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Responses

Thomas G. Krattenmaker

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Responses

Thomas G. Krattenmaker*

The editors have kindly given me time and space to reply to the commenters.[1] For the most part, I have confined my responses to the papers individually, rather than attempting to discuss them collectively. Accordingly, I say a few words about each paper below. I take them up alphabetically, by the last name of the first author.[2] Before that, however, I want to say two general things about these papers.

First, I am truly overwhelmed and gratified by them. That each of these authors, every one a distinguished professional in her/his own right, took the time and care to study and comment upon my article is one of the finest acts of generosity I have ever received, an act for which I feel quite undeserving. I am very grateful to every contributor to this symposium for suggesting that I might have written something worth reading.

Second, so did they! I think these papers, as a whole, greatly expand and enrich the piece I wrote. All the papers together paint a more deeply textured picture of the 1996 Act than any one, including mine, standing alone. I wish I could incorporate them all by reference.

To get the full story on universal service, one must read not only my paper but Professor Campbell's comment as well. Professor Levi provides the detail I missed on content regulation and licensing issues. Messrs. Rosario and Kohler explain, as I did not, how state law will be affected by the new Act. Professor Robinson illuminates virtually everything I discuss; here, I note specifically how he puts flesh on my review of the provisions of the Act that unshackled local exchange carri-

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* *Dean and Professor of Law, William and Mary School of Law.*

1. Not unreasonably, the editors did impose time deadlines on me. Consequently, my comments respond, in some cases, to not-quite-final drafts. I apologize to any commenters whose revisions went unnoticed.

2. Except that Professor Hazlett's comment is discussed at the end.

ers, freeing them to enter allied fields, such as long distance telephony and cable television. Professor Spitzer adds substantially to my treatment of the motivation for, or momentum behind, the Act. Henry Geller puts in perspective one central issue—discipline by markets versus discipline by regulators—while Professor Becker highlights another key question—the aspirations we have for the beneficial deployment of telecommunications technologies.

To all the commenters, then, thank you. Thank you for your care. Thank you for improving "our" product . . . . OK, enough! No more Mr. Nice Guy! Here's what I *really* think:

Becker

Professor Becker quite rightly reminds us that we need to confront clearly the underlying factual assumptions and value choices that animate our criticisms of regulation and of markets. He and I agree that regulation is not a good thing in and of itself.

After that, we appear to part company. Professor Becker's complaint notwithstanding, I have indeed provided a rather extensive description of the kind of regulation and the kind of telecommunications system I advocate. This required an entire book, *Regulating Broadcast Programming*, which I co-authored with Professor Lucas Powe. I believe readers of that book will find in there a complete description and defense—of course, not necessarily persuasive to all—of the regulatory regime and telecommunications system I would welcome. In the present article, I was constrained by page limitations to settle for a summary of the book's conclusions, the four principles that Professor Becker notes in his critique. To the charge of ignoring to lay out the premises, I plead not guilty. Brevity—perhaps undue brevity—I concede.

Note, however, that what I did is still more than what Professor Becker does. Where are his fact and value assumptions? Anyone can describe things on television they do not like. What is Professor Becker's plan for improving the situation? Surely, it cannot be more government content regulation of broadcasting. We had lots of that in the 1950s. Does Professor Becker think the broadcast industry was more effective in educating and uplifting us in the 1950s than it is now?[3] Does he think that more regulation can get broadcasters to put

3. If he is, he should read Chapter 11 of THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING (1994) which dispels the myth that there once was a Golden

on Mario Cuomo every time they air Rush Limbaugh?[4] He is too smart for that.

It is easy to talk (or write) about how we live in an imperfect world. I thought we all knew that before we turned on the word processor. My paper addresses the questions of how we might make the world of telecommunication a little bit better and whether the new Act helps or hurts in that regard.

What is Professor Becker's answer to those questions? As far as I can tell, he believes telecommunication would be better if it produced more entertainment that entertained him and more information—such as how to deal with the welfare bureaucracy or to dodge bullets on the way to school—that Professor Becker thinks people other than he ought to want. These, he seems to believe, we can achieve by more regulation (perhaps even if he is not the regulator).

