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# The Telecommunications Act of 1996

THOMAS G. KRATTENMAKER\*

President Clinton signed the Telecommunications Act of 1996<sup>1</sup> ("1996 Act," "new Act," or "Act") on February 8, 1996.<sup>2</sup> By that time, the spin masters were already in high gear, heaping superlatives on the bill. Clinton said the new Act was "truly revolutionary legislation that will bring the future to our doorstep."<sup>3</sup> I hope here to provide a somewhat more sober assessment of the bill. After all, a statute that defines "telecommunications" in a manner such that it includes the act of mailing a letter or throwing a newspaper on the lawn, cannot be all that special.<sup>4</sup>

Two features of this article should be noted at the outset because they somewhat limit its scope. First, every sentence in the remainder of this article is (at least a bit of) an over-generalization. This is a warn-

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\* *Dean and Professor of Law, William and Mary School of Law. I wish to thank Tom Koonce for his research assistance and F. John Barker for his editorial assistance. I am grateful to participants in the AALS Mass Media Law workshop and the William and Mary School of Law Colloquium series. I also wish to point out that at note 195 infra I disclose a minor, potential conflict of interest.*

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified at scattered sections of 47 U.S.C.).

2. Mike Mills, *Ushering in a New Age in Communications; Clinton Signs 'Revolutionary' Bill into Law at a Ceremony Packed with Symbolism*, WASH. POST, Feb. 9, 1996, at C1.

3. President William J. Clinton, Remarks at the Signing Ceremony for the Telecommunications Act Conference Report (Feb. 8, 1996) (text of speech can be found at White House Home Page (virtual library) <http://www.whitehouse.gov/WH/html/library.html>).

4. "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." See Telecommunications Act of 1996 § 3(a)(2), *adding* 47 U.S.C. § 153(r)(48).

As written, this section describes equally well a person mailing a letter and the same person sending a fax or telephoning and leaving a message on the recipient's answering machine.

ing, not a boast. The 1996 Act is a very lengthy and very detailed bill. Formally written as a series of amendments and additions to the Federal Communications Commission's ("FCC" or "Commission") basic charter, the Communications Act of 1934 ("1934 Act"),<sup>5</sup> the committee print of the law is 111 pages long. Major changes are made in the law affecting regulation of broadcasting, both radio and television, as well as cable and telephony. Less extensive alterations occur in satellite and spectrum regulation and in the FCC's own processes.

Given the new Act's breadth and depth, no article about it can be simultaneously and consistently readable, fully comprehensive, and utterly complete. If one is to say helpful or sensible things about the 1996 Act, one must to some extent speak broadly. Nevertheless, I remain quite sensitive to the charge that this article may appear to contain more pontificating than analysis; I hope that citations to underlying research, much of which I conducted myself, will further help to convince the reader that I have thought about these issues seriously.<sup>6</sup>

Second, for the most part, what the article says takes for granted the utility of a federal communications commission. This is not an idle point. The 1996 Act does no more than did the 1934 Act (or its predecessor, the Radio Act of 1927<sup>7</sup>) to explain a fundamental, but very contestable, policy choice that underlies U.S. regulation of telecommunications markets: Congress decided, in 1927<sup>8</sup> and again in 1934,<sup>9</sup> to regulate these markets through an industry-specific federal commission. No other medium of communication in this country is regulated in this fashion; we have no Federal Computer Commission or Federal Newspaper Commission, no Federal Internet Agency or National Institute of Theatrical Productions. There may, indeed, be good reasons why Congress created the FCC rather than simply subjecting owners of broadcast stations, cable systems, and telephone wires and switches to laws of general applicability — such as antitrust, labor and securities laws.

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5. Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-610).

6. See THOMAS G. KRATTENMAKER, *TELECOMM. LAW & POLICY* (1994) [hereinafter TLP]. When I cite to this casebook, I am usually citing to primary sources, or to the research work of others, as well. See also THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCASTING PROGRAMMING* (1994) [hereinafter RBP]; STANLEY M. BENSON ET AL., *MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC* (1984) [hereinafter MTV].

7. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, *repealed by* Communications Act of 1934, 48 Stat. 1064.

8. TLP, *supra* note 6, at 11-17.

9. *Id.* at 20-21.

But we do not know what these reasons are; we do know they are not self-evident.

One has to choose, then, between criticizing U.S. telecommunications law from within or without. Criticism from within would ask whether the 1996 Act is a good thing, *given* the presence and purposes of the FCC. Analysis from without would question whether the 1996 Act cogently identifies and then remedies defects in pre-existing, industry-neutral law as it would apply to telecommunications firms or markets. In this article, I choose largely to criticize from within the existing paradigm, although I drop this constraint in the conclusion. To take a concrete example, when Congress writes anti-monopoly provisions for certain telecommunications markets only and entrusts enforcement of them to the FCC, I do not ask in this article why the matter was not left to other federal agencies enforcing general antitrust principles. Rather, I ask only whether Congress seems to have devised wise rules, as they apply to the markets at issue.

## I. STATUS QUO ANTE

What was the problem? Why did Congress think a major overhaul of much of the telecommunications act was in order? What is the context within which we should read the 1996 Act? The answer, in two phrases, is "technological convergence" and "legal balkanization."

### A. *Technological Convergence*

"Telecommunications" is, quite simply, the electronic transmission of information (in audio, video, or simple data form).<sup>10</sup> The electronic data transmission is encoded at the sending end so that it may flow through the ether (the electromagnetic spectrum) at the speed of light or through wires (copper, coaxial cable, fiber optic, whatever) at very rapid speeds.<sup>11</sup> At the receiving end, the encoded information is decoded.<sup>12</sup>

As this simple description shows, telecommunications has value to people because it can transmit information very quickly and over long distances.<sup>13</sup> In this regard, telecommunications is, except for its elec-

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10. *Id.* at 29-31.

11. *Id.* at 30-31.

12. *Id.* at 30-31.

13. In many cases, telecommunications transmissions can also be rendered (relatively) secure

tronic features, like smoke signals.<sup>14</sup> These, too, are data transmission systems that carry information, encoded on one end and decoded at the other, at the speed of light. Telecommunications technology is largely regarded as an advancement over smoke signal technology because it can carry more information per second, carry it a greater distance, and provide more security against surreptitious monitoring.<sup>15</sup>

Thus, when Morse, Bell, and Marconi invented the telegraph, telephone, and wireless transmitter respectively, each pushed us further along a path already trod. What they added to the process of information transfer was the use of electrical energy to drive the system.

All this was comparatively new when Congress wrote the Communications Act of 1934. Everything seemed much simpler then. Electronic communications moved through either the air or wires.<sup>16</sup>

The market for communications through wires was a natural monopoly — who ever heard of two communications wires going into the same house? — and so the telephone and telegraph (after which the monopolist AT&T was named) were to be regulated as common carriers. Accordingly, those who wrote Title II of the 1934 Act essentially copied from the Interstate Commerce Act the then-standard features of public utility regulation and subjected telegraphy and telephony (i.e., AT&T) to such oversight.<sup>17</sup>

Conversely, electronic communication through the spectrum was broadcasting. This market was dominated by three radio networks (owned by two firms, CBS and NBC)<sup>18</sup> and so the task of regulation was to choose “the worthiest” applicants for stations and then to let them compete for listeners’ attention.<sup>19</sup> This competition would be kept within the bounds of good taste by the Commission’s oversight of programming practices.<sup>20</sup>

In 1934, then, telecommunications were characterized by technological balkanization. Telecommunication by wire was a natural monopoly,

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from eavesdroppers, thus increasing their value.

14. The smoke signal analogy is suggested by DON L. CANNON & GERALD LUECKE, *UNDERSTANDING COMMUNICATIONS SYSTEMS* 1 (2d ed. 1984).

15. TLP, *supra* note 6, at 29.

16. *See id.* at 20.

17. Milton Mueller, *Universal Service in Telephone History*, TELECOMM. POL’Y, July 1993, at 354.

18. *See* NETWORK INQUIRY SPECIAL STAFF, FCC, *NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION* VOL. II 49-59 (1980) [hereinafter NISS VOL. II].

19. TLP, *supra* note 6, at 20 & 77-84.

20. *Id.* at 14-17.

subject to common carrier regulation, characterized by speaker and listener privacy and virtually devoid of censorship. Telecommunication through the air was broadcasting, a conversation open to everyone, conducted through workable competitive markets, while censored by the FCC.

That was then. What is now? The perception of technological balkanization has yielded to the reality of technological convergence. Since the 1934 Act, we have witnessed satellites, microwave, television, computers (with their transistors and microprocessors), fiber optics, and the World Wide Web. These have shattered our previous illusion of tightly compartmentalized technologies.

Today, most Americans receive their television programming over a wire, the medium we call "cable television."<sup>21</sup> Millions of telephone calls every day in the U.S. are broadcast from cellular (mobile) telephones.<sup>22</sup> It would probably be impossible, and certainly difficult, to define today the difference between a telephone and a computer. Tomorrow, it will be equally challenging to distinguish a television set with a VCR and a cable connection from a computer with a monitor, CD-ROM, and a good modem.

In short, telecommunications technology is converging. More precisely, as illustrated by the preceding examples, we are witnessing a convergence of devices accompanied by a plethora of transmission paths. The telecommunications receiver is a radio, computer, television, telephone, VCR, and fax machine all rolled into one. We can get information to such devices by broadcast, microwave, satellite, tape or disk, copper wire, or optic fiber.<sup>23</sup>

## B. *Legal Balkanization*

Confronting, and obstructing, these technological developments were (and, to some extent, still are) a series of governmentally imposed entry barriers that sought to force the new and the old technologies into a Procrustean bed. These barriers attempted both to confine certain devices to certain limited uses and to limit the transmission paths telecommunications providers might employ.

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21. *Id.* at 24-25.

22. *U.S. Subscriber Base Increases by 36 Percent*, MOBILE PHONE NEWS, Mar. 25, 1996, no. 13, vol. 14, ISSN: 0737-5077.

23. See TLP, *supra* note 6, at 29-35.

For example, all of these assertions were true at the end of 1995 (and some still are): television stations cannot operate local cable systems;<sup>24</sup> but cable systems must carry television stations.<sup>25</sup> (On the other hand, firms sending multiple television signals to the home via satellite are effectively prevented from carrying network television stations.<sup>26</sup>) Telephone companies cannot offer cable television<sup>27</sup> — and cable television companies cannot offer telephony<sup>28</sup> — although both run wires for electronic communications into the same houses. In several states, almost everyone except the incumbent phone company is barred from offering telephone service to residential subscribers.<sup>29</sup> Here is one Rube Goldberg might have admired: most local telephone companies cannot offer long distance service,<sup>30</sup> nor can they manufacture<sup>31</sup> (although they can sell)<sup>32</sup> telecommunications equipment, but they can sell real estate,<sup>33</sup> although they may not offer cable television programming,<sup>34</sup> unless they neither select nor own the programs.<sup>35</sup> Broadcast stations may also use their frequencies to transmit some information to private, paying subscribers but only types of information authorized by the FCC.<sup>36</sup>

Why did we encounter all these entry barriers? Usually, for one of two reasons. The first, and most frequent explanation, is that we (claim to) fear predation. The issue of telephone entry into cable illustrates the two kinds of predation feared, discriminatory interconnection and predatory cross-subsidization. If telephone companies are allowed to offer cable television, it is said, they will be in a uniquely advantageous position to prey against their cable rivals. First, telephone companies could raise their cable rivals' costs by denying cable equal access to

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24. 47 C.F.R. § 76.501(a)(2) (1996).

25. TLP, *supra* note 6, at 354-76.

26. Section 119 of the Copyright Act gives satellite providers the practically necessary "compulsory license" for network stations only in those few areas not served by conventional or cable television. *See* 17 U.S.C. § 119 (1996).

27. TLP, *supra* note 6, at 565-87.

28. *Id.*

29. *See, e.g., In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 1996 FCC LEXIS 2063, ¶ 5 (Apr. 16, 1996).

30. TLP, *supra* note 6, at 543-53 (citing *United States v. Westvil Elec. Co.*, 900 F.2d 283 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 911 (1990)).

31. TLP, *supra* note 6, at 543-53.

32. *Id.* at 507-08.

33. *Id.* at 544.

34. *Id.* at 565-87.

35. *Id.* at 565-87.

36. *Id.* at 55-58.

necessary facilities, such as pole attachments.<sup>37</sup> I refer to this tactic generically as discriminatory interconnection. Second, while raising their cable rivals' costs, the telephone companies (telcos) could simultaneously artificially underprice their cable rivals by hiding costs of telcos' cable services in the costs of providing telephone dial tones. I call this tactic predatory cross-subsidization.<sup>38</sup>

A second, less frequently voiced, justification for legal balkanization of telecommunications is that we (claim to) fear disruption of a system of pro-social internal cross-subsidies. Local, residential phone subscription rates are as low as they are not because costs are that low but because we force the phone companies to jack up business rates in order to depress residential rates.<sup>39</sup> Taking money from businesses and giving it to consumers is said to be pro-social, regardless of the relative costs of the services involved. If we permit cable systems to offer phone service, they will just target the business users. This "cream skimming" will deny phone companies the wherewithal to subsidize residents' rates, which will therefore increase. Taking money from consumers and giving it to businesses is said to be anti-social, regardless of the relative costs of the services involved.

