

June 13, 2014

Chairman Fred Upton
Energy & Commerce Committee
United States House of Representatives

Dear Chairman Upton,

Thank you for the opportunity once again to comment on communications law reform. In this third white paper, you solicited comment on competition policy and the role of the Federal Communications Commission.

The 1934 Communications Act was passed with common carrier rules for a national monopoly telephone provider. Today, in contrast, the communications market is characterized by rigorous competition from several networks—like LTE, fiber optic, cable, DSL, and satellite—offering many digital services—including Internet access, television, video-on-demand, and telephone service.

The overwhelming political consensus is that the older regulatory categories are no longer useful. As I said in response to your first white paper in January, “Like an old cottage receiving several massive additions spanning decades by different clumsy architects, communications law is a disorganized and dilapidated structure that should be razed and reconstituted.”

It’s unnecessary to start from scratch in crafting reforms. During the last congressional attempt at reform, in 2011, the Mercatus Center released a study discussing and summarizing a model for communications law reform known as the Digital Age Communications Act (DACA). That model legislation—consisting of five reports released in 2005 and 2006—came from the bipartisan DACA Working Group.

The DACA reports represent a flexible, market-oriented agenda from dozens of experts that, if implemented, would spur innovation, encourage competition, and benefit consumers. The regulatory framework report adopts a proposal largely based on the Federal Trade Commission Act, which provides a reformed FCC with nearly a century of common law for guidance. Significantly, the reports replace the FCC’s standardless “public interest” obligation with the general “unfair competition standard” from the FTC Act.

Those reports have held up remarkably well to the passage of time. The 2011 Mercatus paper describing the DACA reports is again attached for submission in the record. The scholars at Mercatus are happy to discuss this paper and the DACA reports further with Energy & Commerce Committee staff as they draft reform proposals.

Notwithstanding the DACA recommendations for a reconstituted communications competition agency, Congress should also consider alternatives such as abolishing the FCC entirely and relying on antitrust agencies or merging the FCC’s responsibilities with the Federal Trade Commission. New Zealand, the Netherlands, Denmark, and other countries have merged competition and telecommunications regulators. Agency mergers streamline competition analyses and prevent duplicative oversight.

Thank you for initiating discussion about updating the Communications Act. Reform can give America’s innovative technology and telecommunications sector a predictable and technology-neutral legal framework. When Congress replaces antiquated command-and-control rules with market forces, consumers will be the primary beneficiaries.

Sincerely,

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WORKING PAPER

THE CONTINUING CASE FOR SERIOUS COMMUNICATIONS
LAW REFORM

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The ideas presented in this research are the author's and do not represent official positions
of the Mercatus Center at George Mason University.

The Continuing Case for Serious Communications Law Reform

Raymond L. Gifford

Communications law reform is like Brigadoon. It appears periodically, presents a gauzy vision of a better, more logical and sensible communications world, and then recedes into the mists, only to reappear again after a suitable interval. Lacking a book and lyrics by Lerner and Loewe, communications law reform might not make for quite as compelling a revival as Brigadoon, but it continues to reappear as a topic for the FCC chairman,¹ think tanks,² and Congress to discuss,³ even if it gets sent into hibernation by more pressing topics like mergers, net neutrality, or the latest indecent utterance or image broadcast on the airwaves. Nevertheless, a high-level consensus exists between progressive and free-market groups, the regulators and the regulated, that we need *some* reformation of the FCC and communications law, even if there is not agreement on the substantive details. If reform is not going to disappear again into the mists, then substantive proposals need to be brought forward, or, in the case of this paper, dusted off.

FCC reform has again pushed its way onto the stage, though perhaps not center stage. The House Commerce Committee, led by Communications and Technology Subcommittee Chairman Greg Walden, is proposing reforms at the FCC: more rigor and time limits in its processes, the use of cost-benefit analyses, and the curtailing of duplicative merger reviews with “voluntary” commitments. Despite these proposals, the current discussion surrounding reform accepts many of the legacy categories, methods, and assumptions of 1934 telecommunications law.

While FCC reform is necessary and salutary—even in the smaller ways currently being discussed—a more fundamental rethinking of the institutional and normative standards of communications law remains compelling. Technological change continues apace; appetite for wireless spectrum remains voracious and unable to keep up with consumer demand; universal service remains focused on subsidizing rural telephony; and the FCC continues to be tasked with incompatible statutory goals based on backward-looking technological categories. If the Telecommunications Act of 1996, itself an amendment to the Communications Act of 1934, was immediately rendered obsolete by the Internet,⁴ then 15 years on from that last revision, it surely remains ripe to reorient a communications law premised on monopoly and scarcity. Both the progressive left and

¹ Federal Communications Commission, “Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies,” news release, July 11, 2011, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308340A1.pdf.

