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# Reinventing Competition

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# Reinventing Competition

by  
NICHOLAS W. ALLARD\*

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\* Latham & Watkins, Washington, D.C. The views expressed in this review are those of Mr. Allard and do not necessarily represent those of any client or any other party. Mr. Allard is on the COMM/ENT Advisory Board. He has published numerous articles and is a frequent speaker on communications law and policy. © All rights reserved.

## I

**Libertarian at the Gate**

Huckleberry Finn was a libertarian.<sup>1</sup> While Huck's lyrically appealing voice is all Mark Twain, his ideals of individual liberty and self-determination have long been an integral part of American political debate. In early eighteenth century colonial America, widely read libertarian pamphlets known as *Cato's Letters* helped to articulate a philosophical foundation for the revolution.<sup>2</sup> Later, many of their themes were embodied in the Declaration of Independence, the United States Constitution, and several essays published to debate the merits of adopting a federal republican form of government after the failure of the Articles of Confederation.<sup>3</sup> Over the years the full throated libertarian rhetoric of many of the Founders withered and dried to a rasping whisper of its former self, while the Libertarian Party, sometimes perceived as a haven for political eccentrics, is relegated to footnote status on November ballots. Ironically, the phrases of the doctrine are so assimilated, so familiar in mainstream political discourse as often to be taken for granted, and their very familiarity

1. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (William Morrow & Co. 1994) (1884). Consider, for example, Huck's rebellion over the efforts of the widow Douglas and Miss Watson to "civilize" him, *id.* at ch. 1, compared with his preference for the independent lifestyle of joyfully rafting down the Mississippi with Jim, thinking about choices people make for themselves and choices society imposes on people, including people such as his father, and the fake Duke and Dauphin who boarded the raft when they were run out of a riverbank town, *id.* at ch. 19. Huck felt that the "best way to get along with this kind of people was to let them have their own way" rather than to try to challenge them or change them. *Id.*

2. JOHN TRENCHARD & THOMAS GORDON, *CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* (Leonard W. Levy ed., Da Capo Press 1971) (6th ed. London 1755) [hereinafter *CATO'S LETTERS*]. See BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 53-58 (1968) (discussing the influence on colonial politics of opposition literature including the two London journalists Trenchard and Gordon's *Independent Whig*, Joseph Addison's immensely popular 1713 play *Cato*, and the colonists' selectively whiggish reading of the Roman historians). "Cato," derived from "catus" (wise or sagacious), was the name of several celebrated Romans including the senator, Cato the Elder, who ended all his speeches, no matter what the subject matter, with the words "Carthage must be destroyed." E.D. HIRSCH, JR. ET AL., *THE DICTIONARY OF CULTURAL LITERACY* 192 (1988). See generally FRANK BOURNE, *A HISTORY OF THE ROMANS* chs. 14-20 (1966) (regarding the remarkable life of Cato).

3. On the day the proposed United States Constitution was published in newspapers, immediately beside it appeared an attack upon the Constitution signed by "Cato," who was known to be New York Governor Clinton. *Biographical Note*, 40 *GREAT BOOKS OF THE WESTERN WORLD* 23 (1993). Many other powerful figures in New York came out in opposition to the Constitution as well, also writing under names of renowned Romans. *The Federalist Papers*, printed under the name "Publius," responded to the attacks of Cato and others. *Id.* See *THE FEDERALIST*, discussing libertarian themes, especially Nos. 9, 84 (Alexander Hamilton), Nos. 37, 44, 47, 48 (James Madison), Nos. 49-53 (Alexander Hamilton or James Madison).

breeds neglect of the meaning they convey. It could be time, some would say, to return and reexamine basic principles. Today, for example, nowhere are the concepts of free will, individual freedom of thought, expression and action, private property rights and laissez-faire, and free market economy more relevant than the intense policy debate currently underway in the United States over the laws and rules that should govern the uses of technology by our information age society. While libertarian thinking may be as American as the central character in this nation's greatest novel, upon close examination the neo-libertarianism now in the air might prove to be a mutant strain. Those who would rush to embrace this school anew to advocate cutting private industry free from the fetters of government regulation might need to be reminded that the original libertarian concepts of individual freedom and self-government were expressly conditioned on the supremacy of law and justice, not the absence of law, and reflected a deep-seated abhorrence of monopoly and the corruption of influence.<sup>4</sup> Without law and just rules, liberty is impossible because society is replaced by chaos, a state of nature which our forefathers and their philosophical progenitors knew would lead to life that is "nasty, brutish and short."<sup>5</sup>

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4. BAILYN, *supra* note 2, at 56. See CATO'S LETTERS, *supra* note 2, No. 14 (*the unhappy State of despotick Princes, compared with the happier Lot of such as rule by Settled Laws*), No. 18 (*The terrible Tendency of publick Corruption to ruin a State*), No. 25 (*Considerations on the destructive Spirit of arbitrary Power. With the Blessings of Liberty, and our own Constitution*), No. 26 (*The Sad Effects of general Corruption*), No. 27 (*General Corruption, how ominous to the Publick and how discouraging to every virtuous Man*), No. 31 (*Considerations on the Weakness and Inconsistencies of human Nature*), No. 42 (*Considerations on the Nature of Laws*), No. 59 (*Liberty proved to be the unalienable Right of all Mankind*), No. 90 (*Monopolies and exclusive Companies how pernicious to Trade*), No. 91 (*How exclusive Companies influence and hurt our Government*).

5. THOMAS HOBBS, *LEVIATHAN* pt. I, ch. 13 (Penguin Books 1974) (1651) (describing human life in a state of nature and arguing that government must be strong to keep people from lapsing into a savage existence). See CATO'S LETTERS, *supra* note 2, No. 20 (*Of publick Justice, how necessary to the Security and Well-being of a State and how destructive the Neglect of it to the British Nation*), No. 31 (*Considerations on the Weakness and Inconsistencies of human Nature*), No. 42 (*Considerations on the Nature of Laws*), No. 60 (*All Government proved to be instituted by Men, and only to intend the general Good of Men*), No. 89 (*Every Man's true Interest found in the General Interest—How Little this is considered*). These ideas were, of course, the concern of many of history's great minds. See especially JOHN LOCKE, *CONCERNING CIVIL GOVERNMENT* SECOND ESSAY § 202 ("wherever law ends, tyranny begins"), ch. IX (*of the Ends of Political Society and Government*), ch. XVIII (*of Tyranny; Regarding the restrictions of freedom by justice*) (1690) (on the supremacy of law as a condition of political liberty). See also JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (James H. Tully ed., 1983) (London 1689). Even the Roman namesake of *Cato's Letters* demonstrated deep concern about excess individualism, albeit in an interesting way. BOURNE, *supra* note 2, at 202. In his history of Rome, Cato the Censor omitted the names of any generals in the wars he described to avoid glorifying the

