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A Fresh Start in Communications Policy

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A FRESH START IN COMMUNICATIONS POLICY[1]

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A country that leads the world in the development of the technologies that have revolutionized communications services should not have a second-rate system for regulating those services. Our communication policy is an embarrassment to the United States and a bad example to other countries. Fixing the economy, Social Security, and the health care system may be more pressing, but repairing America's communications policies should be on the agenda as well. The new President and Congress should try to make America's communication policy worthy of America's communications technology and its people. But that will not be easy.

This brief essay offers an overview of what needs fixing and why, and of the obstacles to reform. I suggest two specific policy initiatives, both aimed at loosening the persistent grip of obsolete decisions on current policy. One useful reform would be to permit spectrum users to resell or repurpose their frequencies, so long as no new interference is created for other users. A second helpful reform would mandate that all individual rules and regulations contain provisions for automatic expiration after a term of years.

WHAT'S WRONG? -- *The process*

"Communications policy" refers to how we regulate electronic mass media, Internet and telephone services. American communication policy is a mish mash of laws, rules and regulations—over 300,000 words of statutes alone and five printed volumes in the *Code of Federal Regulations*, accumulated over the past century. In addition the fifty states each has its own set of communication policies and local regulations.

Communications policy is not just law and regulation, it is also the daily bread of a *community* made up of thousands of specialized lawyers, lobbyists, labor unions and industry associations, consultants, regulators, and congressional staffers. The community has its own daily newspapers, weekly magazines, online pundits and blogs; and its own argot. In principle the community helps the government decide what communication policies are in the public interest. In practice the cost of joining and participating in the community is prohibitive for all but relatively small groups with strong economic interests. The interests of ordinary citizens as taxpayers and consumers are not well represented, except by single-issue activists, usually from ideological polar regions. Non-participation by individual consumers and voters is rational. None of this is unusual in Washington; similar communities exist for transportation, health, environmental, energy, financial, and tax policy.

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Communication policy is made, of course, by commissioners, senators and representatives heading relevant committees or subcommittees, presidents, judges, and by their staff advisors, interacting with each other and with the greater communication policy community. The formal interactions are governed by laws and procedural rules known as "administrative law." Decision-makers hear daily from highly-paid, skilled advocates, none representing the ordinary consumers who often bear the costs of regulatory goodies over which the economic interest groups are tussling.

None of the players in this game pursues Platonic ideals. There is no way to understand our current communication policies except as the outcomes of complex bargaining among industry groups competing for government favors. The reality is that communication policy consists of compromises, brokered by public officials, among the various economic and political interest groups, heavily weighted in favor of the best-financed, most articulate and politically influential. These outcomes have been worked out over the past century and are now embedded in laws, regulations, and legal precedents, much of which survives today.

Taking a wider view, our political system can be viewed as an elaborate game in which elected officials pursue political advantage by catering to the economic and other goals of competing interest groups—what the Founders called "factions." It is necessary to keep these factions in the game in order "preserve the Union," meaning the coalition of interests that constitutes our nation. Key factions and potential coalitions of factions must feel that they are better off being part of the system than out of it; compromise must seem preferable to the costs and risks of some form of secession. Our system is structured to reward politicians who respond to the incentives created by interest group competition and the art of compromise. The system has been remarkably successful, producing only one bloody civil war in more than two centuries; that war is a useful reminder that the alternative to compromise can be very costly.

Keeping the coalition intact is a praiseworthy endeavor, and the politicians who work to do so should be praised. But human nature seems to require more than the considerable gift of political stability, a condition that is frankly boring and sells no newspapers. We crave high ideals and lofty rhetoric—the dangerous cant of extremist true believers—for which the slogans of work-a-day politicians may seem an unsatisfactory substitute. Hence the importance to these officials of the myths that the system is designed, and that politicians are obliged, to seek "the public interest" at the expense of the "special" interests. The truth is that the system, broadly speaking, serves the public interest by keeping the special interests in the game. Unfortunately, the contrast between the rhetoric and the reality probably contributes to the general disrepute of elected officials.

