

Communications Law and Policy in the Digital Age

Communications Law and Policy in the Digital Age

The Next Five Years

Edited by

Randolph J. May

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For Laurie

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Foreword

Randolph J. May

On October 12, 2011, the Free State Foundation held a slightly delayed Fifth Anniversary Celebration at the Mayflower Hotel in Washington, DC. The theme of the celebratory event was “Communications Law and Policy in the Digital Age: The Next Five Years.” Perhaps not surprisingly, this book, which is comprised in part of papers and ideas presented at the anniversary celebration, bears the same title as the event’s theme.

Since its founding in 2006, the Free State Foundation’s mission has been to promote, through its research and educational activities, free market, limited government, and rule of law principles, especially with respect to the communications, information services, and high-tech market sectors. I am gratified that in the Foundation’s rather short lifespan, FSF has become one of the nation’s leading free market-oriented think tanks—if not *the* leading think tank—working in the communications law and policy arena. And, more to the point, FSF has become an acknowledged leader in the fight to reform our nation’s communications law and policies.

So, in addition to celebrating the Foundation’s past successes at the October 2011 event, we wanted to use the occasion not only to examine existing communications laws and policies but, more importantly, to look ahead. Hence this volume. While there is much in the way of describing the current state of affairs, certainly a necessary predicate to understanding *why* law and policy should be changed, the primary focus of most of the essays in this book is forward-looking. In other words, the emphasis is on *how* com-

munications law and policy should be changed in the next five years, and beyond.

This forward-looking emphasis should make the book particularly valuable not only for academics and students, but also for policymakers and law practitioners as well. Taken together, the essays will provide a detailed roadmap for policymakers who wish to achieve meaningful, comprehensive reform of our nation's communications policies. For practitioners, the volume points the direction in which communications law and policy likely will move and suggests the core elements of the likely reforms. Armed with these insights, law practitioners will be in a better position to serve their clients.

Before saying just a bit about each chapter by way of introduction, I would be remiss if I did not express my profound appreciation to the book's contributors. They are an outstanding group of notable scholars who have established reputations as leaders in the field of communications law and policy. With the exception of U.S. Representative Marsha Blackburn (R-TN), who serves on the House Energy and Commerce Committee, and my colleague, Seth Cooper, Research Fellow at the Free State Foundation, all the others are full-time academics and members of FSF's prestigious Board of Academic Advisors. I am very grateful to all for their contributions to this book, and especially to the six academics for their contributions to the Foundation as members of the advisory board.

In the *Introduction*, I set the stage by explaining why, in my view, the marketplace and technological changes that have occurred since the last major revision of the Communications Act in 1996 have rendered existing law and policy woefully outdated, if not obsolete. In the more than a decade and a half since passage of the Telecommunications Act of 1996, which was grafted onto the original Communications Act of 1934, we have witnessed a switch from analog to digital services and equipment, from narrowband to broadband network facilities, and, most importantly, from a mostly monopolistic to a generally competitive marketplace environment. I argue that these are fundamental changes that call for a radical new communications law.

The new communications law should get rid of the current “stovepipe” regime in which regulatory activity is tied to different service classifications grounded in now outmoded techno-functional constructs, as well as the ubiquitous public interest standard that grants the agency wide-ranging discretion as it goes about regulating. The replacement regime should have at its core a competition standard grounded in antitrust jurisprudential principles. This new competition-based, market-oriented model would force the FCC to focus its attention more intently on overall consumer welfare, not on outdated regulatory classifications grounded in particular technology platforms or functional characteristics that, without good reason, may favor one competitor over another in the marketplace. And the Commission no longer would be able to invoke the highly elastic public interest standard to devise new regulations that have little or nothing to do with existing marketplace realities.

I acknowledge that the reform proposal discussed in the *Introduction* is bold, and that it may be several years before Congress again tackles comprehensive revision of the Communications Act on the order of the Telecom Act of 1996. But I am confident that the direction of comprehensive reform that I outline is necessary and proper. Indeed, for the most part, the other essays in this volume persuasively bolster the case for reform and suggest specific paths along the reform roadmap.

