41. Telecommunications, Broadband, and Media Policy

Congress should

- level the telecom playing field by placing all carriers on an equal legal footing and comprehensively deregulate all carriers to accomplish this goal,
- sunset all forced-access regulatory mandates,
- reform and devolve universal service subsidies and the ''E-Rate'' program,
- quarantine broadband wireless Internet telephone services from remaining federal and state regulation,
- clean up the telecom industry tax mess,
- reject new cable and satellite regulations,
- enact comprehensive spectrum reform and privatization, and
- allow comprehensive media ownership reform to advance.

Revising Telecom Regulation

The telecommunications sector is just beginning to emerge from the meltdown that decimated stocks, destroyed billions in shareholder value, and left once-proud industry giants scrambling to avoid bankruptcy. The reverberations of this meltdown were also felt well beyond the boundaries of the telecom sector as upstream and downstream industries, especially the equipment market, took a hit as well.

Although there were many business causes for the market meltdown, public policy has had an equally important impact on this sector. While markets and technologies have evolved rapidly, the communications policy landscape remains encumbered with many outdated rules and regulations. That is largely because when Congress last attempted to address these

matters seven years ago in the Telecommunications Act of 1996, legislators intentionally avoided providing clear deregulatory objectives to the Federal Communications Commission (FCC) and instead delegated broad and remarkably ambiguous authority to the agency and state regulators. That left the most important deregulatory decisions to regulators who, not surprisingly, did a very poor job of following through with a serious liberalization agenda.

As policymakers look to the future, they must acknowledge just how much the world has changed and modify telecom law accordingly. Traditionally, the industry was regulated because of the lack of competition and the need to ensure universal service, but those concerns are no longer an issue. America long ago achieved universal connectivity, and the market has grown increasingly competitive with each passing year. Millions of Americans are now ''cutting the cord'' entirely by switching to wireless cellular service, and countless more are switching from their traditional wireline provider to Internet telephone providers, or ''VoIP'' (voice over Internet protocol). Meanwhile, energy companies are on the cusp of breaking into the telecom market to provide yet another wire into the home for broadband over powerline systems. In a world where consumers have multiple wireline and wireless options, Congress must recognize that the old rationales for regulation have been either satisfied or rendered moot by the relentless march of technology. Consequently, the mistakes of the Telecom Act must not be repeated in upcoming legislation; indeed they must now be undone to protect future competitors and technologies from repressive regulatory burdens.

Regulatory Asymmetry

The Telecom Act's most serious flaw was its backward-looking focus on correcting the market problems of a bygone era. Instead of thoroughly cleaning out the regulatory deadwood of the past, legislators and regulators decided to instead rework archaic legal paradigms and policies that were outmoded decades ago. The act kept in place increasingly unnatural legal distinctions, such as the artificial separation of local and long-distance wireline telephone services even though those two services can be bundled and sold as one service as they are by wireless cellular providers.

In particular, the Telecom Act did not address the underlying regulatory asymmetry that governs formerly distinct industry sectors. That is, regulators have traditionally grouped providers into categories such as common carriers, cable services, wireless, and mass media and broadcasting. But

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technological convergence in this industry has meant that those formerly distinct industry sectors and companies are now integrating and rivals are searching for ways to offer consumers a bundled set of communications, broadband, and even media services under a single brand name. Increasingly, providers are referring to themselves as information services providers, broadband providers, or network services providers. Yet the Telecom Act endorsed the paradigms of the past and allowed increasingly interchangeable services to be regulated under different legal standards: telecom, cable, wireless, broadcasting, and so on.

Therefore, the first step Congress must take to begin seriously reforming communications policy is to end this asymmetry, not by ''regulating up'' to put everyone on an equal footing, but rather by ''deregulating down.'' Placing everyone on the same *deregulated* level playing field should be at the heart of telecommunications policy. The easiest way for Congress to tear down the old regulatory paradigms and achieve regulatory parity would be to borrow a page from trade law and adopt the equivalent of a ''most favored nation'' principle for communications. In a nutshell, this policy would state that ''any communications carrier seeking to offer a new service or entering a new line of business should be regulated no more stringently than its least regulated competitor.'' That would create regulatory simplicity and parity without any new regulation.