The accumulation of compromises would make for an even less coherent and stable set of policies than we have, were it not for the role of the federal courts in supervising regulators. Generally, of course, courts do not recognize "compromise among interest groups competing for government favors" as sufficient justification for regulations. Most policies must be couched or de-

fensible in terms of a "public interest" standard. The courts seek consistency, insisting that new compromises be capable of rationalization in ways consistent with prior rationalizations. New regulatory actions also have to be articulated in the language of the underlying assumptions and precedents of communication policy—what I call the community's "foundation myths."

Like many nations and indigenous peoples, the communications policy community does have foundational myths. One is the idea that the enterprise is concerned directly with the public interest, as opposed to the political regulation of the pursuit of economic advantage.

Many other basal myths, particular to communications policy, are mostly mistaken or outdated—but precedential—assumptions about the technology of telecommunications, such as the notion that the radio waves are uniquely scarce, the idea that television is still the only medium for political ideas to reach the public, or the idea that telecommunication companies retain intractable monopoly power. Obeisance to these myths sometimes restricts the ability of government officials to broker compromises, and often preserves obsolete laws and regulations—that is, policies that reduce consumer welfare and are no longer relevant to a compromise among contending interest groups.

What does it mean for a policy to be "bad," given the preceding understanding of the political process? The answer is simple, at least from an economic perspective. Among politically feasible compromises, we should choose those that make consumers as well off as possible. If a policy harms consumers and is not required to achieve or sustain the resolution of a significant conflict among current interest groups, it should be abandoned. In forging solutions to political conflicts, no more consumer welfare should be sacrificed than necessary to resolve the problem. This is common sense and obvious to all, but too little observed.

WHAT'S WRONG? -- *The outcomes*

Example: Phone service

Behind the facade of public interest rhetoric, foundation myths and techno-babble argot, the big picture of current communication policy is easy enough to understand. Let's start with the telephone business. The federal and state governments regulate telephone service because telephone service used to be a monopoly. During the monopoly period the FCC, Congress, and the old Bell System connived to create valuable perks for various special interests, such as low rates for citizens of rural states.

The old monopoly Bell System had no interest in providing rural telephone service—it left that to hundreds of small companies and cooperatives. Nevertheless, the Bell System did promote rural telephone service by agreeing to charge its urban customers prices higher than the cost of service, and using the extra revenue to subsidize prices charged to rural telephone companies in exchange for protection from competition itself. The money for the rural-state special interests was extracted from other phone customers, by charging them higher prices. Urban telephone cus-

tomers, rich and poor alike, paid higher rates so that telephone service in, for example, Oklahoma, could be cheap for rich and poor alike. The slogan for all this cross-subsidization was "universal service," the idea that it would be a good thing if everyone, however remote, who wanted a telephone should have one, whatever the cost to other telephone customers.

All of this may have made political sense during the period between the two world wars, a period when rural life was particularly brutal and rural telephone suppliers were at odds with the Bell System monopoly. Such subsidy schemes cannot be sustained in a competitive market, because consumers have choices. When competition finally arrived in the telephone industry a generation ago, the obvious policy would have been to abolish the universal service subsidy, which by then was producing much cheap multi-line telephone service for the rural vacation homes of the urban rich. Today, the character and size of the rural population and the structure of the telephone industry no longer require a "universal service" subsidy. Assuming that the reality of the cross-subsidies and the rhetoric of universal service was a satisfactory solution to a conflict of interest groups in the 1920s and 30s, it cannot be so today. Why is the system still in place?