### C. *Motives for the 1996 Act*

From the vantage point just sketched out, we can discern the key reasons for the 1996 Act. I believe Congress and other opinion leaders reached three overriding conclusions about telecommunications law and policy that underlie the core of the new Act.

First, a consensus formed that the issue(s) of technological convergence should be answered more commonly by marketplace forces, less frequently by regulatory fiat. Policy makers believe (or profess to believe) that if telephony, radio, and television are to merge — or not to merge — that result should be driven by consumers making choices in open markets that express their preferences. Regulation is at most a second best method for deciding who will offer what telecommunica-

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37. This is what Steve Salop and I call the "bottleneck" method of raising rivals' costs. See Thomas G. Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 234-36 (1986).

38. This is a sophisticated, or special case of, predatory pricing. Unlike most alleged predatory pricing schemes, this one does not require the sacrifice of profits in the short run. For a fuller discussion see TLP, *supra* note 6, at 510-12 & 514-23.

39. *Id.* at 467.



tions services to whom.

As noted, however, unleashing market forces might also just lead to monopolistic predation rather than open bazaars in which many firms flourish. Accompanying the conclusion that we should subject convergence issues to the marketplace, then, was the conclusion that predation could (perhaps must) be avoided by appropriate regulatory oversight. The FCC's job description needed to be rewritten. The agency should not decide who could enter what markets, but rather should monitor the conditions under which such entry took place and the responses to such entry by those already there ("entrenched interests," if you prefer).<sup>40</sup> Tear down entry barriers, but replace them with specific regulatory instruments to hunt down predators.

Were this the entire story, it would be comparatively simple to retell. Indeed, we might then note that the 1996 Act was, at bottom, just an extension of the philosophy underlying the 1983 antitrust consent decree pursuant to which AT&T was broken into several parts.<sup>41</sup> But a third policy conclusion, beyond the preference for competition among technologies monitored by predator hunters, also deeply affects the new Act.

That conclusion is the continuing conviction that markets for telecommunications services ought to be governmentally managed so that they provide — and to some extent conceal — pro-social cross-subsidies. Baldly stated, non-predatory competition is not good if it leads to higher residential subscription rates for basic telephone services. Competition among broadcasters should not be permitted to generate a television system that does not provide closed-captioning, without charge, to everyone, or that does provide too much violence or talk about sex.

Think, then, of the Telecommunications Act of 1996 as an effort to hit a legislative trifecta:<sup>42</sup> (1) Entry barriers will be torn down so that legal balkanization no longer stands in the path of technological convergence. (2) As cross-cutting entry subsequently takes place all over the telecommunications field, the FCC will be charged with ferreting out predators and given special regulatory tools for this task. (3) Lest the new competition harm the most vulnerable, pro-social<sup>43</sup> cross-subsidies

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40. As we shall see, it is this conclusion especially that accounts for the fact that the new Act is just about as much regulatory as it is deregulatory in its provisions and effects.

41. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd* 460 U.S. 1001 (1983).

42. As explained in greater detail below, these three goals are not easily compatible with each other. Some of the law's less satisfactory aspects arise from its attempts to achieve simultaneously inconsistent goals.

43. I assume it is clear by now (if there was ever any doubt) that one cannot determine

will be maintained and even added to the value produced by telecommunications firms and markets.<sup>44</sup>

## II. HEADLINERS

Specifically, what did the 1996 Act do? An abbreviated version of it is appended to this Article, but I edited over half the words out of the Act to produce the appendix. Here, I am even less detailed, trying to identify the major changes and to do so in reasonably brief fashion.

### A. *Controls over Industry Structure and Commercial Practices*

The FCC has regulated telecommunications markets through controls imposed on industry structure or commercial practices (process regulations) much more frequently than it has imposed content (or outcome) regulations. Many headlines about the Act emphasized its censorship features, discussed below, but most of its provisions affect industry structure and commercial activity.

#### 1. *Radio*

The 1996 Act drops all limits on the number of AM and FM radio station licenses that any owner may control nationwide.<sup>45</sup> It also substantially raises the number of stations that may be commonly owned in any one market, varying the multiple ownership limit with the size of the market.<sup>46</sup> Of course, antitrust law continues to supply an upper limit on station consolidation.

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whether a cross-subsidy is "pro-social" without first making important, subjective value judgments, such as whether services should be provided below cost or how much we dislike gratuitous TV violence.

44. I am speaking here, of course, of the 1996 Act as it will be described in law, which requires that a public-regarding purpose be articulated as the basis for the statute. *See, e.g.*, the discussion of "rational basis review" in GEOFFREY R. STONE ET. AL., *CONSTITUTIONAL LAW* 532-38 (2d. ed. 1991). Outside courts of law, many better (or more interesting) ways to analyze the Act might be employed. For example, one might compare the sources and amounts of political action committee ("PAC") donations with final provisions in the Bill. Senators and Representatives may have voted for the Act out of a conviction that this was the best way to maximize their PAC contributions, their chances for reelection, or their likelihood of immortality, but these are beside the point of this article.

45. Telecommunications Act of 1996 § 202(a), *modifying* 47 C.F.R. 73.3555 (1996).

46. *Id.* § 202(b)(1), *modifying* 47 C.F.R. 73.3555 (1996). The new Act also changes, but less drastically, the group ownership rules applicable to television. *Id.* § 202(c), *modifying* 47 C.F.R. 73.3555 (1996).

## 2. Television

The next big development in television is expected to be the arrival of high definition television (HDTV).<sup>47</sup> This new method of propagating television signals produces a much clearer, richer, more textured picture — akin to what one sees watching a 35mm film in a movie theater.

HDTV signals, however, are incompatible with conventional television signals and so must be transmitted on a different frequency and cannot be decoded by conventional television sets. This creates a real transition problem: how does one offer HDTV without forcing all viewers to buy new sets right away?<sup>48</sup>

Several years ago, the FCC decided that it should manage the process of transition from conventional to HDTV technology and that conventional television broadcasters should take the lead in implementing HDTV. Conventional U.S. television stations broadcast in either the VHF (very high frequency) spectrum, where we locate channels 2-13, or the UHF (ultra high frequency) spectrum, where we locate channels 20-70. The agency determined that it could scrounge up enough UHF spectrum to give almost every existing full-strength television VHF or UHF broadcaster another 6 MHz, the bandwidth presently assigned for each television station. The Commission's initial plan was that each broadcaster would be offered an additional channel, on which it could broadcast HDTV, and that at some future time — presumably after most U.S. households had acquired HDTV sets — broadcasters would then be required to surrender one of their channels.

Two things happened shortly after that initial plan was announced. (1) The Commission started auctioning off spectrum that was being newly devoted to new common carrier technologies and the bidding went through the roof.<sup>49</sup> Politicians became enamored of the idea that

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47. Unless otherwise indicated the data presented here with respect to HDTV may all be found at TLP, *supra* note 6, at 281-93.

48. The puzzle is thus like that faced by the FCC when it moved the FM radio band. *Id.* All FM broadcasters' equipment became obsolete overnight and consumers had no radios (decoders) that could receive the new FM signals. The FM industry became a weak step-sister to the AM radio industry instantly and stayed that way for over two decades. See SYDNEY W. HEAD & CHRISTOPHER H. STERLING, *BROADCASTING IN AMERICA* 152-53 (1982). The puzzle is not like that faced by the Commission when color television was introduced. One does not need a color-equipped set to receive a color-encoded signal. Consumers do not need color receivers to decode transmissions of programs that are coded for color.

49. See Mike Allen, *Wireless Systems Put Out Their Antennas*, N.Y. TIMES, May 27, 1996 at A29; see also George Graham, *U.S. Broadband License Bids Start Today: Government Hopes*

spectrum auctions might materially reduce the national debt.<sup>50</sup> (2) Digital technology overtook analog technology and it is now agreed that any HDTV transmissions will be digital.<sup>51</sup> The 6 MHz channels will therefore be quite ample to broadcast four or five conventional signals<sup>52</sup> at once or HDTV plus some other types of information or two HDTV signals.<sup>53</sup> Putting (1) and (2) together made some people realize the enormity of the give-away the FCC had proposed.

The 1996 Act essentially protects the deal the broadcasters first wrung out of the Commission. Congress instructs the FCC that if the agency decides "to issue additional licenses for advanced television services,"<sup>54</sup> it "should limit the initial eligibility for such licenses"<sup>55</sup> to existing television broadcasters. Since one cannot conduct an auction with only one bidder, this ends the auction idea.<sup>56</sup>

### 3. Broadcasting

Two features of the new Act combine to grant virtually perpetual licenses to all radio and television stations. The basic term for all

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for *World's Largest Auction of Public Assets in Forthcoming Wireless Personal Telecoms Sell-off*, FIN. TIMES, Dec. 6, 1994, at 7.

50. See Edmund L. Andrews, *Digital TV, Dollars and Dissent: The Political Battle Grows over the Use of New Broadcast Technology*, N.Y. TIMES, Mar. 18, 1996, at D1; see also Paul Farhi *Clinton Proposes Radio Spectrum Auction; Benefits for Deficit, New Communications Technologies Seen*, WASH. POST, Feb. 18, 1993, at B12.

51. See Tom Foremski, *The Key Challenge Is Price - The Cost of Digital Television Sets Will Come Down in Price as New Chips Are Developed*, FIN. TIMES, Mar. 6, 1996, at XI.

52. Paul Farhi, *FCC Gathering to Decide on Fate of HDTV; Broadcasters Want Airwaves for Wireless Communications*, WASH. POST, July 27, 1995, at B9.

53. FCC Chairman Reed Hundt, Speech at the Museum of Television & Radio (June 6, 1996) (transcript available in < <http://www.fcc.gov/Speeches/Hundt/spreh626.txt>).

54. Telecommunications Act of 1996 § 201, adding 47 U.S.C. § 336(a).

55. *Id.* § 201, adding 47 U.S.C. § 336(a)(1).

56. There is an informal agreement in Congress that the issue of whether to auction HDTV channels may be revisited in the next year. Inertia suggests there will be no auctions. So does the extraordinary political clout broadcasters possess. However, the broadcasters did not get everything they may have wished for in this section of the Act. Other provisions tell the Commission to allow the holders of the new HDTV licenses to offer "ancillary or supplemental" services, (see *id.* § 201, adding 47 U.S.C. § 336(a)(2)) but to collect a fee (roughly equivalent to what an auction would have brought) for any services for which the licensee charges. (See *id.* § 201, adding 47 U.S.C. § 336(e)(1).) Additionally, if the FCC does give each broadcaster an extra channel it must require that, at some appropriate time, either the original or the additional license be surrendered. (See *id.* § 201, adding 47 U.S.C. § 336(e).)

broadcasting licenses is extended to eight years.<sup>57</sup> Additionally, at renewal time, the Commission must grant the application of the incumbent broadcaster if the agency finds that the licensee "served the public interest,"<sup>58</sup> committed "no serious violations"<sup>59</sup> of the Communications Act or of the FCC's rules, and has not committed any other violations "which, taken together, would constitute a pattern of abuse."<sup>60</sup> Only if the incumbent-applicant flunks one of these tests<sup>61</sup> and only if the Commission then determines that a sanction short of non-renewal is not appropriate may the Commission consider an outsider's application.<sup>62</sup> Comparative hearings in which an incumbent is an applicant have produced volumes of legal wrangling, but almost no license denials.<sup>63</sup> Now such hearings are a thing of the past.

#### 4. Cable

The new Act makes two major changes in cable regulation. One reduces entry barriers. The other sunsets some rate regulation.

##### a. Reduced Entry Barriers

In 1984, Congress passed the Cable Communications Policy Act, prohibiting telephone companies ("telcos") from offering cable television service directly to subscribers in their service areas.<sup>64</sup> Subsequent FCC interpretations of this law, embedded in the agency's so-called "video dial tone" rules, had substantially narrowed the force of the cable/telco ban.<sup>65</sup> The rules permitted phone companies to offer distinct cable tele-

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57. *Id.* §203, amending 47 U.S.C. § 307(c)(1).

58. *Id.* § 204(a)(1), adding 47 U.S.C. § 309(k)(1)(A).

59. *Id.* § 204(a)(1), adding 47 U.S.C. § 309(k)(1)(B).

60. *Id.* § 204(a)(1), adding 47 U.S.C. § 309(k)(1)(C).

61. *Id.* § 204(a)(1), adding 47 U.S.C. § 309(k)(1).

62. *Id.* § 204(a)(1), adding 47 U.S.C. § 309(k)(2).

63. TLP, *supra* note 6, at 89-120.

64. Pub. L. No. 98-549, 98 Stat. 2779 (1984). *See also* TLP, *supra* note 6, at 567. This is a classic example of the "legal balkanization" discussed above. Congress feared that telephone companies might be able to prey successfully against cable systems and so banned their participation in cable television. Meanwhile, converging technologies made it more and more difficult to determine just what was "cable television programming" and what was "telephone service" (Consider, for example, video images transmitted over the Internet).

