers.³³ The number of carriers serving more than forty-five states has grown from only two to nine.³⁴

As Baby Bells enter other markets, they bring additional competition to existing industries as the national information network is constructed. "[P]romoting competition . . . will prevent the kind of single-behemoth providers that the regulators are concerned about," says Suzanne Tichenor, a vice president of the Washington-based Council on Competitiveness.³⁵

B. Infrastructure Development

Whatever the effects of the AT&T divestiture, the long-distance service market has grown under a competitive scheme, in both financial and technical terms. The total long-distance market has grown from \$38.8 billion in 1984 to \$59.4 billion in 1993.³⁶ Increased competition and rapid technological advances have forced AT&T to become more responsive to consumer demands.³⁷ Before the break-up, AT&T had little incentive to introduce products invented by its research division.³⁸ In 1985, for example, AT&T decided not to build a nationwide fiber-optic system. A competitor, Sprint, soon started running advertisements highlighting the clarity of Sprint's fiber-optic lines. Within a month, AT&T reevaluated its decision and, today, its fiber-optic network has grown from several hundred

32. *Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance Comm. on Energy and Commerce*, 103d Cong., 2nd Sess. 184 (1994) [hereinafter Hundt testimony] (testimony of Reed Hundt, Chairman, FCC).

33. *Id.* Other major long-distance service providers include MCI, with a 20% share of the market, and Sprint, which holds a 10% share. *See also Carranza & McElroy, supra* note 7, at A13.

34. Hundt testimony, *supra* note 32, at 184.

35. Yates, *supra* note 4, § 4, at 1.

36. Hundt testimony, *supra* note 32, at 193.

37. Carranza & McElroy, *supra* note 7, at A13.

38. Aaron Zitner, *10 Years Later, Bell's Breakup Impact Grows*, BOSTON GLOBE, Dec. 27, 1993, at 38.

miles to more than 35,000 miles.³⁹ The variety of equipment and services available to customers has dramatically expanded since deregulation.⁴⁰ Many analysts cite the divestiture's effect on AT&T as an indication that more competition among all telecommunications providers will eventually lead to even better service and more innovations for consumers.⁴¹

C. Keeping Costs Low

The common wisdom is that extensive regulation keeps telephone rates low.⁴² Yet, long-distance telephone rates have decreased by approximately 50 percent in real dollars since divestiture.⁴³ Before divestiture, the price of a ten-minute daytime call from Chicago to Atlanta, in 1993 dollars, was \$6.28; after increased competition, the same call costs only \$2.30.⁴⁴ These decreased costs to consumers occurred while the total long-distance market grew from \$38.8 billion in 1984 to \$59.4 billion in 1992 and while total traffic volume grew from 167 billion minutes to 212 billion minutes.⁴⁵ Increased competition in other telecommunications markets can be expected to achieve the same positive results as long-distance competition for all parties.⁴⁶ BOC-backed studies say competition in the long-distance market could save consumers \$30 billion in phone rates over a decade.⁴⁷

D. Furthering Public Policy

The Clinton administration has made the development of the National Information Infrastructure (NII) to provide widespread telecommunications services a top priority.⁴⁸ The administration has proposed administrative and legislative reform of telecommunications policy based on the following

39. *Id.*

40. *Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 145 (1994) [hereinafter Irving testimony] (testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Dep't of Commerce).

41. Guy Halverson, *Callers Win From Leaps in Telephone Technology*, CHRISTIAN SCI. MONITOR, Jan. 7, 1994, at 9.

42. *Id.*

43. *Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 135 (1994) [hereinafter Bingaman testimony] (testimony of Anne K. Bingaman, Assis't Attorney General, Antitrust Div., U.S. Dep't of Commerce).

44. Hundt testimony, *supra* note 32, at 193-94.

45. *Id.* at 194.

46. *Id.*

47. Eaton & Helm, *supra* note 6, at A16.

48. Laurent Belsie, *Gore Supports Move to End Information Monopolies*, CHRISTIAN SCI. MONITOR, Dec. 23, 1993, at 9.

principles: (1) encouraging investment in the NII; (2) promoting and protecting competition; 3) providing open access to the NII by consumers and service providers; (4) ensuring universal service; and (5) ensuring a regulatory framework flexible enough to handle rapid market and technological changes within the telecommunications industry.⁴⁹

The administration has acknowledged that current regulations may harm consumers by impeding competition and discouraging investment in the NII. To promote growth of the NII, the administration has supported legislation that would eliminate burdensome regulations and increase competition both by companies already in the telecommunications market and those seeking entry.⁵⁰

