New Directions in Communications Policy

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For Laurie

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Foreword

Randolph J. May

In enacting the Telecommunications Act of 1996, the most significant amendment to the Communications Act of 1934 since passage of the original act, Congress declared the statute's intent "to promote competition and reduce regulation."[1] Consistent with the statutory language, the conference report stated the legislation was intended "to provide for a pro-competitive, deregulatory national policy framework."[2]

In signing the bill into law, President Bill Clinton's rhetoric was soaring: "With the stroke of a pen, our laws will catch up with the future. We will help to create an open marketplace where competition and innovation can move as quick as light."[3] For good measure, he called the 1996 Act "truly revolutionary legislation."[4]

Whether or not the 1996 Act was really "pro-competitive" and "deregulatory," as Congress said it intended, or "truly revolutionary" as President Clinton characterized it, has been much debated by scholars and policymakers. And whether or not the act itself was deregulatory or revolutionary is a separate issue, at least to some extent, from questions relating to how the Federal Commu-

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (preamble).

2. H.R. Conf. Rep. No. 104–458 at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

3. "Remarks by the President in Signing Ceremony for the Telecommunications Act Conference Report," Library of Congress, White House Press Release, Washington, DC, February 8, 1996.

4. Id.

nications Commission ("Commission" or "FCC") implemented the statute. For there is little doubt the 1996 Act's ambiguity left the FCC with a large measure of regulatory discretion.

As Justice Antonin Scalia famously put it in the first post-1996 Act case to reach the Supreme Court, "[i]t would be a gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or even self-contradiction."[5] Under the Supreme Court's *Chevron* test, the agency is traditionally accorded a large measure of administrative discretion in interpreting opaque provisions.[6] Moreover, the broad discretion accorded to the FCC also stems from the fact that, even after the supposedly deregulatory 1996 Act amendments, the Communications Act still has nearly one hundred statutory provisions that delegate authority to the agency to act in the "public interest."[7] At one time, it might have been thought that such an indeterminate standard would fail to pass muster under the constitutional nondelegation doctrine that requires that congressional delegations of authority contain an "intelligible principle" to guide the agency.[8] But such a thought would be wrong. The Supreme Court has refused to hold unlawful the public interest standard, and, consequently, the Commission has been able to use its inherent indeterminateness to support broad notions of administrative authority.[9]

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5. AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 397 (1999).

6. Chevron U. S. A. Inc. v. Natural Resources Defense Council, 467 U.S. 116 (1985) (If a statutory provision is ambiguous and if the implementing agency's interpretation is reasonable, a federal court is required to defer to the agency's interpretation, even if it differs from one the court deems better.) For a recent Supreme Court decision upholding the FCC's broad administrative discretion when interpreting an ambiguous statutory provision, see Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Serv., 545 U.S. 967 (2005).

7. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate To Be Constitutional?*, 53 Fed. Comm. L. J. 427 (2001), Appendix A.

8. Id., at 443–452; see also Randolph J. May, *A Modest Plea for FCC Modesty Regarding the Public Interest Standard*, 60 Admin. L. Rev. 895, 898–901 (2008).

9. The seminal case, NBC, Inc. v. United States, 319 U.S. 190, 227 (1940), is almost seventy years old, but it remains good law and is still oft-cited.

In any event, my purpose here is not to define the contours of the FCC's discretion, but rather to drive home the point that the agency continues to possess broad leeway in carrying out many of its regulatory activities. As with the debate surrounding the statute itself, there has been much debate concerning whether the Commission has implemented the 1996 Act in the deregulatory manner Congress, at least ostensibly, intended. In my view, it has done so only in fits and starts, and without consistency and coherence.

But we are where we are. So the distinct emphasis of this book is forward-looking. Hence the title, *New Directions in Communications Policy*. In this volume, looking backwards is reserved primarily for the purpose of learning from past mistakes in the vein of Santayana's famous axiom: "Those who do not remember history are condemned to repeat it." Consistent with the "New Directions" theme, each essay contains at its end a "Recommendations and Conclusions" section. There the chief suggested new policy initiatives are summarized.