The Perils of Forced Access

Next, Congress must clean out the most burdensome regulatory deadwood in the telecom sector by closing the book on ''open-access'' regulation for good. This was the second serious problem with the Telecom Act: its fundamentally flawed premise that competition could be micromanaged into existence through open-access—or as they are more appropriately called, ''forced-access''—mandates. The act included provisions that required local telephone companies to unbundle and share elements of their networks with rivals at a regulated rate. The theory behind those interconnection and unbundling rules was that smaller carriers needed a chance to get their feet wet in this market before they could invest in facilities of their own to serve consumers. To encourage entry by smaller carriers, Congress delegated broad and undefined authority to the FCC to create rules that would allow independent carriers to lease capacity from incumbent network owners at a regulated (and very low) price so that the new rivals could resell that capacity to customers and still earn a profit.

The danger inherent in that scheme should have been apparent from the start: If regulators went to the extreme and set the regulated rate for

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leased access too low, then new rivals would come to rely on infrastructure sharing as their core business model and avoid making the facilities-based investments necessary for true competition to develop. That is essentially what happened in the wake of the Telecom Act as the FCC overzealously implemented the act's network-sharing provisions. That encouraged new entrants to engage in a crude form of regulatory arbitrage as they pushed for regulators to constantly suppress the regulated price of access to existing telephone networks. Meanwhile, those resellers largely ignored investment in new networks of their own through which legitimate competition could have developed. In other words, the goal of federal telecom policy became infrastructure sharing instead of infrastructure building. But sharing is not competing, and infrastructure socialism was never a sensible prescription for bringing about true communications competition or innovation.

Luckily, despite the best efforts of the FCC and state regulators to retain the current forced-access regulatory system, the courts have repeatedly struck down elements of that scheme. The District Court of Appeals' March 2004 decision in *USTA v. FCC* might have been the final nail in the coffin of infrastructure socialism. In that case, the court blasted the FCC for overstepping its authority and converting the Telecom Act into a regulatory instead of a deregulatory measure. When the Bush administration refused to appeal the decision to the Supreme Court, it signaled to many observers that the forced-access crusade might have seen its final days. But Congress still needs to take action to formally close the door on that counterproductive chapter of telecom history, especially in light of the fact that the rules now threaten emerging technologies.

Protecting New Services and Preempting the States

A third flaw of the Telecom Act was its failure to shield emerging technologies from the new forced-access regulations or other ''legacy'' regulations. In particular, Congress failed to realize the potential threat state and local regulators might pose to new or existing communications technologies and thus failed to include language in the act preempting them.

The gravity of that threat was exposed in the late 1990s when several state and municipal regulatory officials began advocating the extension of forced-access mandates to cable providers and their broadband offerings in particular. Regulators argued that the same infrastructure-sharing logic that applied to old telephone networks needed to apply the new high-speed services cable companies were rolling out. Ironically, federal regulators rejected such calls for forced-access regulation of cable largely because

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some at the FCC wanted to make sure cable companies were well positioned to compete against telephone companies. But the FCC lacked the clear authority to preempt the state and local governments altogether. Thus, the debate is still raging today, and litigation is pending.

Equally troubling is the threat state and local regulation poses to VoIP and wireless services. Recently, some state officials have openly advocated greater regulation and taxation of both those services under the guise of ''consumer protection.'' But no amount of rhetoric can disguise what this effort really is: a turf battle. State and local officials are increasingly concerned that emerging technologies are eroding their very raison d'être.

These jurisdictional regulatory issues demand immediate attention by Congress. Federal lawmakers must take the same bold steps they have while deregulating previous network industries (railroads, trucking, airlines, banking) by preempting a great deal of the economic regulation state and local governments engage in today.