The reason we need regulation, according to Professor Becker, is that "telecommunications today . . . is already perhaps the chief mechanism through which our society informs itself about the world around it, and carries on the discussion and debate essential to a properly functioning democratic society."[5] For those who do not have the time to plow through Professor Powe's and my book, I suggest this easier test of Becker's thesis: Newspapers in the period 1870-1930 appear to fit his definition of telecommunications today. Do you agree with Professor Becker that extensive federal regulation of the content of newspapers in that period would have improved our moral, spiritual, financial, or intellectual well being? Would our ancestors have been better off had they lived in a world in which people of the caliber of, say, Interstate Commerce Commission commissioners ruled the media of mass communications?

I am afraid that what I have said will sound as though I have some personal animus toward Professor Becker. Quite the opposite is true. I have the highest regard for his insights. What this response reflects is rather my frustration at the willingness of even our most intelligent analysts to call for regulation, without describing the regulation they desire or how it will operate on real people, simply because they can

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Age of Television.

4. If he does, he should read Chapter 9 of REGULATING BROADCAST PROGRAMMING, *supra* note 3, which dispels the myth that the FCC's "Fairness Doctrine" was a doctrine or that it had anything to do with promoting fairness.

5. Loftus E. Becker, Jr., *Comments on "The Telecommunications Act of 1996," by Thomas G. Krattenmaker*, 29 CONN. L. REV. 175, 176-77 (1996).

describe a better world.

Let's talk, then, about implicit premises. At bottom, I submit, the implicit assumption in Professor Becker's critique is that regulation will make us better off because he will be the regulator. Yet, as he and we know, people with Professor Becker's talents, energy and empathy are rarely appointed to administrative agencies and have never been in the majority of one for any time. Professor Becker's views—and mine—are much more likely to be counted in the marketplace of ideas than in the marketplace of regulatory politics so aptly described by Professor Spitzer in his contribution.[6]

Campbell

Professor Campbell's paper is a very valuable addition to this symposium. She provides a clear, comprehensive, and quite fair description of the universal service provisions of the new Act and their origins. As I suggested in my principal paper, I believe that the universal service aspects will prove to be some of the most important and most contentious features of the Act. Her road map to the universal service features of the 1996 Act will prove very helpful to all of us, as the law and regulations in this area unfold.

Another advantage of Professor Campbell's paper is its contribution to a study of the political economy of the Act. Her description of the origins of the universal service provisions contains interesting illustrations of some of the points advanced by Professor Spitzer. Professor Campbell shows how people—no matter how wealthy—who live in rural areas are given special treatment principally because some senators from states with large rural populations were strategically positioned to affect the bill.[7] She also reveals that low income consumers were added to the list of protected interests only at the last minute, virtually as an afterthought.[8]

Nevertheless, we may be sure that the universal service provisions will be defended as a measure to alleviate the conditions of poverty.

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6. Regarding universal service, I regret that my article did not make sufficiently clear that I was complaining about the new Act's strategy of obtaining universal service through internal cross-subsidies. As to universal service as a general policy, divorced from the issue of achieving it by disrupting efficient low cost business arrangements, please see my response to Professor Campbell.

7. Angelia J. Campbell, *Universal Service Provisions: The "Ugly Duckling" of the 1996 Act*, 29 CONN. L. REV. 187, 190-91(1996).

8. *Id.* at 191.

Certainly, this is what both Professor Campbell and Professor Becker do. In this regard, I fault Professor Campbell's paper for two omissions.

First, she does not tell us why we should tell low income people or people who live in rural areas that they have a very strong need for cheaper basic telecommunications services. Universal service is not free; it does not grow on trees or float along in the air for us to pluck it. At the moment, subsidized basic phone service is provided courtesy of people who make long distance phone calls and who, while doing so, pay inflated access charges to compensate local exchange carriers for providing "universal service." Some of the people who make long distance phone calls live in rural areas or are low income consumers. Why, they might ask Professor Campbell, have you decided to increase our long distance bills in order to lower our basic connection charges?

Indeed, one might push the point somewhat farther. Why have we decided—on behalf of Americans who live in rural areas, low income consumers and high school principals—that what they need most is cheap Internet access? What if they would rather have a cheap hot breakfast every day? Or more disposable income? Universal service is paid for with dollars collected by artificially keeping the prices of some telecommunications services above their costs.[9] Why should we not choose to spend those dollars to subsidize hot meals for low income consumers or high school students or (rich and poor) rural dwellers? In truth, if these folks are so worthy—and I certainly agree that some of them are—why don't we give them the dollars? Why do we know better than low income consumers what are those consumers' most compelling unfulfilled wants?