Next is Representative Marsha Blackburn’s contribution, *Why We Need a Free Market Approach for the Communications and High-Tech Sectors*. Rep. Blackburn, one of Congress’s most informed communications policy experts, as well as an articulate advocate of free market principles, delivered a keynote address at the Fifth Anniversary Celebration. Her brief chapter, adapted from her keynote remarks, explains, as she puts it, “why we must apply some conservative, deregulatory principles to the communications, information services, and high-tech market sectors.” These principles, on which Rep. Blackburn elaborates, are: (1) the government’s default position must be “do no harm”; (2) government needs to respect private markets; and (3) regulations need to be streamlined to better reflect the competitive and dynamic charac-

teristics that define communications and technology markets. The bottom line, she says, is that technology and communications companies are “infinitely more responsive to consumer demands and better equipped to meet consumer needs, wants, and interests, and desires than are federal officials.”

Following Rep. Blackburn’s chapter is one authored by my FSF colleague, Seth Cooper, and myself, entitled *Placing Communications Law and Policy Under a Constitution of Liberty*. What is now a long paper began as an idea I developed initially in a short blog in early January 2012, as I contemplated the year ahead. Our chapter takes Friedrich Hayek’s path-breaking work, *The Constitution of Liberty*, and distills from it a set of basic principles that we believe are relevant to establishing welfare-enhancing policies in today’s competitive, fast-changing, technologically dynamic communications marketplace. Applying these Hayekian principles to contemporary communications law and policy, we set forth a communications reform agenda for the coming years—one that promotes free markets and the rule of law by respecting contracts and private property, maintains the primacy of markets for determining prices and the quantities of goods produced, encourages freedom to innovate free from unnecessary regulatory restrictions, and constrains otherwise unbridled administrative discretion. We address in considerable detail the application of Hayekian principles to current issues involving broadband policy, media regulation, and spectrum assignment and licensing controversies.

The next chapter is *Internet Policy Going Forward: Does One Size Still Fit All?* Christopher Yoo takes as his departure point the FCC’s December 2010 *Open Internet Order*, which, with its core one-size-fits-all approach, he says represents a major turning point in U.S. regulation of the Internet. Right at the outset, Professor Yoo makes clear that he is going to challenge the premise, which in significant part undergirds the *Open Internet Order*, that “the Internet’s past success stemmed from the fact that there has always been a single Internet that was open to everyone.” Not so, explains Professor Yoo, calling upon his acknowledged combination of technical, economic, and regulatory expertise. And he suggests, in terms understandable to laymen and Internet gurus alike, the various trade-

offs that should be considered, say in loss of innovation and higher costs borne by users, if the *Open Internet Order's* “single Internet” claim is enforced rigidly by policymakers. Professor Yoo’s conclusion: “The growing heterogeneity of the technologies, end user demands, and business relationships underlying what is now often referred to as the Internet ecosystem may require reframing the issues in a fundamentally different manner.” In other words, a one-size-fits-all Internet policy may be harmful to consumer welfare.

James Speta’s essay, *Reconciling Breadth and Depth in Digital Age Communications Policy*, is a natural follow-on to Professor Yoo’s piece. While Professor Yoo focuses more intently on how the Internet’s technical architecture and engineering operations are impacted by, and ought to impact, public policy, Professor Speta cogently explains why marketplace shifts attributable to new services and technologies coming to market point to the need for an entirely new Communications Act. As he puts it, the existing law “barely acknowledges the Internet and provides very little direction on the regulation of mobile services—the two areas in which communications services are moving most importantly.” Professor Speta recommends that Congress adopt a new Digital Age Communications Act (DACA) along the lines of a model statute that he and I, along with others, helped draft back in 2005. DACA would establish the FCC’s jurisdiction, now in much doubt, over broadband Internet services, while at the same time, carefully circumscribing the agency’s authority to regulate such services. This would be accomplished by replacing the FCC’s existing “public interest” authority with an antitrust-like competition standard borrowed from the Federal Trade Commission Act. Consistent with the ideas presented in my *Introduction*, Professor Speta presents a convincing case for a Communications Act overhaul and a clear statement of the core elements that should be embodied in such a new statute.