Lawrence Gasman, a management consultant specializing in telecommunications technology, and author of *Telecompetition: The Free Market Road to the Information Highway*,<sup>6</sup> Is no Mark Twain, but then is anyone? Mr. Gasman, whose libertarian prose is somewhat cranky and in *Telecompetition* often more opinionated than substantiated, has written a hair shirt of a book for policy makers: hard to like and intended to be read both as penance and a prickly reminder of the sin of regulatory excess. Gasman explicitly states that his book "is primarily a complaint about the continued over regulation of U.S. electronic communications"<sup>7</sup> which if continued, he fears, could perversely erode individual liberties and deprive the public of the new wealth of communication, information, and entertainment that technological innovation now lays at our doorstep. He argues that the private sector is willing, and should be relied upon, to build new electronic networks and deliver advanced technology to the marketplace—even to high-cost rural areas without more than very short-term government intervention or public subsidy. Gasman is not at all sympathetic to those who would guard against creating a society of information haves and have-nots.<sup>8</sup> He tartly states, "the idea of telecommunications services as a basic human right is on very shaky ground."<sup>9</sup> Gasman calls for

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individual, although Cato did record the exploits, by name, of Surus, the bravest of the Carthaginian war elephants. *Id.*

6. LAWRENCE GASMAN, CATO INSTITUTE, *TELECOMPETITION: THE FREE MARKET ROAD TO THE INFORMATION HIGHWAY* (1994). The institute is a public policy research foundation named for *Cato's Letters*. Among other things, the Cato Institute publishes the CATO JOURNAL and the quarterly magazine REGULATION. Reminiscent of Huck Finn's reaction to the widow Douglas, the chairman of the Cato Institute recently complained about what he described as "the Nanny State." Cindy Skrzycki, *Hill Republicans Promise a Regulatory Revolution*, WASH. POST, Jan. 4, 1995, at A1, A6.

7. GASMAN, *supra* note 6, at ix.

8. *Id.* at 112, 124. The most visible proponents of the position Gasman attacks are Vice President Al Gore, Secretary of Commerce Ron Brown, and FCC Chairman Reed Hundt. See, e.g., Vice President Al Gore, Remarks at the Information Highway Summit (Jan. 11, 1994) and National Press Club (Dec. 21, 1993); FCC Chairman Reed Hundt, Remarks at Harvard Graduate School of Education (Feb. 28, 1994) and Information Highway Summit (Jan. 11, 1994). Although the "haves v. have nots" phrase is not used by Republicans, their policy framework sounds similar. See *Senate Republican's Proposal on Telecommunications Legislation: Executive Summary, Outline, and Policy Framework Overview*, Antitrust & Trade Reg. Rep. (BNA) No. 8, at M9 (Jan. 12, 1995) [hereinafter *Senate Republican's Proposal*]. House Speaker Newt Gingrich recently proposed, then called it a "dumb idea," giving tax credits to poor people to buy laptop computers. Mike Mills, *Convergence on the Data Highway; Gingrich Echoes Some Gore Themes at Technology Conference*, WASH. POST, Jan. 11, 1995, at D1. See David S. Bennahum, *Mr. Gingrich's Cyber Revolution*, N.Y. TIMES, Jan. 17, 1995, at A19; *Virtually Open Government*, WASH. POST, Jan. 14, 1995, at A24 (noting common ground shared by Speaker Gingrich and Ralph Nader affiliated Taxpayer Assets Group about the availability of electronic information).

9. GASMAN, *supra* note 6, at 124. Actually, Gasman would need to look no further than *Cato's Letters* to find a foundation for arguing about the importance of universal

sweeping government deregulation to be replaced by free and open markets, protection of individual property rights, and judicial enforcement of first amendment freedoms in a technology neutral manner.

The government would still have a role to play in keeping the telecommunications industry on track. But that role would have more to do with the traditional functions of government . . . the only legitimate role of government is enforcing property rights and facilitating the definition of those rights where necessary. This is mostly a job for the courts, although the legislature and the executive branches also have a small role to play.<sup>10</sup>

Otherwise, Gasman contends, government should essentially stand back and watch. An author who knows what he wants to say, and says it, Gasman concludes that most government action in the communication arena is unnecessary and undesirable.<sup>11</sup>

## II Clarity

The central fact of the modern communications era is that different distribution technologies are interchangeable, and therefore, legal distinctions among different kinds of conduits become obsolete. This is especially true once content is converted and transmitted in a digital format. Consequently, the current balkanization of the marketplace into telephone, broadcast, movie, cable, computer, newspaper, and a host of other separate communication and information entities is a regulatory hangover, not an incurable technological condition. Driven by technological change of historic proportions, the breakdown of increasingly artificial legal barriers is well underway. It is occurring in the marketplace through ingenuity and growth that bursts out of outmoded regulatory straight jackets,<sup>12</sup> and it is occur-

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access to the means of communicating ideas. *E.g.*, CATO'S LETTERS, *supra* note 2, No. 15 (*Of Freedom of Speech; That the Same is inseparable from publick Liberty*).

10. GASMAN, *supra* note 6, at 168-69. Ironically, many who support telecommunications reform legislation say it is time to take management of communications business out of the courts, referring to Judge Greene's continuing supervision of the Modified Final Judgement in the AT&T case. See *Hearings on Telecommunications Reform Legislation Before the Senate Commerce Comm.*, 104th Cong., 1st Sess. (1995) [hereinafter *Hearings on Telecommunications Reform*] (remarks of Sen. Robert Dole).

11. GASMAN, *supra* note 6, at 157.

12. See, e.g., Elizabeth Corcoran, *Firms Board Interactive Bandwagon*, WASH. POST, Jan. 6, 1995, at B1 (reporting on announcement at annual consumer electronics show of two teams of companies—AT&T Corp. and Zenith Electronics Corp., along with Thompson Consumer Electronics and Sun Microsystems Inc.—that will create interactive services enabling consumers to shop, play games, and check local news via their television, telephones and computers); Fred Dawson, *Time Warner Eyes Fast Track into Digital TV*, MULTICHANNEL NEWS, Dec. 19, 1994, at 41 (Orlando test of multi-application interactive services); Larry J. Yokell, *Cable TV Moves into Telecom Markets*, BUS. COMM. REV., Nov.

ring piecemeal through *ad hoc* legal decisions by judges and regulators.<sup>13</sup>

Meanwhile, Congress is still plodding forward towards a comprehensive rewrite of six decades worth of communications statutes and rules. These changes eventually will make even the notion of distinct telephone companies, television companies, or computer companies out of date—soon it will be easier simply to think generally of companies that provide various electronic communications, entertainment, and information services through an array of different appliances. In the emerging multimedia age, it is time for Congress, the executive branch—including the independent Federal Communications Commission (FCC)—as well as the courts, to address law and policy without being distracted by the nature of different transmission technologies. This will entail discarding archaic assumptions about the capabilities of modern technology and resisting the influence of established interests that oppose legal changes in order to maintain their market position.