In highlighting the recommendations at each chapter's end, I need to be careful not to minimize in any way the breadth and depth of the scholarship contained in the entirety of each essay. The authors are among the nation's most preeminent law and economics scholars. They are widely-published, well-respected academics in the communications law and policy field. Many have had hands-on experience in high-ranking policy positions. I am proud to say that each essay author is a member of the Board of Academic Advisors of the Free State Foundation, the nonprofit think tank I founded in 2006 and of which I serve as president. And I am grateful that these busy teachers and thought leaders have lent their time and energy in advising the Free State Foundation and participating in its educational activities.

One more word about "revolution" before briefly introducing the individual essays. The notion that the Telecommunications Act of 1996 was "truly revolutionary," as President Clinton suggested, is, in my opinion, hyperbolic. Nevertheless, there truly has been a revolution in the communications marketplace environment since 1996, one owing much to the ongoing rush of

technological developments. Sometimes ill-conceived policies may have slowed the dramatic marketplace changes, but they could not completely throttle them.[10] The Internet was still in its early adolescent phase in 1996, with the World Wide Web only recently having made its appearance in rudimentary form. Cable television companies didn't provide phone service, and telephone companies didn't provide video services. We didn't have hundreds of choices of video channels available from the cable, satellite, or telephone providers. Cell phone service was no more than a complement to traditional wireline services, not a rapidly increasing replacement. And, of course, you couldn't watch your favorite soap opera or other television show on your portable wireless device. You can now. And with today's Internet, we can all instantaneously be publishers or recipients of content from around the neighborhood or around the world. Many of the individual essays contain information describing various aspects of this revolution in the communications marketplace, so there is no need to belabor the point here.

The book begins appropriately with a broad-ranging essay by Dennis Weisman and Glen Robinson titled, "*Lessons for Modern Regulators from Hippocrates, Schumpeter and Kahn*." That would be Hippocrates of "First, do no harm" fame; Joseph Schumpeter, best known for his description of the process of "creative destruction" that is at the heart of his theory of dynamic capitalism; and Alfred Kahn, whom the authors appropriately call "one of the foremost contemporary scholars of regulated industries, as well as one of the most distinguished regulators (both at state and federal levels)." Drawing on lessons learned from the learned three, Professors Weisman and Robinson conclude that "[t]he centripetal model of command-and-control regulation of the

10. Indeed, not long after the 1996 Act's passage, then FCC Commissioner, later FCC Chairman Michael Powell wrote: "We are in the throes of a revolution. This statement is not intended to be melodramatic, but rather descriptive of the breathtaking moment in which we in the communications field find ourselves." Michael K. Powell, *Communications Policy Leadership for the Next Century*, 50 Fed. Comm. L. J. 529, 529 (1998).

past that put in place strict rules to elicit a uniformity of market outcomes must now yield to a centrifugal model of regulation in which the regulator becomes less of a controller and more of an enabler." They assert that the FCC's implementation of the 1996 Telecom Act suffered from the fact that, despite changes in the marketplace environment, the agency continued to default "to its traditional regulatory mode in which it substituted its judgment for the marketplace when its task was to unleash the power of these burgeoning markets in a manner that would enable market forces to provide the requisite discipline."

As case studies, Professors Weisman and Robinson examine the most controversial topical communications policy issues: net neutrality regulation and broadcast ownership restrictions. After considering all the claims put forward to justify imposing neutrality mandates on broadband Internet providers and applying lessons from the three sages, they urge policymakers to exercise caution before accepting any of the pro-regulatory rationales. As for the broadcast ownership restrictions, the authors show that for decades there has been a mismatch between the claimed rationale that the regulations support program diversity and the means devised to achieve the supposed objective. At bottom, Professors Weisman and Robinson conclude: "While there may be some legitimate role for regulation to play in facilitating the transition from monopoly to competition, we think it is one that poses great risks of undermining the very competition it is supposed to foster."