One of Professor Speta’s core elements for a proposed new Digital Age Communications Act is the elimination of the indeterminate public interest standard, but, for now, the standard remains the congressional delegation of authority under which so much of the FCC’s activity takes place. In his chapter, *Restoring a Minimal*

Regulatory Environment for a Healthy Wireless Future, Seth Cooper focuses on the FCC's regulation of mobile services, and especially the agency's more recent actions adopting a more activist regulatory posture relying on its public interest authority. Mr. Cooper's paper contains an up-to-date detailed description of the wireless broadband marketplace to demonstrate its present competitiveness and dynamism, especially as wireless transitions to new higher-bandwidth fourth generation (4G) facilities and services. Next he traces how recent FCC actions, in which the agency typically invokes the elastic public interest standard, have eroded the minimal regulatory environment that existed before the Commission recently began adopting a more interventionist posture. Finally, Mr. Cooper explains exactly what the FCC needs to do by way of modifying its approach to wireless regulation to get back on the right regulatory track and why it is important that it do so.

As the old saw goes, the lifeblood of wireless services is spectrum. And there is a general consensus, which includes current FCC Chairman Julius Genachowski and his fellow commissioners, that the nation faces an impending "spectrum crunch" in light of exploding wireless broadband usage, especially wireless video. Indeed, back in February 2011, President Obama, acknowledging the looming spectrum crunch, announced a plan to free up 500 MHz of new spectrum over the next decade primarily for wireless broadband use. In her chapter, *Proposed FCC Incentive Auctions: The Importance of Re-Optimizing Spectrum Use*, Michelle Connolly focuses on one of the most important components of the plan—employing so-called incentive auctions to allow up to 120 MHz of high-quality spectrum currently used by television broadcasters to be reallocated to more economically beneficial uses. As Professor Connolly states, "[i]n light of the economic and social benefits that accrue from broadband availability and adoption, the public policy goal is to free up additional spectrum that could be used to provide mobile broadband services." Employing her expertise as an economist, along with the first-hand experience gained from serving two stints as the FCC's Chief Economist, Professor Connolly sets forth the theory of spectrum incentive auctions. Then she explains how, in practice, incentive auctions should be designed to

ensure their success in repurposing the maximum amount of spectrum reclaimed from broadcasters, while protecting taxpayers' interests as well. Subsequent to completion of Professor Connolly's chapter, Congress did, in fact, authorize the FCC to conduct the incentive auctions along the lines she advocates. Her detailed guide to properly designing the incentive auctions should be a must-read for those at the FCC tasked with implementing the legislation, and for all those who seek to understand and influence the design process.

Among the FCC-administered regulatory programs most resistant to reform efforts over the past decade or two has been the system of Universal Service Fund (USF) subsidies, especially the so-called high cost fund component that subsidizes certain carriers serving less densely populated, more rural areas. In his essay, *Reforming the Universal Service Fund for the Digital Age*, Daniel Lyons details how the existing Universal Service Fund is wasteful, inefficient, and unaccountable. For example, the higher a company's costs, the more it will receive in subsidies. And rural telephone companies may receive subsidies for providing service even in areas served by another carrier operating without subsidies.

Professor Lyons also points out that in November 2011, the FCC took meaningful steps to begin reforming the USF regime, including reorienting the fund's focus from ordinary telephone service to broadband access. But he proposes a much bolder reform program than the FCC's more modest reforms. Professor Lyons would target the distribution of subsidies to low-income persons. So the program's cornerstone "should be a voucher program similar to a telecommunications version of the food stamp program, or a phone-provided broadband phone card." Professor Lyons would jettison the current contribution methodology under which the USF subsidies are now funded by a 17% surcharge (read "tax" if you are straight-talking) assessed on all interstate and international calls. In its place, Professor Lyons suggests the "simplest and most elegant solution to the contribution problem is simply to fund universal service through a line of the federal budget like most other entitlement programs." These are bold—and sensible—ideas in an area where bold thinking is especially needed.