Congress made the "universal service fund" into law as part of the Telecommunications Act in 1996, mandating subsidies not only for rural telecommunications services but also for rural health and education providers. Congress also expanded the definition of telecommunications to include internet service, and to pay for all this, it decreed, not that the government would pay, but rather that everyone who was not on the list of those subsidized would pay—through higher rates for telephone and internet service.

None of this makes the slightest economic policy sense. Alaska has now become the poster child for the absurd set of cross-subsidies that benefit all rural states. It is one thing to help poor people, it is another to help Senator Ted Stevens (who happened to chair the relevant Senate subcommittee) get re-elected by subsidizing citizens of a state that distributes, at present, $1,700 in surplus oil royalties to every resident. Poor people, whether rural or urban, can be helped far more effectively with targeted direct subsidies.

The new tax scheme requires that regulation continue, even though monopoly has disappeared and most of rural American has been depopulated. As a result the FCC and the states continue to supervise a telephone industry that is increasingly competitive. Most Americans already can buy telephone service from five or six independent providers. Telephone service prices are so low that long distance service is now effectively a commodity item—but nevertheless priced higher for most customers than it would be without regulation. The mere existence of continued regulation offers opportunities for the FCC and Congress to pander to new special interests.

Perhaps the simplest explanation is that it was far easier for Congress in 1996 to cater to the relatively weak economic political interests still benefitting from the obsolete universal service system than to abolish the system. The beneficiaries of abolition (ordinary telephone customers) had

little or no political muscle, or even awareness of the issue, and hence were weaker still. The status quo had acquired its own unfortunate inertia.

Example: Mass media

The background story with mass media service is much the same as with phone service. As everyone knows, America started out with a great idea: freedom of the press from government censorship. But the Supreme Court later decided that censorship of broadcasters was okay because stations were using the government-owned radio spectrum, and there wasn't enough of that commodity to go around. The FCC took on the task of regulating the content of radio and TV stations, and later of broadcast networks. In the days when most citizens received their information and embedded social cues from programming provided by just three radio or TV networks, many believed this policy a sound one. After all, in the 1930s and 40s the reputation of government was much improved, relative to business, and the excesses of George III and Lord North a distant memory. And in any event the *printed* press was still free of censorship.

But the same technological revolution that hit the telephone industry also transformed the electronic mass media. In place of three television networks we now have hundreds. Thanks to the internet, information and social cues no longer are under the control of any small group of suppliers. Mass media content today is even more responsive to consumer demand than it was in the days when only three networks sold eyeballs to advertisers. And even totalitarian governments have failed in efforts to control use of the internet by ordinary citizens.

Still, we continue to regulate electronic media content. Why? Some on the left advocate continued regulation of electronic mass media because they see media "moguls" still deciding the content of what the public views. These advocates confuse cause and effect. At any given time a huge fraction of the public demands whatever is popular, but what is popular by definition changes constantly. Fashion is driven by random events, creative effort, marketing skill and consumer demand, not mogul power. The moguls are merely the alertest imitators, forced by competition to drive what is popular out of fashion. Anyone who complains about mass media content is complaining about the public's tastes, and media moguls' forced pursuit of it.

Advocates on the right reach the same policy conclusion—that federal regulation of media content is righteous—but by a different route, placing all their emphasis on the single issue of "family-friendly" media content. The right seems unmoved by the contradictions between this position and its traditional distrust of government and emphasis on literal constitutional interpretation.

In spite of extremist support for government regulation of the electronic media, it seems very doubtful that either the Congress or the courts today would *initiate* (or permit) such intervention, were it not already in place. A policy that began as a political compromise involving a minor industry (radio broadcasting in the 1920s) has been preserved long after the relevance of the compromise has faded.

Thus, pointless FCC regulation of broadcast content continues, focused on such silliness as penalties for out of bounds football half-time entertainment and radio shock jocks. More seriously, the courts and Congress so far have consented to the expansion of FCC content regulation to the new mass media. Given the decline and likely demise of printing as a technology of mass communication, it seems we will eventually have no medium of expression to which the press freedom of the First Amendment applies. The Supreme Court will have a chance in the 2008 term to rethink the whole matter when it hears Fox's challenge to one of the FCC's recent acts of censorship.

