UNITED STATES MEDIA POLICY AND THE GLOBAL INFORMATION REVOLUTION

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I. Introduction

The United States has made the availability of broadband media a major national priority. In 2009, Congress directed the FCC to develop a National Broadband Plan to ensure that every American has "access to broadband capability." It required this plan to include a detailed strategy to maximize affordable broadband service in order to promote "consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes."[1] The National Broadband Plan is a top priority for the Obama Administration and for the FCC under its current Chairman, Julius Genachowski.

Pursuant to this mandate, the FCC unveiled its National Broadband Plan in March 2010, setting forth six policy goals:

1. At least 100 million U.S. homes should have affordable access to actual download speeds of at least 100 megabits per second and actual upload speeds of at least 50 megabits per second.

2. The United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.

3. Every American should have affordable access to robust broadband service, and the means and skills to subscribe if they so choose.

4. Every American community should have affordable access to at least 1 gigabit per second broadband service to anchor institutions such as schools, hospitals, and government buildings.

5. To ensure the safety of the American people, every first responder should have access to a nationwide, wireless, interoperable broadband public safety network.

6. To ensure that America leads in the clean energy economy, every American should be able to use broadband to track and manage their real-time energy consumption.

[1] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009).

Another section of the Plan that addressed "civic engagement" made a number of recommendations designed to create open and transparent government, build a robust digital media ecosystem, expand civic engagement through social media, increase innovation in government, and modernize the democratic process. [2]

Although the demand for a national plan originated with findings that the U.S. had fallen behind other developed nations in broadband deployment, its inclusion as a part of economic stimulus legislation transformed it into something other than just landmark communications policy. The broad focus of its goals signaled that communications policy is now considered to be integral to major facets of domestic, and, to a certain extent, foreign policy, including national security, health care, education, employment, and energy consumption. It also illustrated the extent to which the Internet had emerged as the centerpiece of emerging U.S. communications policy, notwithstanding previous congressional findings that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." [3] In short, the National Broadband Plan cast the Internet as part of a massive public works project.

The overarching question this presents is how this view of the Internet can be reconciled with the historic approach to media policy in the United States. In some respects, the connection between the National Broadband Plan and legacy media regulation is quite direct. For example, the plan calls for broadcasters to give up as much as 120 MHz of spectrum for wireless broadband access, with channels 46 through 51 being reassigned by 2015. A total of 300 MHz would be needed, with mobile satellite service giving up 90 MHz.[4] In addition, the FCC adopted "network neutrality" rules, discussed in more detail below, to require broadband network providers to provide access without "unreasonable" discrimination between users.

But more profound questions arise from issues that go to the heart of media policy: How will the transition to broadband affect government policies that regulate more traditional media? Will the historic justifications for imposing government control wither away as new media become more ubiquitous, or will the government employ regulatory models designed for older media as a template for controlling new communications technologies? If so, what legal theories will be used to replace justifications that were tailored to the particular characteristics of older media?

Perhaps more importantly, how will the National Broadband Plan and other emerging policies address revolutionary changes in the media sector that have threatened existing business models that support traditional media? And how will such "public goods" as quality journalism that are essential to maintaining public discourse be provided? Two agencies of the federal government launched investigations to explore how journalistic values will be preserved in the Digital Age. The FTC in 2009 announced a project to

[2] CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, pp. 297-310 (March 17, 2010) (available at http://www.broadband.gov/plan/).

[3] 47 U.S.C. Sec. 230(a)(4).

[4] John Eggerton, *FCC Broadband Plan: FCC Sets 2015 Spectrum Deadline*, BROADCASTING & CABLE, March 15, 2010.

consider the challenges faced by journalism in the Internet age. [5] In particular, the inquiry explored the Internet's impact on the news media, including its effects on innovation and the financial challenges it created for the industry.

Likewise, the FCC sought comment on all media – from newspapers to the Internet – and asked a large number of questions for the purpose of making policy recommendations. Among other things, it asked whether public interest obligations historically applied to the broadcast media should be "strengthened, relaxed, or otherwise re-conceptualized," and whether they "should be applied to a broader range of media or technology companies, or be limited in scope."[6] The resulting report, released on June 9, 2011, acknowledged that prior policy approaches were not well-suited to the new media environment, and that government may not be the most significant player in ensuring that citizens' informational needs are met. [7]

II. The Best of Times or the Worst of Times for Media Policy?

In many ways, the unexpected emergence of the Internet as a dominant medium fulfilled the often-expressed goals of policymakers. It established for the first time a truly democratic medium of communications. As the United States Supreme Court explained in 1997, the Internet is a unique and wholly new medium of worldwide human communication. Any person with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. This unique medium, known to its users as cyberspace, is located in no particular geographical location and has no centralized control point, but is available to anyone, anywhere in the world with access. [8] The Court described the information available on the Internet is as "diverse as human thought" with the capability of providing instant access on topics ranging from "the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls."[9] A lower court judge in the case likewise characterized the Internet as "a never-ending worldwide conversation" and "the most participatory form of mass speech yet developed." He added that "[t]he Internet is a far more speech-enhancing medium than print, the village green, or the mails."[10] The Supreme Court agreed with this characterization, noting that "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders and newsgroups, the same individual can become a pamphleteer." [11] In short, the Internet has made more information available to more people than ever before.