More bold ideas are presented in Ellen Goodman's thoughtful paper, *Public Media Policy Reform and Digital Age Realities*. By "public media," Professor Goodman means to refer generally to non-profit media infrastructure and content networks that are supported by some kind of public subsidy, whether in the form of tax relief, a federal appropriation, a spectrum set-aside, or some other regulatory intervention. Professor Goodman explains why the same market failure rationale that supported the public broadcasting system created in the 1960s no longer fits comfortably in today's digital world and why, in her view, the country needs a redesigned public media regime that pursues innovation. She would retain the decentralized structure of the legacy public broadcasting system but build in more flexibility so that public media support can take into account, and be responsive to, changing digital marketplace realities. In the end, she concludes, "it seems inconceivable that ambitious telecommunications policy reform should ignore the carbuncle of the Public Broadcasting Act in its sweep through the calcified remnants of 20th century regulation."

The volume's final chapter is Bruce Owen's work examining what we might call the political economy of communications policy reform. The chapter's title, *Communications Policy Reform, Interest Groups, and Legislative Capture*, may foretell that Professor Owen is not overly optimistic about the prospects for achieving the fundamental reforms proposed by the book's other authors—although he leaves no doubt that he is sympathetic to the need for implementing the "meritorious reforms" they propose. In considerable detail, and based on long observation of communications policy sausage-making, he bluntly explains how interest group politics, coupled with the FCC's subservient relationship to its congressional overseers, subverts reform efforts.

Despite Professor Owen's portrayal of the difficulties of achieving reform in the face of the political economy realities, it is important to observe that he does not foreclose the possibility of success. Indeed, he concedes that "it may be that the disconnect between the existing communications policies and the current marketplace realities will become so great, coupled with imperatives

driven by the need for U.S. companies to compete in the global economy, that conditions will become ripe for implementation of meaningful reform.” And at chapter’s end, Professor Owen concludes, even a bit optimistically, that, with “continuing education” as a spur, the “good news” is that the anti-reform policy bias cannot continue indefinitely in an economy that faces global competition, “and therefore it will not.”

I do not believe the anti-reform bias will continue indefinitely either. The disconnect between current marketplace realities and existing communications policies cannot continue to exist for too much longer. In fact, I am optimistic that by the time the Free State Foundation celebrates its tenth anniversary in 2016, the FCC will be in the process of implementing a new “Digital Age Communications Act,” however denominated, that incorporates many of the free market and rule of law reform ideas presented in this book. If such a new law is adopted, I am confident the “continuing education” provided by FSF will have been a significant spur. Even if comprehensive reform has not been achieved through adoption of a new law, I have no doubt that the constructive critiques and specific proposals contained in this book will influence communications law and policy in a positive direction during the next five years, and beyond. And, after all is said and done, as the founder and leader of a think tank devoted to the promotion of sound communications policy, that is all I can ask.

In closing, I want to acknowledge once more the contributions to this volume of my fellow authors and express my gratitude for their dedication and scholarship. And I extend special thanks to my Free State Foundation colleague Seth Cooper for helping to edit many of the chapters in addition to contributing his own. Aside from his contribution to this book, by virtue of his keen intellect, understanding of the principles upon which communications policy ought to be based, and dedication, Seth has been an important contributor to FSF’s success since he joined us. I want to thank FSF’s Kathee Baker for her good work in assisting with the preparation and editing of the manuscript. She maintained her good cheer throughout the process. And my thanks to all those at Carolina Academic Press, from the top of that excellent publishing

house on down, without whom this book could not have been completed so professionally, and so successfully. I am especially grateful to CAP's Shelbi O'Dor for her excellent assistance throughout the publication process.

Finally, I extend my heartfelt thanks to my wife Laurie. I know she must question, not without justification, the very long hours, including many late nights and weekends, I have devoted to communications law and policy reform since founding the Free State Foundation. I am grateful for Laurie's indulgence and patience. And I know she shares with me the pride I have in knowing that ideas matter—and that the ideas put forward by the Free State Foundation are contributing to sound public policy that benefits our nation and our citizens in many ways.

Rockville, Maryland

June 2012