From the broad sweep of the first chapter, with its erudite discussion of the ideas of Hippocrates, Schumpeter, and Kahn, as they relate to the political economy of communications regulation, the focus in the ensuing chapters narrows somewhat as topics are addressed more specifically. The essays of Professors Speta, Yoo, and Epstein begin a threesome, each focusing to a greater or lesser extent on probably the most contentious issue of the day: network neutrality. To attempt to define "net neutrality" here not only would be impossibly difficult—difficulty of definition is a major problem, in my view, with the notion of adopting net neutrality mandates—but it also would preempt some of the most useful

discussion in the essays that follow. By way of the briefest of introductions, suffice it to say that net neutrality regulation has to do with government mandates purporting to require that broadband service providers, such as Verizon or Comcast, do not block, impair, or degrade access to any Internet site or discriminate against any unaffiliated applications, content, or equipment providers that make use of the providers' broadband services.

In "*Redefining the Landscape of Internet Regulation*," Jim Speta recommends that the Obama Administration order a systemic, substantive inquiry into Internet policy, especially in light of the uncertainties created by the FCC's August 2008 order holding that Comcast acted unlawfully by interfering with certain bandwidth-intensive peer-to-peer video applications.[11] According to Professor Speta, in rejecting Comcast's argument that its actions impacting the flow of peer-to-peer traffic constituted reasonable network management practices, the *Comcast Order* suggests a fundamental and ill-conceived departure from the "non-regulation" of the Internet that the FCC had long practiced and which many experts had regarded as having been successful. He criticizes the FCC for articulating a vision of its regulatory authority over broadband Internet services that is as broad as the agency's authority over traditional common carrier services. Professor Speta says the FCC's *Comcast Order* suggests economic regulation of Internet services could be part of the agency's agenda. Before going any further down this regulatory road, and given the importance of communications to the economy and our polity, he argues that we need a rigorous investigation of Internet markets, Internet economics, and Internet regulatory possibilities with the aim of developing a clearly articulated set of policies.

Also taking the FCC's *Comcast Order* as his departure point, Christopher Yoo casts a wary eye on proposals to impose net neutrality restrictions. In "*Network Neutrality after Comcast: Toward a Case-by-Case Approach To Reasonable Network Management*," Pro-

11. Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13028 (2008) ("Comcast Order").

fessor Yoo recognizes the merit of the case-by-case adjudicatory approach that seems to characterize the agency's action in the Comcast case. He explains that this approach, with its emphasis on the facts of a specific complaint, is superior to the adoption *ex ante* of categorical rules that almost always are "blunt instruments that do not permit fine distinctions."

While sympathetic to case-by-case adjudication as a methodological approach, Professor Yoo has considerable worries about the harms that might result if such an approach were to lead to the adoption of net neutrality mandates. Using his keen knowledge of antitrust jurisprudence and the economics of network industries, Professor Yoo explains why consumer welfare may be adversely affected by regulations that purport to prohibit all "discrimination" by broadband Internet service providers. Forced standardization makes it more difficult for providers to innovate and respond to consumer demand for new products. In effect, neutrality mandates that purport to prohibit discrimination do discriminate—they have the practical effect of discriminating against innovations that depend on new network designs that deviate from standard protocols. And the seeming restriction on pricing flexibility that is implicit, if not explicit, in most net neutrality proposals would make it more difficult for Internet service providers to recover the costs of building out more broadband facilities. In other words, according to Professor Yoo, by enforcing standardization that inhibits the development of network innovation and by restricting pricing flexibility that allows recovery of more network costs from premium content and applications services, net neutrality mandates end up harming overall consumer welfare.

Through the looking glass of an earlier FCC decision involving broadcast licensing, Richard Epstein, with his usual intellectual incisiveness, sees distinct perils in government adoption of net neutrality regulations. In "*What Broadcast Licenses Tell Us About Net Neutrality: Cosmopolitan Broadcasting Corporation v. FCC*," Professor Epstein recounts the FCC's rejection of Cosmopolitan Broadcasting's plan to sell broadcasting time slots to various foreign language programmers to use the time as the "sublicensees" saw fit. In this now mostly forgotten case, the agency decided the licensee had

given up too much control over the station's programming in brokering the time slots. In the FCC's view, this lack of control was inconsistent with the "public interest," the ubiquitous, vague standard that guides most of the agency's regulatory activities. Calling on his deep knowledge of the Progressive and New Deal eras, including the FCC's own early regulatory history, Professor Epstein explains how the Communications Act came to be interpreted—wrongly in his view—to give the regulators such broad administrative power. The views of Felix Frankfurter sanctioning broad agency discretion to dictate detailed command-and-control regulations under the public interest standard prevailed over any Hayekian notions that marketplace dictates might best serve consumers.