Ending Universal Service Entitlements

The fourth flaw of the Telecom Act was Congress's unwillingness to dismantle or even reform the universal service subsidies and regulations that continue to distort market pricing and competitive entry in this market. The system has been riddled with inefficient cross-subsidies, artificially inflated prices, geographic rate averaging, and hidden phone bill charges for average Americans. Although some reform efforts have been undertaken in recent years, they have been quite limited.

To make matters worse, section 254 of the Telecommunications Act mandated that the FCC take steps to expand the definition of universal service. It did not take the agency long to follow up on that request. In May 1997 the agency created the ''E-Rate'' program (known among its critics as the ''Gore tax'' since it was heavily promoted by then–vice president Al Gore), which unilaterally established a new government bureaucracy to help wire schools and libraries to the Internet. The FCC then dictated that the American people would pick up the $2.25 billion per year tab for the program by imposing a hidden tax on everyone's phone bills. Although the constitutionality of the E-Rate program was questioned initially, the program withstood court challenges and early legislative reform efforts. Consequently, the E-Rate threatens to become yet another entrenched Washington entitlement program and further set back needed reform efforts.

In addition, there is now growing a new crop of federal spending initiatives that cover broadband, the Internet, and the high-technology

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sector in general. Although not a formally unified effort, the combined effect of federal legislative activity on this front is tantamount to the creation of what might be called a ''Digital New Deal.'' That is, just as policymakers proposed a litany of ''New Deal''' programs and spending initiatives during the Depression, lawmakers are today devising myriad new federal programs aimed at solving the many supposed emergencies or disasters that will befall industry or consumers without government assistance. The recent troubles of the dot-com and telecommunications sectors have only added fuel to the fire of interventionism.

The new communications-, cyberspace-, and Internet-related spending initiatives that policymakers are considering, or have already implemented, can basically be grouped into four general categories: (1) broadband deployment; (2) digital education, civic participation, and cultural initiatives; (3) cybersecurity; and (4) research and development. Dozens of new federal programs were proposed in those areas during the past two sessions of Congress. And dozens of other promotional programs already exist.

The dangers of this cyberpork should be obvious. Washington subsidy and entitlement programs typically have a never-ending lifespan and often open the door to increased federal regulatory intervention. Political meddling of this variety could also displace private-sector investment efforts or result in technological favoritism by favoring or promoting one set of technologies or providers over another. Moreover, subsidy programs aren't really necessary in an environment characterized by proliferating consumer choices but also uncertain market demand for new services. Finally, and most profoundly, perhaps the leading argument against the creation of a Digital New Deal is that, by inviting the feds to act as a market facilitator, the industry runs the risk of becoming more politicized over time.

Congress should abolish the current system of federal entitlements and devolve to the states responsibility for any subsidy programs that are deemed necessary in the future. A federal telecommunications welfare state is not justified. If schools desire specific technologies or communications connections, for example, they can petition their state or local leaders for funding the same way they would for textbooks or chalkboards: through an accountable, on-budget state appropriation. There is nothing unique about communications or computing technologies that justifies a federal entitlement program paid for by hidden telephone taxes while other tools of learning are funded through state and local budgets.

Rejecting New Paradigms Based on Old Regulations

As Congress looks to reopen and revise the Telecom Act, it must be wary of proposals to adopt new regulatory paradigms that are really little

more than a repackaging of the misguided schemes of the past. In particular, some policymakers have become enamored with so-called Net neutrality and network layers regulatory paradigms.

Network layers models divide our increasingly packet-based Internet world into at least four distinct layers: (1) content layer, (2) applications layer, (3) logical/code layer, and (4) physical/infrastructure layer. The layers model is an important analytical tool that could help lawmakers rethink and eventually eliminate the increasingly outmoded policy paradigms of the past, which pigeonhole technologies and providers into discrete industrial regulatory categories. That does not mean, however, that the layers model should be taken a step further and be formally enshrined as a new regulatory regime. In particular, a layer breaker should not be considered a lawbreaker. Vertical integration across layers can create efficiencies and ensure that firms achieve the scale necessary to become major competitors.