Professor Campbell's first omission, then, is to tell us why rich and poor telecommunications service consumers should be taxed to provide cheap telecommunications services to rich and poor telecommunications service consumers. How do we know that this tax is a good strategy to raise welfare dollars and that the dollars are being well spent?

Professor Campbell's second omission is her failure to explain what the new Act's universal service features portend for the future of competition in telecommunications markets. In particular, other provisions of the new Act seek to facilitate competition in local, wired telephony markets by encouraging new firms to offer services by leasing necessary facilities from entrenched local exchange carriers. What is to pre-

9. Or more above their costs than they otherwise would be.

vent the existing firms from convincing state regulators that every new entrant must be directed either (a) to price above cost in order to support the universal service fund or, (b) if its services are sold to low income or wealthy rural subscribers, to price below cost? Both pricing patterns, of course, forestall entry, thus protecting incumbents.

Now, however, it is time for my concession speech. Whatever I might think about employing a system of internal cross-subsidies to preserve cheap Internet access for vacationing skiers in Vail, Professor Campbell's views about the utility of such an expanded universal service mechanism have won out. Congress voted her proposal up and voted mine down. The second half of her paper provides an excellent road map to the issues that arise in implementing the universal service requirements, as well as an articulate defense of those requirements. This part of Professor Campbell's paper will, I believe, be a major contribution to the telecommunications literature for some time to come.

Geller

Henry Geller and I seem to agree on most of the particulars of the new Act. Where he and I part company, it appears, is in the lessons we take from the history that both of us have observed.

With me, Henry Geller agrees that the universal service provisions of the Act are unfortunate. We think it is decent policy to extend telecommunications services to the poor, but see no reason to include people living on ranches or in ski resorts in the definition of "poor." Nor do we believe that internal cross-subsidies are a useful mechanism to expand telecommunications services.

With Professor Levi and me, Henry Geller believes that content regulation of radio and television is a bad thing. He cannot understand, nor can I, the desire to single out for censorship the broadcast method of publication. He would not subject editors to the peril of guessing how to comply with vague dictates.

With me, Henry Geller believes that our system of awarding licenses and parceling out the spectrum does not work well. He would go to a system of auctions, with the high bidders allowed to use the spectrum in a wide variety of ways.

What have I learned from these experiences? That we do not need a Federal Communications Commission charged with micro-managing the processes of competition in telecommunications.[10] What has Henry

10. As I point out in my principal paper, there might be other reasons to have a commis-

Geller learned? Astonishingly to me, Henry Geller apparently has learned from this history that it is good for Congress to cheer on the FCC as it micro-manages competitive processes where the Commission has not yet failed miserably.

Thus, Geller applauds what he describes as the "micro-managing" of the process of telephony.[11] We need this, he says, to get through a transition period. Similarly, Geller applauds the FCC's effort, backed by the new Act, to "facilitate [conventional television broadcasting's] transition into digital broadcasting," after having noted that there is no practical need for this oversight.[12] But, it will help with the transition period.

What is not said is this: *Every* failed policy that Henry Geller now laments was once defended as a necessary bit of micro-managing, needed just to get us through a transition period. Most regulations promulgated by most industry-specific regulatory agencies have been defended that way.

Henry Geller, an astute and intimate observer of telecommunications regulation for several decades, knows these things. And he knows, further, that every one of these regulations takes on a permanent life of its own as it generates a constituency that makes money from the regulation and therefore needs to be placated, before the agency and in the Congress, before the regulation can be altered.

And so it will become with the "micro-managing" of the "transitions" from monopoly to competition in wired local exchange service and from analog to digital, high definition television. One does not need a Ph.D. in prophesy to foretell the futures of these rules. Each will spawn an industry dependent for its livelihood on the rule's retention. These rules will stymie efficient innovation, deter entry, and confer greater wealth on the already wealthy.

Henry Geller, ten years from now, will observe these things and explain that he does not favor the rules. But, he will note, we could use some FCC micro-managing—while Congress cheers in the background—of these new problems that have just emerged in, say, Internet regulation and in competition among fixed microwave service providers.