² See Reforming the FCC, a joint project of Public Knowledge and Silicon Flatirons, <http://fcc-reform.org>.

³ Representative Greg Walden, chairman of the Subcommittee on Communications and Technology of the House Energy and Commerce Committee, is the latest to initiate legislation on FCC reform. See Walden, “FCC Needs Reform, Accountability,” September 18, 2011, <http://walden.house.gov/index.cfm?sectionid=94§iontree=8,94&itemid=747>.

⁴ See Robert C. Atkinson, “Telecom Regulation For The 21st Century: Avoiding Gridlock, Adapting to Change,” *Journal on Telecommunications and High Technology Law* 4, no. 2 (2006): 379, 403; John D. Podesta, Jr., “Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet,” *DePaul Law Review* 45 (1996): 1093, 1109.

free-market writers criticize the FCC for corporatism, for enabling rent-seeking, and for standardless “public interest” decision making. With this bipartisan agreement added to the mix, the imperative for bipartisan communications law reform becomes all the more compelling.

But imperatives for communications reform do not need to start from scratch. Indeed, current reform can profitably build from earlier efforts. Specifically, in 2005, the Digital Age Communications Act (DACA) working group published five separate reports on discrete communications law topics.⁵ The DACA project gathered more than 50 leading communications policy scholars, including lawyers, academic economists, think tank analysts, and technologists, to craft model regulations in five major policy areas. The working group also strove for ideological balance by including free market and libertarian analysts, although a majority of working group members served in Democratic-led administrations. While each individual did not have to agree with every recommendation, the reports’ goal was consensus on a better model than currently existed.

The working group published collaborative reports intended to guide regulators and legislators in their efforts to reform communications laws. Those reports resulted in a recommended model for communications law and became embodied in the Digital Age Communications Act of 2005.⁶ Although never implemented, DACA provides a good start for communications reform six years from its introduction.

To reintroduce DACA into the communications law reform discussion, this paper proceeds in three parts. First, it considers whether communications should be treated as a separate species of law rather than be handled under property, contract, and tort law. Second, the paper describes the DACA project, its composition, and its purpose and discusses and summarizes the DACA recommendations. Third, it looks at the issues DACA did not address and offers a DACA-like solution.⁷

I. Does Communications Need a Separate Law?

A threshold question for reformers is: Why treat communications law as a separate area of law?⁸

More than a decade ago, Peter Huber advocated communications law reforms in his book *Law and Disorder in Cyberspace*. The book’s subtitle gives its essential thesis:

⁵ Progress and Freedom Foundation, “Digital Age Communications Act,” <http://www.pff.org/daca/>.

⁶ *Digital Age Communications Act of 2005*, S. 2113, 109th Cong., 2005, <http://www.govtrack.us/congress/bill.xpd?bill=s109-2113>.

⁷ The original DACA recommendations emerged from working group consensus reports. Any suggestions here are the author’s own and have not been vetted through the DACA working group process.

⁸ A succinct presentation of this question comes from Judge Easterbrook in “Cyberspace and the Law of the Horse,” *University of Chicago Law Forum* 207 (1996). Judge Easterbrook cautions against legal innovations for the special case of the Internet, arguing instead that legal norms of property and contract will better allow the emergent order of the Internet to take shape.

*Abolish the FCC and Let Common Law Rule the Telecosm.*⁹ Huber argues that problems with communications law arose from its treatment as a discrete area of law. This treatment allows special interests to predominate, he states. He further argues that general common law, combined with antitrust law as an expression of the common law of unfair competition, would be much more effective at promoting the rule of law, competition, and consumer welfare in telecommunications. Huber also indicts the FCC based on its inglorious history of thwarting competition and innovation and protecting monopoly. After all, it did take an antitrust case to break up the AT&T telephone monopoly. Why, then, Huber asks, persist with a special-sector regulator like the FCC, when general laws and general courts can perform just as well, if not better, and without the public choice hazards?