Net neutrality regulatory models are built on the layers model and are also at war with the notion of vertical integration. Net neutrality mandates would limit efforts by physical infrastructure owners to integrate into other layers, especially content, on the grounds that infrastructure providers will leverage market power in one segment of the industry into another and destroy innovation in the process. Net neutrality proposals illustrate how the layers model could be used to restrict vertical integration in this sector by transforming the layers concept into a set of regulatory firewalls between physical infrastructure; code, or applications; and content. You can offer service in one layer, but not another.

Quite obviously, Net neutrality mandates or a network layers paradigm would entail a great deal of ongoing regulation of the communications and Internet sectors. But such regulations are not needed in today's marketplace since it has grown increasingly competitive. Net neutrality or network layers regulation would discourage added facilities-based competition and innovation by instead opting for the short-term optimization of activities on current networks at the expense of longer-term investment and innovation. Finally, the regulatory regime envisioned by Net neutrality mandates would also open the door to a great deal of potential ''gaming'' of the regulatory system and allow firms to use the system to hobble competitors. Worse yet, it will encourage more FCC regulation of the Internet and broadband markets in general.

Agency Power

Finally, Congress must rectify what may have been the Telecom Act's most glaring omission: the almost complete failure to restrain or cut back

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the size and power of the FCC. During previous deregulatory experiments, Congress wisely realized that comprehensive and lasting reform was possible only if the agencies that oversaw the sectors involved were also reformed or even eliminated. In the telecom world, by contrast, the FCC grew bigger and more powerful in the wake of reform, and we witnessed spending go up by 37 percent, a tripling of the number of pages in the *FCC Record*, and 73 percent more telecom lawyers after the act than before. It is safe to say that you cannot deregulate an industry by granting regulators more power over that industry.

This situation must be reversed to achieve lasting reform. The next cut at a Telecom Act must do more than just hand the FCC vague forbearance language with the suggestion that the agency take steps to voluntarily regulate less. Regulators cannot be expected to voluntarily reduce their own powers. Congress needs to impose clear sunsets on existing FCC powers, especially the infrastructure sharing provisions of the last act. Sunsets must also be imposed on any new transitional powers granted to the FCC in the next revision of Telecom Act. And funding cuts should also be imposed. Without such agency reforms and cuts, Congress will be forced to continuously revisit telecom policy and correct the FCC's mistakes, which markets could handle on their own.

Cleaning Up the Telecom Industry Tax Mess

Regulation is not the only thing holding back America's communications and broadband sector. Burdensome and unique tax rules also remain a serious threat. That is largely due to the fact that policymakers at the state and local levels have long treated this sector as a cash cow from which they could draw substantial sums. They justified such heavy levies by arguing that the industry was a natural monopoly. But the telecommunications industry is no longer being treated as a regulated monopoly, so policymakers should stop taxing it as though it were. That is, as competition comes to communications in America, tax policies based on the regulated monopoly model of the past must be comprehensively reformed.

Some of the taxes are federal in nature and can be addressed by Congress or the FCC. A good example is the federal 3 percent excise tax on telecommunications put in place during the Spanish-American War of 1898. That anachronistic tax should be repealed immediately. And the hidden taxes associated with the E-Rate, or ''Gore Tax,'' program should also be repealed or at least devolved to a lower level of government for administration.

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The more problematic tax policy issues, however, arise from burdensome state and local mandates. For example, many states impose discriminatory ad valorem taxes on interstate communications services by taxing telecommunications business property at rates higher than other property, driving up costs for consumers. Federal protections against such taxes—already in effect for railroads, airlines, and trucking—should be extended to telecommunications. Many governments impose multiple and extremely high taxes on communications services. Such taxes should be slashed to a single tax per state and locality, and filing and auditing procedures should be radically streamlined. Finally, taxes and tolls on Internet access should be permanently banned since those charges represent a burdensome levy on the free flow of information and the construction of new interstate broadband networks. The recent congressional effort to extend the Internet Tax Freedom Act moratorium on Internet access taxes as well as other ''multiple and discriminatory'' Internet taxes, was a good start that should be broadened to incorporate tax protection of other services including nationwide VoIP and wireless offerings.