There is no limit to my admiration for Henry Geller's grasp of the history of telecommunications regulation. I remain puzzled, however, by

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sion, but with much reduced powers.

11. Henry Geller, *The 1996 Telecom Act: Cutting the Competitive Gordian Knot*, 29 CONN. L. REV. 205, 207 (1996).

12. *Id.* at 211.

the lessons he draws from the history he knows so well. I guess I learned the old aphorism backwards. I thought it taught that people who *do not* read history are doomed to repeat it.

Levi

Professor Levi on paper is like Professor Levi in person: a very sharp—but at the same time gentle—lawyer with a distaste for extreme solutions. One can only salute a paper that reflects such qualities. But, in my judgment, the sensible middle course she suggests has already been tried and found wanting.

My paper said some pretty contemptuous things about the licensing process and especially the comparative licensing process. The paper left unsaid, as Professor Levi figures out, even more contemptuous things.

Professor Levi does two things that I think are very valuable and inarguably so. First, she insists that the licensing process be given a more scholarly and more respectful burial. Her analysis of the history of broadcast licensing controls is a model of accuracy and clarity. Second, excellent communications law scholar that she is, Professor Lev notes something I did not—and wish I had: The new Act can be read to open the door to the FCC promulgating many broadcast censorship rules that it will then enforce in the licensing process with more "bite" than any we have seen to date. Further, indications to date are that this is precisely the way the present FCC chair will read these provisions of the Act.

With Professor Levi, I agree that this latter course is a bad idea. With Professor Powe, I wrote a whole book about that idea[13] and hope that Professor Levi's comment may boost its sales. If my response to Professor Becker is one of abrupt passion, Professor Levi's equally stringent critique of his argument is more one of measured reason.

I part company with Professor Levi when she suggests that the FCC not "abdicate any licensing oversight in favor of rubber-stamping renewals without searching review of compliance with the Act and the FCC rules."[14] Government has no authority to condition continuance of the privilege to publish upon some governmental review of its past performance. That is the lesson—a lesson worth heeding—not only of

13. REGULATING BROADCAST PROGRAMMING, *supra* note 3.

14. Lili Levi, *Not With a Bang But a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996*, 29 CONN. L. REV. 243, 287 (1996).

the more modern *Pentagon Papers* case,[15] but also of the seminal case of *Near v. Minnesota.*[16]

My objection to Professor Levi's admonition to the Commission, however, is not only constitutionally grounded. Her protestations notwithstanding, I believe her suggestions are remarkably similar to—indeed, virtually identical to—the manner in which the D.C. Circuit, in the *Citizens Communication Center* case,[17] suggested the FCC should operate its licensing processes. Even the D.C. Circuit is no longer of that view, as Professor Levi herself explains, and I think she should abandon it, too, for the same reasons.

Let's agree that broadcasters have a duty to serve the public. Can we not also agree that this duty should be enforced by listeners and viewers turning the control knobs on their sets? Isn't this a better process than suspending the rule against prior restraints so that a small group of Platonic Guardians of the Airwaves can determine for us what we are fit to hear and see?

Robinson

My responses to Professor Robinson are, perhaps regrettably, more of the nit-picking variety. This is because, as any reader of both our pieces must realize, he and I appear to approach these issues in largely the same way. Thus, for the most part, all I can do is to commend his trenchant analysis—while lamenting that I did not say it as well as he. Some examples of Professor Robinson's particularly well taken points include, in my judgment, his discussions of the removal of group ownership limits for radio stations;[18] his very well illustrated point that efficient use of the spectrum does not require auctions, but rather the "development of flexible and tradable property rights in spectrum use";[19] his pithy summary and damning critique of the 1992 Cable Act;[20] his

15. New York Times Co. v. United States, 403 U.S. 713 (1971).

16. 283 U.S. 697 (1931). As Professor Powe and I show in REGULATING BROADCAST PROGRAMMING, *supra* note 3, at 180-84 had the courts merely applied *Near* to the activities of the Federal Radio Commission, we could have avoided a whole lot of mischief, not to mention some very bad constitutional, administrative, and broadcasting law. I am sorry that Professor Levi does not discuss how her proposals would square with the doctrine against prior restraint.

17. Citizens Communication Center v. FCC, 447 F. 2d 1201 (D.C. Cir. 1971).

18. Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 292-95 (1996).

19. *Id.* at 297.