A pure common law approach had great appeal to many DACA working group participants, and it retains strong normative and institutional advantages over an agency specially focused on communications law. For those concerned with “agency capture” (for which there is ample historical evidence), a general common-law approach solves the public choice problems endemic to a single-focus administrative agency. In the end, the technical expertise arguments and practical political impediments to abolishing the FCC won out as a consensus position among DACA members, and DACA rejected abolishing the FCC and letting general law take over the communications sector. However, as a baseline set of assumptions against which to evaluate reform proposals, common law norms of adjudication, case-by-case decision-making, and judicial rigor remained valued goals for the working group.

First, DACA noted that general antitrust law depends on case-by-case, fact-based adjudication, where general rules take time to emerge, particularly across multiple jurisdictions. Because communications networks are national, indeed, global, the need for rule uniformity calls for a national regulator. The absence of a federal common law further exacerbates the problem to the extent that state and federal laws would both have a separate track of “emergent” rules for communications.¹⁰ In addition, Balkanized legal rules would impede the scale of communications networks. If each state’s common law, plus federal antitrust law, had some rule to offer governing communications networks, the result would likely be laws that hampered communications innovation rather than enabling it.

Next, DACA endorsed a sector-specific regulator because the regulation of communications networks would take ongoing supervision and expertise, which courts of general jurisdiction are not suited to do. As the Supreme Court noted, access to networks and facilities “will ordinarily require continuing supervision of a highly detailed decree,” and “an antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.”¹¹ It judged that a specialized regulator, with expertise in the

⁹ Peter Huber, *Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecosm* (New York: Oxford University Press, 1997). Nomenclature surely has changed since Huber wrote his book. “Telecosm” and “cyberspace,” neologisms then, sound quaint and outdated today.

¹⁰ *Erie v. Tompkins*, 304 U.S. 64 (1938).

¹¹ *Verizon Communications, Inc. v. Law Offices of Curtis J. Trinko*, 540 U.S. 398, 415 (2004).

technical details, capabilities, and potential of communications networks, would be superior to either an agency or court of general jurisdiction. It comes down to a prudential judgment whether this expertise and need for national uniformity outweigh the hazards of rent-seeking and agency capture.

Finally, the DACA working group's endorsement of a sector-specific regulator is premised on the judgment that economic regulation and social policies like universal service are inextricable, and that Congress will, for the foreseeable future, treat them together. The DACA model seeks to separate the economic regulatory issues from the social policy issues and seeks to create a single regulatory governance structure to promote both economic welfare and social policy goals, but with more straightforward and transparent regulatory mechanisms.

In the end, the DACA working group opted for a rewritten communications law. The proposed new law was intended to minimize some hazards of a sector-specific legal regime through increased use of *ex post*, adjudicatory-type mechanisms. The DACA working group's consensus judgment was that the benefits of a single, national regulatory regime outweighed its all-too-well-known costs.

II. DACA as a Model for Communications Law Reform

The DACA model for communications law reform consists of five discrete reports issued in 2005 and 2006. The reports address the following topics:

1. regulatory framework
2. universal service
3. spectrum reform
4. federal–state jurisdiction
5. institutional/agency reform

Since DACA's issuance, spectrum reform remains crucial, and universal service reform is timely given [1]FCC activity in just this past month. Other topics, notably the federal–state jurisdictional split, have diminished in importance. State regulatory issues have grown senescent and federal–state struggles over jurisdiction and regulatory priority have receded. Nevertheless, the reports cover the main topics that still need to be addressed in communications reform, and the DACA model remains a consensus of some of the best minds in communications law and policy. While any given choice of the DACA working group can be disputed, the group's judgments represent a model for Congress as it looks to broadly supported principles for communications law reform.

a. Framework

DACA's regulatory framework is its centerpiece recommendation and its most overarching purpose. The DACA working group adopted a proposal largely based on the Federal Trade Commission Act. This model embraces antitrust-focused thinking and centers on the idea that “competition law and economics provides the only sound basis for addressing communications markets in the future, as those markets become more

competitive.”¹² The DACA model does away with the persistent technological silos of “telecommunications,” “cable,” “wireless,” and so forth. Instead, it opts for the antitrust-derived standard of consumer welfare and embraces competitive markets as the first protection of that welfare.