Rejecting New Cable Regulations

The American cable and satellite sectors are dramatic examples of what free markets can accomplish once regulators step out of the way. The direct broadcast satellite (DBS) industry didn't even exist 25 years ago but today offers hundreds of channels of service to every American home. And after Congress repealed the disastrous price controls mandated by the Cable Act of 1992 as part of the Telecom Act, the cable sector responded with $85 billion in new investment, hundreds of new digital channels, and high-speed Internet services. Cable firms are also rapidly deploying competitive phone service to square off against telephone giants.

Instead of celebrating this as a great capitalist success story, many members of Congress complain that consumers now have *too much* choice from cable and satellite television, but not the choice they are looking for. Some legislators are proposing that cable and DBS companies be forced to give customers the ability to pick and choose every channel on an à la carte basis, instead of picking from tiers of service with their dozens of bundled channels. In theory, an à la carte mandate would presumably give cable subscribers more choice and help lower overall rates since consumers could reject more expensive channels that inflate the cost of any given tier. In reality, however, mandatory à la carte regulation would have potentially devastating implications for the cable

industry and consumers alike and would result in less channel choice and higher prices in the long term.

Consider first the cost of time for both industry and consumers. Presumably, an à la carte mandate would require that cable operators provide each household a channel checklist (either on paper, online, or over the phone) that would need to be filled out. In a 500-channel universe, how many hours will consumers need to spend on their computers, or on the phone with cable representatives? Second, the technology upgrades that would be necessary to make à la carte a reality could be quite expensive. An ''addressable converter box'' would need to be installed in each home to ensure that channel selections could be properly scrambled if they were not selected by the consumer. Thus, ''cable ready'' TV sets would no longer be an option; everyone would need a set-top box under an à la carte system, and that means higher costs for many households since most currently do not have such boxes.

More important, à la carte regulation would undermine the economic model that has driven the success of the cable sector and helped create so much program diversity. Proponents of à la carte foolishly assume that program bundling and tiering hurt consumers when, in reality, the exact opposite is the case. Sometimes the whole is much greater than the sum of the parts. For example, newspapers bundle issue sections together instead of selling them individually because an à la carte approach would not attract as great a customer or advertiser base. The same is true of cable and DBS. Programming tiers that include a diversity of channels increase value for advertisers and consumers alike. And if advertising dollars dry up, cable bills will likely increase.

Thus, à la carte regulation would likely curtail the overall amount of niche or specialty programming on cable networks. The current tiering approach keeps many smaller channels afloat. In fact, as a business matter, many programmers refuse to sell their channels to cable operators unless they are included in a specific tier. An à la carte regulatory mandate would need to nullify existing contracts in order to immediately offer consumers unrestricted channel choice. But doing so would likely cut back the overall range of consumer choices in the long term. And how would consumers even find new niche channels in an à la carte environment? An October 2003 General Accounting Office report notes that ''subscribers place value in having the opportunity to occasionally watch networks they typically do not watch.'' In other words, viewers place a high value on channel surfing since it allows them to sample new channels and programs. But

à la carte regulations would discourage that process and suppress the development of new niche programming options. For those reasons, the GAO report argued that à la carte regulation would have dangerous unintended consequences, namely, diminished consumer choice, less program diversity, and a likely increase in overall rates.