While many others might miss the connection, Professor Epstein asserts that the same mode of thinking that led the FCC to dismiss the contention that broadcast sublicensees might be in a better position than the agency bureaucrats to determine what programming consumers prefer likely will cause the agency to take an unduly expansive view of net neutrality regulation. Pleas to prohibit "discrimination," like pleas to promote "diversity" through broadcast regulation, may sound benign. But Professor Epstein asserts that history teaches—indeed, the FCC's actions in *Cosmopolitan* and other broadcast cases teach—that "the parties who seek to develop sophisticated and sensible schemes for state control quickly lose control over the administrative process to persons whose ambitions for state control are not bound by any fine-grained rationale." In a wonderful (under)statement of the perils of government action that do not comport with sound economic principles such as those that infuse antitrust jurisprudence, Professor Epstein says, "the expected rate of depreciation of sound public norms that rely on administrative discretion is high." Such being the case, in no uncertain terms Professor Epstein concludes: "Keep private control over broadband pipes by abandoning the siren call of net neutrality."

The next chapters turn to issues relating to reform of the archaic "universal service" and "intercarrier compensation" regimes. These subjects create nearly as much controversy as those relating to net neutrality. One difference, however, is that proposals to change universal service and intercarrier compensation have been around for

more than a decade, while net neutrality, at least in its current iteration, for only half that time. In shorthand, intercarrier compensation has to do with the regulatory regime that governs the rates, terms, and conditions upon which interconnecting telecommunications service providers originate and terminate traffic on each other's networks. Universal service has to do with a regime composed of various forms of subsidies—some of which are derived from explicitly above-cost intercarrier compensation rates—designed to assure that telephone service is affordable and ubiquitously available.

John Mayo and Gerald Brock take us from my shorthand to a deep understanding of the reasons why each of these interrelated legacy regulatory regimes, developed in a much more monopolistic era, must now be reformed to account for new marketplace competition and technological developments. Professor Mayo's contribution is entitled, "*Universal Service: Can We Do More with Less?*" His answer is an emphatic "yes," but not before taking a close look at the way subsidies for so-called "high cost" areas have grown rapidly in recent years and the moral hazard created by the high cost support program. Professor Mayo concludes that "the now century-old effort to promote universal service remains woefully antiquated, misdirected and, from an economic perspective, massively bloated." While Professor Mayo is not averse to the notion that some subsidies should be redirected from the support of narrowband to broadband communications, he urges this not be done before the regime is reformed in line with the economic principles he articulates.

Professor Brock does an admirable job of explaining, demystifying really, the truly complex compensation system that governs —largely by regulatory fiat—the payments made by one carrier to another for traffic that transits two or more networks. His essay, "*Unifying the Intercarrier Compensation Regime*," explains the irrationality inherent in the way the regulations treat various types of traffic based on legacy classifications or jurisdictional considerations that have no relevance to the economic cost considerations that ought to prevail in a competitive environment. If Professor Brock's essay did nothing else, it would have performed a useful service. But, indeed, it does much more. He argues for the replacement of the current regime, with its compartmentalized sub-

regimes, with a single unified compensation framework that is neutral with regard to technology, industry structure, and pricing plans. Conceptualizing a new framework more closely aligned with economic costs and competitive realities is one thing, but wrestling with the difficulties, as a matter of political economy, of getting from here to there is another. In this regard, Professor Brock puts forward an innovative proposal for a new regime based, to the extent possible, on private bargaining, but with arbitration by industry experts as a backstop. His piece is made even more valuable for the detail he provides concerning how the arbitration process should be designed and how it should work in practice.