III. H.R. 3626: A PROPOSAL TO LIFT MFJ RESTRICTIONS

On November 22, 1993, Rep. Jack Brooks (D-Tex.) and Rep. John Dingell (D-Mich.) introduced H.R. 3626 (Brooks-Dingell bill or Antitrust Reform Act) in the House of Representatives, a move to supersede the Modification of Final Judgment in *AT&T*.⁵¹ In introducing the bill, Rep. Dingell said enactment would allow Congress to “reclaim its rightful role in formulating telecommunications policy.”⁵² The bill sets forth a series of incremental dates after which BOCs may petition the Attorney General and the FCC for permission to provide services restricted by MFJ provisions.⁵³

The Brooks-Dingell bill was not the only telecommunications legislation passed by the House of Representatives during the first session of 1993. House Telecommunication Subcommittee Chairman Ed Markey (D-Mass.) and Rep. Jack Fields (R-Tex.) sponsored House Bill 3636, which would have required that local phone companies allow competitors, such

49. Administration White Paper on Communications Act Reforms I (Jan. 27, 1994).

50. *Id.*

51. H.R. 3626, 103d Cong., 1st Sess. (1993). The bill has two titles. Title I, the Antitrust Reform Act of 1993, concerns the supersession of MFJ restrictions and is the subject of this Note. Title II, the Communications Reform Act of 1993, concerns the regulation of manufacturing, alarm services, and electronic publishing by BOCs.

52. 139 CONG. REC. H10,911 (daily ed. Nov. 23, 1993) (statement of Rep. Dingell).

53. H.R. 3626, 103d Cong., 1st Sess. (1993). Rep. Dingell was involved in earlier congressional efforts to lift MFJ restrictions. See *Dingell Joins Bipartisan Group in Endorsing Free-RHC Effort*, COMM. DAILY, July 15, 1988, at 4. One resolution suggested removing the line-of-business restrictions to promote development of a public transportation network and further public policy by improving the capacity of the United States to better compete in the global information and high technology marketplace. H.R. Con. Res. 339, 100th Cong., 2d Sess., 134 CONG. REC. E2412-13 (1988).

as cable companies, to have access to their telephone lines.⁵⁴ The Brooks-Dingell bill, by contrast, was focused on issues presented by MFJ restrictions.⁵⁵

A. Time Frame for Review

The Brooks-Dingell bill allows BOCs to request authorization to provide services in noncompetitive markets, offer interexchange telecommunications services incidental to another BOC service, and provide interstate, interexchange telecommunications services that originate and terminate within the BOC's service area immediately upon enactment.⁵⁶ The BOCs may request authorization to provide interexchange services by acquiring and reselling those services eighteen months after enactment.⁵⁷ Sixty months after enactment, the BOCs could ask permission to provide any interstate telecommunications services.⁵⁸

B. Standards for Review

Before a BOC could offer expanded services, the Attorney General and the FCC would publish an application for authorization in the *Federal Register* within ten days of receipt. Interested parties could then comment within forty-five days.⁵⁹ The bill requires the Attorney General and the FCC to consult with each other before issuing separate written determinations, based on clear and convincing evidence of their decision to grant, or not grant, interstate service.⁶⁰ The Attorney General is to approve applications only upon finding "that there is no substantial possibility that such company or its affiliates could use monopoly power to impede competition in the market such company seeks to enter."⁶¹ This is the standard currently used, at least in part, by the decree court.⁶²

The bill allows the FCC to approve the BOC's proposals to the extent that granting permission to enter new communications markets would be

54. H.R. 3636, 103d Cong., 1st Sess. (1993); see also Eaton & Helm, *supra* note 6, at A16.

55. *Brooks and Dingell Introduce MFJ Bill*, COMM. DAILY, Nov. 24, 1993, at 1.

56. H.R. 3626. The Department of Justice and the Federal Communications Commission (FCC or Commission) must establish criteria for evaluation within 180 days of enactment of the bill.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

consistent with public interest, convenience, and necessity.⁶³ In making such a determination, the FCC would consider whether approval would: (1) reduce rates in the market the BOC seeks to enter; (2) increase rates for exchange service; (3) further delivery of new products and services to consumers; (4) permit collusion between BOCs; (5) result in concentration among service providers to the detriment of consumers; and (6) whether regulations will preclude the applicant from engaging in coercive practices in the market that the applicant seeks to enter.⁶⁴ Authorization would be granted to the extent that the FCC and the Attorney General both approve.⁶⁵ The bill requires that final opinions must be published in the *Federal Register*, which would remain final unless vacated or reversed by judicial review.⁶⁶