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[5] Federal Trade Commission, *From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?*, 74 Fed. Reg. 51605 (October 7, 2009).

[6] *FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age*, DA 10-100 (released Jan. 21, 2010) at 1, 6 ("*Future of Media Inquiry*").

[7] THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE (June 9, 2011) (www.fcc.gov/informeedsreport) ("*FCC Report*").

[8] *Reno v. ACLU*, 521 U.S. 844, 849-852 (1997) ("*Reno I*").

[9] *Id.* at 851.

[10] *ACLU v. Reno*, 929 F. Supp. 824, 882-883 (E.D. Pa. 1996) (Dalzell, J.), *aff'd*, 521 U.S. 844 (1997).

[11] *Reno I*, 521 U.S. at 870.

The Internet also ends the singularity of function that characterized earlier mass media, making it hard to label. Television, for example, traditionally provided only one-way one-to-many communication. The telephone, on the other hand, largely provided only two-way one-to-one communication. By contrast, the Internet enables various forms of communication, including one-to-one messaging, one-to-many messaging, distributed message databases, real time communication, real time remote computing, and remote information retrieval. Information transmitted may take the form of text, audio, video, or a combination of each of these modes of communication. And the available types of services continue to evolve toward a more personalized experience via wireless connectivity and various forms of social media.http://en.wikipedia.org/wiki/National_Broadband_Plan_(United_States)#cite_note-eggerton-0#cite_note-eggerton-0

Such revolutionary changes in the means of communication predictably resulted in upheaval among traditional media. Like a man in a lifeboat dying of thirst despite the unbounded sea around him, established media businesses may get no help from the abundance of information now being made available on a global basis. A combination of declining readership trends, the 2008 recession, and fundamental shifts in the way people use media (and advertising) led to what some described as a "perfect storm" that undermined established business models.[12] The emergence of websites that aggregate news stories from more traditional sources and make them available without charge contributed to – and accelerated – long term downward trends in lower subscriptions. More importantly, the availability of lower-cost advertising online and free classified advertising undermined the economic foundation of commercial journalism.

To be sure, these developments began long before the advent of the Internet. Between 1965 and 1999, eight out of ten newspapers studied by the AMERICAN JOURNALISM REVIEW saw at least one competitor disappear. [13] But such trends, bolstered by a severe economic downturn and institutionalized by systemic changes in media consumption, gathered alarming momentum in more recent years. Between 2000 and 2010, advertising revenue for news organizations declined forty-five percent. [14] Revenue dropped by twenty-three percent in the years 2008-2009 alone,[15] and newspapers' print revenue in 2010 was less than half what it was in 2005.[16]

This necessarily led to sharp cuts in editorial staffs nationwide. Nearly 16,000 jobs in journalism were lost in 2008, and another 8,000 were cut in the first four months of 2009.[17] Overall, the number of newspaper editorial employees grew from 40,000 in

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[12] Victor Pickard, Josh Stearns & Craig Aaron, *Saving the News: Toward a National Journalism Strategy* (2009) ("*National Journalism Strategy*") at 7.

[13] Carl Sessions Step, *State of the American Newspaper, Then and Now*, AMERICAN JOURNALISM REVIEW, September 1999 (http://bit.ly/eDev0Y).

[14] Federal Trade Commission, *Staff Discussion Draft: Potential Policy Recommendations to Support the Reinvention of Journalism* (June 15, 2010) ("*Draft FTC Report*") at 2.

[15] State of the News Media 2009, *Media Get More Bad News*, MARKETWATCH, March 12, 2009.

[16] Bill Grueskin, Ava Seave, Lucas Graves, *The Story So Far: What We Know About the Business of Digital Journalism* (Columbia Journalism School, May 2011) ("*The Story So Far*") at 8. *See The Report of the Knight Commission on the Information Needs of Communities in a Democracy*, INFORMING COMMUNITIES: SUSTAINING DEMOCRACY IN THE DIGITAL AGE (2009) ("*Knight Commission Report*") at 3.

[17] *National Journalism Strategy* at 5.