The next three essays relate to mass media policy. As with telecommunications, if we can use that term here to refer to one-to-one communications, the mass media marketplace—that of one-to-many communications—is also being transformed dramatically by the digital broadband revolution. Where once there was radio, and then over-the-air broadcast television, suffice it to say there are now, alongside them, cable and satellite television services that offer subscribers hundreds of different channels. And there are mobile devices that deliver not only voice calls, but text messages and the latest video offerings. And, of course, the Internet is the ultimate—well, not likely the ultimate—but the latest, one-to-many mass media communications medium.

In his penetrating essay, "*Delivering Media Content in a New Technological Environment: An Exploration of Implications for Television Policy,*" Steven Wildman examines one particular way in which technological change is altering the media landscape. He argues that the economics of server-based distribution systems, video systems that allow viewers to select and play programs stored on a video server at times of their choosing, undermines two of the basic policy tenets that prevailed in what he calls television's linear era of prescheduled appointment viewing. The first tenet undermined is that lawmakers and regulators can influence the mix of programs supplied to viewers through regulations aimed at influencing content choices made by owners of local television distribution facilities. The second is that the bandwidth employed to distribute television programs is a scarce resource limiting the sup-

ply of programs to viewers. Professor Wildman explains how the undermining of these two tenets should cause lawmakers and regulators to address whatever legitimate concerns they may have about the undersupply of program content through means less directly regulatory than the traditional dictation of program content.

Diane Disney, on the other hand, is concerned that, whatever marketplace and deregulatory changes already have occurred, have had the effect of reducing the amount of local broadcast programming, especially traditional public service announcements. Her essay, "*Public Affairs and Private Employment: Some Unintended Consequences of the 1996 Telecommunications Act*," does double duty in that it also examines some of the downside effects on employment that, in her view, followed consolidation in the telecommunications marketplace. Professor Disney is skeptical whether what others see as the increased consumer choice made available by new technologies and new entrants is really meeting the needs of the public, especially local communities. For her, broadcasters are failing in their public service obligations as licensees. While shying away from proposing outright a reinstatement of the Fairness Doctrine, at least labeled as such because she says the term generates such strong stereotyped reactions, Professor Disney proposes some kind of "Nonprofit Access Mechanism" regulation applicable to broadcasters as a way to bring local interests and local problem-solving organizations back to visibility in their communities. Readers can decide for themselves whether or not the new name is a distinction without a meaningful difference.

The next essay, *"Charting a New Constitutional Jurisprudence for the Digital Age,"* is mine. It will be easy enough there to discern that I have a much more positive view of the impact of the technological and marketplace changes that have occurred than does Professor Disney. As I see it, as the transition from the analog to digital age nears completion, we have entered an age characterized by media abundance. The availability of so much content through alternative platforms in and of itself is reason enough, as a matter of policy, for jettisoning almost all legacy regulations that have the government dictating carriage of some content and suppression of other programming.

But my essay focuses on a reason more compelling than policy for doing so: conformance with the Constitution. I review the landmark First Amendment cases, such as *NBC*,[12] *Red Lion*,[13] *Pacifica*,[14] and *Turner Broadcasting*,[15] recognizing that the Supreme Court upheld the curtailment of free speech challenged in each of those cases, whether based on notions of spectrum scarcity, the unique pervasiveness of the broadcast media, or the existence of media bottlenecks. In light of the then-prevailing less competitive marketplace and less dynamic technological environment, I concede that perhaps it was predictable that the First Amendment's protections would be substantially limited in the analog age. I hope I make a persuasive case that it is time for the Court to adopt a new constitutional jurisprudence that is much more protective of free speech values than is the existing jurisprudence. As I say in closing, "now, in the face of proliferating competitive alternatives and media outlets spurred by profound marketplace and technological changes, it ought to be considered predictable, and, yes, even likely, for the Court to establish a new First Amendment jurisprudence befitting the media abundance of the twenty-first century's digital age."[16]

Bruce Owen's essay, *"A Fresh Start in Communications Policy,"* closes the volume. Because of the breadth of its sweep, it makes a perfect bookend to the broad sweep of the opening essay by Professors Weisman and Robinson that invokes Hippocrates, Schumpeter, and Kahn. In part, Professor Owen's essay is a brief primer on the political economy of American government decisionmaking, with special emphasis on the role played by Madisonian factions in shaping policy. In this regard, Professor Owen states, "[o]ur system is structured to reward politicians who respond to

12. National Broadcasting Co. v. United States, 319 U.S. 190 (1943)

13. Red Lion Broadcasting Co. V. FCC, 395 U.S. 367 (1969).

14. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

15. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).