*Telecompetition* Is an ambitious, confident effort to address this complex subject in a straightforward manner that ultimately succeeds in being mildly provocative. Mr. Gasman is at his best, and sometimes even soars, when explaining in plain English the science underlying technological developments. In a slender volume, Gasman offers a “science for poets” primer on a remarkable range of topics, including, for example, a brief history of microelectronics—from vacuum tubes to transistors to microchips to microprocessors—along with intelligible explanations of digital communications, electronic intelligence, electromagnetic spectrum, bandwidth, frequency, switching, compression, and convergence. Gasman also usefully defines a veritable alphabet soup of acronyms (e.g., ISDN, LAN, MAC, NREN, PC, PCS, PLMS, RACE, SMDS, TCP/IP, not to mention ITU, CCIR, CCITT,

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1994, at 43. See also Peter H. Lewis, *Microsoft's Next Move is On Line*, N.Y. TIMES, Jan. 13, 1995, at D1.

13. *US West v. United States*, No. 94-35775, 1994 WL 719064 (9th Cir. Dec. 30, 1994), *aff'd* 855 F. Supp. 1184 (W.D. Wash. 1994) (holding cable-telco cross ownership prohibition to be unconstitutional); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), *aff'd* 830 F. Supp. 909 (E.D. Va. 1993); *In re Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Service*, *Report and Order* in Gen. Dkt. No. 90-357, FCC 95-17 (Jan. 12, 1995); *In re Telephone Company-Cable Television Cross-Ownership Rules*, Sections 63.54-63-58, *Fourth Further Notice of Proposed Rulemaking* in CC Dkt. No. 87-266, FCC 95-20 (Jan. 12, 1995); Christopher Stern & Chris McConnell, *FCC to Advance Telco TV, Satellite Radio*, BROADCASTING & CABLE MAG., Jan. 9, 1995, at 6.

Intelsat, Inmarsat, and this writer's personal favorite, NSDD-145).<sup>14</sup> These are labels Gasman often brings to life with a "who shot John" type of story about a related regulatory struggle of various established business interests.<sup>15</sup> For experts Gasman's approach, by his own admission, is too simple. Yet the text probably is too technical and specialized to hook the lay person who lacks any experience or prior interest in this type of bait. For everyone in between, Gasman's style, like Baby Bear's porridge, is just right. This would include those who need to understand the political and economic implications of innovations in electronic technology such as business executives, analysts, investors, wannabe policy wonks, and what Gasman purports are the vast unwashed masses of regulators whose technical ignorance he finds "appalling."<sup>16</sup>

Mr. Gasman's use of clear language, his refusal to be a slave to jargon, is no small feat in a field where the terms have become as fuzzy and as unnourishing as cotton candy, where inelegant bureaucratic techno-speak burkes the life out of what should be a colorful age of enhanced communication. In addition, William Safire recently decried the proliferation of Cyberlingo such as "National Information

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14. Integrated Services Digital Network (ISDN), *GASMAN*, *supra* note 6, at 90; Local Area Network (LAN), *id.* at 6; Multiplexed Analogue Components (MAC) television, *id.* at 98-100; National Research and Education Network (NREN), *id.* at 85-86; Personal Computers (PCs), *id.* at 6, 26-27; Personal Communications Services (PCS), *id.* at 51; Private Land Mobile Radio Services (PLMS), *id.* at 138; Research and Development in Advanced Communications Technologies in Europe (RACE), *id.* at 109; Switched Multimegabit Data Service (SMDS), *id.* at 95; Transport Control Protocol/Internet Protocol (TCP/IP), *id.* at 158; International Telecommunications Union (ITU), *id.* at 99, 159-60; Consultative Committee for International Radio (CCIR), *id.* at 160-61; Consultative Committee for International Telephony and Telegraph (CCIT), *id.* at 89, 160-61; and National Security Decision Directive (NSDD-145), *id.* at 145.

15. Gasman's narratives need to be taken with a grain of salt. They are a bit sulphurous but at least he is even handed, as is, for example, his criticism of efforts by conservatives and liberals alike to control broadcast content: "Cultural conservatives would like broadcasting to be restricted to constant reruns of 'Little House on the Prairie' and other morally uplifting programming. Liberals believe taxpayers' money should find documentaries about homelessness, lesbian nuns, or supposed environmental threats." *GASMAN*, *supra* note 6, at 82. Perhaps he is just being Catonian, which the Compact Edition of the *OXFORD ENGLISH DICTIONARY* explains, is, like Marcus Porcius Cato or Cato the Censor and his descendent, Cato of Utica, to be severe, stern, and austere. Bailyn's synonym for Catonian is "grumbletonianism." *BAILYN*, *supra* note 2, at 53. There has been some suggestion that Gasman's book is a front for the telephone industry. See Joe Abernathy, *Highway Robbery Selling the Net: Cable and Telephone Companies Working to Tap into the So-called Information Highway*, *PC WORLD*, May 1994, at 56; *Collision on the Information Superhighway: Letters to the Editor*, *PC WORLD*, Sept. 1994, at 19. Gasman certainly does not read like a man who can be told what to write, and there is much in his little book that might make a telephone executive dyspeptic.

16. *GASMAN*, *supra* note 6, at 16.

Infrastructure.”<sup>17</sup> According to Safire, Sir Winston Churchill, the patron saint of English language watchdogs, must be turning over in his grave.<sup>18</sup> It seems that Sir Winston once even rose up in the House of Commons to ridicule an opposition politician for using the word “infrastructure” in parliamentary debate.<sup>19</sup> Lately, however, standing up to empty communications jargon in Congress would amount to aerobic exercise. Gasman himself finds enough material on what he calls metastasizing infrastructure policy to devote an entire chapter to the new “in” word.<sup>20</sup>

Indeed, perhaps the first telecommunications reform law the new Congress should enact is a statutory prohibition on the use of the annoying phrase “information superhighway” and all its inbred, metaphorical progeny. It certainly has become one of the most widely used, overhyped, least understood phrases on the planet. For most people the whole concept is as elusive as grasping the right coins at a correct change toll machine. Yet it is hard to find a witness at a communications hearing who can resist calling the FCC the “highway patrol.” The popularity of the quasi-public worldwide system of computer networks known as the Internet is reportedly causing “traffic jams” that rival beach-bound lanes in the summer. For many, the failures of some start-up ventures and the well-publicized break-ups of proposed mega-deals are blinking amber lights warning that not all roads on the superhighway are paved with gold. Businesses and industries left behind will be “roadkill.” The underserved, including rural and poor Americans must not be left on the “shoulder.” They deserve a “right of way” and need “on ramps” that afford universal access. Some say there should be a “bike lane” for public interest, educational, and health services because the whole shebang is “the fast track to Tomorrowland.” No member of Congress wants legislative gridlock, U-turns, or fender benders that prevent drafting a “roadmap” for the future, and, of course, everyone wants to put the consumer in the “driver’s seat.”<sup>21</sup>

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17. William Safire, *On Language: Cyberlingo*, N.Y. TIMES MAG., Dec. 10, 1994, at 32.