20. *Id.* at 299-304.

succinct treatment of the V-chip issues;[21] and his lengthy and carefully balanced analysis of "the cyberporn problem."[22]

So where do we differ? Largely, I think, in some of his understandings of some of my positions. These misunderstandings may lead to a false sense of conflict or may mask real differences. I highlight here two such interpretive differences.

First, with respect to spectrum allocation and the assignment of additional stations to existing television licensees, the points I meant to convey were these. (1) We ought to allocate the spectrum efficiently, which means giving it to its highest valued use. (2) Providing an extra channel for each television licensee does not even pretend to accomplish this efficiency goal. (3) The usual rationales for substituting some non-efficient outcomes are that we need to expand the number of licensees, or to increase female or minority ownership of broadcast stations, or to expand the number of outlets to expand the number of networks. (4) Perversely, the new Act's determination that each licensee shall get another channel not only does not serve the efficiency goal, but it also retards achievement of the non-efficiency goals listed in point (3). To Professor Robinson's complaints that my objections are based on inconsistent criteria[23] and that I fail to raise "the appropriate question,"[24] then, I plead not guilty. Perhaps a charge of negligent draftsmanship on my part might, I confess, hold up in court.

Second, I think his analysis of the new Act's provisions respecting interconnection to local exchange carriers—or, perhaps more precisely, Professor Robinson's introduction to that analysis[25]—misapprehends my reservations. My hesitation to join the loud cheerleading over these provisions—as well as those freeing telephone companies to offer cable television services—stems from the simple fact that I suspect that the electronic transmission of encoded audio, video, or other data to the home via wire is a natural monopoly. If that suspicion is correct, then, the way to increase competition with firms laying wire to the home is to increase the competitiveness of non-wire carriers. I am not against efforts to facilitate wire facilities-based competition, but I am more strongly for stimulating competition from cellular telephony, personal communications services, multi-point distribution television and direct

21. *Id.* at 309-310.
22. *Id.* at 310-316.
23. *Id.* at 293-94.
24. *Id.* at 294.
25. *Id.* at 304-05.

satellite broadcasting. I am not, as Professor Robinson puts it, "only lukewarm on what most observers, around the world, regard as one of the stunning achievements of modern public policy."[26] Rather, I just do not agree that letting telephone companies offer cable television services is such an achievement, while I do believe that creating a commercial mobile radio service and a direct broadcasting satellite service and a true open pipeline common carrier Internet configuration are such stunning achievements.

To return to the positive side, I especially enjoyed Professor Robinson's concluding discussions. His lengthy analysis of the universal service issue[27] provides a nice contrast to that of Professor Campbell. The two really ought to be read together. I remain content with my conclusion that, whatever we ought to do about universal service, doing it with internal cross-subsidies is not wise.

Finally, some of his more intriguing observations occur in Professor Robinson's ruminations that he labels "*Regulation and Entitlement in the Information Age*."[28] Here he provides, inadvertently, his own responses to Henry Geller, similar to those I just offered. In a book I entitled *Telecommunications Law and Policy*, I asked whether supporters of the antitrust consent decree that broke up the Bell System ought to proclaim their approval of the decree by chanting, "The New Deal is dead; long live the New Deal."[29] My students usually think this is a joke. Professor Robinson knows it is not. He knows—and has illustrated in a most interesting fashion—that it has become standard operating procedure to accompany telecommunications "deregulation" with extensive regulatory oversight, detailed oversight that is conduct specific and outcome specific. He also knows that these regulations, to date, in most cases have increased the costs of doing business to existing firms and raised entry barriers to new ones—retarding rather than enhancing competition. He knows that today's regulation is often tomorrow's entitlement. These are reasons why we should look skeptically at those provisions of the new Act that call for regulatory intervention so massive that the Chair of the FCC can compare the agency's task with the Manhattan Project.

For these reasons, I am puzzled that Professor Robinson suggests

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26. *Id.* at 304.
27. *Id.* at 320-28.
28. *Id.* at 316.
29. THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW & POLICY, 514 (1994).

he is more enthusiastic than I about the new Act.[30] What source of enthusiasm has he discovered that I overlooked? Professor Robinson further complains that I have not been sufficiently clear in my conclusions.[31] Let me try again. Drawing frequently on many lessons that Professor Robinson has taught us, I believe that the new Act is good insofar as it reduces entry barriers and "bad" or "ugly" insofar as it does not. Further, I take comfort in the assurance that the Act can do no lasting harm to my grandchild[32] because in the long run telecommunications technology will overwhelm any barriers that Congress and the FCC try to impose.