1971 to over 60,000 in 1992, but dropped back to 40,000 in 2009. [18] Such staff reductions inevitably affect the ability of media organizations to report the news. For example, between 2003 and the beginning of 2009, the number of newspaper reporters covering state capitals in the United States fell by nearly thirty-three percent, from 524 to 355. [19]

In this environment, many long-established news organizations closed their doors or curtailed operations. Major newspapers folded in Denver, Seattle, and Tucson. The Tribune chain of newspapers, including the LOS ANGELES TIMES, the CHICAGO TRIBUNE, THE BALTIMORE SUN, the ORLANDO SENTINEL, and NEW YORK NEWSDAY, went into bankruptcy. Smaller newspaper chains followed suit, affecting papers in prominent cities such as Minneapolis and Philadelphia. More than one hundred daily newspapers curtailed delivery on certain days of the week. [20]

Such losses were not confined to the print media. Other traditionally advertiser-supported media, including radio and television stations, are facing difficult times and have reduced news staffs as well. [21] The audience for broadcast network news programs has been declining steadily since 1980, and is now only half was it was three decades ago.[22] Television network news staffs have declined by half since the 1980s, and the number of all-news local radio stations dropped from fifty in the mid-1980s to thirty today. [23]

Paradoxically, even in the face of such business reversals in the media industries, the public has greater access to information from more diverse sources than ever before. Facebook.com has reported that its users submit approximately 650,000 comments *every minute* on the more than 100 million pieces of content it hosts. [24] Likewise, over 35 hours of video are uploaded to Youtube.com every minute.[25] Eric Schmidt, the former CEO of Google has estimated that humans now create as much information in two days as we did from the first appearance of *homo sapiens* through 2003. [26]

There are no barriers to entry for publishing online, and, as a consequence, the practice of journalism has become far more participatory and collaborative. The FCC found that citizens "are more empowered than ever" in that they can choose where to get their content, how to share it, and are reporting it themselves.[27] A report by the COLUMBIA

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[18] Leonard Downie, Jr. and Michael Schudson, *The Reconstruction of American Journalism*, COLUMBIA JOURNALISM REVIEW (Oct. 19, 2009) ("*Reconstruction of American Journalism"*).

[19] *Id*.

[20] *Id*.

[21] *National Journalism Strategy* at 6.

[22] *The Story So Far* at 8.

[23] *FCC Report* at 10.

[24] Ken Deeter, *Live Commenting: Behind the Scenes*, Facebook.com, February 7, 2011 (http://www.facebook.com/note.php?note_id=496077348919).

[25] *Great Scott! Over 35 Hours Uploaded Every Minute to YouTube*, YouTube.com, November 10, 2010 (http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html).

[26] *FCC Report* at 8.

[27] *Id*. at 15.

JOURNALISM REVIEW similarly noted that "everyone from individual citizens to political operatives can gather information, investigate the powerful, and provide analysis." It added "[e]ven if news organizations were to vanish en masse, information, investigation, analysis, and community knowledge would not disappear." [28]

But mainstream journalism is not going to disappear. Far from it. The major news organizations have moved online and have more readers and viewers that ever. Sixty-five percent of people ages eighteen to twenty-nine get their news from the Internet – more than three time the number that rely on newspapers, and now outpacing television as the primary source of news. Even among older people – ages fifty to sixty-four – the Internet and newspapers are almost equal as the primary news source.[29] A January 2011 study found that almost half of all Americans (47 percent) get at lease some local news and information by tablet computer or cell phone. [30]

As a consequence of the growing number of ways to connect, established publishers now reach their largest audiences ever. Local media outlets are no longer limited to reaching just a local audience. A community newspaper or broadcast station is no longer confined to its particular locale, and can reach a global audience. The LOS ANGELES TIMES announced it's online edition received 195 million page views in March 2011, with 33 million different users.[31] The NEW YORK TIMES has a weekday circulation of less than 900,000 newspapers, but it has more than 30 million online readers.[32]

However, increases in reader- and viewership have not forestalled reductions in revenue because existing business models do not translate to the new environment. In most cases, content is offered online without charge, and news stories produced by established media companies are also made available by news aggregators. But more importantly, the model for advertising has broken down. Thus, while the Internet may have captured twenty-eight percent of the time Americans spent viewing media in 2009, it accounted for only 13 percent of total ad revenue. [33] In particular, McClatchy Co., the third largest newspaper publisher in the U.S., reported that the number of local daily unique visitors to its websites increased by 17.3 percent in 2010, yet digital revenue grew only by 2.4 percent.[34] Overall, the FCC found that from 2005 through 2009, online advertising for the entire newspaper industry grew $716 million, while the print advertising side of the business lost $22.6 billion.[35] Reviewing such statistics, the FTC reached the tentative conclusion that it "appears unlikely that online advertising

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[28] *Reconstruction of American Journalism*.

[29] *The Story So Far* at 11.

[30] *State of the News Media 2011: Mobile News and Paying Online*, Pew Research Center's Project for Excellence in Journalism (http://bit.ly/fsVAWf).

[31] Jimmy Orr, *Latime.com Has Record Page Views in March*, LATIMES.COM, April 8, 2011 (http://lat.ms/i435ob).

[32] *The Story So Far* at 21.

[33] *Morgan Stanley's Meeker Sees Online Ad Boom*, BLOOMBERG BUSINESSWEEK, Nov. 16, 2010 (http://buswk.co/dP8wQU).

[34] *McClatchy Reports Fourth Quarter 2010 Earnings*, Feb. 8, 2011 (http://bit.ly/hsfERQ).