18. *Id.*

19. *Id.*

20. GASMAN, *supra* note 6, at 85-115.

21. In a recent poll about the information highway, more than 50% of all Americans said they were in favor of it, and two-thirds said they did not know what it was. FCC Chairman Reed Hundt, Address at the Electronic Industries Association Consumer Electronics Show (Jan. 6, 1995). United States Telephone Association President, Roy Neel, the Vice President’s former chief of staff, has been simply calling the information highway “The Thing” until he finds a better expression. See, e.g., *Needed: New Term for “Information Superhighway,”* SACRAMENTO BEE, Dec. 28, 1994, at F2. Stanford Professor Paul Goldstein uses the expression “celestial jukebox.” See PAUL GOLDSTEIN, COPYRIGHT’S

### III Timeliness

While Mr. Gasman's clear language is commendable, *Telecompetition's* usefulness, and ultimately its persuasiveness, is limited in a number of respects. First, the book, a product of a four year effort, is at best a snapshot of a rapidly moving target: technological and legal change of great magnitude occurring at unprecedented speed. Rather than lead his target, Gasman has developed a freeze frame of the past, often critiquing a regulatory environment or mindset that no longer exists or has already been superseded by critical developments. For example, although Gasman devotes considerable attention to spectrum management issues, *Telecompetition* does not even address the biggest change in the history of United States licensing of the airwaves since the failure of warning and distress signals in the Titanic disaster bolstered momentum for the federal government to seize control of the radio spectrum in the first place.<sup>22</sup> In the summer of 1993, when Congress narrowly approved President Clinton's deficit reduction package by passing an Omnibus Budget Reconciliation Act (OBRA),<sup>23</sup> It also authorized the FCC, for the first time, to issue microwave spectrum licenses through competitive bidding procedures.<sup>24</sup>

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HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX (1994).

22. Former Georgetown University Law and now Dean of William & Mary's Law School, Professor Thomas G. Krattenmaker explains the causal link between the sinking of the Titanic and the passage of the Radio Act of 1912. In brief, the congressional investigation into the disaster revealed that the Titanic's distress calls had been received by the Marconi station in Newfoundland. Amateur radio interference along the East Coast prevented the signals from reaching potential rescuers in the vicinity of the Titanic. The Titanic incident helped to propel efforts to obtain government control of the airwaves. The history is vividly portrayed in greater detail in THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 5-7 (1994). See also Vice President Al Gore, Remarks at the National Press Club (Dec. 21, 1993) (relating Titanic disaster to first efforts to regulate airwaves).

23. Pub. L. No. 103-66, 107 Stat. 312 (1993) (codified as amended in scattered sections of U.S.C.) (signed into law by President Clinton on Aug. 10, 1993).

24. *Id.* § 6002, 107 Stat. at 388-92 (to be codified at 47 U.S.C. § 309(j)(1)-(12)). Underlying bills in the 103d Congress included the Emerging Telecommunications Technologies Act of 1993, H.R. 707, 103d Cong., 1st Sess. (1993) and its accompanying report, H.R. REP. NO. 19, 103d Cong., 1st Sess. (1993). H.R. 707 passed the House under suspension of the rules. 139 CONG. REC. H936-42, H950 (daily ed. Mar. 2, 1993). The Emerging Telecommunications Technologies Act of 1993, S. 335, 103d Cong., 1st Sess. (1993), was introduced on February 4, 1993. 139 CONG. REC. S1384 (daily ed. Feb. 4, 1993). It was ordered reported with amendments by the Senate Commerce, Science and Transportation Committee on May 25, 1993, however, no report was filed. 139 CONG. REC. D575 (daily ed. May 25, 1993). See also *Emerging Telecommunications Technologies Act of 1993: Hearings on S.335 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 1st Sess. (1993). See Nicholas W. Allard, *The New*

Since enactment of the new spectrum auction law, there have been several major rulemakings addressing the myriad of practical details involved with implementing competitive bidding procedures, including allocation of spectrum blocks to various geographic license areas,<sup>25</sup> rules for eligibility and bidding,<sup>26</sup> and rules designated to encourage participation of small businesses, women, minorities, and rural businesses in the auctions.<sup>27</sup> These new procedures have already been used to auction frequencies allocated for two-way paging (national and regional narrowband Personal Communications Services), Interactive Video Distribution Services (IVDS), and broadband Personal Communications Services (PCS).<sup>28</sup> The results, in terms of efficiency, fairness, and revenues raised have been impressive.<sup>29</sup> So while Gasman writes about the inefficiencies associated with the traditional techniques for allocating and assigning spectrum, i.e., comparative hearings and lotteries, and although he mentions in passing that he prefers lotteries to auctions but would rather have the government get out of spectrum management altogether,<sup>30</sup> his analysis has been overtaken by a completely novel technique for awarding new spectrum licenses for most communications uses.<sup>31</sup>

Actually, there has been so much water under the bridge since Gasman wrote *Telecompetition* that it often now reads, through no fault of his, like a late arriving message in a bottle. It is certainly no longer news that what Gasman accurately describes as the "three-segment" regulatory model, which in the past has divided common carriers, print media, and broadcasters into distinct industries subject to separate regulatory regimes, is outdated and needs to be revamped.<sup>32</sup>

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*Spectrum Auction Law*, 18 SETON HALL LEGIS. J. 13, 15-35 (1993) (discussing evolution and legislative history of the auction statute).

25. *In re* Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd. 1411 (1994).

26. *In re* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd. 2330 (1994).

27. *See supra* notes 25-26.

28. *See, e.g.*, FCC, VISITOR'S AUCTION GUIDE (Dec. 5, 1994) (including summaries of narrowband and IVDS auctions).

29. *Id.* *FCC Now a Money-Maker After Makeover*, CHI. SUN-TIMES, Jan. 2, 1995, at 33; Teresa Riordan, *The Bidding For Airwaves May Pick Up*, N.Y. TIMES, Jan. 9, 1994, at D1, D8.

30. GASMAN, *supra* note 6, at 133. *See id.* at 132-40. *See also id.* at 65-67, 126-28.

31. Gasman has since had the opportunity to write about the new auction law. Lawrence D. Gasman, *Free Markets for Telecom: Create A Spectrum of Competition*, WALL ST. J., June 9, 1994, at A14. He concludes that auctions and lotteries can have a role in privatizing spectrum but advocates flexible use and transferability of licenses so that "[c]hunks of the airwaves would be sold as freely as bread or salami in the supermarket." *Id.*

32. Senate Commerce Committee Chairman Larry Pressler calls this outdated regulatory regime "regulatory apartheid"—each technology has its own native homeland. *Hear-*

For example, even in the absence of legislative action a fistful of federal courts have struck down the restriction in the 1984 Cable Act that blocks telephone companies from offering cable television services in their local telephone markets;<sup>33</sup> the FCC has begun to plow through a small mountain of telephone company video dialtone applications;<sup>34</sup> the broadcast industry has renewed its efforts to use some of the spectrum assigned for high definition television for nontraditional purposes;<sup>35</sup> and new online press services such as Bloomberg Business News are rapidly becoming multimedia.<sup>36</sup> Similarly, since *Telecompe-*