Equally insidious are regulatory proposals to break up existing tiers and create new bundles that offer consumers different types of programming options (perhaps over ''mini-'' or ''micro-tiers.'') In particular, some people suggest that requiring cable and DBS operators to offer ''themed'' tiers, such as a ''family-friendly'' tier, might be one way of expanding consumer choices or helping ''clean up'' cable and satellite TV. This is dangerous thinking. A themed-tier programming requirement potentially puts Congress or the FCC in the content regulation business with a vengeance. If video programmers are required to offer the public a ''family-friendly'' tier of programming, it means someone must define what that term means. The ''light touch'' regulatory approach would simply mandate that firms offer such a tier but then allow the interaction of operators, program suppliers, and consumers to determine what fell into that mix. But how long would it be before some consumers cried foul about one channel or another, which they did not regard as being truly ''family friendly,'' being thrown into that mix?

Enough consumer complaints would likely produce calls for government assistance in defining ''family friendly.'' Hence, a censorship regime is born. A regime based not necessarily on direct regulation of certain channels, programs, or content (although that might be the end result) but instead an indirect censorship regime based on ''regulation by raised eyebrow,'' in which policymakers provide informal feedback to cable and DBS operators regarding what they'd like to see included in any ''family-friendly'' tier. In the end, neither Congress nor the FCC has the legal authority to censor programming that appears on private video networks. Cable and satellite television are not licensed to operate ''in the public interest'' like broadcasters and, therefore, cannot be subjected to the same sort of indecency regulatory scheme that covers broadcasters. But à la carte regulation or ''themed-tier'' mandates might force this question in the courts and lead to protracted legal battles that would benefit neither industry nor consumers.

Spectrum Reform and Privatization

The Telecommunications Act largely ignored the wireless sector and spectrum reform in general. That was a highly unfortunate oversight

by Congress, given the ongoing problems associated with centralized bureaucratic management of the electromagnetic spectrum. For more than seven decades, the FCC has treated the spectrum as a socialized public resource, and the results have been predictable: gross misallocation, delayed innovation, and the creation of artificial scarcity.

In recent years, however, the FCC has gradually come to accept the logic of a free market in spectrum allocation and management. The shift to the use of auctions in the early 1990s was a major step forward in this regard. Previously, all spectrum allocations had been made through comparative hearings or random lotteries. Although not all new spectrum allocations are made through auctions, many are, meaning that people who value the resource most highly are now obtaining the spectrum.

Moreover, the FCC has recently signaled its interest in allowing spectrum license holders greater flexibility in use to ensure that this valuable resource can be put to its most efficient use. Although the agency has not yet followed through on this reform, recent FCC Spectrum Policy Task Force meetings and initiatives suggest that the agency is at least moving in the right direction.

But auctions and flexible use, while important steps, are not enough. The task of spectrum reform will be complete only when policymakers grant property rights in spectrum. Just as America has a full-fledged private property rights regime for real estate, so too should wireless spectrum properties be accorded the full protection of the law. As long as federal regulators parcel out spectrum under a licensing system, the process will be a politicized mess. The alternative—a pure free market for the ownership, control, and trade of spectrum properties—should be a top priority.

To begin this task, Congress should grant incumbent spectrum holders a property right in their existing or future allocation. That means spectrum holders would no longer lease their allocation from the federal government but instead would own it outright and be able to use it (or sell it) as they saw fit. That also means that all arbitrary federal regulatory oversight of the spectrum would end, including content or speech controls on broadcasters. Federal regulators would be responsible only for dealing with technical trespass (interference) violations and disputes that arose between holders of adjoining spectrum.

Auctions should be used to allocate scarce spectrum to which there are competing claims. Auctions should not be one-time events; they can be ongoing as spectrum claims develop and multiply. Policymakers should not rig the auctions in any way, either to favor certain demographic groups

or to artificially boost the amount of money raised for the federal Treasury by such auctions. The primary goal of spectrum auctions is to allocate spectrum to its most highly valued use by offering it up for competitive bidding, not to funnel money into the federal coffers.

Under this new system, spectrum owners—better thought of as ''band managers'' of the bands of spectrum they will own and manage—would henceforth have complete freedom to use, sublease, combine, or sell spectrum in any way they saw fit. Government agencies and public-sector users should purchase the spectrum they need at ongoing auctions. It should be noted that government agencies already control a significant portion of the spectrum, so under this scheme, they would be granted rights to their existing holdings. Congress or state governments should ensure that public-sector spectrum users have money in their budgets for ongoing spectrum acquisition.