[35] *FCC Report* at 17.

revenues will ever be sufficient to replace the print advertising revenues that newspapers previously received."[36]

There are many reasons for this, but the principal explanation follows from the different ways that users consume online media, and the different relative value of advertising in that space. Most users of online media spend relatively little time on a particular website, and instead use hyperlinks to follow their interests from site to site. In this connection, the average LATIMES.COM reader clicked on an average of six pages in March 2011, which works out to just one page every fifth day of the month.[37] Accordingly, a 2010 analysis of Nielsen media statistics found that the average visitor to a news site spends just slightly over three minutes per session.[38] By contrast, people give more focused attention to print media and its associated advertising. A 2005 study found that half of U.S. newspaper readers devoted more than thirty minutes reading their daily paper, and even less attentive readers spent at least fifteen minutes.[39]

Such differences generate varying degrees of pessimism about the state of American journalism and whether the advertiser-supported business model is broken beyond repair. The progressive organization Free Press, which favors much greater governmental involvement in media policy, has proclaimed that "[j]ournalism as an institution is collapsing before our eyes, [causing a] crisis that goes well beyond the demise of newspapers to strike at the foundations of democratic self-governance."[40] A report published in the COLUMBIA JOURNALISM REVIEW offered the more realistic assessment that newspapers and television news "are not going to vanish in the foreseeable future," but "they will play diminished roles in an emerging and still rapidly changing world of digital journalism."[41]

Notwithstanding the difficult realities that face media companies and the gloomy predictions about their future viability, there have been notable successes. It took only six years for the blog site HUFFINGTON POST grew from a mere concept to a valuation of $315 million in its 2011 sale to AOL.[42] AOL's news sites include Patch, which created local websites in 800 local communities, hiring a reporter-editor in each location.[43] The combined resources mean that AOL's newsroom now has more reporters than the NEW YORK TIMES.[44] But such success stories also illustrate a dramatic reversal of fortune between traditional publishers and new media companies. In March 2001, Apple Computer and Knight-Ridder, formerly the second largest newspaper publisher in the

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[36] *Draft FTC Report* at 3.

[37] *The Story So Far* at 23.

[38] *State of the News Media 2010,* Pew Research Center's Project for Excellence in Journalism (http:////bit.ly/gcIRQ2) (analysis of Nielsen data).

[39] *The Story So Far* at 23.

[40] *National Journalism Strategy* at 6.

[41] *Reconstruction of American Journalism* at 1.

[42] *The Story So Far* at 12.

[43] *FCC Report* at 16-17.

[44] Henry Blodget, *AOL's Newsroom Is Now Bigger Than The New York Time's*, BUSINESS INSIDER, June 8, 2011 (www.businessinsider.com/aols-newsroom-is-now-bigger-than-the-new-york-times-2011-6).

United States, were both valued at $3.8 billion. Ten years later, Knight-Ridder no longer exists as an independent company, while Apple's valuation now exceeds $300 billion.[45]

It is unknown at present whether positive examples like AOL and the HUFFINGTON POST will counterbalance the losses among traditional media. And even if they do so from a business perspective, it is yet to be determined whether the journalistic function of the traditional media will be fulfilled by the new. While many online sites are an endless source of opinion and commentary, as well as links to other information sources, traditional media continue to provide the primary source of original reporting and investigative journalism. Without a sustainable economic model to support traditional journalistic functions in the new media, both public and private inquiries have expressed concern about the future of "accountability journalism."[46]

The FTC's tentative findings on the reinvention of journalism note that "newspapers have not yet found a new, sustainable business model, and there is reason for concern that such a business model may not emerge."[47] The FCC, on the other hand, was more upbeat. It concluded that "despite the serious challenges, we are optimistic" and that "[i]f citizens, entrepreneurs, nonprofit groups, and businesses work collectively to fill the gaps and continue to benefit from a wave of media innovation, the nation will end up with the best media system it has ever had."[48]

III. U.S. Media Policy and the Puzzle of Convergence

U.S. media policy historically has treated different media under entirely different regulatory and constitutional regimes in recognition of the different functions each medium fulfilled. No unique regulatory regime was established for traditional print media. But as electronic media emerged in the late Nineteenth and early Twentieth Centuries, starting with telegraphy and telephony, and evolving to include broadcasting and other technologies, the United States developed discrete legal and policy regimes to regulate each medium. The different approaches were premised largely on the that each of the technologies served a different purpose, apart from the general function of "communication." But new media emerging in the late Twentieth and early Twenty-First Centuries do not perform singular or unique functions, and thus undermine the premise for maintaining separate legal regimes. As a consequence, new media are less likely to be bounded by old regulatory models, and the reasons for treating older media differently have begun to be questioned.

The United States did not have a body of law that could be thought of as "media policy" before electronic media emerged. Newspapers and other publications historically were subject to postal regulations and received certain postal subsidies, but otherwise were not subject to the types of rules commonly found in contemporary media policies. One reason for this is that the First Amendment to the U.S. Constitution placed an express limit on the government's ability to intrude too deeply into the affairs of newspapers. It provides, in relevant part, that "Congress shall make no law . . . abridging the freedom

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[45] *Id.* at 1.