65. TLP, *supra* note 6, at 567-87.

vision services to their customers if the companies operated on a common carrier basis, not selecting the programming they transmitted. The video dial tone rules, however, prohibited phone companies from offering cable services in their service area if the telco played a major role in choosing the programming on its system.<sup>66</sup>

The 1996 Act repeals both the telco ban<sup>67</sup> and the FCC's video dial tone rules,<sup>68</sup> replacing the old scheme with one that allows telephone companies (or anyone else) to offer cable television while these new entrants also choose from a menu of regulatory options as to how they will be regulated.<sup>69</sup> New cable companies (or "multi-video program distributors" (MVPD) as the FCC likes to call them) may operate like, and be regulated as, broadcasters<sup>70</sup> or common carriers<sup>71</sup> or cable companies<sup>72</sup> or as something new: open video systems<sup>73</sup> (which bear a striking resemblance to video dial tone systems).<sup>74</sup>

#### b. Sunsetting (Some) Rate Regulation

Perhaps in part because Congress had kept telephone companies from offering competition to cable systems, Congress found in 1992 that cable systems enjoyed monopoly power. So Congress heaped on more regulation, in this case price regulation of cable services.<sup>75</sup> The 1992 Cable Act required every cable system that was not subject to effective competition<sup>76</sup> to divide its services into a basic tier, a cable programming tier, and other services such as pay per view or pay per channel.

The latter, such as HBO or Showtime, receive no rate regulation

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66. *Id.*

67. Telecommunications Act of 1996 § 302(b)(1), *repealing* 47 U.S.C. § 533(b).

68. *Id.* § 302(b)(3).

69. *Id.* § 302(a), *adding* 47 U.S.C. § 651(a).

70. *Id.* § 302(a), *adding* 47 U.S.C. § 651(a)(2).

71. *Id.* § 302(a), *adding* 47 U.S.C. § 651(a)(2).

72. *Id.* § 302(a), *adding* 47 U.S.C. § 651(a)(3).

73. *Id.* § 302(a), *adding* 47 U.S.C. § 651(a)(4).

74. *See, e.g., Id.* § 302(a), *adding* 47 U.S.C. § 651(b)(1).

75. TLP, *supra* note 6, at 442-60.

76. "Effective competition" was defined so that few cable systems were subject to it and therefore exempt from rate regulation. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

under the 1992 Act.<sup>77</sup> Rates for the basic tier, essentially retransmitted local stations plus public access channels and imported super-stations (e.g., WTBS, WGN), are regulated by states or localities following rules set down by the FCC.<sup>78</sup> Rules for an intermediate tier, what I call the cable programming tier, which contains the cable networks for which viewers are not charged separately<sup>79</sup> (such as TNT, MTV, ESPN, BET), are regulated by the FCC.<sup>80</sup>

The 1996 Act, as it unleashes telephone companies into the cable market, also unshackles existing cable systems from rate regulation of their cable programming tiers as of 1999.<sup>81</sup> If all goes according to Congress' plan (or hope), moreover, even more rate deregulation will occur. Cable rate regulation of any sort is authorized only when the cable system is not subject to "effective competition."<sup>82</sup> The Act treats as subject to "effective competition" any cable system that confronts a real rival in its market.<sup>83</sup> If telephone companies (or other utilities, such as electrical or water or gas, that also run lines into our homes) successfully initiate cable services, then both the incumbent companies and the newcomers will be subject to "effective competition" and therefore freed of rate regulation.<sup>84</sup>

### 5. Telephones

As just mentioned, the 1996 Act frees telcos to enter cable television markets in any (non-predatory) manner they see fit. The new Act makes three other major changes in the regulation of telephone services. To understand the first two, one must first know the basics of the 1983 consent decree that divested AT&T of its local operating companies.

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77. TLP, *supra* note 6, at 442.

78. *Id.*

79. Viewers do pay for most of these services, but not separately. Rather, each cable program network usually charges the cable operator a set fee per month per subscriber and the cable system that carries that network then sets the fee for its cable programming tier high enough to cover those charges. Think of the non-basic and non-per-channel part of your cable line-up as one gigantic tie-in, if you will (Well it's better than thinking of how to write one sentence that contains *five* hyphenated words!).

80. TLP, *supra* note 6, at 442.

81. Telecommunications Act of 1996 § 301(b)(1)(C), *adding* 47 U.S.C. § 543(c)(4).

82. TLP, *supra* note 6, at 442.

83. Telecommunications Act of 1996 § 301(b)(3), *amending* 47 U.S.C. § 543(l)(1).

84. *Id.* § 301(b)(3)(C), *adding* 47 U.S.C. § 543(l)(1)(D).

The consent decree (or modified final judgment or "MFJ")<sup>85</sup> rested on the premise that the Bell System had used the power of its monopoly local exchange carriers ("LECs") to gain power in markets that could have been competitive, such as providing long distance services or manufacturing phones, switches, and wires.<sup>86</sup> Accordingly, the MFJ (1) took its LECs away from AT&T, *and* (2) set AT&T largely free from regulation to compete in long-distance and equipment markets,<sup>87</sup> *while* (3) preventing these newly divorced Bell operating companies ("BOCs", a sub-species of LECs — since some local phone companies were never formerly owned by AT&T) from getting into such markets as long distance and manufacturing.<sup>88</sup> These latter restrictions, just like the liberation of AT&T, followed from the underlying logic of the consent decree:<sup>89</sup> AT&T's power came from the LECs/BOCs; now that the BOCs were divorced from AT&T, AT&T could not find its old predatory tactics profitable, but the BOCs might adopt those tactics for the same reasons (and with the same successes) as had AT&T.<sup>90</sup>

The 1996 Act essentially reflects two important new policy conclusions about the 1983 consent decree. First, some important provisions of the new Act rest on the conclusion that we may be able to cut the Gordian knot, to avoid choosing between complete exclusion of the former BOCs from competitive markets or permitting entry only under heavy regulatory constraints. We clearly would be able to avoid this choice were there competition in the local loop. Perhaps if local exchange carriers were forced to make their switches and wires available to anyone who wished to offer telephone services through the LECs' facilities, competitive markets in the provision of telephone exchange services might emerge. So certain sections of the new Act promise an "everyone into LECs" regime, under which any firm can acquire access to LEC facilities to offer competitive services. (As explained below, these provisions apply to all local exchange carriers, not only to those

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85. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd* 460 U.S. 1001 (1983).

86. TLP, *supra* note 6, at 510-13.

87. *Id.* at 499-505.

88. *Id.* at 505-09.

89. *Id.* at 513.

90. *Please*: you do not have to believe the underlying story. I am not sure I do. AT&T may not have committed all these predatory acts. Even if it did, one BOC may not have the same opportunity profitably to prey, as I argue below. The point is only that the MFJ rested on this account of how AT&T acquired and maintained such size and breadth and on the assumption that the newly created BOCs would enjoy the same opportunities that AT&T had exploited.



that formerly were Bell companies.)

Second, other important portions of the new Act rest on the conclusion that, at least until competition in the local loop becomes a reality, the best way to protect competitive markets — such as long distance or equipment manufacturing — that former Bell operating companies might wish to enter is not to ban BOCs' entrance into those markets, but to permit entry subject to regulatory constraints. Accordingly, the "BOCs into everything" provisions of the bill abolish all remaining line of business restrictions imposed by the consent decree. A panoply of regulatory constraints are imposed on BOCs who enter these newly opened markets.

Finally, the Act also codifies for the first time the regulatory goal of "universal service." I discuss that section after reviewing the provisions growing out of the aftermath of the consent decree.

a. Everyone into LECs

Many provisions of the Act are important to this point, but the key is new section 251, added to Title II. Entitled "Interconnection," this provision imposes general duties of access and nondiscrimination on every "telecommunications carrier"<sup>91</sup> and each "local exchange carrier" (LEC).<sup>92</sup> More substantial obligations are imposed on "incumbent local exchange carriers,"<sup>93</sup> that is, the local exchange carriers in existence when the act was passed. (More simply, your present local telephone company.)

These incumbent LECs are required to provide, at just and reasonable rates, interconnection with their networks for the transmission and routing of telephone exchange service and exchange access at any feasible point within the LECs' networks.<sup>94</sup> They must provide nondiscriminatory access at reasonable cost to network elements on an unbundled basis at any technically feasible point and in a manner that allows the requesting party to combine the network elements to provide a telecommunications service.<sup>95</sup> The incumbent LECs must permit each of their services to be resold and must offer for sale at wholesale rates

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91. Telecommunications Act of 1996 § 101(a), *adding* 47 U.S.C. § 251(a).

92. *Id.* § 101(a), *adding* 47 U.S.C. § 251(b).

93. *Id.* § 101(a), *adding* 47 U.S.C. § 251(c)(1).

94. *Id.* § 101(a), *adding* 47 U.S.C. § 251(c)(2).

95. *Id.* § 101(a), *adding* 47 U.S.C. § 251(c)(3).

any services they offer at retail to customer-subscribers.<sup>96</sup> They must provide reasonable public notice of new information necessary to transmit and route services over their facilities and networks.<sup>97</sup> They must permit firms seeking interconnection to locate their equipment on the incumbent LECs' premises (known as "collocation" to the industry).<sup>98</sup>

In addition to these special obligations imposed on incumbent LECs, both incumbent and subsequent LECs are also required to provide number portability<sup>99</sup> (so that customers can move from one phone company to another, but keep their phone numbers). All LECs must also provide dialing parity<sup>100</sup> (entrenched firm A and newcomer B must provide the same system of dialing for, say, directory assistance or long distance access). And all local phone companies must provide access to their poles, ducts, conduits, and rights of way to competing providers of telecommunications services.<sup>101</sup>

What does this all mean? Simply put, every entrenched local exchange carrier must open its facilities up to new rivals who may employ those facilities, acquired at reasonable rates and on nondiscriminatory terms, to offer competing services. If a firm wants to offer "call waiting" services to Bell Atlantic's residential subscribers, it may "interconnect to" any relevant parts of Bell Atlantic's system to create a call waiting service. The same holds for a firm that may wish to offer message routing services to brokerage houses or to provide teleconferencing services within a particular city. The firm need not build that which the incumbent LEC has already built; the entrant may just plug into it, at prices deemed fair by the FCC.

Competition in long distance telephone markets developed by an arguably analogous process.<sup>102</sup> Outfits like MCI and (the forerunners of) Sprint built rather small operations that interconnected only two or three cities. They were then permitted, however, to interconnect their system to AT&T's (over AT&T's objection). In this manner, MCI's St. Louis to Chicago line could become a St. Louis to Chicago to the entire world line. From such bases, these new entrants acquired the customer base from which to build their own complete networks.

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96. *Id.* § 101(a), adding 47 U.S.C. § 251(c)(4)(A).

97. *Id.* § 101(a), adding 47 U.S.C. § 251(c)(5).

98. *Id.* § 101(a), adding 47 U.S.C. § 251(c)(6).

99. *Id.* § 101(a), adding 47 U.S.C. § 251(b)(2).

100. *Id.* § 101(a), adding 47 U.S.C. § 251(b)(3).

101. *Id.* § 101(a), adding 47 U.S.C. § 251(b)(4).

102. TLP, *supra* note 6, at 477-79 & 485-89.

Conceivably (hopefully, if you voted for the 1996 Act), local telephony markets may prove accessible to just such incremental competitive growth. Perhaps new carriers will build better networks inside the existing local loops or will disaggregate the existing structures and sell their components at lower prices.

#### b. BOCs into Everything

The 1996 Act adds to Title II of the 1934 Act a new Part III, called "Special Provisions Concerning Bell Operating Companies."<sup>103</sup> New section 271 permits the BOCs to offer long distance telephone service. Section 273 allows the BOCs to manufacture telecommunications equipment (i.e., the wires and switches, and associated software, that make up the local loop) and customer premises equipment (i.e., the handsets and switchboards that connect individuals and offices to the local loop). All of these activities were forbidden by the MFJ.<sup>104</sup>

The consent decree also kept the BOCs out of "information services,"<sup>105</sup> a vague term that essentially embraced providing data that the phone company had assembled or acted upon.<sup>106</sup> That restriction was removed in subsequent court proceedings,<sup>107</sup> but a new section 274 now governs "electronic publishing" by the BOCs. The Act contains a laundry list definition of electronic publishing, describing several types of data that are included in the term and others that are not.<sup>108</sup> Essentially, "electronic publishing" is the transmission by a phone company of information that the company has generated or altered. The definition is, in other words, very close to that employed in the consent decree.<sup>109</sup>

As noted, the purpose of these provisions is to remove the absolute entry barriers that the MFJ's line of business restrictions imposed on

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103. Telecommunications Act of 1996 § 151(a).

104. TLP, *supra* note 6, at 505-07.

105. *Id.* at 506.

106. *Id.* at 550-53 (citing *United States v. Western Elec. Co.*, 993 F.2d 1572 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 984 (1993)). Nynex could not supply a stock quotation system for which it had assembled the data, but it could transmit a ticker service whose content was managed by others.