The DACA working group did not embrace a pure antitrust model, however, because of concerns specific to the communications market:

The Working Group’s proposal nevertheless differs from a pure antitrust model in three regards. First, the proposal maintains the Federal Communications Commission as a sector-specific regulator. Second, the proposal imports the general “unfair competition standard” from the FTC Act as the principal substantive standard for FCC action. This standard, while based upon the antitrust laws, does allow the FTC some leeway to take action to prevent incipient violations of the antitrust laws. Third, the proposal allows the FCC to order the interconnection of public networks without a finding of an abuse of significant market power, although the proposal does require a finding that markets are not adequately assuring interconnection.¹³

The operative DACA statutory standards forbid “unfair competition” and “unfair or deceptive acts” affecting commerce. Under the FTC Act model, the regulator retains its investigative and enforcement powers, and DACA supports this model.¹⁴ In addition, DACA’s “unfair competition” model would import the understanding of that standard worked out through the FTC’s adjudications and litigation. The working group agreed with Judge Posner that “antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy.”¹⁵

In adopting an FTC model, the DACA working group also generally preferred the FTC’s reactive, *ex post* adjudicatory model over the current FCC’s prophylactic *ex ante* rulemaking, with enforcement as an afterthought. Accordingly, under a DACA regulatory framework, the core regulatory functions would be administrative adjudications. The “new FCC” would retain limited rulemaking authority, but that authority would be tethered to “unfair competition” principles, not the more open-ended “public interest.” The breadth of “unfair competition” concerned some working group members, such that DACA explicates the standard as:

practices that present a threat of abuse of significant and non-transitory market power as determined by the Commission consistent with the application of jurisprudential principles grounded in market-oriented competition analysis such

¹² Randolph J. May and James B. Speta, *Digital Age Communications Act: Proposal of the Regulatory Framework Working Group, Release 1.0* (Washington, DC: Progress and Freedom Foundation, June 2005), 18, <http://www.pff.org/issues-pubs/other/050617regframework.pdf>.

¹³ *Ibid.*, 19–20.

¹⁴ See 15 U.S.C. § 45(b).

¹⁵ Richard A. Posner, “Antitrust in the New Economy,” *Antitrust Law Journal* 68 (2001): 925.

as those commonly employed by the Federal Trade Commission and the United States Department of Justice in enforcing the Federal Trade Commission Act and the antitrust laws of the United States.¹⁶

While section 3(a) of DACA constrains the FTC unfair competition standard, section 3(b) offers expanded regulatory supervision over interconnection. The working group concluded that denial of interconnection presented a uniquely important and powerful leverage point in communications networks, and hence specified supervisory regulatory authority over interconnection. The working group did not flat out require blanket interconnection, however, recognizing that consumer welfare harms from denial of interconnection had to be balanced by potential adverse affects on facility investment and innovation. The gist of the DACA recommendation is that interconnection still retains special regulatory scrutiny, but the commission would retain discretion over whether denial of interconnection would negatively affect consumer welfare.¹⁷

Along with the FTC act's antitrust thrust, the DACA model also prefers *post hoc* adjudication over the current FCC's rulemaking. Under DACA, the agency would have authority to entertain private complaints and would have enhanced remedial authority to award damages, where appropriate. Rulemaking authority would still be present under DACA, but would require "clear and convincing evidence" before the agency acts. DACA codifies a preference for *ex post* adjudication, but still allows the agency to act when marketplace competition breaks down.

The DACA model thus changes both the normative legal standard and the institutional focus of communications law. The legal standard—unfair competition—remains broad but is anchored in antitrust consumer welfare. Instead of rulemaking, institutional change prefers adjudication, which the working group identified as increasing rigor, reducing error, and reflecting the predominance of market competition in the communications arena.

To be sure, these antitrust-like standards have their detractors. On one side, opponents point to the negative social utility of much antitrust action and to antitrust's susceptibility to the same rent-seeking the FCC is so easily convicted of.¹⁸ On the other side, the progressive view finds antitrust too constrained to satisfy the desired regulatory scope of FCC action. The FCC's own Open Internet Order rejects any antitrust-like limits on the Commission's regulation of the Internet.¹⁹ DACA constitutes the mean between

¹⁶ DACA §3(a).

¹⁷ The working group endorsed the conclusions of Michael Katz and Carl Shapiro that interconnection and denial of it raises special concerns in "systems markets." The working group also heeded Katz and Shapiro's caution about information problems and status quo protection. See Michael L. Katz and Carl Shapiro, "Network Externalities, Competition and Compatibility," *American Economic Review* 75 (1985): 525.