[46] *See, e.g., Reconstruction of American Journalism*; *Knight Commission Report* at 13-15.

[47] *Draft FTC Report* at 3.

[48] *FCC Report* at 10.

of speech, or of the press."[49] The contours of this constitutional protection were not fleshed out by the courts until the Twentieth Century.

Once the courts began to develop a body of First Amendment law, it became increasingly clear that the Constitution left little latitude for government regulation of the press. In 1931, the Supreme Court struck down a municipal nuisance ordinance that had been applied to enjoin publication of a sensationalist newspaper for publishing inflammatory accusations against local officials. The Court described the law as "the essence of censorship" and noted that "[t]he fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."[50] Under the governing law that developed, the government was permitted to apply generally-applicable business regulations to news corporations, but was foreclosed from imposing special rules on the press. Among other things, the Court held that the government could not impose special taxes on the press[51] or require newspapers to publish material to provide a "balanced" presentation of the news.[52]

The initial decisions limiting the government's power over the press were issued in the 1930s during the New Deal, at the same time the federal government was creating independent regulatory commissions to exert regulatory authority over broad sectors of the American economy. One of the new agencies was the FCC, created by the Communications Act of 1934 to consolidate regulatory power over telegraphy, telephony, and the newly emerging field of broadcasting.[53] Unlike the more constrained approach of government toward the traditional press, the new agency imposed significant controls over every aspect of the technologies under its jurisdiction, including whether prospective licensees could provide service at all. The government's authority to regulate was premised on the unique characteristics of each medium, and the rules that applied depended on how each medium was classified. Common carriers (telegraph and telephone companies) were regulated under Title II of the Communications Act and broadcasters were regulated under Title III.

Telegraph and telephone companies were regulated like public utilities for the purpose of transmitting the communications of their customers. The concept of common carriage was developed centuries earlier in English common law, but was codified in U.S. transportation law in 1887.[54] It was extended to telephone and telegraph operators by the Mann-Elkins Act of 1910,[55] and later codified in the Communications Act. The hallmarks of common carrier service involved the offering of communications facilities "whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[56] Such

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[49] U.S. CONST., amend. I.

[50] *Near v. Minnesota*, 283 U.S. 697, 713, 720 (1931).

[51] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

[52] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[53] 47 U.S.C. § 151 *et seq*.

[54] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

[55] Mann-Elkins Act, Pub. L. No. 61-218, § 7, 36 Stat. 539, 544 (1910).

[56] *FCC v. Midwest Video Corp*., 440 U.S. 689, 701 (1979).

services are to be provided without discrimination and for reasonable rates, subject to government oversight. More recent amendments to the Communications Act classified common carriers as providing "telecommunications" service. [57]

The FCC issues radio and television broadcasters licenses to operate under Title III of the Communications Act. Licenses are awarded for a period that currently runs eight years, and broadcasters are subject to various "public interest" requirements, including certain regulations governing editorial content. For example, federal regulations historically required licensees to provide certain amounts of "public interest" programming, "reasonable access" to federal political candidates for office and "equal opportunities" for candidates at all levels to respond to opponents, and educational programming for children. Additionally, broadcasters are prohibited from airing "indecent" programming. To obtain a license, the broadcaster must satisfy the FCC that it is legally, technically, and financially qualified to operate the station, and that it possesses good character.[58] Licensees must obtain FCC renewal of their licenses at the end of each term, must obtain approval before the license can be transferred to another entity, and are subject to ownership restrictions limiting their ability to acquire other broadcast stations beyond specified levels or other types of media. [59]

FCC rules also have restricted ownership of the broadcast media in order to promote localism, diversity, and competition in broadcasting. The Commission historically has restricted the number of broadcast stations a single party can own, both in a single market and nationally, on the theory that diversification of mass media ownership serves the public interest by promoting diversity of viewpoints.[60] The specific restrictions imposed by the rules have changed over time and have been politically contentions. In 1996, Congress adopted an amendment to the Communications Act that required the FCC periodically to review the ownership rules to determine if they remain necessary as media markets evolve. The FCC currently is conducting such a review. [61]

Congress added new sections of the Communications Act as other new communications technologies were introduced. After cable television became an established medium in the U.S. it added Title VI to the Act, which established a dual system of regulation in which the FCC imposed federal rules while states and localities issued local franchises that set forth the geographic territories in which systems could operate.[62] Despite the fact that cable operators provide service that is much like over-the-air television, the FCC's governing rules are quite different. Cable operators are not licensed by the federal government but instead are subject to local franchising. And, despite some overlap, the FCC does not impose the same type of "public interest" rules on cable operators as it does on broadcasters.

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[57] 47 U.S.C. § 153(44), (46).

[58] 47 U.S.C. § 308(b).