Within forty-five days of a determination on the authorization request, the BOC or “any person who might be injured in its business or its property as a result of the determination” could institute a civil action in the Court of Appeals for the D.C. Circuit against the FCC or the Department of Justice for review of the determination.⁶⁷ The bill also includes a provision precluding a BOC with a monopoly in any exchange-service market from bundling services to lessen competition in any market.⁶⁸

C. Reaction to the Bill

The Clinton administration announced its support for the bill,⁶⁹ and urged Congress to enact it quickly and with few changes.⁷⁰ FCC Chairman Reed Hundt also endorsed the measure, saying, “[C]ompetition in this market can be expected to produce the same positive results for consumers that we have seen in other markets for telecommunications services that have undergone the transformation from monopoly to competition: technological and service innovation, lower prices, and responsiveness to consumer tastes.”⁷¹

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* Bundling of services means to tie (directly or indirectly), in any relevant market, the sale of any product or service to the provision of any telecommunications service.

69. Joanne Kelley, *Clinton Endorses Choice for Phone, Cable Services*, CHI. SUN-TIMES, Jan. 27, 1994, at 46.

70. *White House Officials Urge Lawmakers to Make Few Changes to Competition Bills*, Daily Rep. for Executives (BNA), at A-18 (Jan. 28, 1994).

71. Hundt testimony, *supra* note 32, at 202.

Long-distance carriers lobbied against the effort and placed advertisements with the slogan "Tell the Bells to mind their own business" in newspapers and magazines.⁷² Several consumer groups also voiced concerns about whether the measure would adequately protect consumers from anticompetitive practices by BOCs.⁷³

The House of Representatives passed House Bill 3626 on June 28, 1994, by a lopsided vote of 423-5.⁷⁴ Assistant Secretary of Commerce Larry Irving said support for the bill "crossed every possible ideological and party line, indicating that it's pretty good legislation."⁷⁵

Telecommunications reform did not fare as well in the Senate. The Senate Commerce, Science, and Transportation Committee less enthusiastically approved a telecommunications reform bill (Senate Bill 1822), sponsored by Sen. Ernest Hollings (D-S.C.) on August 11, 1994.⁷⁶ The BOCs were displeased that the Senate bill set a higher standard for their entry into the long-distance market by requiring that they face substantial competition in their local telephone market before they can offer long-distance services.⁷⁷ Sen. Hollings pronounced the measure dead on September 24, saying opposition by the BOCs and other factors would have made it impossible to pass the bill before Congress adjourned.⁷⁸

IV. BENEFITS OF EASING INTEREXCHANGE RESTRICTIONS ON LOCAL EXCHANGE COMPANIES

Local telephone service has been described as a "natural monopoly" or an industry where "it is less costly for a single firm to serve the market than it is for two or more firms [to compete]."⁷⁹ Some observers have concluded that local telephone service is not a natural monopoly but a regulated one, and that government should remove the artificial legal barriers that perpetuate it.⁸⁰ In addition, technological changes now make

72. *Mind Your Own Business*, COMMUNICATIONSWEEK, Jan. 3, 1994, at 109, 109.

73. *Key Consumer Groups Opposing House Telco Measures*, NATIONAL JOURNAL'S CONGRESSDAILY, Dec. 7, 1993.

74. Lochhead, *supra* note 6, at A1.

75. *Id.*

76. S. 1822, 103d Cong., 2d Sess. (1994).

77. Aaron Zitner, *House Votes to End Cable, Phone Curbs*, BOSTON GLOBE, June 29, 1994, at 24.

78. Edmund L. Andrews, *Bill to Revamp Communications Dies in Congress*, N.Y. TIMES, Sept. 24, 1994, § 1, at 1.

79. INFRASTRUCTURE REPORT, *supra* note 2, at 268-69.

80. See JOHN T. WENDERS, THE ECONOMICS OF TELECOMMUNICATIONS 173 (1987); see also PETER W. HUBER, U.S. DEP'T OF JUSTICE, ANTITRUST DIV., THE GEODESIC NETWORK: 1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY 2.23 (1987).

it desirable for local telephone companies to provide interexchange services not contemplated when the MFJ restrictions were put into place.