Rosario & Kohler

I admire this article very much. My admiration does not, I hope, stem from the fact that the authors offer almost no quarrel with my analyses and criticisms of the 1996 Act.

Instead, the authors helpfully focus on the changes in *state* telecommunications regulation dictated by the new *federal* Act. To revert to my previous grading system, I would rate some of these changes as "good"—such as the prohibition on states erecting entry barriers not justified by compelling health and safety concerns.[33] I think some are "bad"—such as the Act's failure to provide a well defined path for judicial review of state commission interconnection decisions.[34] Others I judge to be just plain "ugly"—such as the conclusion that, although cable rate regulation is still in order, it is not in order for systems with less than 50,000 subscribers, for that reason alone.[35]

I think the authors agree with the grades I give to each of these specific examples. More importantly, I know that they have provided a very valuable catalog of the key issues of state law that the 1996 Act spawned.

Nevertheless, I remain a bit unsatisfied. The authors explain what state functions or policies the new Act threatens, but do not help us to evaluate these threats. What are the proper roles of state regulators in

30. Robinson, *supra* note 18, at 304, 328.

31. Robinson, *supra* note 18, at 293-94, 304.

32. Hi, Lance!

33. Discussed by Phillip Rosario & Mark F. Kohler, *The Telecommunications Act of 1996: A State Perspective*, 29 CONN. L. REV. 331, 333 (1996).

34. *Id.* at 336-37 and n.24.

35. *Id.* at 344-45.

telecommunications markets today?

This is a very hard question. It raises issues not only about the proper distribution of authority between market and regulatory mechanisms but also about allocating power vertically, between the states and the national government. One reason the vertical issue (as I will call it) is difficult is that it is hard to imagine why state lines should play any role in delineating the bounds of regulatory authority over telecommunications. Telecommunication is, after all, a product designed to transcend geopolitical boundaries and to knit together people widely scattered; we praise telecommunication for having these attributes. Offhand, I cannot think of a major telecommunications firm that does business solely within one state. When AT&T's local exchange business was spun off, the Bell Operating Companies were organized along regional, not state, lines. Indeed, given the technology and its achievements, one might say that the real issue should not be what authority the states possess, but rather why telecommunications regulation is not conducted principally at the international level.

Yet, the case for regulation below the federal (or international) level remains strong. Local regulatory agencies might, while competing among themselves, introduce and test novel regulatory standards and processes. We might all learn from observing these experiments. Consumers may benefit from more accessible regulators. For some issues—e.g., environmental standards to control siting of telecommunications facilities[36]—varying local rules seem to make sense. In other areas—control over Internet access and local distance phone rates come to mind—localism seems perverse.

Rosario and Kohler, then, in my estimation, have not only provided an excellent catalog of the state law issues emanating from the Telecommunications Act of 1996. They have also, by their carefully researched example, shown just how badly we need some theory or set of standards by which to judge the vertical distribution of regulatory power over telecommunications.

Spitzer

Professor Spitzer beautifully tells a fascinating and coherent story. What are we to make of it?

Professor Spitzer is correct that the portions of the Telecommunica-

36. *Id.* at 350.

tions Act of 1996 that deal with broadcasting can quite easily be understood as the reaffirmation of a political economy deal between Congress and broadcasters that was first struck in 1927. Indeed, Professor Spitzer quite rightly points out that this is what gets my goat. It is downright intolerable that we should allow the major medium of expression in this country to make a deal whereby for some free (or discounted) inputs and protection from entry barriers, the medium's owners agree to avoid controversy and to serve up only mediocre fare. One is hard-pressed to decide who is more blameworthy—Congress, for surrendering its responsibilities to uphold the Constitution, or broadcasters, for giving away freedoms they could enjoy in no other country in the world.

Perhaps in part because he is a long time student of this area of law,[37] Professor Spitzer understands the realities and possibilities of broadcast programming, and the federal regulation of broadcast programming, far better than Professor Becker. Yet, does Professor Spitzer really know what he's talking about?