[59] *See generally*, Zuckman, Corn-Revere, Frieden, and Kennedy, MODERN COMMUNICATIONS LAW, Vol. 3, pp. 150-167 (West Group 1999).

[60] *See FCC Report* at 310-311 (summarizing FCC ownership rules).

[61] *See 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 25 FCC Rcd. 6086 (2010).

[62] *Id*. at pp. 1-4.

FCC regulations also have imposed ownership restrictions on cable operators or on those wishing to provide cable television service. For many years FCC rules and the Cable Act prohibited telephone companies from providing cable television service on the theory that allowing phone companies into the video market would undermine competition.[63] Likewise, the judicially-imposed consent decree governing the break-up of AT&T barred the telephone company from engaging in electronic publishing.[64] The rationale underlying both the cable-telco cross-ownership ban and the consent decree restriction on electronic publishing was much the same. The government claimed that the telephone companies had the incentive and ability to restrict potential competitors, and that they might exercise that power in the future to limit free speech. However, telephone companies began to challenge these restrictions in the early 1990s, and the Fourth and Ninth Circuits, as well as several U.S. district courts, held that the cross-ownership restrictions violated the First Amendment rights of telephone carriers.[65] Supreme Court review of the decisions was cut off when Congress repealed the cross-ownership ban with passage of the Telecommunications Act of 1996.[66] Since that change in policy, telecommunications companies have become vital competitors in providing video and broadband services.[67]

The FCC's classification of each medium determined which body of law was applicable in a given case, and which was not. In this regard, courts held that that the Commission did not have the authority to regulate an entity that was classified as one thing, as if it were something else. The Communications Act provides, for example, that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier,"[68] and the Supreme Court has held that the Act "firmly . . . rejected the argument that the broadcast facilities should be open on a nonselective basis [as a common carrier] to all persons wishing to talk about public issues."[69] Likewise, the Court held that the FCC could not impose common carrier obligations on cable television systems because cable operators do not make a "public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[70]

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[63] *See generally C&P Tel. Co. of Va. v. United States*, 42 F.3d 181, 186 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (discussing early history of cable television regulation).

[64] *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[65] *See C&P Tel. Co. of Va.*, 42 F.3d at 202-203; *U.S. West v. United States*, 48 F.3d 1092-1106 (9th Cir. 1994), *cert. granted, judgment vacated*, 516 U.S. 1155 (1996); *Ameritech Corp. v. U.S*. 867 F. Supp. 721, 736 (N.D. Ill. 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Nynex Corp. v. United States*, 1994 WL 779761 (D. Me. 1994); *Southwestern Bell v. United States*, 1995 WL 444414 (N.D. Tex. 1995).

[66] Pub. L. 104-10, § 302, 110 Stat. 56,118 (1996), *codified as amended at* 47 U.S.C. § 571.

[67] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, 604-606 (2009) ("*Thirteenth Annual Video Competition Report*").

[68] 47 U.S.C. § 153(10).

[69] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 105-108 (1973).

[70] *Midwest Video Corp*., 440 U.S. at 701.

Such distinctions between the regulatory classifications of different media involve more than mere questions of statutory interpretation. More is at stake than simply determining which regulatory category fits a given technology so that policymakers may choose which rules to apply. This is because the courts have applied different levels of First Amendment protection to different media based on their regulatory classifications, which may mean a given medium may have more – or less – immunity from government policymaking authority, depending on how it is classified.

Accordingly, the U.S. government historically exerted more intrusive regulation over broadcasting content than it did newspapers based on the particular physical characteristics of the electromagnetic spectrum used by broadcasters as a means of transmitting information. The Supreme Court explained in *Red Lion Broadcasting Co. v. FCC* that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them" and that, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[71] Particular programming regulations, such as requirements that broadcasters carry a certain amount of educational programming, were expressly predicated on this notion of spectrum scarcity.[72]

Conversely, the Supreme Court held that the government could not impose broadcast-type content controls on cable television, despite its similarity of function. Reviewing courts consistently invalidated FCC-type regulations for media that are not "scarce" in the *Red Lion* sense. For example, the Supreme Court struck down attempts to impose restrictions on newspapers requiring "balanced" news coverage of controversial issues,[73] as well as indecency regulations on cable television.[74] The Court explained in *Turner Broadcasting System v. FCC* that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation." Noting the "fundamental technological differences between broadcast and cable transmission," the Court found that the 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."[75]

The same considerations limit the government's ability to regulate the Internet, and will have significant ramifications for new media policies under the National Broadband

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[71] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 390 (1969).

[72] H.R. Rep. No. 101-437, at 8, *reprinted in* 1990 U.S.C.C.A.N. 1605, 1612-13 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388-89 (1969). *See also Policies And Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10660, 10729 (1996).