107. TLP, *supra* note 6, at 550-53.

108. Telecommunications Act of 1996 § 151(a), *adding* 47 U.S.C. § 274(h).

109. The 1996 Act also addresses two lines of business not expressly covered by the MFJ. New section 275 regulates a BOC provision of alarm monitoring services. New section 276 sets new ground rules for any Bell operating company that provides pay phone services.

the BOCs and to substitute a system of regulated entry to guard against potential predation or discrimination by the BOCs against their rivals who do not control local exchange facilities. What types of regulations are substituted? You name any and you'll find it here. Various provisions dealing with various practices impose various regulations. For example, new section 275 erects an absolute entry barrier; neither BOCs nor their affiliates may offer alarm monitoring services in the next five years.<sup>110</sup> The same section also imposes a flat ban on granting rival alarm services inferior interconnection<sup>111</sup> and on cross-subsidizing BOC alarm services from telephone exchange operations.<sup>112</sup>

New section 274 forbids BOCs to offer electronic publishing except through a separate affiliated entity or a joint venture,<sup>113</sup> but this separate-subsidiary requirement sunsets after four years.<sup>114</sup> New section 272 also imposes a separate affiliate requirement on BOC manufacturing of equipment or provision of long distance services,<sup>115</sup> but imposes a different sunset rule.<sup>116</sup> (Previously, the FCC had determined that the separate subsidiary requirement was not a sound policy because it needlessly sacrificed economies of scale and scope,<sup>117</sup> but Congress determined otherwise in the new Act.)

Most dramatically, BOCs may not offer long distance services<sup>118</sup> or manufacture telecommunications equipment<sup>119</sup> until they have first been certified by the FCC. To be certified for these purposes, a BOC must demonstrate to the Commission that it meets the fourteen requirements specified in a "competitive checklist" established by new section 271(c)(2)(B).<sup>120</sup> Most of these conditions relate to the interconnection obligations, detailed above, that other provisions of the Act impose on each incumbent LEC. For example, the BOC must show that it is providing or has offered to provide nondiscriminatory access to its poles,<sup>121</sup> number portability,<sup>122</sup> and unbundled services.<sup>123</sup> In short, the BOCs'

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110. Telecommunications Act of 1996 § 151(a), *adding* 47 U.S.C. § 275(a)(1).

111. *Id.* § 151(a), *adding* 47 U.S.C. § 275(b)(1).

112. *Id.* § 151(a), *adding* 47 U.S.C. § 275(b)(2).

113. *Id.* § 151(a), *adding* 47 U.S.C. § 274(b).

114. *Id.* § 151(a), *adding* 47 U.S.C. § 274(g)(2).

115. *Id.* § 151(a), *adding* 47 U.S.C. § 272(a)(2).

116. *Id.* § 151(a), *adding* 47 U.S.C. § 272(f)(1).

117. TLP, *supra* note 6, at 554-58 (citing *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990)).

118. Telecommunications Act of 1996 § 151(a), *adding* 47 U.S.C. § 271(b)(1).

119. *Id.* § 151(a), *adding* 47 U.S.C. § 273(a).

120. *Id.* § 151(a), *adding* 47 U.S.C. § 271(c)(2)(B).

121. *Id.* § 151(a), *adding* 47 U.S.C. § 271(c)(2)(B)(iii).

122. *Id.* § 151(a), *adding* 47 U.S.C. § 271(c)(2)(B)(xi).

ability to offer long distance services and to manufacture equipment is conditioned on their meeting their new open interconnection responsibilities; in turn, if BOCs meet these responsibilities, true competition in the market(s) for local exchange services may become feasible.

Further, before the FCC authorizes a BOC to offer long distance services, the agency must ask the Attorney General for an opinion.<sup>124</sup> What, if any, weight the Commission must give to the Attorney General's opinion is not specified. A BOC that manufactures and sells equipment must also disclose vast quantities of information about its protocols, technical requirements, and network configuration.<sup>125</sup> The goal of these provisions is to prevent the BOC from using inside information gained in its role as a local exchange service to become the sole supplier of equipment to operate that service.

In sum, it is difficult to imagine a regulatory strategy, other than a permanent complete ban on entry into allied markets,<sup>126</sup> for coping with the possibility of predatory cross-subsidization and discriminatory interconnection by Bell operating companies that is not employed, at one point or another, in the 1996 Act. The new Act does abandon the MFJ's premise that the newly created BOCs should be strictly confined to offering regulated plain vanilla local exchange service. But the Act does not permit unrestricted entry into other markets or deny the MFJ's premise that the BOCs, if not regulated, will likely unfairly monopolize allied markets. Rather, the 1996 Act expresses a preference for seeking the benefits of competition in these markets, by letting the BOCs in, while strictly overseeing these carriers' behavior so that BOC entry does not perversely retard competition. (These provisions of the new Act apply only to those local exchange carriers that are former Bell companies.)

### c. Universal Service

"Universal service" has been an articulated goal of telephone regulation at least since the 1960's.<sup>127</sup> What it means, however, has never

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123. *Id.* § 151(a), adding 47 U.S.C. 271(c)(2)(B)(vi).

124. *Id.* § 151(a), adding 47 U.S.C. § 271(d)(2)(A).

125. *Id.* § 151(a), adding 47 U.S.C. § 273(c).

126. Recall that this was the principal regulatory strategy employed in the consent decree.

127. Mueller, *supra* note 17, at 355.

been clear, although the concept has always been tied, in some fashion, to the presence of internal cross-subsidies in the pricing of phone service and has been limited to the subsidized pricing of basic voice-grade dial tone.

For example,<sup>128</sup> to some, "universal service" means that a telephone line should be available to every U.S. residence at an average, roughly standardized, cost. Principally, this entails pricing basic phone service to outlying rural areas below the costs of that service.<sup>129</sup> To others, "universal service" means keeping the costs of basic dial tone service to residences as low as is feasible. Principally, that has entailed charging higher rates to businesses than to residences for equivalent phone service. To yet others, "universal service" means charging lower rates to people with lower incomes. One method of pursuing this goal at the national level has been to price long-distance service substantially above its costs, so that residential rates could be subsidized by the override. (Lower income people make fewer long distance calls than higher income people.)

Until the 1996 Act was passed, no statutory codification of the principle of universal service existed. Now we have new Section 254 of old Title II.<sup>130</sup> It requires the Commission to set up a federal-state joint board ("Joint Board") to implement the universal service goal.<sup>131</sup>

What is "universal service" now? Well, it is everything. Certainly, it is no longer restricted to providing simple basic voice-grade dial tone to favored classes. One key provision states that the Joint Board and the Commission are to observe this principle:

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange [i.e., long distance] services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas

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128. Most of the examples in this paragraph are discussed in TLP, *supra* note 6, at 467-68.

129. If the point is not intuitively obvious, suppose it costs \$100 to string a telephone line one mile. Such a line might service one million people in Chicago, but only ten people in the rural parts of Montana. If the latter are to receive phone service at the national average cost per home of stringing a wire to the home, then rural Montana residents will pay less than the costs of stringing a wire to them.

130. Telecommunications Act of 1996 § 101(a), *adding* 47 U.S.C. § 254.

131. *Id.* § 101(a), *adding* 47 U.S.C. § 254(a)(1).

and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>132</sup>

Nothing seems to be left out of this list. Universal service encompasses below cost treatment on the basis of income, geography, and quality of service. Nor is the subsidy limited to basic voice-grade dial tone service.

But wait; there's more. Another key provision states that "[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically . . . taking into account advances in telecommunications and information technologies and services. . . ." <sup>133</sup> Further, universal service includes the principle that "[e]lementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services . . . ." <sup>134</sup> Both the "universal" and the "service" aspects of "universal service" will grow over time.

How will these universal service goals be achieved? By giving universal service support, for specific universal service purposes, to telecommunications carriers.<sup>135</sup> Whence the money? The Commission and the Joint Board will place a tax<sup>136</sup> on telephone operators. "All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."<sup>137</sup> In particular, "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis . . . ." <sup>138</sup>

Universal service is now an explicitly articulated goal of telecommunications regulation. It is to be achieved by levying a proportionate tax on all telecommunications service providers, which should make more visible both the nature and amounts of the cross-subsidies encompassed within the universal service program. Several classes of custom-

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132. *Id.* § 101(a), adding 47 U.S.C. § 254(b)(3).

133. *Id.* § 101(a), adding 47 U.S.C. § 254(c)(1).

134. *Id.* § 101(a), adding 47 U.S.C. § 254(b)(6).

135. *Id.* § 101(a), adding 47 U.S.C. § 254(e).

136. I beg every Representative and Senator who voted for this bill, and the President who signed it, to forgive me for calling this thing by its correct name. The new Act, of course, does not employ the "T word."

137. Telecommunications Act of 1996 § 101(a), adding 47 U.S.C. § 254(b)(4).

138. *Id.* § 101(a), adding 47 U.S.C. § 254(d).

ers are to be protected by the universal service policy. Exactly what services will be encompassed within the concept of universal service remains quite unclear, however, because no specific or fixed meaning may be ascribed to the list of items that make up "universal service"; it is an "evolving level" of services to be established "periodically" by the FCC,<sup>139</sup> not just a basic dial tone.

### B. Content Controls

Government cannot effectively control the content of the electronic mass media in this country.<sup>140</sup> When it tries to do so, it inevitably acts to advantage privileged speech and to penalize that which is unpopular and out of fashion.<sup>141</sup> At times, the FCC has appeared to grasp the truth of these virtually self-evident propositions.<sup>142</sup> But neither the Senate nor the House has ever been able to resist for long the temptation to try to make radio and television "better"<sup>143</sup> and the Supreme Court seems to delight in cheering on their efforts to do so.<sup>144</sup>

In the 1960's the hot button topics were media access and drug use among the cultured elite (i.e., children of Senators, Representatives, and Commissioners). So we got the fairness doctrine, cable access channels and bans on playing songs that "promoted" or "glorified" drug use.<sup>145</sup> Today, the hot button issues are the virulent corruption of young people's morals by the sounds of profanity and the sight of human genitals and the brutalizing, dehumanization of our youth by permitting them to watch simulated violence.

So, Congress added to the 1996 Act a variety of censorship regulations designed to turn the Internet into a souped-up version of *My Weekly Reader* and to return broadcast and cable television to the glory years of *Amos 'n' Andy*. These new regulations are embedded in Title V of the new Act, which is called the "Communications Decency Act

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139. *Id.* § 101(a), adding 47 U.S.C. § 254(c)(1).

140. RBP, *supra* note 6, *passim*.

141. *Id.* at chs. 4, 5 & 9.

142. See, e.g., TLP, *supra* note 6, at 149-52 & 188-94.

143. Consider, for example, Congress' repeated efforts to legislate on "indecent" broadcasting, described *id.* at 176-78.

144. RBP, *supra* note 6, at 175-202.

145. See generally *id.* at chs. 4 & 5.



of 1996" ("CDA").<sup>146</sup>

### 1. *Internet*

The key provision here is section 502 of the new Act,<sup>147</sup> entitled "Obscene or Harassing use of Telecommunications Facilities Under the Communications Act of 1934," which is reprinted at the end of this article. The section is, to say the least, somewhat opaque. People are already arguing about its meaning and these arguments will persist through at least several court challenges.<sup>148</sup> The central part of section 502 makes it a crime to:

use[] an interactive computer service to send to a specific person or persons under 18 years of age; or [to] use[] any interactive computer service to display in a manner available to a person under 18 years of age, any comment . . . image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.<sup>149</sup>

Literally, these provisions would appear to criminalize transmission over the Internet (or any other pathway to a personal computer accessible to anyone under 18)<sup>150</sup> of countless novels, poems, photographs or motion pictures. Adults appear to be required to converse, through their interactive computers, in language fit for nine-year-olds.

But with a statute like this, literalness may not get us very far. After all, the Communications Decency Act literally distinguishes between "an interactive computer service" and "any interactive computer service."<sup>151</sup> The Act also provides some defenses that suggest that the

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146. Telecommunications Act of 1996 §§ 501-561.

147. *Id.* § 502, amending and adding to 47 U.S.C. § 233.

148. As this article was written, a three-judge federal district court held the Act unconstitutionally vague and an impermissible intrusion into the First Amendment rights of adults. *See* ACLU v. Reno, Nos. CIV.A.96-963, 96-1458, 1996 U.S. Dist. LEXIS 7919, at \*86 (E.D. Pa. June 12, 1996). The Justice Department has filed a notice of appeal to the Supreme Court. *See also* Randall Mikkelsen, *Internet Indecency Ruling Appealed to U.S. Supreme Court*, REUTERS N.A.M. WIRE, July 2, 1996; Telecommunications Act of 1996 § 561(b).