Finally, as Table 41.1 shows, regarding spectrum ''commons'' areas—or portions of the electromagnetic spectrum that are less scarce and can be shared by many users without assigning specific rights—the government has three options: (1) It can directly allocate certain bands of spectrum for commons use, much as it purchases large portions of land for public parks, and then open those areas to common use. (2) At the opposite end of the spectrum, so to speak, government could simply rely on private band managers to contract with independent users to create commons areas within their allocation. Practically speaking, however, it might be very difficult for commons areas to develop under this model, given the need for coordination across many bands. The transaction costs would be enormous. (3) A compromise between those two extremes would be for public officials to designate certain ceilings and floors above and below which certain noninterfering uses of the spectrum would be tolerated. In spectrum parlance, those ceilings and floors are known as ''overlay'' and ''underlay'' rights or areas. That is a quite practical solution, as such ''easements'' already exist today in some bands of the spectrum.

Those three options represent practical and legitimate solutions to the need for ongoing spectrum commons areas. One option, however, should be taken off the table, the pure commons regime for the spectrum. Some spectrum engineers and academics—infatuated with the exciting technologies emerging today that enable reuse and efficient sharing of the spectrum—have called for adoption of a pure spectrum commons model to govern ongoing spectrum allocations. Those theorists believe that new technologies such as software-defined radios and smart antennas can allow

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Table 41.1
Property Rights vs. a Spectrum Commons: What Are the Options?

	Requires Ongoing Regulatory Oversight	Requires Little Continuing Oversight
Emphasis on Importance of Property Rights	**Ceilings and Floors—Easements Model**: Use auctions and property rights for mutually exclusive uses but impose federal ceiling and floor requirements ("easements") above or below which band managers have no control. So long as they do not meaningfully interfere, allow unlimited overlay or underlay across all private bands. Possible historical models: airline traffic above private property or subsoil mineral or oil drilling rights.	**Pure Property Rights Model**: Grant incumbent spectrum holders property rights in their allocations. Use auctions and property rights for new mutually exclusive uses of spectrum. Grant spectrum owners the absolute right of excludability and flexible use. Rely on private band managers to subdivide and sublease portions of their band to common uses.
Emphasis on Importance of Commons	**Public Parks Model**: Most of spectrum fully privatized but feds (perhaps states and localities or even private associations) purchase large swaths of spectrum and open it up for free use to create a spectrum commons. Or the FCC could just generously expand "Part 15" rules for unlicensed spectrum.	**Pure Commons—Homesteading Model**: No exclusive property rights. Let overlay and underlay users tap into spectrum as they wish and fight about the interference later in the courts or have faith that new devices ("agile radio," or software-defined radios) will allow everyone to work things out voluntarily.

users to infinitely divide the spectrum and shatter the notion of spectrum scarcity in the process.

But that is a stretch. There will almost certainly be *some* scarcity at work within the spectrum, just as there is for all natural resources. If nothing else, the limits of the human imagination create scarcities within the spectrum. More practically, commons areas are likely to encourage overuse and congestion, which will force many parties to search out

privately managed bands where they could pay a premium for uninterrupted use. And the commons crowd does not have a useful transitional solution to the issue of spectrum incumbency. Existing users, many of whom have controlled a specific swath of spectrum for several decades, would not take lightly the idea of sharing their allocation with newcomers. And a good case can be made that they should not be forced to share that spectrum, given their long-standing control and use of the resource. It would be better to grandfather them into a property rights model by granting them complete ownership and flexible use rights to that spectrum.

Under the property rights regime envisioned above, the FCC would get out of the spectrum management business altogether. Residual regulatory functions, such as the adjudication of interference disputes or international coordination, could be left to some sort of ''spectrum court,'' which would be a set of administrative law judges with particular expertise in resolving technical spectrum disputes.