[73] Beginning in 1949, the FCC enforced a policy on broadcasters known as the Fairness Doctrine, that required the holders of broadcast licenses both to present issues of public importance and to do so in a manner that was – in the Commission's view – honest, balanced, equitable and fair. The Commission abolished the Fairness Doctrine in 1987. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 660-666 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

[74] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (right of reply law for newspapers violates the First Amendment); *United States v. Playboy Entm't Group*, *Inc*., 529 U.S. 803 (2000) (indecency regulation for cable television violates the First Amendment).

[75] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994).

Plan. When the Internet and the World Wide Web first caught the attention of U.S. policymakers, their initial inclination was to regulate the new medium like broadcasting. Congress passed the Communications Decency Act as part of the Telecommunications Act of 1996. Despite the overall deregulatory thrust of the legislation, it sought to impose the regulation of "indecent" speech online, using an almost identical standard to the one imposed on radio and television. But the Supreme Court struck down the law as a violation of the First Amendment, holding that the "special characteristics" that historically had supported different treatment of broadcasting did not apply to the Internet. In *Reno v. ACLU*, the Court found "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online communication because the new medium did not suffer from the problem of physical scarcity. Rather, it is characterized by abundance and ease of access.[76]

In short, the regulatory concepts policymakers previously employed no longer describes reality. The new media allow users to engage in virtually all of the things legacy electronic media had made possible – and more – because their functions have converged. Moreover, new media are not constrained by the limitations that had been cited to justify disparate regulation of older media. As the FCC most recently acknowledged, "[t]he lines between these sectors are becoming increasingly blurred." In this world of converging media, "TV is on the phone, the Internet is on the TV, and the newspaper is on the tablet." [77] However, new regulatory constructs have not yet been conceived.

IV. Network Neutrality and the Search for New Theories of Regulation

U.S. policymakers must address a number of important questions as they seek to address the changes wrought by the Digital Age. Perhaps the most fundamental issue will be to decide whether the difficulties facing media organization will be more effectively addressed by private initiative or government action. If Congress or the FCC decide to exert a more active policy role, it will be necessary to articulate new theories of regulation and regulatory classifications that are both workable for the new media and that will survive constitutional scrutiny. This will not be an easy task.

Nevertheless, the FCC already has attempted to grapple with the issue of regulatory classifications and its implications for media policy. The FCC's initial attempt to classify broadband access service led to a conclusion that the new medium was an "information service" and not "telecommunications," thus freeing it from common carrier regulation. The Commission found that "cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications," and which "supports such functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the [domain name system]." The Commission therefore concluded that "cable modem service, an Internet access service" is an information service . . . regardless of whether subscribers use all of the functions provided . . . and regardless of whether every cable modem service provider offers each function[.]" Accordingly, it found such service does not include an offering

[76] *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

[77] *FCC Report* at 20.

of telecommunications service to subscribers, because the telecommunications component is inseparable from the service's data-processing capabilities. [78]

The Supreme Court upheld the FCC's decision in *NCTA v. Brand X Internet Services*, with the Court characterizing the question to be decided as determining "the proper regulatory classification under the Communications Act of broadband cable Internet service."[79] After reviewing the language of the Communications Act and tracing the history of FCC classification decisions involving telecommunications and information services, the Court held that the decision to forego imposing common carrier requirements was reasonable.

Since then, the FCC has attempted to articulate principles for preserving open access to the Internet in support of a policy that has come to be known as "network neutrality." This is a cornerstone of the FCC's approach to the Internet, and has been described as an essential part of the Obama Administration's National Broadband Plan.[80] The movement toward such rules began with the FCC's articulation of open access principles in a 2005 policy statement.[81] However, a court of appeals blocked the FCC's effort to bring an enforcement action against a network provider it alleged had failed to adhere to the principles. In *Comcast Corp. v. FCC*, the United States Court of Appeals for the D.C. Circuit held that the FCC lacked the power under the Communications Act to enforce the principles using its inherent, or "ancillary," authority.[82]

This triggered a search for a new justification for network neutrality rules. As part of this, the FCC considered whether it should reconsider its earlier decision, and "reclassify" broadband service as telecommunications, subject to certain common carrier requirements. [83] Ultimately, however, the FCC chose to adopt new network neutrality rules without attempting to reclassify broadband service.[84] Instead, the FCC relied on its existing authority that it identified in various sections of the Communications Act. In broad terms, the rules seek to maintain an open Internet by (1) requiring providers to disclose their network management practices as part of their terms and conditions of service; (2) prohibit them from blocking lawful content, applications or services; and (3) prohibit "unreasonable discrimination" in transmitting lawful network traffic.[85]

The theory underlying network neutrality rules is that providers of broadband service have the incentive and ability to discriminate against competing services and that they

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[78] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002).

[79] *NCTA v. Brand X Internet Services*, 545 U.S. 967, 975 (2005).

[80] *See generally* Joan Indiana Rigdon, *Net Neutrality: Who Should be Minding Online Traffic?*, WASHINGTON LAWYER (June 2011) at 22-30.

[81] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14986 (2005).

[82] *Comcast Corp. v. FCC*, 600 F.3d 642, (D.C. Cir. 2010).