We have a fairly complete historical record of the politics of the 1920s and a pretty detached vantage point from which to observe that record. Accordingly, I think we can be quite confident that the "original deal" that Professor Hazlett described, and which Professor Spitzer here recounts, really did happen. This might come as a surprise to the Supreme Court, which is fond of describing broadcast regulation as born out of the chaos that occurred when unregulated stations interfered with each other.[38] By now, however, I think everyone except the Supremes knows the truth: Congress, or at least the key people there who controlled the agenda on the issue of broadcast regulation, realized that "interference was not the issue, interference was the opportunity."[39] They and the broadcasters made a deal and the Federal Radio Commission and later the FCC carried it out.

That is, however, only historical interpretation. How do we know what is moving us today? If this political economy thing is so good, why can't it predict anything? Compare Professor Spitzer with Professor Levi. He says the new Act renewed an old deal; she says the new Act made possible a new deal. Aren't these conflicting claims equally

37. So there is, after all, some value to knowing the details before working on the mega-theory.

38. *See, e.g.*, Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969); NBC v. United States, 319 U.S. 190 (1943).

39. REGULATING BROADCAST PROGRAMMING, *supra* note 3, at 18 (quoting Professor Hazlett).

plausible?

Let me try to express my discomfort with Professor Spitzer's political economy another way. Suppose Congress had not added the Communications Decency Act of 1996 to the new Act, but rather had repealed every statutory provision that suggested—or even hinted—that the federal government had any powers to regulate "indecent" telecommunications. Could not Professor Spitzer also—and with equal plausibility—claim that this was a renewal of the old deal, cast in new form because of changed circumstances?

Professor Spitzer could tell us, perhaps, that given the incredible plethora of broadcast stations, licensees now find it much more valuable to compete for niche audiences. To do so, many of them need to cuss and show pictures of naked women. Meanwhile, Congresspersons watched Bob Dole rescue a campaign from the brink of bankruptcy by going to Hollywood and shrieking at a few television executives for making him watch shows he doesn't like. So, Congress "renewed the original deal" by giving broadcasters a pile of money, while the broadcasters gave Congress back a valuable political gift, a whipping boy.

If one can tell the story of the new Act *and* the story of its mirror image equally well in terms of a renewal of the original deal, what is the point of the storytelling? Candor, as well as my affection for Matt Spitzer, requires me to say that I do what he does all the time. Unable to find a coherent public interest rationale for the Act of 1927, 1934, or 1996 (not to mention the all time worst, the 1992 Cable Act), I find helpful the tools of political economy in searching for an explanation as to *why* these things happened. But I also have to remind myself—and am here (perhaps gratuitously) reminding Professor Spitzer—that the real job is to try to figure out what *ought* to be done (or perhaps more plausibly what ought not to be done) and *how* to bring it about.

Hazlett

Through no fault of Professor Hazlett or the editors of this issue, I received my copy of his commentary after I had already written my responses to the other comments. At this point the only fair (or the least unfair) thing to do is to take up his points here, even though I depart from the alphabetical ordering promised at the outset.

Much of Professor Hazlett's paper is an excellent review of the political dynamics, or the political economy, of the new Act. His and

Professor Spitzer's papers thus reenforce each other. Together they provide an excellent overview of the regulatory process as an exercise in bargaining over values to a (temporary) equilibrium point. My response to Professor Spitzer's comment reveals, I hope, both my admiration for this kind of work and my sense of its limitations.

Perhaps I should add, in light of Professor Hazlett's portrayal of the system, that the technology and the rules—what I call "convergence" and "legal balkanization"—did play central roles in this. It is only because the microprocessor made computers, telephones, televisions and radios indistinguishable—and made wireless cable and broadcast satellites possible—that the regulatory equilibrium of the 1970s came unstuck. Further, it was only because that previous equilibrium was dominated by legal balkanization (or, as Professor Hazlett prefers, regulatory apartheid) that a mammoth new Act had to be written—rather than, for example, just appointing some commissioners with new ideas to the FCC.