SOLUTIONS -- *Overcoming grid lock*

Communications regulation is carried out by the FCC. The agency has a lot of discretion, but it does not set communications policy by itself. Congress tells the FCC what policies to pursue, and the federal courts also are in the game. Appellate courts have very little respect for the FCC's ability to make sound policy judgments, and FCC decisions are frequently second-guessed and overturned. Liberal judges overturn Republican policies and conservative judges overturn Democratic policies. Communication policy is grid locked because so many players have a veto, because most issues seem arcane and technical to the public, and because almost any proposal for change threatens the profits of favored industry groups while stimulating frantic lobbying by potential beneficiaries or victims of change.

The President has the power to appoint a majority of the FCC commissioners and to name the chairman, though in most administrations the President's role in communication policy has been small. But any President can choose to be a communication policy leader, and when that happens, real change can occur. For example, the Nixon administration blocked a move by Comsat and the FCC to monopolize domestic communication satellites. The result was healthy open competition in the delivery of video programming to broadcast stations and cable TV systems, and later, direct to homes. This was key to the creation of dozens of competing video networks. The Nixon administration also set the groundwork for the antitrust case that led to the breakup of AT&T. Earlier, President Lyndon Johnson played an important role in the creation and federal funding of the public broadcasting system, at a time when the number of commercial broadcast channels was strictly limited by FCC policies.

Not all presidential interventions are as high minded or as successful as those of Johnson and Nixon. President Reagan, acting at the behest of his old friends in Hollywood, intervened at the FCC to stop a reform that threatened the profitability of the movie studios. The reform had to wait another decade. President Clinton's vice president, Al Gore, played an unusual direct role in policy making at the FCC and participated in forging the 1996 Telecommunications Act. The 1996 Act made it the law of the land that the communication business should be opened up to more competition and deregulated. The FCC was directed to pursue that goal. But more than ten years later, nothing of the sort has taken place. Instead the Republican FCC, members of both parties in Congress, and several federal courts have blocked deregulation and even proposed

creation of new regulations. Wholesale reform simply failed. Too many interests benefit from regulation or would be out of work in an open market.

This experience seems to indicate that a President can achieve significant improvements in communication policy by targeting a few key issues and using the power and prestige of the presidency to bowl over the normal Washington resistance to change. It is tempting to propose another attempt at wholesale reform, but that seems quixotic, and most of the hot-button issues of today—net neutrality, bundling, universal service, various mergers and ownership issues—seem too ephemeral. Instead, I propose two reforms that are in essence procedural. I believe these reforms have the potential to make significant long run improvement, mainly by undermining the power of inertia to preserve obsolete policy.

RECOMMENDATION 1

Resale: Permit licensees to use or sell their spectrum for any purpose that does not interfere with others

The use of spectrum today is mostly determined by dead people. Right now, all spectrum users, even those who paid billions for their licenses in FCC auctions or by purchasing from prior licensees, must continue to use their slices of spectrum as originally intended. If someone holds a radio broadcast license first awarded in 1936, that's all it can be used for today—radio broadcasting at a given frequency on the AM band at a certain location with a specified number of watts, and so on. Never mind that the spectrum assignment could be used far more productively for cell phone service, wireless internet access, or something else without causing interference with other users. The licensee today can sell its spectrum assignment to anyone it wishes (except felons or foreigners), but the new owner can only run an AM radio station. This makes no sense. There actually is an ancient principle in trust and estate law called the "Rule Against Perpetuities," that limits the ability of dead people to control the use of property forever, from the grave.