Congress and the FCC are currently engaged in an effort to balance private and commons spectrum by putting some spectrum up for auction and exclusive use while setting aside other chunks of spectrum for commons or unlicensed uses. That is an experiment worth continuing, but the balance should not tilt too far in favor of unlicensed set-asides since evidence shows that a commons is rarely the most efficient way of ensuring the optimal use of a resource. Private ownership ensures that owners understand or incur the opportunity costs associated with misallocation of resources. Consequently, markets—including spectrum markets—tend to work best when most property is owned by someone. Nonetheless, a good argument can be made that some spectrum should be set aside for unlicensed spectrum applications—from garage door openers and TV remote controls to regional ''wi-fi'' and ''wi-max'' broadband networks.

Ending Arbitrary Media Ownership Regulations

Following the June 2, 2003, release by the FCC of revised guidelines regarding media ownership structures, a remarkably contentious debate erupted in Congress and the general public over this arcane regulatory matter. Although the FCC's order only moderately revised existing standards, many special interest groups and members of Congress mounted a vociferous campaign to overturn the new FCC rules. The critics of media decontrol argued that the FCC's liberalization of ownership rules would result in greater levels of industry consolidation and, more generally, be ''bad for democracy'' because it would result in ''fewer voices.''

On the objective question of whether media are more concentrated today than in the past, the evidence suggests this claim is generally untrue, with some sectors showing slightly greater levels of concentration but others actually exhibiting less. Of course, such comparisons with the past are complicated by the fact that the media marketplace has evolved rapidly in recent decades and entirely new technologies and industry sectors have emerged and displaced older ones.

The critics of media decontrol have actually had greater success with their subjective and quite emotional sociopolitical rationales for media reregulation. But claims about a lack of ''diversity'' and scarcity of ''high-quality news and entertainment'' do not square with marketplace realities. Again, if objective facts are taken into account, such emotional rhetoric and hypothetical fears are found to be baseless. Indeed, by all impartial measures, it is difficult to see how citizens and consumers are not better off today than they were in the past. Regardless of what the underlying business structures or ownership patterns look like, the real question should be ''Do citizens and consumers have more news, information, and entertainment choices at their disposal today than in the past?'' The answer to that question is an unambiguous yes.

What, then, explains the unusual passion of the pro-regulation media critics? It generally boils down to the fact that a lot of people have an axe to grind with the media for one reason or another. Psychologists describe this as the ''third-person effect'': self-proclaimed media ''experts'' and cultural elitists will often overestimate the influence that mass media have on the attitudes and behavior of others, all the while arguing that the media have no impact on them. That phenomenon helps explain why critics on both the left and the right decry ''bias'' in media, when in reality they are just concerned that particular programs are not to their liking and don't want others in the public to hear those viewpoints.

To correct for such perceived ''bias,'' many cultural elitists want to remake the media in their preferred image, arguing the quality of news or journalism can be improved through structural ownership controls among other regulatory methods. Others have a love affair going with the notion of ''localism'' in broadcasting and journalism; they are committed to doing whatever it takes to preserve it even though they don't always make it clear what that means or how it should be accomplished. Finally, others simply loathe the fact that the media business is a business at all and declare that commercialism has destroyed diversity and quality in American journalism and entertainment.

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But while the media critics keep complaining, the media marketplace keeps evolving and now offers citizens more choices than ever before. Ours is now a world characterized by information abundance, not information scarcity. Information and entertainment cannot be monopolized. Today's media marketplace is a dynamic sector subject to intensely competitive pressures. It would be impossible for any single entity or individual to control the flow of information and entertainment in a free society, especially considering the nature of the new technological age in which we live.

Policymakers must decide if the debate over media ownership policy will be governed by facts or fanaticism, evidence or emotionalism. The hyperbolic rhetoric, shameless fear-mongering, and unsubstantiated claims, which have thus far driven the absurd backlash to media liberalization, have no foundation in reality and must be rejected.

Suggested Readings

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