¹⁸ See for example, Tom W. Bell, "The Common Law in Cyberspace," *Michigan Law Review* 97 (1999): 1746, 1753–57; see generally, Fred McChesney and William Shugart II, eds., *The Causes and Consequences of Antitrust: The Public-Choice Perspective* (Chicago: University of Chicago Press, 1995).

¹⁹ See Federal Communications Commission, *In the Matter of Preserving Open Internet Broadband Industry Practices*, GN Docket 09-191, WC Docket 07-52, 78, December 23, 2010, 45–46.

these two extremes. In itself, this position does not recommend DACA as the preferred normative policy, but it does give a basis for a broad political consensus about legal norms. Because DACA is meant to be a practical, politically viable reform model, it allows those more detailed normative legal fights to be carried into the reformed agency.²⁰

b. Universal Service

Universal service is both a central goal of U.S. telecommunications policy and a primary impediment to competition and rational pricing in communications service. Since AT&T President Theodore Vail proclaimed in 1907, “One Policy, One System, Universal Service,” the concept of universally available communications service at comparable prices has been at the core of communications law and policy. In practice, this policy has meant that some consumers subsidize others; some services subsidize others; and some places subsidize others. Because the cost of building and maintaining communications networks varies greatly with geography and population density, the universal service policy has required communications regulators to create a price and taxation system to roughly equalize services and prices. This system has introduced grave pricing distortions and has encouraged uneconomic entry into some markets as well as business models premised on price arbitrage rather than consumer benefit.

The DACA working group conceded the political reality and vitality of universal service. Like the Telecommunications Act of 1996, DACA seeks to make universal service policy more transparent, economical, and efficient. The universal service working group opened its deliberations with three questions. First, what should universal service policy accomplish? Second, how should universal service policy be funded? Finally, how should universal service be distributed? These are the perennial questions of universal service, but the answers must be adapted from the world of communications monopoly to that of competitive free markets, and from that of landline telecommunications to one of wired and wireless broadband.

DACA answered the first question—what is universal service for?—by proposing a universal service policy motivated by “securing affordable basic electronic communication services for low-income households and households located in high cost areas, with transparent, easy-to administer distribution and contribution mechanisms that are economically efficient and competitively neutral.”²¹ The supported service under DACA is called “basic electronic communications services” to reflect neutrality about what the service is and how it is delivered and to allow for advances in what is

²⁰ For instance, the DACA working group issued a statement on how net neutrality would be handled under the framework; see Randolph J. May and James B. Speta, *The Digital Age Communications Act’s Regulatory Framework and Network Neutrality* (Washington, DC: Progress and Freedom Foundation, 2006), <http://www.pff.org/issues-pubs/communications/other/031707dacastmt.pdf>. As this statement makes clear, DACA would contemplate hearing complaints in the vein of net neutrality concerns, but would evaluate them through a rigorous hearing process focusing on consumer welfare effects.

²¹ Randolph J. May and James B. Speta, *Digital Age Communications Act: Proposal of the Universal Service Working Group, Release 2.0* (Washington, DC: Progress and Freedom Foundation, December 2005), 2, <http://www.pff.org/issues-pubs/books/051207daca-usf-2.0.pdf>.

considered “basic service.” The standard for basic service is meant to be emergent and not tied to a specific technology, device, or platform.

The DACA proposal has three key features to encourage innovation and experimentation within and between the states on how to best maximize access and use of “basic electronic communications services.” It caps the overall size of the federal Universal Service Fund (USF). It distributes funds through performance-based block grants that encourage state governments to experiment with alternative subsidy mechanisms. Finally, it finances the USF primarily by a “numbers tax” on consumers and businesses.²²

The FCC would continue to oversee the USF and would still collect contributions for the fund. However, instead of directly transferring federal funds to communications providers, the federal government would allocate them to whatever entity—public utility commission or otherwise—the state legislatures appoint to administer the federal program. In managing the USF, the state administrator would have to comply with federal guidelines, but would have broad discretion to create different models and forms of universal service support. DACA’s block grant program would set forth broad federal goals, and within those goals states would be free to use the universal service grants as they saw fit. States could experiment with plans as disparate as traditional support of specific carriers, service vouchers to eligible consumers, or reverse auctions between providers. States would still be accountable to federal standards and surely would be susceptible to local public choice pressures. But the working group believed that the local public choice hazards would be outweighed by the value of experimentation with metrics that reward least-cost support and by incentives to achieve universal service performance metrics.