149. Telecommunications Act of 1996 § 502(2), adding 47 U.S.C. §§ 223(d)(1)(A)&(B).

150. Anywhere in the world?

151. *Compare* Telecommunications Act of 1996 § 502(2), adding 47 U.S.C. § 223(d)(1)(A)

merely passive act of transmitting what someone else has posted does not violate the Act.<sup>152</sup> Further, the Act is quite silent — perhaps deliberately so — with respect to the kind of intent (or, *mens rea*) necessary to make the behavior criminal. Must a message transmitter intend that a specific underage person receive the communication? Nor does the Act address the question of what knowledge (or, *scienter*) the sender must have. Presumably, the sender must be aware of the contents of the message;<sup>153</sup> must s/he also be aware that the message is “patently offensive”? And whose “community standards” provide the guideposts for this inquiry into offensiveness? Nor does the Act address the issue of extraterritoriality: does Congress mean to punish someone sitting in Estonia who posts a picture of a naked person on his home computer bulletin board that *could* be accessed by an enterprising U.S. teenager?<sup>154</sup>

All these questions ask, in part, what Congress meant. To the extent that anyone can talk about the “intention” of a corporate body, we can say only that Congress meant to get (many or most) discussions or pictures of sexual activities or organs off the Internet. To the extent that we have any memory of censorship efforts in this country, we know that this is a futile task, doomed to failure — but, perhaps a few pitiable folks will be sent to prison in the effort.<sup>155</sup>

Somewhat more helpfully, the Communications Decency Act also contains section 509, entitled “Online Family Empowerment.”<sup>156</sup> This adds a new section 230 to Title II of the 1934 Act, which is to be entitled “Protection for Private Blocking and Screening of Offensive Material.”<sup>157</sup> The new section essentially immunizes from liability any “provider or user of an interactive computer service” who restricts “access to or [the] availability of” indecent material or helps others gain

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with § 502(2), adding 47 U.S.C. § 223(d)(1)(B).

152. *Id.* § 502(2), adding 47 U.S.C. § 223(e)(1).

153. See *Smith v. California*, 361 U.S. 147, 156 (1959).

154. The editors of this journal inform me that this article may be made available, in electronic form, to computer terminals here and abroad. Accordingly, I wish to say for the record that I assume that anyone reading this article — at least in electronic form — is, in fact, fully clothed while doing so. It is certainly not my intention to suggest, much less to incite, coed naked law review reading.

155. It is, I think, no accident that it was Blutarsky, the Quasimodo of “Animal House,” who responded to the classic battle cry, “This situation absolutely requires a really futile and stupid gesture be done on somebody’s part!” with the immortal charge, “We’re just the guys to do it!” who was subsequently elected to the U.S. Senate.

156. Telecommunications Act of 1996 § 509, adding 47 U.S.C. § 230.

157. *Id.* § 509, adding 47 U.S.C. § 230.

the technical means to do so.<sup>158</sup> Without such a provision, a person or firm operating as a common carrier might have been liable for failure to transmit "indecent" material. As an ordinary rule, common carriers are not expected or permitted to censor the contents of communications they carry.<sup>159</sup> Because this section apparently simply facilitates the creation of "indecent-free safe harbors" for those who desire them, this may be regarded as a helpful measure that may affirmatively assist people in the exercise of their constitutional rights to choose what they read, see or hear.<sup>160</sup>

## 2. Cable

The Communications Decency Act contains a few measures designed to reduce the amount of nudity on cable television. Section 505 of the new Act tells cable operators that they must scramble the signal of "any channel of its service primarily dedicated to sexually-oriented programming."<sup>161</sup> Section 506 tells operators that they can refuse to transmit any public access or leased access program "which contains obscenity, indecency or nudity."<sup>162</sup> Most interesting in this regard is Section 504: "Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it."<sup>163</sup> No definition of "such programming" is provided, nor is any reference back apparent. Can this mean that any single subscriber can force an operator to scramble the signal for any channel, without regard to whether the

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158. *Id.* § 509, adding 47 U.S.C. § 230(c)(2).

159. See Michael I. Myerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 114-15, 121-22 (1995).

160. For a good description of the boundaries of this protected right, see *Cohen v. California*, 403 U.S. 15, 21-22 (1971), *reh'g denied*, 404 U.S. 876 (1971).

161. Telecommunications Act of 1996 § 505(a), adding 47 U.S.C. § 641(a).

162. *Id.* § 506, amending 47 U.S.C. § 531(e) and § 532(c)(2). The extension to non-indecent nudity is interesting, but what this is supposed to mean escapes me entirely. To "contain[ ] nudity" must the program depict a completely nude person, portrayed as such from all sides and angles? If not, may the operator censor a program that depicts a baby being diapered? Or a teen-age girl not wearing shoes? One might say that "nudity" in this context must mean "erotic nudity." But, of course, there are pedophiles out there. And some people do have foot fetishes. In any event, we are talking here about nudity that is neither obscene nor indecent, according to the statutory text.

163. *Id.* § 504, adding 47 U.S.C. § 640(a).

channel carries sex or violence?

Note that Congress structured each of these sections so as not to engage in strict censorship. Operators are only told to scramble certain channels or permitted to decline to carry certain programs. The first tactic nevertheless risks invalidation because of its selectivity. Why are only sexually-oriented programs to be scrambled? The second tactic will test the bounds of the Supreme Court's recent decision invalidating a statute that required cable operators to segregate indecent programs on certain channels.<sup>164</sup>

### 3. *The V-chip*

Section 551 of the new Act is entitled "Parental Choice in Television Programming."<sup>165</sup> The section contains Congressional findings that children are harmed by exposure to violent video programming<sup>166</sup> and to pervasive and casual treatment of sexual material.<sup>167</sup> Further, "[t]here is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children."<sup>168</sup> Based on these findings, section 551 attempts to facilitate private, parental screening and blocking of sexual or violent programming.

Accordingly, the Act directs the Commission to establish ways to identify and rate "video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children."<sup>169</sup> To devise this ratings system, the FCC is to employ an advisory committee.<sup>170</sup> These provisions, however, do not become effective for one year.<sup>171</sup> Indeed, they do not become effective

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164. *See Denver Area Educ. Telecoms. Consortium, Inc. v. FCC*, Nos. 95-124, 95-227, 1996 U.S. LEXIS 4261 (June 28, 1996).

165. Telecommunications Act of 1996 § 551, *adding* 47 U.S.C. § 303.

166. *Id.* § 551(a)(4), *adding* 47 U.S.C. § 303(a)(4).

167. *Id.* § 551(a)(6), *adding* 47 U.S.C. § 303(a)(6).

168. *Id.* § 551(a)(8), *adding* 47 U.S.C. § 303(a)(8).

169. *Id.* § 551(b)(1), *adding* 47 U.S.C. § 303(w)(1). Civil libertarians watch out! The notion that "indecent" encompasses more than "sexual" program material (unless meant only as a more polite way of incorporating depictions of excretion) is quite new to the law. What is this "other indecent material" that is neither violent nor sexual in nature, content or theme? *See also* note 162.

170. Telecommunications Act of 1996 § 551(b)(1 & 2), *adding* 47 U.S.C. § 303(b)(2).

171. *Id.* § 551(e)(1), *adding* 47 U.S.C. § 303(a)(1).

at all if the distributors of video programming have "established voluntary [rating] rules"<sup>172</sup> and "agreed voluntarily to broadcast signals that contain ratings of such programming."<sup>173</sup>

In short, through section 551, Congress calls on the industry to adopt a uniform rating code. That "request" is backed up by the direction to the Commission to do the job itself if the industry fails to do it. Not surprisingly, the television industry fears the outcome of an FCC-initiated process. Shortly after passage of the new Act, an industry committee was formed which is expected to devise and implement a ratings system.<sup>174</sup>

What will be done with these ratings? First, as noted, they will be embedded in the signal broadcasters (and cablecasters) transmit. Then they can be scanned by television sets. The Act also directs the Commission to regulate television set manufacture so that in the future television sets are "equipped with a feature designed to enable viewers to block display of all programs with a common rating."<sup>175</sup> In short, the ratings code will be inserted into broadcast signals, where it will be "read" by a feature added to the decoder on these new television sets. If the new feature (in political parlance, a "V-chip"<sup>176</sup>) is activated by the set owner, the feature will block reception of encoded signals.<sup>177</sup>

### C. Overview

The Telecommunications Act of 1996 is to a large extent a grab-bag, a pastiche of provisions aimed at a variety of real or imagined ills. One might say that the only thing all these provisions have in common is that they reform the law the FCC applies.

That would be too simple, of course. Recall that at the outset, I suggested the Act might also be characterized principally as a legisla-

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172. *Id.* § 551(e)(1)(A), adding 47 U.S.C. § 303(e)(1)(A).

173. *Id.* § 551(e)(1)(B), adding 47 U.S.C. § 303(e)(1)(B).

174. See generally *Media Notes: TV Ratings Group Formed*, MEDIA DAILY, Mar. 14, 1996, at no. 5, vol. 4, available in LEXIS, Newsletter Database. See also Paul Farhi, *TV Execs Deliver Rating Plan to White House*, WASH. POST, Mar. 1, 1996, at D1.

175. Telecommunications Act of 1996 § 551(c), adding 47 U.S.C. 303(x).

176. The "V" is for "violence."

177. Telecommunications Act of 1996 § 204(b), adding 47 U.S.C. 308(d) also requires all television licensees to keep and make public all complaints they receive concerning violent programming on their stations.

tive response to the twin features of technological convergence and legal balkanization. Also, the censorship features of the Act, while interesting and important, are by no means its dominant features.

Because the Act deals with so many diverse subjects, an evaluation of it must be also somewhat piecemeal. Nevertheless, I attempt some interconnected criticisms in what follows.

### III. EVALUATION

What are we to make of this complicated new Act? In part, one's judgment will be influenced by which provisions one cares about. To take an easy example, the owner of a radio station will find almost nothing to dislike in this Act, while the removal of group ownership caps is quite likely to increase the station's value. Count the AM/FM radio licensees as supporters.

More critically, one's judgment depends on the values one brings to evaluation of telecommunications regulation generally. For an obvious example, consider a person who is comfortable with the post-World War II British model, in which the government owns and operates all the facilities of telecommunications and programs its airwaves. I suspect this person would find little to applaud in the interconnection provisions of the new Act but would presumably not be fazed by the regulation of "indecent" telecommunications.

Personally, I do not like the old British model. It does not comport at all with our notions of freedom of speech and our reliance on market mechanisms to appraise and allocate goods and resources. By what criteria do I suggest we ought to judge regulation of the electronic media? Writing at the time only about broadcast regulation,<sup>178</sup> Lucas Powe and I spelled out criteria that we would employ and which I am satisfied would make admirable baselines for all mass media regulation. (Indeed, we argued that a very compelling reason for adopting our criteria was that, in this country, citizens and scholars of virtually all political persuasions adhere steadfastly to these standards when judging the regulation of non-electronic mass media.)

*In brief,*<sup>179</sup> we advance four criteria for measuring whether telecom-

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178. See Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1726-32 (1995).

179. See *id.* (for details of the arguments set out in this paragraph).

munications regulation serves truly public (not private) interest goals: (1) Editorial control over what is said and how it is said should be lodged in private, not governmental, institutions. (2) Government has an important role to play in fostering access by speakers to mass media. For purposes of this criterion, "access" means the ability to reach any willing recipient by any speaker willing to pay the economic costs<sup>180</sup> of doing so (and does not mean that government must or should require others to subsidize the would-be communicator). (3) Government policies should foster diversity in the media marketplace. Diversity is achieved when people are allowed to bid for any information or entertainment they desire and to receive what they seek, so long as they are willing to pay the economic costs of receiving it. (4) Government may not sacrifice any of the three foregoing principles to further goals associated with either or both of the others. Where such sacrifice is not entailed, however, government may extend the goals associated with any of these principles. Put somewhat less formally, these criteria suggest that we should evaluate government regulation of any medium of mass communications by whether it avoids content controls, reduces entry barriers, prevents anticompetitive behavior, and facilitates technological progress.

Using those criteria, I judge the Telecommunications Act of 1996 to be a mixed blessing. It seems to me that some of its features are good, others bad, and some plain ugly.<sup>181</sup>

### A. *The Good*

#### 1. *Broadcasting*

It seems to me that, by the criteria I urge, three aspects of the new rules regarding broadcasting, both radio and television, are indisputably "good." First, the removal or loosening of limits on the number of stations group owners may control should increase competition. Efficient firms should now be freer to purchase inefficient ones. Costs of

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180. By "economic costs," I mean the costs (including opportunity costs) of resources employed in communicating, not necessarily the prices charged by (perhaps monopolistic) owners of those resources.

181. The attempted invocation here of the motion picture "The Good, the Bad and the Ugly" is deliberate. I find that movie complicated, dull, boring, and unintelligible. So would any English speaking person, not trained in telecommunications law or practice, who reads the new Act. Accordingly, I think it is quite fair to ask (as did one of my students) of those of us who do find the new Act interesting (and somewhat readable) whether we need to "get a life."

access should go down.

I would not rate this as a very large plus. After all, station buyers other than existing group owners have always been available to purchase less efficient stations. Nor does there seem to be a shortage of managerial talent in the industry that would suggest that only group owners are efficient acquirors. Nevertheless, removing this artificial barrier to the market for trading in station licenses ought to make the broadcast industry more efficient.

The second and third "good" provisions operate in tandem. By both extending the broadcast station license term and ending the comparative renewal proceeding, the Act should greatly lower the regulatory costs of doing business as a broadcaster. Those lower costs ought to translate into more stations on the air, operating at (and therefore providing access at) lower rates.