A. *Local Exchange Is Becoming More Competitive*

While BOCs currently hold virtually the entire market share for local-exchange services,⁸¹ technological advances are introducing formidable competition into these services. Capital costs to enter the local telephone service business would drop as telecommunications providers expand their operating bases after the bill is passed.⁸²

Most cable television companies are already installing fiber-optic transmission networks to enable their systems to carry new services, including high-definition television and computer linkages.⁸³ Such fiber-optic networks—which are capable of carrying voice transmissions—give cable companies an opportunity to offer *interLATA* competition, either by leasing facilities or by providing direct services.⁸⁴ Major cable companies, including TCI and Time Warner, have jointly invested in Teleport Communications Group, a communications provider that will let cable operators use their combined eighty million coaxial cables to offer local telephone service.⁸⁵ Other alternative local service providers have introduced fiber-optic systems in highly populated areas to create metropolitan area networks (MANs) intended to bypass Baby Bell local access systems.⁸⁶

Improving digital technology is enabling cellular phone systems to greatly expand their capacity, which will eventually allow them to offer local telephone services on a much larger scale.⁸⁷ Cellular telephone systems already have approximately fourteen million customers,⁸⁸ and industry estimates predict that number could grow to sixty million by the year 2000.⁸⁹ Development of a radio-based personal communications system (PCS), for which the federal government will auction two licenses,

81. Nancy Hass, *Betting on MCI? Don't Bury the Bells Just Yet*, NEWSWEEK, Jan. 17, 1994, at 38, 38.

82. SCOTT C. CLELAND, COMMVERGENCE V. REGULATION: COMMUNICATIONS SECTOR STRATEGIC AND POLITICAL FIVE-YEAR FORECAST 22 (1993).

83. See COMM. DAILY, Mar. 28, 1991, at 5.

84. INFRASTRUCTURE REPORT, *supra* note 2, at 264-65.

85. Leslie Helm, *Talk Is Cheap, and Now Bells' Future Is Rich*, L.A. TIMES, Dec. 25, 1993, at A1.

86. See Gail Garfield Schwartz & Jeffrey H. Hoagg, *Virtual Divestiture: Structural Reform of an RHC*, 44 FED. COMM. L.J. 285, 290 (1992).

87. *Id.* at 294.

88. Carranza & McElroy, *supra* note 7, at A13.

89. Peter Haynes, *The End of the Line*, ECONOMIST, Oct. 23, 1993, at 5.

will enlarge local telephone service competition even further.⁹⁰ Even current long-distance-service providers are investigating ways to move into the *interLATA* market. In January 1994, MCI announced plans to spend \$20 billion over a six-year period to develop an electronic information network that will include local exchange service.⁹¹ AT&T is the only long-distance provider prohibited by the MFJ from entering the local service market,⁹² leaving open the opportunity for entry in local telephone service by any other long-distance provider.

While local exchange service may not yet be completely competitive, it appears that technological advances will continue to draw business away from the Baby Bells' monopoly. BOCs have already lost up to half the revenues they once received from *intraLATA* service now carried by competitors.⁹³ House Bill 3626 contemplates the time when technological advances cause local service companies to lose their predominant share of the local exchange market and provides a mechanism for lifting regulations when that happens.

B. BOCs Should Protect Their Financial Position

Increased competition from alternative local service providers and regulated rate cuts have reduced the Baby Bells' average annual revenue growth to 2.6 percent in the last 4 years, compared with 6.5 percent from 1984 through 1988.⁹⁴ To finance expansion efforts, some local operating companies have cut payrolls.⁹⁵ Stephen Gutkowski of Moody's Investors Service says, "there is a concern that the Baby Bells' financial position could be impacted by the need to finance . . . [expansion] with debt capital."⁹⁶

90. INFRASTRUCTURE REPORT, *supra* note 2, at 264; CLELAND, *supra* note 82, at 27.

91. Martin Dickson, *Uncle Sam's Super-Highway: In a Rapidly Changing Market, the US Is Dismantling Telecommunications Regulations*, FIN. TIMES, Jan. 13, 1994, at 23; Hass, *supra* note 81, at 38. With a \$2 billion investment, MCI could effectively bypass local telephone systems in 20 of the country's largest markets and avoid access fees charged by local providers. See William J. Cook et al., *Fast Lane to the Future*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 56, 56.

92. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. *United States*, 460 U.S. 1001 (1983).

93. *Phone-Cable Convergence Will Test Regulators' Political Courage*, State Telephone Reg. Rep. (BNA) No. 24, Dec. 2, 1993, available in LEXIS, Nexis Library, BNA File.

94. Cook et al., *supra* note 91, at 56.

95. From 1990 through 1992, Baby Bells eliminated 44,848 jobs. *Id.* One Baby Bell, NYNEX, plans to cut another 16,800 positions by the end of 1996. David Robinson, *Suddenly, 'Utility' No Longer Means 'Monopoly.'* BUFF. NEWS, Jan. 30, 1994, at D10.