On the support side, the working group believed that a numbers-based assessment mechanism would be the least distortive and most broad based of the universal service support mechanisms. In assessing the different options for a contribution mechanism, the working group discussed a connections-based tax (based on non-linear taxes on a per-connection basis); a usage tax, and finally a numbers-based tax. The working group opted for a pure numbers-based tax levied on all telephone numbers. The consensus was that the numbers-based tax would be technologically neutral and be levied on the least elastic service: access. This system would best meet the economic criteria of optimal tax policy.

The universal service working group was skeptical of continuing a communications-focused subsidy policy. The preferred economic path for universal service policy would be general taxation and funding from general governmental revenues. This path would be the least distortive and most politically accountable. Nevertheless, communications law discussions inevitably center on untangling the long tentacles of universal service policy in current communications pricing. It is difficult to

²² A numbers tax would assess a tax on each assigned telephone number to raise revenue for the Universal Service Fund.

imagine how universal service policy would not be a continuing central concern of whatever communications reform was proposed.²³

c. Spectrum

Efficient allocation and use of the electromagnetic spectrum has been an acute challenge for communications regulation since the advent of the Federal Radio Commission in 1927. The central problem is a classic question of property law: “interference.” One party’s transmissions interfere with those of another party in the same (or a neighboring) geographic area and/or spectrum band. Historically, spectrum has been treated as a national resource managed centrally by the FCC. In practice, this has meant that the FCC allocated spectrum (a) to specific uses—e.g., broadcast radio or television; (b) by defining service parameters—e.g., transmitter power; (c) by assigning licenses to specific parties for transmitting over specific frequency bands at specific locations; and (d) by enforcing its allocations, service rules, and assignments.

Transfers under this command-and-control model can only happen with FCC permission. In practice, this means inordinate delays, costs, and burdens for spectrum to be efficiently utilized. To be sure, the FCC has taken steps toward a more market-based approach to spectrum allocation. But reform has been slow, and progress only partial. The economics literature is nearly unanimous in stating that property rights in spectrum are superior to the current licensing scheme,²⁴ and that spectrum allocation should take place through auctions that put its use in the hands of the entity that values it the most. The DACA spectrum working group, while considering alternatives, concluded that “there is no serious contender for a system that can be expected to perform as well or better” than a property-based system of spectrum allocation.²⁵

The DACA working group described the property right in spectrum as follows:

The property right would be defined in terms of the right to transmit over a specified spectrum band and geographic area (and during a specified time period) subject to: (1) an out-of-band emission limit; (2) an in-band power limit (because receivers in adjacent bands may be affected by in-band power even if out-of-band emissions are zero, or . . . there may be other in-band licensees); and (3) a field-strength limit for out-of-area emissions. The out-of-band and out-of-area emissions limits would be defined at the band and geographic boundaries, respectively.²⁶

²³ Federal Communications Commission, “Statement of Chairman Julius Genachowski re: Connect America Fund, WC Docket No. 10-90,” news release, October 27, 2011, http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1027/DOC-310695A2.pdf.

²⁴ The pioneering work here is from Ronald Coase, who in 1959 argued for property rights in spectrum. Coase, “The Federal Communications Commission,” *Journal of Law & Economics* 2, no. 1 (1959). This paper is also the first place his famous Coase theorem appeared.

²⁵ Thomas M. Lenard and Lawrence J. White, *Digital Age Communications Act: Report from the Working Group on New Spectrum Policy, Release 1.0* (Washington, DC: Progress and Freedom Foundation, 2006), 3, <http://www.pff.org/issues-pubs/books/060309dacaspectrum1.0.pdf>.

²⁶ *Ibid.*, 7–8.

The working group identified a property rights system as best adapting to new or unforeseen uses of spectrum. Further, property rights enable bargains between spectrum owners who value a given band or use. The working group rejected a wholesale commons model for spectrum, concluding that the conditions of a surfeit of spectrum did not apply, and noting that the regulatory supervision a commons model would require would exceed even that of the command-and-control inheritance. The spectrum working group retained a healthy respect for, and place for, unlicensed uses.