Further, now that radio licenses are essentially perpetual, licensees should also be able to make, at lower cost, better long-term investments in programming and talent. Until these revisions, broadcasters had to rely on the FCC and reviewing courts agreeing that they were entitled to a "renewal expectancy" to justify renewing their licenses.<sup>182</sup> Now, station owners can show lenders and investors that, so long as they abide by the rules, they have a statutory right to a renewal (and for a longer term).

## 2. Cable

Two features of the Act regarding cable seem to me probably good.

### a. Partial Repeal of Rate Regulation<sup>183</sup>

I applaud the removal of rate regulation from the "cable tier." This is because I think that the principal effect of cable rate regulation to date has been to degrade the cable plant. Let me say immediately that I do not know how to prove or disprove that assertion. Now, let me explain why I believe it nevertheless.

When the Commission imposed rate regulation (at Congress's direc-

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182. See TLP, *supra* note 6, at 105-15.

183. The data provided in this discussion is taken from *id.* at 442-60.



tive), it chose not to employ traditional rate of return regulation, in which the agency monitors all costs and chooses an acceptable additional rate of return. Today, most observers agree that such regulation is more costly than any good it produces. Rather, the Commission chose to impose "price caps" on cable systems. Under this method, the FCC sets a limit on ("caps") the regulated (cable) firm's prices. The firm is then free to lower prices as much as it wishes.

A principal asserted advantage of the price caps approach is that this method gives price regulated firms an incentive to become more efficient, an incentive denied them by rate of return regulation, which (in theory) would lower permissible prices as soon as costs were lowered. It is true that price caps increase the incentive to be more efficient. That is because they increase the incentive to cut costs. Another way to cut costs is to let the system go to seed. Price caps also make it next to impossible to increase costs in order to increase quality of service.

Thus, the imposition of price caps on cable systems rendered them almost powerless to increase consumer satisfaction by offering subscribers better quality, albeit at higher cost.<sup>184</sup> So, it appears, the nation's cable plant has just sat there, gathering moss, since the imposition of price caps. To keep profits up, cable systems had the further option actually to let their systems begin to rot. Whether they did, or will, do this only time will tell.

This begrudging partial removal, in three years, of some cable rate regulation ought to offer some possibility for new investment in the cable infrastructure. Meanwhile, competition from even more recent technologies, like direct broadcast satellites, video rentals, and other local entertainment sources, ought to constrain the prices for the "cable network" tier.

#### b. Dropping the Telco Ban

The repeal of the prohibition on telephone companies (telcos) offer-

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184. Belatedly, the FCC realized this problem and began to offer "upgrade incentives." These permitted cable operators to add channels and recover their costs so long as prices were kept down on existing channels. This provided little aid, of course, to systems that might wish to upgrade by offering better physical connections. And it essentially simply substituted rate of return regulation, a method whose ineffectiveness had supposedly led to the preference for price caps!

ing cable services is also commendable, at least in theory. The FCC's "video dial tone" rules already permitted telcos to offer a pure common carrier cable service in their telephone service area,<sup>185</sup> but the new Act permits greater vertical integration of programming and pipeline in a telco cable system. This may enable the telcos to diversify their risk and, thus, to invest more; it certainly offers them the opportunity to create a cable system "just like that" already offered by competing cable firms. If providing cable television service is to become a competitive market, this may occur in many ways, but surely one of the most likely is by the entry, in many local markets, of the local phone company.

### 3. Telephony

On balance, I think it was the better part of wisdom to unleash the Baby Bells, permitting them to enter long distance and manufacturing markets, and to open up the local exchange carriers to interconnection and access so that competitive LECs might arise. Certainly, these approaches follow the path we usually prefer of pursuing the goals of access and diversity by fostering open competitive markets.

One should not let this point pass, however, without noticing that there is another side. Phrased as a smorgasbord of acronyms, perhaps the LECs and BOCs should have been confined to POTS ("plain old telephone service"). In longer and plainer terms, maybe it would be better to permit monopoly firms (or monopoly government agencies) to superintend the infrastructure, while others (excluding the monopoly firms) operate services provided through and upon that infrastructure. This is somewhat analogous to the way we run the highway transportation system. Government builds and operates the roads (infrastructure) but leaves the provision of transportation services (cars, buses, trucks on the highways) to the private sector.

Perhaps, due to economies of scale and scope, it is cheaper to have just one telecommunications wire going into each and every home. If so, it might be wise to let one firm build and operate those wires (and their attendant switches and interconnection points) without being able to sell services to businesses and consumers (i.e., without having the ability to prey in allied markets). Indeed, one might say that such a

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185. TLP, *supra* note 6, at 567-87.

policy — which we might describe by the slogan “Let the BOCs do POTS” — was the central feature of the consent decree that dissolved AT&T and created these BOCs.<sup>186</sup>

I reject this wishful thinking because I believe it is insufficiently sensitive to the dynamism of telecommunications technologies. How could we define “POTS” today in a manner that we thought would be intelligible ten years from now? Would these infrastructure providers also have to provide the mobile telephone services that are growing today? Would we include airplane-to-ground telephones in the LECs’ protected zone? Is “call waiting” or “call forwarding” plain old telephone service or an enhanced service?

In 1956 AT&T signed an antitrust consent decree in which it agreed to confine its services to regulated telecommunications offerings.<sup>187</sup> Two decades later, everyone was squabbling over whether this meant AT&T could operate and sell services for interactive computers.<sup>188</sup> I think an attempt to impose a legal straitjacket on the local exchange carriers would fail similarly.

In short, given the constantly evolving technologies of mass telephonic communication, I believe we will just have to live with competition in this area, like it or not. *How* to induce and oversee that competition is discussed below.

#### 4. *Summary*

Particularly in light of the more negative commentary that follows, I should say that what is good about the Telecommunications Act of 1996 is quite good indeed. It seeks to end monopolization and balkanization, especially of cable and wired telephone markets, by breaking down entry barriers. Whether, to what extent, and in what form telecommunications technologies will converge ought to be decided, then, by the free interactions of producers and consumers in marketplaces rather than by five FCC commissioners construing a sixty-year-old statute. Put in terms of the criteria set forth above, access and diversity should increase, while the increasingly evident powers that consumers exercise over the media should reduce public pressures for censorship.

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186. *Id.* at 491-514.

187. *Id.* at 480.

188. *Id.* at 479-81.

## B. *The Bad*

In my view, most of the main features of the new Act contain "bad" features along with the "good." Candidly, one might describe these not as "bad" features of the Act, but as reasons not to be too optimistic about the good parts. I, however, call these "bad" parts of the Act because of the foregone opportunities to achieve real reform that they represent.

### 1. *Broadcasting*

The new Act does very little to reform broadcasting law and policy in helpful ways. Censorship is not repealed, but rather is extended. The horrors of spectrum allocation for television are not ameliorated, but compounded.<sup>189</sup> The extended license terms and abolition of the comparative renewal hearing will have modest practical consequences because, in practice, licensees who do not flout the FCC or its rules always get their licenses renewed.<sup>190</sup>

The Telecommunications Act of 1996 was supposed to pull together the major needs and ideas for reform in this area of the law. With respect to broadcasting, however, the Act is just a series of missed opportunities. Congress gave the broadcasters some money by increasing the value of their licenses. Viewers and listeners may perhaps benefit from a slightly more competitive and slightly less costly system. Those of us who do not own stations could have done a lot better had Congress seriously considered reform, in the public interest, of broadcasting law and policy. I discuss in subsequent sections of this Article what I believe some of those reforms would entail.

### 2. *Cable*

Here, too, I believe Congress labored mightily and brought forth a mouse. There is, I think, some — but not much — reason to believe that cable can be provided competitively. Probably, it is a natural monopoly.<sup>191</sup> So consumers are unlikely to be able to protect themselves by switching to another cable company in their neighborhood. This means that, at least in the long run, subscribers are most likely to seek,

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189. See Telecommunications Act of 1996 §§ 201-207.

190. TLP, *supra* note 6, at 105-20.

191. For a discussion of the concept of a "natural monopoly" and its application to cable TV and to providing telephone service *see id.* at 331-32.

and perhaps obtain, protection from the monopoly ills of cable in three other ways.

First, and most importantly, cable is likely to encounter direct competition from other multi-video program distributors ("MVPDs") using other technologies, such as direct broadcast satellites and multichannel multipoint distribution service ("MMDS"), to which cable subscribers can easily switch. Second, to the extent that cable remains a natural monopoly, cable service providers are likely to want to discriminate in the prices they charge, for example by offering cheap alternatives to the poor and more expensive ones to the wealthy. Such discrimination would still leave monopolist cable services with unjustifiably high incomes, but would also at least expand options available to all while providing some protection for low income consumers. Finally, modest leased access provisions — say, a requirement that five to ten percent of channel capacity be set aside for programmers' access to cable systems on a common carrier basis — is likely to protect against the chance that a cable monopolist would cause real harm to viewers' welfare by selecting programs on the basis of ideological bias or by engaging in gross price discrimination.

If these arguments are correct, then letting telcos into cable will be, in the long run, of little consequence.<sup>192</sup> It would be more important, by far, to focus on establishing other MVPDs as viable competitors and strengthening and clarifying leased access rules. Further, the merely partial relaxation of rate regulation, to occur three years hence, does not seriously address the issue whether cable systems ought to be freed to compete, with other MVPDs and with other sources of information and entertainment, on the basis of quality of service offered.

### 3. Telephony

#### a. Everyone into LECs

What I have just said about the natural monopoly aspects of cable television<sup>193</sup> applies equally to the attempts to spur facilities-based competition in the local loop. It is most likely that running a telecommuni-

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192. However, if telephone companies can operate cable systems more cheaply than conventional cable operators, then consumers will receive a long term benefit from telco entry that could be quite substantial.

193. See *supra* text accompanying notes 191-92; see also *supra* note 6 at 331.

cations wire to the home is a natural monopoly and so one ought to concentrate on regulating that monopoly or mitigating its ill effects.

To some extent, the new Act accomplishes this. By placing extensive interconnection requirements on incumbent LECs, the 1996 Act creates a new vision of competition at the local loop level. In this vision, one firm may superintend the wires and switches that make up the local loop while that firm competes with others to sell exchange services, including the basic dial tone, to customers.

The difficulty, I believe, with this aspect of the Act is not its vision, but its execution. The interconnection sections impose so many restrictions, and direct the Commission to write so many rules,<sup>194</sup> that one must fear that the regulatory costs of this open access regime will exceed its payoff in reduced rates or improved service quality.

At the same time, the new Act does little to expand the competitive opportunities of the most likely competitors to incumbent LECs, the wireless phone (and other) services providers. Mobile, cellular telephony is now a rather mature technology employed by a large industry. "Personal communications services" ("PCS") — which utilize even smaller devices that can carry even more data — are squarely on the horizon. The 1996 Act misses opportunities to make wireless a more robust competitor. LECs are still permitted to own wireless phone operations in their service area. The Act does not clearly grant wireless phone providers a federally protected right to interconnection with LECs at real economic costs.<sup>195</sup> The rules for auctioning off the spectrum that PCS uses are still loaded with special rules for special groups<sup>196</sup> so that the spectrum is less likely to be used efficiently, while the auctions provide modest "welfare" benefits to small businesses.

Two cheers, then, for the local loop interconnection aspects of the 1996 Act. One can hope that a subsequent Congress will return to this important topic and strip many of the interconnection regulations away while acting further to foster wireless as a competitive alternative.

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194. See, e.g., *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 1996 FCC LEXIS 2063 (Apr. 19, 1996).

195. Some states have read § 252, added to the new Act, to commit this issue to the state regulatory commissions. See Telecommunications Act of 1996 § 101(a), adding 47 U.S.C. § 252. I disagree with this view. I wish to note further that I have expressed this view, at the behest of a private client, to responsible persons at the FCC.

196. See Jon Van, *High-Tech Bet: Cellular's Success Makes New Technology Seem a Surer Thing*, CHI. TRIB., Dec. 5, 1994, at 1, zone C.

b. *BOCs into Everything*

In a preceding section, I explained why I believe it is unwise and infeasible to try to impose line of business restrictions on local exchange carriers. With respect to those LECs that are not Bell operating companies, we have had no such restrictions for some time now. None of these LECs appears to have monopolized long distance or alarm services markets. Consequently, I believe one must applaud those features of the new bill that admit the BOCs into the long distance services, equipment manufacturing, electronic publishing, and alarm monitoring services markets.

But there is a "bad" side to this "good" reform as well. Recall the numerous regulations with which the new Act surrounds any BOC wishing to enter these markets.<sup>197</sup> To enter the long distance market, for example, a BOC must not only employ a separate subsidiary,<sup>198</sup> but it must also show that it is now confronting (or has done all it can to bring about) facilities based competition in its local loop services.<sup>199</sup> At the same time, because the theory underlying the MFJ has now become part of the standard wisdom of antitrust law, the BOC remains constrained by the Sherman Act from engaging in discriminatory interconnection or predatory cross subsidization.<sup>200</sup> Meanwhile, the imposition of price caps instead of rate of return regulation makes a predatory cross subsidy strategy impractical in any event.<sup>201</sup>

And what is the point of these countless regulations? To keep the BOC from preying against AT&T! The theory of the MFJ is now being used to protect AT&T. Is this because we need to protect AT&T from a new monolithic monster? No, these redundant provisions shelter AT&T from seven distinct, uncoordinated firms who will presumably have to compete against each other in the long distance market, as well as against AT&T, Sprint, MCI, and others.