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*ings on Telecommunications Reform*, *supra* note 10 (statement of Sen. Pressler). See, e.g., Cheryl Bolen, *From Hours of Discussions to Non-Negotiable Demands: The History of the Failed 1994 Telecommunications Bill*, *Daily Rep. for Executives (BNA)* No. 226, at C1 (Nov. 28, 1994); William J. Cook et al., *Fast Lane to the Future*, *U.S. NEWS & WORLD REP.*, Jan. 17, 1994, at 56; Martin Dickson, *Uncle Sam's Super-Highway: In a Rapidly Changing Market, the U.S. is Dismantling Telecommunications Regulations*, *FIN. TIMES*, Jan. 13, 1994, at 23; William J. Eaton & Leslie Helm, *House Rewrites Phone, Cable Rules*, *L.A. TIMES*, June 29, 1994, at A1; Carolyn Lochhead, *Historic Reform of Telephone, Cable OK'd, House Votes by Landslide to Boost Telecommunications Competition*, *S.F. CHRON.*, June 29, 1994, at A1. See also John Schwartz, *Over the Net and Around the Law*, *WASH. POST*, Jan. 14, 1995, at C1 (reporting on computer users' access to the Voice of America broadcasts); Anita Sharpe, *Turner Broadcasting Mulling New Unit as Vehicle to Acquire Broadcasting Network*, *WALL ST. J.*, Jan. 13, 1995, at B2.

33. Rulings by the United States Court of Appeals for the Fourth Circuit on November 21, 1994 and the Ninth Circuit on December 30, 1994 echoed several district court rulings that the 1984 Cable Act violates the telephone companies' First Amendment rights. *US West v. United States*, No. 94-35775, 1994 WL 719064 (9th Cir. Dec. 30, 1994), *affg* 855 F. Supp. 1184 (W.D. Wash. 1994); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), *affg* 830 F. Supp. 909 (E.D. Va. 1993); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994). See *COMM. DAILY*, Sept. 27, 1994, at 5; Charles Hadad, *BellSouth Wins Key Victory in Cable Push, Ruling Could Allow Service in 9 States*, *ATLANTIC J. & CONST.*, Sept. 24, 1994, at B1; Dennis Wharton, *Ala. Judge Ok's BellSouth Cable Entry*, *VARIETY*, Oct. 9, 1994, at 50.

34. *In re Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Regulation, Notice of Proposed Rulemaking*, 8 FCC Rcd. 510 (1992); *In re Telephone Company—Cable TV Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Notice of Proposed Rulemaking*, 7 FCC Rcd. 5781 (1992).

There is broad, bipartisan agreement in Congress, in the Administration, at the FCC, and among commentators that the time has come to allow the telephone companies to compete with cable over video services. The cable television industry has a different view. It has opposed every video dialtone application at the FCC, filing opposition papers amounting to more than 33,000 pages, a 12 foot-high stack of paper, containing enough words that if the words were placed end to end, they would reach at least from Washington, D.C. to Philadelphia. FCC Chairman Reed E. Hundt, Remarks Before the Networked Economy Conference in Washington, D.C. (Sept. 26, 1994). See Ted Hearn, *Cable Comforted by Closer FCC Scrutiny of Telco VDT*, *MULTICHANNEL NEWS*, Dec. 19, 1994, at 32.

35. Kim McAvoy, *Republicans Float Telcom Reform Plans*, *BROADCASTING*, Jan. 2, 1995, at 9. Flexible spectrum use is part of the proposed Republican Senate reform package in the 104th Congress. See *Senate Republican's Proposal*, *supra* note 8.

36. According to Bloomberg editor David Zielenziger,

tion first appeared there have already been two high visibility, historic summits of international telecommunications regulators at which the United States delegation, led by Vice President Gore, made the kind of effort to open overseas markets and adopt rational spectrum resource management that Gasman uncharacteristically favored in his book as an appropriate role for government intervention.<sup>37</sup>

With the benefit of hindsight it appears that some of *Telecompetition's* forecasts are more off target than stale. Gasman misjudged the momentum building for landmark legislation to refashion telecommunication law,<sup>38</sup> but his book was written without the benefit of observ-

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Bloomberg Business News, a unit of Bloomberg L.P. in New York, began providing on-line news to about 10,000 users of its financial information system computers in mid-1990. By the beginning of 1995, Bloomberg had over 44,000 users who continued to receive on-line news. Meanwhile, the news service grew to serve over 140 newspapers worldwide.

Bloomberg, which has distributed a 15-minute weekday broadcast called "Bloomberg Business News" on public television stations since mid-1992, started loading the show onto its terminals in late 1994. The "BloombergDirect" channel broadcasts on 18-inch satellite dishes sold to consumers. These programs will also be carried live on the Bloomberg system in 1995.

Bloomberg bought a 50,000-watt AM radio station in New York and began 24-hour broadcasts on WBBR-AM 1130 in 1993. News reports are syndicated nationwide. Radio excerpts have been available on Bloomberg terminals since early 1994.

In 1994, Bloomberg also began offering on-demand audio-video service to clients seeking information on particular securities. Interviews with leading newsmakers, including heads of state, corporate chief executives and money managers, are loaded into the system and available "on-demand" to users anywhere in the world.

Full-motion video service will follow using the same ATM technology leading telecommunications companies plan to offer customers in the future.

Meanwhile, Bloomberg publishes two monthly magazines, "Bloomberg," a monthly, sent to all customers, and "Bloomberg Personal," which appears as a Sunday supplement to leading U.S. newspapers. Both publications tout the Bloomberg terminal but also provide access, through an "800-Bloomberg" telephone line, to Bloomberg interviews and features.

A common thread linking all these enhanced services is that they are completely interactive, which has always been Bloomberg's principal tool in competing in the on-line financial services market.

Memorandum from David Zielenziger, Bloomberg L.P., to Nick Allard, Latham & Watkins 1 (Jan. 11, 1995) (on file with the *Hastings Communications and Entertainment Law Journal*).

37. GASMAN, *supra* note 6, at 159-65. In March 1994 the first development conference in the 100 year history of the International Telecommunication Union involved the top telecommunication officials from 180 countries. See Vice President Al Gore, Remarks Before the ITU in Buenos Aires (Mar. 21, 1994). The second summit was the G-7 Telecommunications Conference in Brussels, Belgium on February 24-25, 1995. The United States delegation to the G-7 summit included the Vice President, the Secretary of Commerce, and 10 executives from United States telecommunications businesses.