Of course, the transition between the current system and a property system is a large part of the problem, and the reason that the FCC—which, to its credit, has generally championed auctions and market-based spectrum mechanisms—has not decreed an immediately open market for spectrum. The FCC gave away much of the spectrum currently in use. To allow these users to simply resell what was conceived as a “public resource” would result in tremendous windfalls. Other users purchased portions of the spectrum at auction and operate it under an FCC license. Because the various allocations cover different uses and different permutations of a more complete property right, the working group offered a transition framework. To accomplish the transition, the DACA proposal treats spectrum differently based on how and where the current license was obtained. There are three broad classes of spectrum:

1. Spectrum that is exhaustively, exclusively (or with well-specified priority rights), and relatively flexibly licensed, with licenses purchased at auction (e.g., the personal communication services [PCS] licenses). This class mostly already operates under a market-driven regime. Under the DACA proposal, it would acquire formal property rights; other than that, it would be largely unaffected.
2. Spectrum encumbered by current use constraints, either on the nature of the service offered or on the time and scale of the service offering. This spectrum may have been licensed by auction or by other mechanisms, and may be exclusively or nonexclusively licensed (e.g., time-shared under a “listen-before-talk” requirement). The key feature is that the current licensee has less complete property rights than will attach to spectrum in the future under a market-based, fully allocated rights regime. Generally, spectrum in these bands is not exhaustively licensed; instead, these licenses give the users the right to operate certain equipment in defined frequencies and geographic areas at defined power levels.
3. Unassigned spectrum, including white spaces—the unused and unencumbered portions of spectrum licensed under category 2.

The transition options discussed below apply to the second and third classes.²⁷ Each option establishes property rights immediately, but the configurations of those rights differ based on distributional and transaction-cost concerns.

²⁷ Ibid., 11.

The DACA working group endorsed a “spectrum registry” akin to a clerk and recorder’s office for real property. The registry would facilitate spectrum transactions and help buyers and sellers to identify one another. The registry’s overall purpose would be to lower transaction and negotiation costs. The public could view who owns what spectrum and under what parameters and power limits. The public could then negotiate more optimal uses or powers or address interference concerns.

Once regulators established spectrum property rights, regulators’ operative role would be to enforce those rights or to provide a forum for that enforcement. Accordingly, DACA turns to the law of trespass for its adjudicatory standard over spectrum rights. The law of trespass would govern respective uses of spectrum—interference questions, for instance, would be cast as trespass claims. Institutionally, these rights could then be adjudicated, whether by courts of general jurisdiction or through a reconstituted FCC with administrative adjudicatory processes. Because of the specialized and ethereal nature of spectrum, specialized FCC administrative courts might make the most sense, according to DACA.

The end goal of spectrum reform would be more spectrum, better utilized, in the hands of those who value it most. The working group strongly endorsed a property system to achieve this goal, using any practical accommodations necessary to effectuate that transition.

d. State–Federal Relations

Traditionally, the state–federal regulatory authority has been conceived as “separate and dual.” States had jurisdiction over local monopoly telephony, and the federal government regulated interstate networks, wireless service, and broadcast issues. The DACA recommendation continues the trend toward greater federalization, and even raises traditional issues of local control like franchising to the statewide level. The DACA working group discussions of state–federal relations were fraught with competing claims and strong views about traditional regulatory prerogatives. Today, that controversy has largely subsided.

The DACA working group’s recommendations reflected that the overall structure and direction of communications regulation is federal. The need for a unitary regulatory framework, the belief that that communications policy should be a subset of general competition policy, and the concern over avoiding patchwork regulation and spillover effects from state regulation all pointed toward communications policy being a federal matter with limited state jurisdiction.

DACA proposed delegating to states and localities the authority to promote public safety and homeland security and to manage public rights-of-way, subject to federal law and a prohibition on effects that spill over state boundaries. DACA favored granting states the discretion to impose streamlined certification requirements. State fees for access to rights-of-way would be limited to the costs of such access.

In short, the working group endorsed a carefully circumscribed role for states and localities going forward in communications law. It recommended eliminating rate regulation, except under narrow circumstances. States would continue to be empowered to deter and remediate fraudulent activities such as slamming and cramming, but they could not engage in economic regulation under the guise of consumer protection.²⁸ While the working group at the time allowed states to retain a basic local service rate, even that rate regulation, in the time since DACA issued its reports, has begun to wane on a state-by-state basis. Hence, a “current” version of DACA might eliminate basic local service rate regulation in all instances save clear monopoly provision of communications services. Finally, states would retain supervision of alternative dispute-resolution procedures and other processes for solving consumer fraud problems.