Simply put, the case for this kind of extensive, overlapping regulation has not been made and probably cannot be made. A BOC is not AT&T. BOC entry into long distance or equipment manufacturing arm does not threaten AT&T in the same way that AT&T's long distance

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197. See *supra* text accompanying notes 103-26.

198. Telecommunications Act of 1996 § 151(a), adding 47 U.S.C. § 272(a)(2)(B).

199. *Id.* § 151(a), adding 47 U.S.C. § 271(d)(3)(A).

200. TLP, *supra* note 6, at 491-526.

201. *Id.* at 532-41.

operations threatened MCI or its equipment manufacturing threatened Rolm. A BOC that wants to enter long distance or equipment manufacturing must face not only AT&T and its rivals, but other BOCs as well, while its prices are capped and it operates in an antitrust climate that now clearly sanctions the strategic anticompetitive behavior the BOC might find profitable.<sup>202</sup> If the BOCs are to be let in, I believe they should be let in like everyone else.

### *C. The Ugly*

The “good” features of the new Act, then, are clouded somewhat by “bad” features that prevent this legislation from being as good as it could be. Perhaps more significantly, the new Act contains several “ugly” features, each of which perpetuates and to some extent magnifies some fundamentally flawed aspects of telecommunications law and regulation.

Oversimplifying, we employ two methods to discipline privately operated telecommunications firms so that they will serve the public interest. One method is subjecting them to the oversight of an independent regulatory agency, the FCC. The other is subjecting these firms to the rigors of marketplace competition, the oversight of consumers. The new Act purports to shift the balance between these two methods decidedly in favor of reliance on consumer-driven market forces as disciplining agents. At the same time, however, the statute does nothing to correct some very deep flaws in our policy of regulating telecommunications by competition.

#### *1. The Problem of Spectrum Allocation*

“The spectrum” is not tangible; it is nothing that someone can possess. Rather what we call “the spectrum” is a list of frequencies on which we currently know how to transmit data through electronic sinusoidal waves.<sup>203</sup> Like the chemist’s Table of Periodic Elements, the electrical engineer’s spectrum has been a constantly growing list as

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202. Of course, these arguments are not convincing if the BOCs are going to be permitted to merge among themselves to the point where only one or two of them remain.

203. *Id.* at 29-35.



technology has evolved to permit effective data transmission at higher and lower ends of the spectrum.

The ability to transmit encoded data electronically on a particular frequency, free from (a substantial amount of) interference, is a valuable resource.<sup>204</sup> I will call this resource "spectrum use." Spectrum use is a resource in precisely the same way that transmitters, electrical energy, microphones, and cameras are resources. Each of these goods, when assembled in various combinations with other goods, permits an operator to create value, to perform a service for which people are willing to pay.

Spectrum use differs from these other resources, however, in one key respect. It is the sole resource used in telecommunications industries that has historically been given away without an explicit charge for it. Broadcasters buy microphones, transmitters, electrical energy, and so forth, but they are "given"<sup>205</sup> spectrum use.

This government "gift policy" creates a huge competitive imbalance between those who would transmit through the air and those who would do so by wire. Congress has recognized this problem and ameliorated it a bit, in other legislation, by permitting or requiring the FCC to auction off spectrum for non-broadcast uses in the future.<sup>206</sup> Perversely, however, the newer 1996 Act seems oblivious to the problem.

For example, the true emerging competitors to cable appear to be direct broadcast satellites ("DBS") and multichannel multipoint distribution service ("MMDS"). Yet most firms in these markets were given free spectrum use while cable had to purchase its wire access. The true emerging competitors for the local exchange carriers appear to be the mobile, cellular industry. But this industry was given its spectrum in large markets and acquired it via lottery in smaller ones.<sup>207</sup> The new Act virtually directs the Commission to give free spectrum use to television broadcasters so that they may develop high definition television ("HDTV"). Why is cable not receiving a similar hand-out for the same purpose?

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204. *Id.* at 35-36.

205. Of course, one does not really get spectrum from the FCC without incurring any cost. Rather, costs are incurred in different form, such as filing fees and legal fees, for those seeking licenses to use the spectrum. These costs, however, are unlikely to amount to the full value of the spectrum use license, as Kwerel and Felker have demonstrated. *See id.* at 121-28 (*citing* KWEREL & FELKER, USING AUCTIONS TO SELECT FCC LICENSEES (1985)).

206. TLP, *supra* note 6, at 129.

207. *Id.* at 129-33.

In all of these instances, we face the dilemma of trying to judge the outcome of competitive markets when the game was rigged at the outset. Suppose we decided to let competition dictate to what extent people drank coffee or tea and what would be the relative prices of each — and then gave away coffee beans, but not tea leaves? The new Act, supposedly designed to make markets work in telecommunications regulation, not only does nothing to create further markets in spectrum, but it exacerbates some existing imbalances between wire-based and ether-based transmitting technologies.

Because we have no markets in spectrum use, we have had to invent a method to create property rights in the spectrum. This has been accomplished by allocating the rights to use the spectrum by administrative fiat.<sup>208</sup> Because the FCC has no prices for its spectrum use rights, it has little idea how valuable one use is as compared to another. And, of course, the agency is susceptible to political pressures to favor certain technologies or services over others.

For these reasons, administrative allocation of the electromagnetic spectrum has not been a shining example of what regulation can do for us. Nowhere is this more evident than in television broadcasting. There, a series of FCC decisions in the 1950's essentially confined us, unnecessarily, to a closed entry, three commercial network system that persisted until the growth of cable made additional television broadcast stations and therefore additional television networks profitable.<sup>209</sup>

To those with a detailed knowledge of the history of mis-allocation and mis-assignment of the television spectrum, the grant to every existing television station of an additional channel for HDTV is an irony that borders on the tragic. A one hundred percent increase in the amount of spectrum allocated to commercial television broadcasting, and *not one single additional licensee!* The new Act doubles the national resources committed to television, yet *leaves the level of concen-*

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208. *Id.* at 36-38.

209. The story of this spectrum misallocation and its effects on the number of stations and number and concentration of networks is laid out in summary form in MTV, *supra* note 6, at 12-20. A full version is in Thomas Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, 54 S. CAL. L. REV. 875 (1981). Perhaps it is not immediately obvious why cable had an impact on television station viability. Briefly, cable improves (indeed, virtually perfects) signal quality to the home. Station assignments that were impractical due to the comparatively poor signals they were authorized to transmit lost that handicap when cable was laid down in their areas. Because the number of television networks is simply a function of the number and geographical distribution of viable television stations, the growth of cable also helped fourth (Fox), fifth (Paramount), and sixth (Warner) television networks to arise.

*tration in this industry completely untouched!* For decades, first the FCC and subsequently the Congress bemoaned the virtual absence of minority ownership<sup>210</sup> — and very small participation of women — in television broadcasting. Now, over 800 additional licenses are to be handed out, *without increasing the ratio of minority or female or small business ownership one whit!*

The acquisition by broadcasters of an additional license (apparently at no charge), then, is more than a property rights grab without parallel in the United States since the days of our previous robber barons, the railroads. It is also an extraordinary denial of our professed commitments to increase competition, to lower entry barriers and to expand opportunities for historically excluded persons in the broadcasting industry. Ironically, it was pursuit of these commitments that was claimed to justify failure to rely on simple market mechanisms to allocate the broadcast spectrum.

Fortunately, the consequences of this extraordinary sell-out will not be so dire. We now have cable. Cable networks and operators are free to offer high definition television today. So are DBS, MMDS, and videocassette entrepreneurs. More importantly, these technologies are technologies of plenty; they expand opportunities for program suppliers and open the television viewing markets to competition. Today, one who does not enjoy the fare produced by an oligopoly can simply tune out the conventional broadcasters.

Nevertheless, the fact remains that the new Act does nothing to redress a fundamental flaw in our competition policy in telecommunications: the competitive imbalance we create between wired and wireless carriers. At the same time, it exacerbates a fundamental flaw in our regulatory policy toward broadcasting: the use of spectrum allocation authority to confer market power on a closed class of privileged broadcasters.

## *2. The Problem of Universal Service*

Universal service, as defined in the new Act, and competitive markets cannot co-exist, where the goods produced have many substitutes or where the technology is dynamic. We are so used to universal service in telephone markets that the point may be better illustrated from

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210. *Id.* at 93-96.

another perspective.

Suppose government decided to establish "universal housing" by requiring that every third new house built be sold at twenty percent below its cost. What would happen? The number of new homes built would fall dramatically. Builders would need to price two of every three new houses well above cost. Purchasers would shift to the "used house" market (at least until they thereby drove prices in that market up to a new balance with the "new house" market).

Similar shifting would occur with telecommunications. If you tell a telephone company to provide basic residential phone service to low income neighborhoods or computer services to elementary schools at below cost prices, it will have to charge above cost prices to someone else. But that someone else will then just shift his or her purchases to a supplier other than the regulated telephone company.

There are three ways around this dilemma. First, government could subsidize the purchase directly, from general tax funds. That is what we do for low income housing, but not for low income telephony, in the U.S. We cannot escape the "universal housing" tax by shifting our purchases in the housing market. Second, government could give the phone company a monopoly, so that the customers to whom it would raise prices would have no where else to turn. That is what we used to do for low income and rural telephony in the U.S., when AT&T operated a fairly complete monopoly in several product lines and so was able to generate subsidies internally. (Indeed, the FCC knew this. It tried to prevent courts from authorizing competition in long distance precisely because AT&T, in its monopoly incarnation, could cross-subsidize pro-social goals.<sup>211</sup>)

A third option, embraced by the new Act, is to levy an equivalent charge on everyone in the industry and then use those funds to subsidize directly the provider of the pro-social service(s). Thus, the new Act specifies that providers of interstate telecommunications services will "contribute, on an equitable and nondiscriminatory basis,"<sup>212</sup> to a fund that will be used to subsidize those who provide "universal service."<sup>213</sup> An "equitable and nondiscriminatory" fee might be, for example, a one percent gross receipts "tax." This is "equitable and nondiscriminatory" in the sense that it is competitively neutral — its collec-

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211. See *MCI Telecomm. Corp. v. FCC* [Execunet I], 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

212. Telecommunications Act of 1996 § 101(a), adding 47 U.S.C. § 254(d).

213. *Id.* § 101(a), adding 47 U.S.C. §§ 254(d) & (e).

tion should not bias consumer choices toward one seller rather than another.

But, of course, this tax will bias choices. First of all, non-telecommunications services will become relatively more attractive. It may be less efficient, measured by the value of resources expended, to mail a letter than to make a phone call. However, due to the "telecommunications tax," it may be less expensive to write than to call. A sensible consumer will choose the (personally) cheaper, but (societally) less efficient alternative.<sup>214</sup> We should note, however, that this is a problem only to the extent that non-telecommunications information technologies are nearly equivalent in costs to those data transmission services that are subject to the tax.

More daunting than the problem of old technologies is the problem of new ones. With the new Act in place, people will now have incentives to create and to purchase methods of data transmission that are (a) not as efficient as existing telecommunications services but (b) not subject to the tax. To revert to the "universal housing" example, a firm might start selling newly constructed mobile homes and argue that they were not "houses" as defined in the Universal Housing Act. MCI started a long distance telephone service, but called itself a "specialized common carrier" and so got to offer deals that AT&T could not.<sup>215</sup> Neither the mobile home builder nor MCI would have to be more efficient to succeed. Because telecommunications technology is so dynamic, it is difficult to conceive of a regulatory regime that treats every such technology and every effective substitute for it on a competitively neutral basis.<sup>216</sup>

Candidly, it is hard to argue against the concept of universal service without sounding like someone who hates little children and people who dwell in rural areas. But the point is not that school children or poor people or rural folk do not deserve or need subsidized access to telephone services. Rather, the point is that we have already learned

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214. Perhaps then, it was not incompetence but brilliance that led the drafters of the new Act to define "telecommunications" to include the act of delivering a letter from its author to a recipient? See *supra* note 4.

215. TLP, *supra* note 6, at 477-78.

216. I am not trying to argue here that public interest regulation can never work. One might note, for example, that requiring seat belts in automobiles imposes a "competitively neutral" tax on auto makers. I agree and do not believe that this makes such a tax poor regulatory or market strategy. Rather, I believe the history of telecommunications regulation shows that the technology outruns the regulators and that, in these markets, the pro-social subsidies virtually always become competitive handicaps.

that we cannot give these benefits to them through a system of industry generated internal cross-subsidies unless we dictate that that industry be monopolized.

I have no doubt that incumbent LECs will argue against competitive entry on the grounds that such entry will retard the universal service goals of the Act. They will frequently be right. One simply cannot have unbundled services with nondiscriminatory access and a system of subsidized universal service obligations existing side by side.

In my judgment, it is both bad competition policy and bad regulatory policy to try to achieve properly functioning competitive telecommunications markets while a regulator sees to it that these same markets generate subsidized pro-social benefits. Sadly, I suspect that many people in Congress know these things, but voted for the bill anyway.