[83] *In the Matter of Framework for Broadband Internet Service*, 25 FCC Rcd. 7866 (2010).

[84] *In the Matter of Preserving the Open Internet Broadband Industry Practices*, 25 FCC Rcd. 17905 (2010).

[85] *Id*. at 17906.

might use this power to distort the openness of the Internet. The FCC described this openness as "essential to the Internet's role as a platform for speech and civic engagement." It noted that the Internet has become a major source of news and information, "which forms the basis for informed civic discourse." It added that local, state, and federal government agencies increasingly use the Internet to communicate with the public directly and to provide essential information and services.[86]

The FCC's decision has been highly controversial and was subject to immediate judicial and legislative challenges. Verizon and MetroPCS filed appeals challenging the network neutrality rules shortly after they were announced, but the cases were dismissed as premature.[87] The Commission has not yet published the rule officially, which is a prerequisite to seeking judicial relief. Meanwhile, the House of Representatives voted to reverse the FCC's decision.[88] However, the legislative effort is not expected to succeed in the Senate or to overcome the President's support of the rules.

Critics of the rules question whether the FCC made a compelling case to extend federal regulation over the Internet. FCC Commissioner Robert McDowell, for example, wrote that the Internet succeeded beyond all expectations because it was privatized and as a result of "bottom-up collaboration, not top-down regulation." He expressed concern that FCC oversight will stifle innovation and lead to unintended consequences.[89] Others have expressed concern that the history of Internet regulation shows that the government has more of an incentive and ability to stifle free expression than do network providers, and that network neutrality rules will provide the jurisdictional means to pursue these proclivities.[90]

The FCC has raised similar questions in other proceedings as well. In 2009 the FCC initiated an inquiry entitled *Empowering Parents and Protecting Children in an Evolving Media Landscape*.[91] It began with the premise that media platforms are abundant, content is diverse, and numerous tools exist that enable individualized control over exposure to media in the household. The FCC observed that "[f]rom television to mobile devices to the Internet, electronic media offer children today avenues … their parents could never have envisioned." [92] Nevertheless, it solicited suggestions for "new actions that the Commission or industry can take to address the issues," and asked "whether the Commission has the statutory authority to take any proposed actions and whether those actions would be consistent with the First Amendment." The Commission did not stop with broadcasting, but invited those

[86] *Id*. at 17912.

[87] *Verizon v. FCC*, No. 11-1014 (D.C. Cir., April 4, 2011). *See* Edward Wyatt, *Court Rejects Suit on Net Neutrality Rules*, NEW YORK TIMES, April 4, 2011.

[88] *See e.g.*, Rigdon, *supra* at 24.

[89] *Preserving the Open Internet*, 25 FCC Rcd. at 18050 (Dissenting statement of Commissioner McDowell).

[90] *See e.g.*, Rigdon, *supra* at 28. *See also* Robert Corn-Revere, *The First Amendment, the Internet & Net Neutrality: Be Careful What You Wish For*, PROGRESS ON POINT (December 2009) (http://www.pff.org/issues-pubs/pops/2009/pop16.28-FCC-workshop-free-speech-net-neutrality.pdf).

[91] 24 FCC Rcd. 13171 (2009) ("*Children's Media Inquiry*").

[92] *Id*. at 13172, 13174-75, 13187-88.

weighing in "to consider the full range of electronic media platforms," including broadcast television and radio, and multichannel video programming distributors such as cable and satellite television, as well as "audio devices, video games, wireless devices, nonnetworked devices, and the Internet." [93]

Conclusion

At this point, U.S. policymakers have more questions than answers. The debate rages on about whether government should be more or less involved in media. It is also a matter of dispute whether government policies might be able to assist struggling legacy media companies, or if doing so would involve too much of a sacrifice of media independence. And if government does choose to get more involved with regulating (or assisting) new media, new theories to support such regulation would have to be devised. While it is evident that older regulatory classifications fail to reflect the dynamic and multi-faceted character of new media, it is unknown what might be adopted in their place.[94] Whatever course the U.S. government takes, new standards of regulation are likely to be subjected to more searching constitutional scrutiny than applies to currently regulated media.

Looking forward, it is far from certain whether the Supreme Court will permit Congress or the FCC to expand federal jurisdiction to regulate the Internet simply by devising new regulatory classifications. In *Citizens United v. Federal Election Commission*, dictum in the majority opinion signaled a growing discomfort with applying different levels of constitutional protection for various media.[95] Justice Anthony Kennedy stressed that "[t]he Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted."[96] He added "[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used" to disseminate speech. Doing so is necessarily suspect, because "those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux."[97]

[93] *Id*. at 13173.

[94] *E.g.*, Robert Corn-Revere, *Regulating Media Content in an Age of Abundance*, COMMUNICATIONS LAWYER (September 2010) at 1.

[95] *Citizens United v. Federal Election Commission,* 130 S.Ct. 876 (2010).

[96] *Id*. at 906.

[97] *Id*. at 890-891.

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