96. Cook et al., *supra* note 91, at 57.

Lifting MFJ restrictions would allow BOCs to seek entry into potentially profitable markets as telecommunications technology develops. By doing so, they can realize a fair profit, which enables them to reinvest in research and development without paring employees or borrowing capital.

C. Eased Restrictions Would Facilitate Agency Review

Since the divestiture of AT&T, national telephone system policy has been under the exclusive control of the decree court, with Judge Harold H. Greene guiding decisions about how to interpret the MFJ. Congress never intended the decree court to usurp power over determining communications policy.⁹⁷ The Clinton administration wants "to create a stable regulatory environment" for telecommunications, not one subject to change by a new court ruling every three years.⁹⁸

The companies affected by the MFJ restrictions apparently would welcome freedom from court jurisdiction.⁹⁹ The reform called for in House Bill 3626 would, in the words of Assistant Attorney General Anne K. Bingaman, "move telecommunications policy out of the courtroom and into the hands of the two expert agencies charged with protecting the public interest in telecommunications [the FCC] and competition [the Department of Justice]."¹⁰⁰ The bill would also allow a more consolidated and timely approach for handling rapidly changing market conditions. The review process set forth in House Bill 3626 ensures that regulations would preclude local exchange companies from improperly entering restricted markets. Because BOCs will not have to wait out a judicial review process, they will not be excluded from evolving telecommunications opportunities any longer than is beneficial or necessary.

D. Reform Would Allow BOCs to Contribute to Infrastructure Development

The Administration maintains that the NII should be developed by the private sector and driven by increased competition following eased government regulations. The BOCs are uniquely suited to contribute to this development. The local telephone companies have already built an infrastructure that reaches into nearly every home in the United States. By

97. See CLELAND, *supra* note 82, at 18.

98. See Dennis Wharton, *FCC to Extend Freeze on Rate Increases*, VARIETY, Nov. 22, 1993, at 27.

99. Robert D. Hershey, Jr., *2 in House Want to Free Baby Bells*, N.Y. TIMES, Nov. 24, 1993, at D1.

100. Bingaman testimony, *supra* note 43, at 142.

gaining the ability to compete in other markets, Baby Bells could eventually reduce the total costs of constructing the NII by building on the existing infrastructure.¹⁰¹ Preventing telephone companies from cooperating or competing with other NII participants could slow the process of building a system.

E. Competitive Concerns Are Protected

In upholding the lower court ruling allowing BOCs to own information services, the Court of Appeals for the D.C. Circuit noted the types of companies against which Baby Bells would compete. "They include GE, AT&T, . . . IBM, and Sears with their Prodigy service, Merrill-Lynch, ITT, Mead Corporation, American Express, Citicorp, Chase Manhattan Bank, and a variety of foreign and independent telephone companies. . . . These firms are not pushovers."¹⁰² When entering any new telecommunications market, Baby Bells are going to have to compete with large, well-financed corporations. The likelihood that a BOC could drive such a competitor out of the market is slim.

In addition, the Brooks-Dingell bill would have adequately protected competitive concerns by setting forth standards for review. The Attorney General is charged with approving only those applications where there is "no substantial possibility 'the BOC' could use monopoly power to impede competition."¹⁰³ Any party who, as a result of the ruling, suffers an injury to its business or property, has an opportunity for judicial review.¹⁰⁴ By including such safeguards, the Brooks-Dingell bill ensures that BOCs cannot enter markets where they would have an opportunity to use their local telephone monopoly to a detrimental, anticompetitive effect.

CONCLUSION

Provisions in House Bill 3626 to lift MFJ restrictions on BOCs would have allowed local telephone companies to effectively compete in the growing telecommunications industry without compromising concerns about protecting American consumers from anticompetitive behavior. Enactment of a similar measure in the next Congress would further the development of the NII and increase competition for communications services, resulting in lower prices and better service for consumers.

101. Daniel Brenner, *Telephone Company Entry Into Video Services: A First Amendment Analysis*, 67 NOTRE DAME L. REV. 97, 98 (1991).

102. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1993).

103. H.R. 3626, 103d Cong., 1st Sess. (1993).

104. *Id.*

House Bill 3626 would have given the FCC and the Attorney General the power to review any authorizations for antitrust and public policy concerns, fully empowering them to deny authorization to requests that do not satisfy these standards. Further, the bill would have taken control of telecommunications policy away from the decree court's triennial review and appeal process, and replaced it with a more efficient and immediate review by agencies qualified to consider antitrust and communications policy issues. Congress should use House Bill 3626 as a model when proposing telecommunications reform legislation in the next session.

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