### *3. The Problem of Competition Analysis*

An extensive, thoughtful literature on the economics of industrial organization and behavior underlies current antitrust law. This literature teaches us that, in order to analyze the effects on competition of the behavior at issue, we should first define the market(s) in which the firm(s) operate, then determine who controls what firms in that market, and then calculate the extent of concentration of control in that market.<sup>217</sup> These might seem obvious and elementary principles. To any student of antitrust they are quite simple and basic. Yet one who had read only the Telecommunications Act of 1996 would think that Congress was completely unaware of this antitrust learning.

#### *a. Defining Markets*

Industrial organization economists and antitrust lawyers alike start with markets. They know (or believe) that we employ competition to discipline firms — to keep them from producing shoddy goods or restricting output to raise prices. A “market” is the group of firms that, with respect to any other particular firm, disciplines that firm, by threatening to steal its customers if the firm produces shoddy goods or

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217. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 2-17 (1994).

to expand output if the firm tries to raise its price. Thus, to know the competitive consequences of a merger or an agreement, we need to know the market or markets within which firms that are parties to the merger or agreement operate.

With respect to telecommunications firms, it is particularly important to distinguish between local and national markets. Conventional telecommunications delivery services to the home operate mostly in local markets. I believe it is safe to assert that no one ever moved from New York to Chicago to get better television reception or cable or telephone service. Thus, Chicago broadcasters do not discipline New York broadcasters in the market for selling broadcasts to listeners and viewers.<sup>218</sup>

The new Act appears to recognize this principle when it removes all national limits on radio station ownership. But it does not remove them for television. Moreover, the new Act, as we have seen, greatly hobbles local Bell operating companies' entry into long distance telephone service. But long distance service is provided in a national market. It is at best unclear how control over a few local switched networks can be translated into market power in the national long distance market.

#### b. Measuring control

Once markets are defined, one needs to know who controls which firms in those markets. The new Act perpetuates a time-honored failing of broadcasting law in treating formal and informal integration as worlds apart, when they are in fact two phenomena that exist on a single continuum. Depending on the length and complexity of an informal, contractual relationship, it may occupy a spot on that line quite close to a formal merger.

The new Act seems not to recognize this principle. For example, at one point, the bill establishes rules limiting the television stations a firm may own nationwide.<sup>219</sup> The Act does nothing, however, to limit the number (or collective reach) of stations with which a television network may affiliate nationwide. Yet, as my colleagues and I have

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218. Or, if you prefer, the market for selling ears and eyeballs to advertisers.

219. See Telecommunications Act of 1996 § 202(c)(1), *modifying* 47 C.F.R. 73.3555. Helpfully, the limit is expressed in terms of the collective reach of those stations, not the simple number of them.

shown elsewhere, the distinction between a network's ownership of a television station and its affiliation with another is a good deal more formal than real.<sup>220</sup> For example, the difference is quite small between the rate at which affiliated stations, on the one hand, and owned stations, on the other, clear major networks' prime time programs.<sup>221</sup> In a similar vein, the new Act establishes limits on the number of radio stations any firm may own in one local market, but does not count as an "owned" station one that is staffed and programmed by another under a "local marketing agreement," a form of joint venture that is rather common in today's commercial radio broadcasting industry.<sup>222</sup>

### c. Measuring Concentration

Conventional wisdom has it that the number of firms in a market is, at best, only a partial measure of the extent to which firms within it probably compete fiercely. Also important, certainly in markets with less than a dozen firms, are the percentage shares of the market that each firm controls. Not all firms are created equal and the impact on market behavior of commercial practices or mergers depends partly on whether the firms engaging in the questioned behavior are among those created more equal than others.<sup>223</sup>

Again, the new Act largely perpetuates a method by which regulators measure acceptable levels of concentration by how many stations a firm acquires, not by the size or power of those stations. Thus, for example, one firm may own eight radio stations in a market of forty-five or more.<sup>224</sup> This applies regardless of whether those are the most or least popular in the market or propagate a broad or a relatively narrow signal.

A clever person might argue that, for purposes of measuring concentration, all stations should be treated as equal, because each has an equal potential to be most productive. That might explain why the new Act simply counts numbers for the radio multiple ownership rules, but would not explain why it establishes national television station owner-

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220. MTV, *supra* note 6, at 31-93.

221. NISS VOL. II, *supra* note 18, at 260-66.

222. FCC Rules would count such stations. TLP, *supra* note 6, at 271-76.

223. HOVENKAMP, *supra* note 217, at 455-66.

224. Telecommunications Act of 1996 § 202(b)(1)(A), *modifying* 47 C.F.R. 73.3555(a).



ship rules based on the collective reach of the owned stations.<sup>225</sup>

Why do I rate as "ugly" the failure of the new Act to engage in serious competition analysis at several points? Not, I confess, because this omission will do great harm to consumers. Multiple ownership of radio and television stations or the grounds on which BOCs are allowed into long distance do not seem to bear enormously on listener, viewer or consumer welfare.

Rather, I object to the implications of this shoddy analysis. These features of the new Act seem to bespeak an absence of genuine commitment to competition as the prime regulator of telecommunications markets. These provisions appear to reflect instead a simple private interest give and take, in which legislators bicker over a series of numbers — eight stations or seven stations per large radio market — rather than deliberate over an important legislative principle. Why would we not simply leave formal and informal consolidation to the antitrust authorities, as we do for most other U.S. industries and markets?

#### 4. *The Problem of Censorship*

Lucas Powe and I recently published both a book<sup>226</sup> and a law review article<sup>227</sup> about the evils, the futility and the wastefulness of censorship of the electronic media.<sup>228</sup> While neither is hot off the press, both are still pretty warm, so I see little need to repeat our arguments here. Further, I think my description, above, of the censorship features

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225. *Id.* § 202(c)(1), *modifying* 47 C.F.R. 73.3555.

226. RBP, *supra* note 6, *passim*.

227. *See* Krattenmaker & Powe, *supra* note 178, *passim*.

228. Both the Communications Decency Act of 1996 (Telecommunications Act of 1996 §§ 501-509) and the Parental Choice in Television Programming (*Id.* § 551, 552) section are excellent examples of futile, wasteful regulation. Anyone who cares to think about it can figure out that no government official, bureau or commission can keep George Carlin's "Seven Dirty Words" off the Internet, no matter how much legislators (pretend to) wish they could.

Similarly, common sense shows that to encode all television programming for "sexual, violent or other indecent material" is not a manageable task. The Motion Picture Association of America rates about 600 theatrical films, or about 1200 hours, *every* year. Let's compare the volume of television programming. Assume that a 70-channel cable system averages 20 hours of cablecasting per day. That's 1400 hours of programming *every day*. No one can intelligently, responsibly, accurately and fairly encode 1400 hours of programming every day for "programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children." *See id.* § 551(b)(1).

of the new statute<sup>229</sup> is sufficiently non-neutral to convey my distaste for most of them.

I do wish to add three points. First, as a whole, the censorship features of the new Act are anti-cable. The indecency rules aimed at the Internet cannot prove enforceable, but those aimed at cable will be. Further, violence has pretty much been scrubbed from conventional network television, but not from cable which is full of old network shows that had lots of violence as well as movies and cable network fare that are comparatively violent.<sup>230</sup> Whether those who voted for the Act know it or not, it is cable that will bear the brunt of the bill's censorship features.

Second, all these censorship features of the new Act — as all other acts of censorship — at bottom reflect hostility to the programmer's (or editor's) status or class or points of view. Although this is not stated in the new Act, we all know that the V-chip proposal is not aimed at the most violent fare on television — sports (especially football) and news coverage of crime, war, and terrorism. The indecency provisions are aimed at those obsessed with sexual acts, not those obsessed with racist hatred or religious intolerance or greed. That is, the "indecency" targeted by the new Act does not include racial epithets, expressions of religious bigotry, or advertisements for alcohol and tobacco — each of which may well be more damaging to young psyches than a joke about farting or a picture of testicles. We say we care about children, but we are at least equally concerned to punish speakers we dislike and to absolve those with whom we are familiar and comfortable.

Third, the new Act will put some strains on existing constitutional jurisprudence because of the clever (too clever, perhaps?) way in which some of the censorship features are crafted. *After* telling cable operators that they must carry smut, *then* Congress tells them to segregate it. The Act may thus be portrayed as an attempt to shield children and to support operators' editorial preferences and control. The FCC shall manage the V-chip system *only* if the industry does not *voluntarily* undertake to do so first. Consequently, the industry's response may be characterized as private, rather than governmental, action.<sup>231</sup> Although governmental

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229. See *supra* text accompanying notes 140-77.

230. RBP, *supra* note 6, at 123.

231. To say that the claim is transparently preposterous, which it is, is not to say all that much in terms of Supreme Court jurisprudence. Remember, this is the Court that told us that a law that differentiated on the grounds of pregnancy did not distinguish between men and women. See *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Court also told us that a law requiring

censorship is forbidden by the first amendment, private censorship is protected by it.<sup>232</sup>

#### IV. CONCLUSIONS

I have argued that the Telecommunications Act of 1996 is neither a miracle drug nor a poison pill for what ails our telecommunications law and policy. The new Act has good, bad, and ugly features.

How does it all balance out? That depends on what matters most to you. I have a friend who buys and sells radio stations. At any given time, he owns lots of them. He told me that the V-chip was the best thing to happen to him in years. Why? Because, he believes, the presence of the V-chip sections got the White House interested in supporting the bill, so my friend got expanded radio group ownership rules.

What matters most to me? Two things. First, I think it is downright shameful to pretend to enact a pro-competition policy, while continuing to preserve the worst features of our old spectrum allocation policies, exacerbating the anti-competitive, anti-efficiency effects of universal service policy, and steadfastly refusing to ask (or to require the FCC to ask) real questions about real competitive conditions in real markets. My objection is not simply to the inelegance or intellectual shallowness of these policies, but to the real harms they threaten to the goal of competition: serving consumers efficiently. No one of these failings is likely to cause "pretend competitive" markets to perform badly, but in combination they may do much harm.

My second large objection to the new Act stems from the fact that I continue to believe that the case has never been made for maintaining a large, independent agency with industry-specific powers over telecommunications firms and markets. Perhaps we need a Federal Spectrum Commission to manage spectrum assignment and to mediate interference claims. Certainly, we need a Telecommunications Bureau to represent us in international negotiations over frequency use and assignments. We may need an Interconnection Department (or just an amendment to the antitrust laws) to establish the principle that local telecommunications carriers that possess market power must provide sophisticated and non-

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separate seating, by race, on public transportation facilities provided both blacks and whites the equal protection of the laws. See *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 494 (1954).

232. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that New Hampshire residents cannot be forced to display "Live Free or Die" on their license plates).

discriminatory access to other providers of allied or competing telecommunications services. But what other sound, important public policies are reflected in the 1934 Communications Act or the Telecommunications Act of 1996 that cannot be pursued by agencies — like the FTC, the SEC, the NLRB — that are not industry specific and so are much less susceptible to capture by private interests? Without the Communications Act, neither Congress nor its constituents would assume that government is charged with superintending communications in this country.

These seem to be the larger questions that a true reform of U.S. telecommunications law and policy would address. The 1996 Act not only failed to address these questions, but created an even larger Federal Communications Commission, charged with even more responsibilities. One Commissioner reports that the new law will require the FCC to conduct eighty rulemakings!<sup>233</sup> One reads the new Act in vain for something that reflects Congressional awareness that the FCC may not be omnipotent, its commissioners not omniscient. I find it difficult to see how such an enlargement of the FCC and its duties can be squared with a determination to reduce the extent of government management of telecommunications and to increase the role of competition — i.e., discipline inflicted by consumers — on the industry.<sup>234</sup>

Finally, and perhaps most fortunately, I believe we can be quite sure that all the matters I have raised in this Article are relatively short term transitory issues. Telecommunications technology marches forward. We cannot retard it any more than we can catch lightning in a bottle. Some people are now using the Internet for long distance phone calls. Who knows what technologies will dominate in 2025? Just as we now snicker and guffaw over earlier attempts to regulate the telephone industry through the Kingsbury Commitment of 1913 and the AT&T consent decree of 1956,<sup>235</sup> so will our grandchildren wonder what all this fuss was about.

U.S. governments, both state and federal, have erected countless entry barriers in the course of writing and rewriting telecommunications

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233. FCC Comm'r Susan Ness, Remarks at the Public Policy Forum Series, Wharton School, U. Penn (Feb. 22, 1996) (transcript available at <http://www.fcc.gov/Speeches/Ness/spsn604.txt>). Note, further, that a single rulemaking may well spawn dozens of individual rules. We are certainly looking at over 1,000 new FCC rules as a result of the new Act.

234. For some years now, a soft drink has promoted itself as "The Uncola." Perhaps we might call the new Act the "Un-deregulation bill."

235. TLP, *supra* note 6, 468-71.

laws. Not one of them has withstood the critical analysis of those blessed with hindsight. Technological change has circumvented them all. To oversimplify one final time, to the extent that the new Act destroys entry barriers, I would judge it a success while, to the extent that it creates or strengthens them, I would judge it a failure.