Although I enjoyed all of Professor Hazlett's commentary, I want to single out two parts for special praise. First, I admire his discussion of the difference (which I missed) between the FCC's video dialtone ("VDT") rules, which the new Act repealed, and the Open Video System ("OVS") alternative, established in the new Act. I had noted only that the VDT and OVS rules are substantively quite similar. Professor Hazlett importantly notes that the processes employed in implementing the two concepts are very different—the VDT rules virtually begged competitors to use the FCC's regulatory processes to retard entry, while the OVS rules do not give a similar opportunity to disgruntled competitors.[40] Hazlett's remarks remind us, more generally, that the processes of regulation, fully as much as the content of the rules, have direct bearings on the structure and behavior of the regulated industry. He makes the truly important point that genuine "deregulation" might focus as much on how the agency implements its rules as on the rules themselves. I wish I had said that.

A second aspect of Professor Hazlett's paper which I especially admire is that he took better care than I to identify all the winners and all the losers in this latest legislative attempt to make communications law relevant to the previous ten minutes of world history. In particular, I noted as he counted up the victims and winners that the victims were

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40. Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker*, 29 CONN. L. REV. 217, 231-32 (1996).

by and large those who move data by wire (cable operators, local exchange carriers), while the winners—that is, those untouched by the frenzy of reregulation that forms the core of the new Act—are largely those who move data by air (terrestrial broadcasters, commercial mobile radio services, satellite broadcasters, personal communications services). Not only are most of the latter incorrigible federal welfare recipients,[41] who get their key input—spectrum use—for free, but most of them got a free ride (or something close to a free ride) through this reregulation Act. I am not sure why this is so.

Finally, I must address Professor Hazlett's attempt to come to grips with the question I raised at the end of my article: What is the appropriate role for the FCC? He concludes that we need a regulator without discretion and thinks such a person might be a judge. I admire his bold and imaginative effort to take seriously the question I posed, but I cannot applaud the result he reaches.

In my judgment, many of the failures of the 1996 Act, both mistakes of commission and those of omission, stem from a deeper failure, a failure to ask why we have a Federal Communications Commission and what it might reasonably be expected to accomplish. Professor Hazlett agrees with this point, I believe, and he helpfully points to two functions—spectrum allocation and oversight of the conditions of network interconnection—that are enduring issues of telecommunications policy and for which a federal regulatory authority might be a wise solution.

But to suggest that this authority be a judge without discretion? Not a good idea. One is tempted simply to ask whether Professor Hazlett reads his own stuff. A regulator without discretion? How could anyone who has any official governmental authority to order or control behavior in telecommunications markets not possess discretion? How could the political economy of regulation ever produce such a character?

If such a thing might be produced, it could not be a judge. Judges are people. People have souls. People with souls have discretion because they have their own senses of right and wrong. No judge has *ever* said, "I do not like this result. I think it is bad for society and the parties to this case. Nevertheless, I am going to reach this conclusion because I lack discretion to do otherwise." No judge will ever say that,

41. Imagine what would happen if some legislator proposed that the new federal approach to welfare be applied to broadcasters, so that they had to get off the dole—that is, stop using the spectrum without paying for it—within five years.

even one selected by Professor Hazlett.[42]

It is almost quaint to imagine that one could solve the issues of spectrum allocation and network interconnection by handing them to a judge who lacks discretion. The suggestion, I think, speaks volumes, not about telecommunications law, but about non-lawyers' perceptions of the legal and judicial process. But, in this case, even the non-lawyers should know better. As Professor Hazlett himself notes, one effect of the new Act was to take some important aspects of telecommunications regulation away from a federal district court judge because no one was comfortable with such a system.

To put my criticisms in a more polite form and a more charitable light, Professor Hazlett does not mention that we will need to give this hypothetical judge without discretion some rules to follow. Given his description of the legislative process that yielded the Telecommunications Act of 1996, how does Professor Hazlett imagine that wise rules—and rules that leave no discretion to the judge who implements them—can be legislated for two of the most important and most enduring problems of telecommunications regulation: spectrum allocation and network interconnection?[43]

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42. Just as Professor Becker imagines a well functioning regulatory environment that controls program content because he assumes people like him will manage it, so Professor Hazlett can advocate what he regards as a tolerable system of regulation because, in his imagination, he can also invent a new species to administer it.

43. If there is a judicial model out there that will work, it is probably the model of antitrust law. Antitrust judges have done a remarkably good job of fashioning legal rules to protect competitive markets and restrict anti-competitive practices. The judges do not, however, perform this work without exercising discretion; nor do they necessarily do a better job than regulatory commissions. I think we will do better to chew on these kinds of issues than to search for a judge without discretion.