A self-conscious commitment to an integrated regulatory framework would best promote sound communications policymaking, the working group found. Under such a model, states and localities would be permitted to regulate only within federally authorized spheres. This authority involves both an explicit delegation of authority—as exists, for example, under the 1996 Act’s interconnection agreement regime—and a tolerance (through a “savings clause”) for states to act in ways that do not affect other states and that are “not inconsistent” with federal regulatory policy.

e. Institutional Reform

DACA’s institutional reform recommendations cannot be separated from the regulatory framework discussion. The framework envisions a competition policy agency focused on adjudication, not rulemaking. To complement this legal standard, the Institutional Reform Group recommended that a split agency model be adopted as the institutional mechanism for executing the regulatory functions proposed under DACA. In practice, a split agency model would mean that a multimember agency similar to the present FCC would be responsible largely for conducting the adjudications envisioned under the new statute, and a single executive branch official would be vested with the authority to conduct the more limited rulemaking proceedings envisioned by the new act as a means of establishing policy. The working group thought that the split-agency model would better serve the twin goals of political accountability for administrative policymaking through rulemaking while achieving efficient, effective, and sound decision-making through adjudicatory rigor.

The agency split would proceed as follows. Rulemaking authority for the agency would be vested in a single official located in the executive branch. The adjudication function (the principal form of agency action under DACA) would remain the FCC’s role in its current multi-member form. The reformed commission would focus on a function within the traditional competence of multi-member panels—applying established principles to specific facts and circumstances during the adjudication of particular cases.

²⁸ “Slamming” and “cramming” involve the fraudulent actions of communications carriers to switch a subscriber’s communications carrier (slamming) and add unauthorized charges to communications bills (cramming). Both are instances of consumer fraud.

Spectrum functions—registry supervision and the conduct of options—would be in the hands of the single executive branch administrator. In essence, DACA’s institutional setup could be viewed as transferring the rulemaking/policy decisions over the current National Telecommunications and Information Administration, with the FCC remaining an adjudicatory body. The FCC, sitting in its adjudicatory capacity, would also make certain policy, but the primary rulemaking role would now be split off to a politically accountable executive branch official. Because the DACA FTC model reduces regulation through rulemaking, this institutional structure would still keep a large regulatory nexus at the FCC, but the executive branch would make the broader policy calls in rulemaking.

The institutional structure of communications law should be considered as important as the substantive legal standards. A broad antitrust standard in the hands of a lawless agency disinclined to rigor would accomplish little. That same standard in a more self-consciously adjudicatory and law-abiding agency would be better than current practices.

III. What Is Missing?

DACA did not presume to encompass every topic in communications law. Media law and ownership constitute the most glaring omissions. DACA also sidestepped content-regulation issues and public safety communications and networks. In addition, circumstances may have overtaken some of DACA’s recommendations, illustrating how even a self-consciously forward-looking regulatory plan can mistake what the future will hold. For instance, federal–state issues appeared central to the working group in 2005–2006. Now, those issues seem largely worked out, with the states stepping aside for a national regulatory model.

Because it is styled as a law of general applicability within the communications sphere, DACA should be able to encompass issues like media ownership. An “unfair competition” standard with an antitrust pedigree would apply to media ownership and concentration issues. This standard would not satisfy those who are concerned about media ownership and concentration issues. Nevertheless, it would require a rigor and level of proof that are currently lacking from media ownership debates. Congress could add social policy objectives relating to media ownership, subject to constitutional constraints. Nevertheless, a DACA model for media ownership would begin with a strong presumption that the standards of general applicability from the FTC Act and the institutional method of adjudication would be the preferred lenses through which to view media issues.

Content issues do not fit neatly into the DACA framework. Competition policy law does little to regulate speech, particularly in a fecund media environment. While First Amendment law might be on the way to making specialized administrative regulation of content obsolete, DACA in its outlook and aims would not encompass a content regulation regime. The DACA response, if there were one, to proposals for content

regulation would likely leave such regulation to other agencies or to Congress rather than to the specialized competition policy agency that DACA contemplates.

Conclusion

Communications law reform remains a perennial topic because the categories, aims, and institutions of the 1934 and 1996 telecommunications laws are ill-suited to current technological and market reality. The “digital broadband migration,” a term coined in 2000 by then-FCC Chairman Michael Powell, has continued apace, and law must be updated to reflect the technological reality. DACA thoroughly considered many models and standards for communications regulation, and a bipartisan group of scholars and analysts agreed on consensus outcomes. If Congress takes up communications reform on a wholesale basis, it can start with DACA as a roadmap to thinking about reform.