The historical reason for this really bad rule is the assumption that the late FCC engineers and commissioners got it right when they decided in the 1930s and 40s how much of the then-usable spectrum should be used for, say, AM broadcasting as opposed to taxicab radios. Common sense tells us that the decisions they made, even if sound at the time, cannot possibly still be correct today. But the FCC sticks with the status quo, meaning that any potential improvements in the efficiency of spectrum use must take place, willy nilly, only as new technology opens up room at higher and higher frequencies, and others cannot take place at all.

The benefits of this initiative go far beyond efficiency in spectrum use. A major economic benefit is that anywhere suppliers of communication service are overcharging customers, entrants can get the spectrum they need to build new capacity, driving down the prices consumers have to pay for service. A major political benefit is that industry participants with existing licenses are no longer bound to spend millions to block reform; now they can put their spectrum to its most valuable use. Even federal government spectrum users, such as the Department of Defense, for

which huge swaths of spectrum are now reserved, would benefit. The department could sell off its unused spectrum to help fund other defense communication activities, and it could buy spectrum for any new needs that arise, just as it procures other goods and services.

What's not to like about the initiative? The only obvious problem is the interference issue. Suppose someone claims that interference is taking place. How will we deal with such disputes? It turns out that we already have a solution. Engineers can (and already do) measure interference—it is nothing more than the profile of the licensee's signal (frequency, power, etc.) at specific locations. To achieve optimal levels of interference (which are not zero), simply set the level of interference that currently exists as the norm. More interference than that requires the licensee either to stop the interference or to negotiate a deal with anyone who complains. A right to be free of interference could be enforced by civil proceedings at the FCC or in the courts, using the existing tools for real property rights. The vast majority of interference claims would be settled out of court.

RECOMMENDATION 2

Sunset: Terminate rules which embody obsolete political compromises

It is a healthy thing, in general, that Washington produces political compromises. But political compromises when embodied in law or regulation have a downside. They stay in place long after the politics and economics that produced them are long forgotten. Legislative and administrative procedures make it much harder to get rid of old policy than to enact new policy. The need to respect founding myths gets in the way of house cleaning. The experience with the 1996 Telecommunications Act illustrates this point dramatically. Even an Act of Congress is powerless to force regulatory reform at the FCC.

There is only one way to solve this problem: "sunset rules." If every component of the entire corpus of communications regulation automatically expired by law at a certain date after adoption, at least the rules would reflect current political compromises, rather than old ones. Moreover, rather than requiring an effort and a majority of the FCC or of Congress to get *rid* of a bad rule, an effort and a majority would be required to *keep* a bad rule. This is potentially a big difference.

Congress in 1996 passed up its chance to rely on sunsets. Instead, the FCC was ordered to review its rules at regular intervals and to deregulate gradually, as increased competition reduced the need for regulation. Although not explicit in the language of the Act, the implicit message was that old obsolete regulations must go. That sounds sensible enough. Why didn't it work?

It turned out that most FCC rules (and many provisions of regulatory statutes) simply don't make sense to begin with, except of course as compromises among competing interests. For example, the FCC sought to ease a rule limiting the number of TV stations one company can own. But because the original rule was itself arbitrary from a rationalist perspective, the Commission could

not come up with a "rational basis," either for the original standard or the new one. One standard was an old political compromise; the other standard was a new political compromise. The courts keep overturning FCC attempts to "adjust" such limits. The procedural result is that the old rule remains in place. This reinforces the status quo bias of other features of administrative law.

Establishing a sunset regime for existing rules and statutes doesn't automatically eliminate policies that injure consumers. There is a sunset rule in place now, for example, for the regulation that requires many program producers not to sell on an exclusive basis to cable systems (as opposed to satellite broadcasters or other multi-channel video services). Every five years or so, the FCC has to review the rule, and so far has renewed it each time. The non-exclusivity rule is bad for consumers because it reduces the incentive of the various video services to develop new programming as a means of competing for viewers. As a result, the programming by cable and satellite operators is pretty much the same. First enacted back in the early 1990s when satellite broadcasting was new, the non-exclusivity rule was intended to protect satellite broadcasters from being outbid for programming by cable operators. Satellite broadcasters are no longer new entrants requiring such protection from competition.