16. I was gratified that Justice Thomas cited an earlier version of this essay in his concurring opinion in FCC v. Fox Television Stations, 129 S. Ct. 1800, where he expressed his willingness to reconsider the existing First Amendment jurisprudence applied to the electronic media.

the incentives created by interest group competition and the art of compromise." Compromise is not inherently a bad thing. Indeed, compromises are necessary, at least at certain times, if government is to function. But focusing on the somewhat insular communications policymaking community, Professor Owen asserts that the need of the various special interests to engage in compromises and trade-offs has led to the adoption of the community's own "foundational myth," the notion that "the enterprise is concerned directly with the public interest, as opposed to the political regulation of economic advantage." Of course, the prevalence and prominence of the vague public interest standard in the Communications Act facilitates, and provides easy cover for, this foundational myth.

Having in mind the persistence of the public interest foundational myth and the very real history of mission creep that has characterized communications regulation from the outset, Professor Owen offers two specific recommendations, one substantive and one process-oriented, for achieving fundamental change. He recommends permitting spectrum licensees to use or sell their spectrum for any purpose whatsoever that does not interfere with other licensees. This would be a bold break with the still too prevalent "command and control" approach to spectrum regulation that always has prevailed and that has led to substantial underutilization of this valuable resource. Perhaps no other suggested change would constitute such a substantive "new direction" in communications policy.

The second, more process-oriented recommendation is for the establishment of a meaningful sunset regime for all existing and future communications statutes and rules. Professor Owen shows that many of the existing statutes and rules have outlived whatever usefulness they once may have had. He suggests creating a legal presumption that all regulatory provisions would become defunct after a number of years fixed at the time of enactment, unless those who believe a particular provision should remain in effect can convince a majority of the then current decisionmaking body that the provision continues to makes sense. While adoption of such a sunset regime may not be on the near-term horizon, Professor Owen makes a persuasive case for his recommendation. It would impact the long-term sustainability of the regulations built on the tradi-

tional public interest foundational myth. With a lessening of the hold of the foundational myth, new directions in communications policymaking would follow more easily.

That brings me back full circle to this volume's principal purpose: To point the way forward, in the midst of tremendous marketplace and technological change, to concrete new policy directions that take account of digital age realities. I am confident that the scholars have accomplished this central purpose. They have offered concrete recommendations on today's most important issues. These recommendations, and the supporting rationales, should be considered carefully by all regulators and policymakers with responsibilities for establishing communications policy. In addition to regulators and policymakers, the book, with its wealth of background information on the theory and practice of communications regulation, will prove valuable to any person interested in communications law and policy, no matter whether a new student or teacher of the subject, or an experienced practitioner.

I am grateful to all the contributors for the care and diligence they exhibited throughout the preparation of their essays. Their willingness to comply with my sometimes stringent deadlines has ensured that the content of the book remains as timely as I envisioned it would be when, together, we embarked on the project. Such timeliness, in turn, ensures the book will be impactful.

I want to thank Laurie May, Len Lazarick and Elaine Orr for their editorial assistance in preparing the manuscript. I also want to thank Susan Reichbart, the Free State Foundation's Events Coordinator, for her assistance in making the February 2009 "New Directions in Communications Policymaking" conference in Washington, D.C. so successful. At the conference, several of the contributors to this volume had an opportunity to present some of the ideas they developed for this book.

In closing, I have no hesitancy in affirming my conviction that many of the "new directions" suggested in this volume will one day be considered important, even noncontroversial, elements of sound communications policy.

Potomac, Maryland
May 2009