38. *E.g.*, GASMAN, *supra* note 6, at 36 n.3 ("The old Bell companies are almost certainly further from winning an end to the restrictions or their entry into long distance

ing the vigorous efforts in the 103rd Congress to enact a top to bottom overhaul of the law.<sup>39</sup> The political *tsunami* that swept Republicans into control of Congress is likely to alter the course of the debate but hardly likely to sink ongoing nonpartisan efforts to achieve this goal in the 104th Congress.<sup>40</sup>

Gasman also railed against the Cable Act of 1992 as an example of the trend toward increasing government regulation.<sup>41</sup> If anything, however, the Cable Act now looks like the transitional exception that proves the point that generally competition, not regulation, has become the preferred tool of communications policy. This will be even more apparent if the 104th Congress weakens or eliminates the rate regulation provisions enacted just a few years ago. Gasman's reaction to the Cable Act is quite visceral, for his views were written before practically any of it was implemented and, like so many commentators quick out of the blocks on this controversial subject, offered without any significant data in hand to argue the case either way.<sup>42</sup> Just a year after the break up of the Bell Atlantic-TCI deal, the sun still rises and sets, the cable and broadcast industries appear to have buried the hatchet and agreed not to fight the Cable Act's must carry provisions on Capitol Hill,<sup>43</sup> and telephone company ventures into Hollywood to produce programming for their own video networks show their desire

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business than they are from gaining freedom from other line-of-business restrictions."), 154 ("there is nothing like the political consensus necessary to refashion U.S. communications policy from top to bottom").

39. Bolen, *supra* note 32.

40. *Hearings on Telecommunications Reform*, *supra* note 10 (statements of Chairman Larry Pressler and Sen. Daniel Inouye; testimony of Sen. Robert Dole, Rep. Thomas Bliley, and Rep. Jack Fields); Edmund L. Andrews, *New Effort to Settle Data Issues*, N.Y. TIMES, Jan. 9, 1995, at D1; McAvoy, *supra* note 35; *MacNeil-Lehrer News Hour* (PBS television broadcast, Jan. 4, 1995) (interview with Senate Majority Leader Robert Dole).

41. GASMAN, *supra* note 6, at 36 n.1, 38-39.

42. For a provocative analysis of the impact of rate regulation on what programming cable operators carry, see Thomas W. Hazlett, *Regulatory Cable Television Rates: An Economic Analysis* (July 1994) (unpublished manuscript, on file with Thomas W. Hazlett, Director of the Program on Telecommunications Policy, Institute of Government Affairs, University of California, Davis) and compare with data summarized by FCC Chairman Reed E. Hundt, *Speech Before the Washington Cable Club* (Dec. 20, 1994); Kirk Victor, *Cable's Comeback*, NAT'L J., Dec. 17, 1994, at 2962, 2999. "Cable had the highest operating profit margin in the communications industry in 1993, according to a recent analysis by the investment banking firm of Veronis, Suhler & Associates. But the industry argues that the rate rollback, which went into effect in May 1994, is having an adverse financial impact." *Id.*

43. Ted Hearn, *NCTA Focus on Bell Bout Not Must Carry*, MULTICHANNEL NEWS, Dec. 19, 1994, at 1; *Rate Regulation Affected: Cable Wants Looser Effective—Competition Definition in Bill*, COMM. DAILY, Dec. 19, 1994, at 2.

for competition, rather than mere marriage to cable.<sup>44</sup> Meanwhile, by no coincidence the cable industry suddenly is thinking more fondly of the once reviled fair access to programming provisions of the Cable Act,<sup>45</sup> and many indicators demonstrate that cable is not only healthy but that the prognosis for the industry is good.<sup>46</sup>

The difficulty of writing a topical book about telecommunications is the same challenge encountered by lawmakers who try to legislate and regulators who try to draft rules in a dynamic and rapidly evolving field. Ironically, the instances where *Telecompetition* has not weathered the short passage of time makes as powerful a case as anything Gasman says explicitly about what is the proper role of government. Communications policy needs to be flexible, technology neutral, and not tied to the past or even the present. Otherwise, policy will have a distorting impact that delays change and innovative services.

#### IV Persuasiveness

*Telecompetition* Is postured as a contrarian tract, so it is surprising to find Mr. Gasman arguing so vigorously in favor of so many views, with some significant exceptions, which have become part of the growing consensus about what needs to be done. In 1934 Congress enacted the Communications Act,<sup>47</sup> which to this day provides this country's central body of communications law. The regulatory framework and the resulting market structure were altered significantly in 1984 when the breakup of AT&T took effect<sup>48</sup> and with the

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44. Richard Corliss, *A Studio is Born*, TIME, Oct. 24, 1994, at 68; Ronald Grover, *Hollywood Scuffle*, BUS. WK., Dec. 12, 1994, at 36.

45. See *supra* note 43.

46. See Rich Brown, *Cable Rebound Forecast for '95*, BROADCASTING & CABLE MAG., Jan. 2, 1995, at 8-9; Hundt, *supra* note 42; Victor, *supra* note 42, at 2966. The recent announcement that Sprint Corp., the nation's third-largest long distance company, was linking up with TCI and two other cable companies—Comcast Corp. and Cox Enterprises Inc.—to provide local and long distance service, cable television, and wireless communications in a single package is cited by some as indication that, notwithstanding the break-up of the Bell Atlantic-TCI deal, cable firms are moving headlong to establish a place on the networks of the future. Victor, *supra* note 42, at 2966.

47. Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.). Other especially important statutes include Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 419 (codified as amended in scattered sections of 47 U.S.C.) and Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

48. *United States v. AT&T*, 552 F. Supp. 131, 178-79 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

enactment of the first Cable Act,<sup>49</sup> and revised again more recently by the Cable Act of 1992.<sup>50</sup> With regard to the massive rewrite of these existing statutory, regulatory, and judicially imposed rules which the 104th Congress will undertake, there is more agreement than disagreement on the core issues. While much jostling and verbal pyrotechnics can still be expected, this will largely occur at the margins.

For example, it is almost now an article of faith that the much ballyhooed advanced communications networks of the future should be built through private investment and privately owned rather than by government subsidy and state controlled. Though when writing *Telecompetition* Gasman perceived growing support for subsidizing new technology at taxpayer expense.<sup>51</sup> In reality, it would be difficult to find anyone in government today who would support this proposition.<sup>52</sup>

Gasman's analysis of communications monopolies is also almost mainstream.<sup>53</sup> For over six decades the model of the regulated natural monopoly has dominated United States law and policy. Depending on one's perspective, this model may or may not have served well in the past to protect the public interest. Now, however, the assumptions underlying this model are patently false; without government intervention creating and protecting communications industries from competitors they are neither natural nor monopolies. Consequently, all three branches of the federal government are working in tandem, sometimes consciously, sometimes inadvertently, at legal changes that will replace the monopoly model with a competition model. In the competition model the role of government becomes that of a referee, not a player or a cheerleader. Markets are opened to multiple players from the private sector and their vigorous competition with each other; playing the game, rather than gaming regulations, is the primary determinant of how business is conducted. Competition, not regulation, is the principal check on abuse of market power. Accordingly, as Gasman could only hope, there is considerable support for streamlining and, in many instances, phasing out or completely replac-

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49. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

50. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

51. GASMAN, *supra* note 6, at 84-85.

52. This position has been disseminated so broadly that it even was part of Vice President Gore's message to children in the so-called *Mini-Page* of the Sunday comics. Betty Debnam, *Answers from Vice President Al Gore, The Information Superhighway*, Universal Press Syndicate, Oct. 9, 1994 ("Q. Who will build it? A. The information superhighway will be built by private companies, not the government.").