Still, sunset keeps hope of reform alive. Every five years the satellite broadcasters' arguments for protection get weaker, and a majority of the FCC gets harder to obtain. The lesson of the example is that policies harmful to consumers may survive the political bargain that gave rise to them, even with sunset provisions, because their rents continue to generate economic incentives for political action.

CONCLUSION

It is often laudable and no evidence of corruption or incompetence that politicians use compromise to resolve conflicts among economic interest groups, even if they do so at the expense of consumer welfare, because consumers also have an interest in "preserving the Union." We need to accept that this produces policies that cannot be explained rationally as supporting a narrow consumer welfare objective. But keeping the coalition intact is not the only legitimate task of government. Consumer welfare should not unnecessarily be sacrificed to resolve current conflicts, and consumer welfare losses attributable to policies that resolved obsolete conflicts should be stemmed. Foundational myths that no longer serve a useful purpose should not be allowed to prevent improvements in consumer welfare that threaten no extant political interest.

In communications policy we can take two modest procedural steps, steps that will permit technological progress and shifting industrial structure to improve consumer welfare more quickly than will otherwise be possible. First, we can permit spectrum users to do what they like with their spectrum, subject to the usual competition laws, so long as they create no new interference with other users. Second, we can create a presumption in the law that any regulatory provision becomes defunct after a number of years fixed at the time of enactment, unless its proponents

can convince the majority anew that the provision makes sense. These steps, like the Rule Against Perpetuities, would improve the lot of the living, and provoke only the dead.

Notes

Resale of spectrum rights

Using markets to allocate the radio spectrum has long been advocated by economists. Ronald Coase, "The Federal Communications Commission," 2 *Journal of Law and Economics* 1-40 (1959). Pablo T. Spiller and Carlo Cardilli, Toward a Property Rights Approach to Communications Spectrum 16 *Yale Journal of Regulation* 53-84 (1999). A market of sorts in spectrum rights was developing prior to nationalization of the spectrum in 1927; see Thomas W. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," 33 *Journal of Law &Economics 133-175* (1990). A Johnson administration task force on communications policy commissioned a study of how salable spectrum rights might best be defined; see Arthur De Vany, et al., "A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study," 21 *Stanford Law Review 145-162 (*1969). A principal barrier to adoption of a property rights system in spectrum is the implied legitimization of scarcity rents in the hands of existing rights holders, an outcome offensive to many. But the offense is based on a misconception. The scarcity rents accrued to the original license holders many years ago. Most licenses today are held by parties who purchased them directly or indirectly from the original holders for prices that included the value of the scarcity rents. Thus, spectrum resale creates no windfall for current licensees.

Sunset provisions

Sunset provisions have been around for a long time. The Roman republic automatically terminated delegations of dictatorial and military powers at the conclusion of the terms of the Consuls. Thomas Jefferson wrote that every law "naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right." (Thomas Jefferson to James Madison, 6 September 1789, enclosure in Jefferson to Madison, 9 January 1790, in Julian P. Boyd ed., 15 *The Papers of Thomas Jefferson* 392-97 (Princeton, 1958). Political scientist Theodore J. Lowi more recently explored use of sunset provisions in his well-known book *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (Norton, 1969). See also Mark R. Daniels, *Terminating Public Programs: An American Political Paradox* 34 (M. E. Sharpe 1997); Bruce Ackerman, "Sunset Can Put a Halt to Twilight of Liberty," *The Los Angeles Times* (September 20, 2001).

Behavior of reviewing courts

See Thomas J. Miles and Cass R. Sunstein, "Depoliticizing Administrative Law," *Harvard Public Law Working Paper No. 08-16* (June 26, 2008).