53. GASMAN, *supra* note 6, at 35-62.

ing existing regulations—regulations that prohibit local telephone companies from offering long distance and other services, that bar telephone competition with cable and cable competition with telephone voice services.

The concept of technology neutrality is also holy writ in the new regulatory religion. Gasman speaks of this concept largely in terms of how the courts should apply First Amendment principles, and this is indeed an important point. Unfortunately, it is hard to be optimistic that the Supreme Court will any time soon develop a coherent first amendment analysis that moves beyond outmoded and naive views of technology and the telecommunications marketplace.<sup>54</sup> In *Turner Broadcasting System v. FCC*,<sup>55</sup> the most recent opportunity for the Court to tackle the subject matter, the Court expressly declined the opportunity to reexamine the validity of the so-called "scarcity rationale" it has long held to justify more intrusive regulation of broadcasting than other media.<sup>56</sup> In its technology specific, scarcity-based approach the Court discusses technical differences between broadcast and cable television and describes advances in communications technology in a way that is simplistic and unconvincing, if not just wrong.<sup>57</sup>

54. See J. GREGORY SIDAK, TELECOMMUNICATIONS: UNLEASHING THE INDUSTRY 41 (American Enterprise Institute (1994)) (calling the "inferior protection that the Supreme Court has afforded electronic speech . . . one of the great embarrassments of contemporary constitutional jurisprudence" and arguing that electronic speech conveyed by telecommunications deserves as much protection under the First Amendment as newspapers). Compare the approaches of Sidak and Philip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147 (1993), who would elevate electronic speech to full first amendment protection afforded newspapers and thereby analogize new media technology to existing regulatory models, with other criticisms of the existing hierarchical First Amendment distinctions among different media which propose alternative technology neutral First Amendment models. See Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329; Laurence H. Winer, *The Signal Cable Sends—Part 1: Why Can't Cable Be More Like Broadcasting*, 46 MD. L. REV. 212 (1987); Note, *The Message in the Medium: The First Amendment and the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).

55. 114 S. Ct. 2445 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993), *reh'g denied*, 115 S. Ct. 30 (1994) (directing three-judge court to resolve material issues of fact in light of the Court's First Amendment analysis).

56. The scarcity rationale focuses on the physical characteristics of the microwave spectrum which determine the availability and ability to use microwave frequencies to broadcast signals. See *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Compare *NBC v. United States*, 319 U.S. 190 (1943) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). See KRAT-TERMAKER & POWE, *supra* note 22, at 196, 208, 229, 235 (discussing *Turner's* treatment of scarcity rationale).

57. The Court explains:

[t]he broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression

In contrast, those policy makers working on the new rules for the market of the future find the concept of technology neutrality of considerable use. To the extent possible, technical standards should assure the compatibility and interoperability of all information appliances and services without regard to the type of technology involved or the delivery system employed: wireline or wireless; terrestrial or satellite; broadcast or cable; print or computer. The objective is eventually to encourage the deployment and use of a seamless global interconnected web of networks. And where regulation is appropriate, as in transitional situations where competitive markets do not yet exist, regulations should be technology neutral. In light of accelerating change and dramatic convergence in the marketplace with different technologies capable of delivering similar services, regulations should be flexible, comprehensive, and fair—businesses offering similar services should face comparable rules for conducting business.

In two areas, however, Mr. Gasman's views are rather extreme and not likely to find significant political support anytime soon. First is his suggestion that further protection of universal telephone service should be minimal and relatively short lived, if indeed it is not altogether unnecessary.<sup>58</sup> Currently, universal service refers to the implicit agreement between local phone companies and their regulators to assure that basic local phone service is priced at levels most people can afford, despite the substantially higher actual cost of providing the service. On average, local residential phone service is subsidized and is generally offered below cost, especially in rural areas. This differential has historically been made up by the rates local phone companies charge for other services such as long-distance service, touchtone phones and other items. The "Universal Service Fund" is one of the primary financial mechanisms now in place to subsidize companies serving high-cost rural areas, enabling these companies to charge rela-

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technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.

*Turner*, 114 S. Ct. at 2457; see also Justice Kennedy's opinion describing the differences between broadcast and cable, *id.* at 2451, and Justice O'Connor's dissent describing limits of cable capacity, *id.* at 2475-81.

58. GASMAN, *supra* note 6, at 112, 124, 130-31. The Heritage Foundation has called for elimination of universal service subsidies. ADAM D. THIERER, THE HERITAGE FOUNDATION, A POLICY MAKER'S GUIDE TO DEREGULATION TELECOMMUNICATIONS—PART 1: THE ACCESS SOLUTIONS (1994).

tively low rates despite especially high costs. Currently, approximately ninety-four percent of all American households have telephones.<sup>59</sup>

The arrival of new telecommunications technologies capable of delivering a wide range of advanced services and the advent of greater competition creates pressure on the existing universal service system and an opportunity to upgrade the availability and quality of the service offered. Policy makers are considering whether access to basic dialtone service should continue to be the only goal of universal service or whether the concept should be redefined as technology advances to encompass a more varied bundle of information services. The question is whether universal service moves from POTS (Plain Old Telephone Service) to PANS (Pretty Advanced New Stuff).

Widespread competition in the local telephone exchange market, for all its advantages, also puts pressure on rate structures because under existing rules new entrants do not have universal service obligations and can profit by undercutting the local phone company which does. Both the Administration and the sponsors of Telecomm Reform Legislation make preserving and enhancing universal service a priority.<sup>60</sup> While much remains to be decided (so far the congressional debate has done little to determine basic details such as who gets, who pays for, and what is included in universal service) it is likely that any new rules will at a minimum strengthen the existing system, rather than, as Gasman strongly implies, count on the free market to provide uninterrupted affordable service to all Americans.

A second rather radical proposal would be to completely privatize spectrum management of unused frequencies.<sup>61</sup> Gasman calls this

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59. *Hearings on H.R. 3626 Before the House Subcomm. on Telecommunications and Finance Comm. on Energy and Commerce*, 103d Cong., 2d Sess 183-95 (1994) (testimony of Reed E. Hundt, Chairman, FCC). As Chairman Hundt testified, although 94% of Americans are served, a disproportionate percentage of households without telephone service are low income households, particularly African-American and Hispanic households. *See also id.* at 145 (testimony of Larry Irving, Asst. Secretary for Communications and Information, U.S. Dep't of Commerce).

60. *E.g.*, *Senate Republican's Proposal*, *supra* note 8; Administration White Paper on Communications Act Reforms 1-2 (issued Jan. 27, 1994), *reprinted in* Daily Rep. for Executives (BNA) No. 18 at M1, M4 (Jan. 28, 1994); U.S. Dep't of Commerce, National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49,025 (1993); Vice President Al Gore, Remarks at the Federal-State-Local Telecomm Summit (Jan. 9, 1995). The very first section of the reform bill that passed through the Senate Commerce Committee by an 18-2 vote (11 Democrats and 7 of 9 Republicans) was devoted to protecting and enhancing universal service. *See* S. 1822, 103d Cong., 2d Sess. (1994). Similarly, the House bill, approved by the full House by an overwhelming bipartisan majority, provided for protecting and enhancing universal service. H.R. 3636, 103d Cong., 2d Sess. (1994).

61. GASMAN, *supra* note 6, at 65, 129-40.

approach "frequency-coordination" or "homesteading," but as described it sounds more like it would lead to range wars. He is in good company criticizing past FCC allocation and assignment techniques under the 1934 Communications Act, which, for example, delayed the advent of cellular telephones thirteen years or more.<sup>62</sup> There is also considerable support for his view that spectrum scarcity is in many respects a government created myth.<sup>63</sup> Gasman departs from this relatively well charted terrain to resurrect a proposal supported by Ayn Rand that would permit private parties to obtain enforceable property rights to unused spectrum by registering their intent to use the spectrum and then using it, presumably in a fashion that does not interfere with other legitimate spectrum users.<sup>64</sup> In order for this approach to work, spectrum would have to be available for any desired use, not specific limited uses as is now the prevailing FCC practice. Moreover, private rights in the spectrum would have to be freely transferable. In this way, the theory goes, spectrum would efficiently find its highest valued use. The details of the methods for limiting interference problems are not clear. Gasman notes that tests of some kind might be necessary to check a new registrant's claim of noninterference with incumbents.<sup>65</sup> Apparently, private frequency-coordination groups and the courts would be used to clear up disputed rights. One wonders how practical and desirable it is for entrepreneurs and other newcomers to have to litigate their way onto the airwaves. Conversely, homesteading could give rise to so-called green mailers with no actual intention of using the spectrum but instead whose objective would be to be bought off by others that would seek to use the spectrum free of even the prospect of interference. For these reasons the homestead-

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62. *Id.* at 72-73. For a summary of the criticisms leveled against comparative hearings and lotteries, see Allard, *supra* note 24, at 23-30.

63. GASMAN, *supra* note 6, at 67-71. Technology consistently expands the supply of usable spectrum by increasing our ability to use existing spectrum (e.g., compression technology) and by developing ways to use new, previously unused spectrum. Hazlett and others argue that the federal government has historically created false scarcity through its spectrum licensing policies. See, e.g., NATIONAL TELECOMMUNICATIONS AND INFO. ADMIN., U.S. DEP'T OF COMM., U.S. SPECTRUM MANAGEMENT POLICY: AGENDA FOR THE FUTURE 119-26 (1991); CONGRESSIONAL BUDGET OFFICE, A CBO STUDY: AUCTIONING RADIO SPECTRUM LICENSES IX-XI, 5-7 (1992); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 136-39 (1990); *Auctioning the Airwaves*, FORBES, Apr. 11, 1994, at 99; George Gilder, *What Spectrum Shortage?*, FORBES, May 27, 1991, at 324-32; George Gilder, *TELECOSM, The Bandwidth Tidal Wave*, FORBES, Dec. 5, 1994, at 162; Thomas W. Hazlett, *The Political Economy of Radio Spectrum Auctions* (Jan. 1994) (unpublished manuscript, on file with Thomas W. Hazlett, Director of the Program on Telecommunications Policy, Institute of Government Affairs, University of California, Davis).

64. GASMAN, *supra* note 6, at 133. See also Gasman, *Free Markets*, *supra* note 31.

65. GASMAN, *supra* note 6, at 133 n.15.

ing approach seems at least as cumbersome and inefficient as past spectrum management methods. Until the advent of some technological breakthrough or market development that would greatly simplify interference issues, the Gasman homesteading concept is likely to remain on the back burner.

Sometimes in hindsight what once passed for conventional wisdom looks like a beer wagon driver's view of a team of Clydesdales. *Telecompetition* offers a libertarian send up of much of what was long considered wise communications policy. It might be surprising, or perhaps unsettling, for the author to reflect on how conventional his book has become in a short time. It might even be a mistake to reject, out of hand, his more radical ideas—elimination of universal service and privatization of spectrum management. In the future, innovations and changed market conditions might make these proposed policies more palatable and more practical. Right now that future is hard to see.

What, however, is clear is that tough policy decisions are right on the horizon. No facile allusion to political, literary or cultural icons, no matter how selective, how appealing, or how entertaining, will help with the hard choices. Neither TJ, FDR, nor JFK, neither *Cato's Letters*, *Bleak House*, nor even *Huckleberry Finn*, neither *Little Women's* Jo March, *Boys' Town's* Father Flanagan, nor anyone's Bubba will provide much help with the work that lies ahead. Any observer of recent efforts to relaunch comprehensive telecommunications reform legislation might conclude that without too much of a stretch, the speeches given by Republican and Democratic members of Congress, along with the speeches given by top Administration officials, could be collected, shuffled, and redealt, and they could almost deliver each other's remarks.<sup>66</sup> The big ideas, the rhetoric, and the jargon are all pulling together as a consensus builds for the new legal structure of the telecommunications marketplace. Of the hard questions that remain many distill into one: What is the appropriate role of government? The simple answer "none" cannot get a passing mark from any serious grader. There are too many examples that come to mind in a nanosecond—schools, education, public health and safety, universal telephone service, and many other information services that are crucial to the quality of life and the equality of opportunity—to deny that government has an important role. The issue is, after all, the very question at the heart of the Vice President's National Performance Review which is rethinking in a hard headed and systematic way

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66. See e.g., *Hearings on Telecommunications Reform*, *supra* note 10; Gore, *supra* notes 8, 60; Hundt, *supra* note 8.

“what the government should do and how should it do it?”<sup>67</sup> A variation on this theme was also the subject of the recent Telecommunications Conference for top industry executives sponsored by House Republicans which explored “What policies can Congress promote or repeal that would help your company to be more competitive and successful?”<sup>68</sup> These are questions much more interesting than simply asking how to change the laws to let special interests run free from government controls, questions that even neo-libertarians can relish.

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67. Stephen Barr, *Gore Urges Rethinking for Reinvention*, WASH. POST, Jan. 4, 1995, at A13; Stephen Barr, *Luring Reinvention With a Fish Story*, WASH. POST, Jan. 13, 1995, at A21; Memorandum for Heads of Executive Departments and Agencies from the Vice President Regarding Second Phase of the National Performance Review (Jan. 3, 1995).

68. *Bliley-Fields Field Trip*, BROADCASTING & CABLE MAG., Jan. 16, 1995, at 117; Daniel Pearl & Phil Kuntz, *House GOP, Communications Executives Plan Private Meeting on Regulations*, WALL ST. J., Jan. 17, 1995, at B4.

