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The good of the people is the greatest law.[1]

--Cicero

It is difficult to make our material condition better by the best law, but it is easy enough to ruin it by bad laws.[2]

--Theodore Roosevelt

A democracy built on participation and freedom of choice must develop the habit of criticizing its laws; for, in no other way, can the people move toward their ideals. After 200 years of struggling to create a more perfect union, American policy makers and analysts hold this value as axiomatic. No matter the tactical concessions nor the last minute compromises, every law engages discourse and debate as part of its legacy. In telecommunications, that discourse may be heated or it may be arcane; but, at its essence, it embraces Cicero's great principle and Roosevelt's warning.

Debate over the potential and efficacy of the Telecommunications Act of 1996 arose at the moment of its first consideration, continued right through the President's signature, and shows no sign of diminishing. Its predecessor, the Communications Act of 1934, generated debate throughout its 62 year existence, so it should come as no surprise to find debate persisting after passage of the '96 Act. The arrival of an information economy and society has simply added fuel to the fire.

In cosidering the impact of the Act five years later, three central issues emerge: competition, regulation, and access.

Competition

Policy makers and analysts share near consensus on the importance of the Act's intent to promote competition. The vision of fully competitive markets offering the best prices to consumers was strongly endorsed by most, if not all, of the parties. To a large extent, the promoters of the Act saw the opening of markets previously run as regulated monopolies as vindication of the power of market forces. Fully open markets would best meet the requirements of the public convenience, interest, and necessity. Even those most wary of the market were willing to cede some acceptance to the arbitration of the market.

Against that criterion, the Federal Communications Commission's and the Court's efforts to create competition have fallen far short of the Act's mandate. Many consumers have yet to experience choice or better quality service in broadband, local telephone, or Internet service markets. Rather than the rough-and-tumble, head-to-head competition envisioned by enthusiasts, the absorption of the cable business by phone companies, and consolidation among the phone companies themselves, leaves free marketeers uncomfortable. Five years into the era of the Act, the telecommunications world defies the original confident predictions.

Regulation

Hand-in-hand with competition, the Act aims "To. . . reduce regulation in order to secure lower prices and higher quality services. . .." The obvious allusion to market forces carries

significance because of the belief that market forces are superior to regulation in the promotion of the common good.

Reduced regulation, the operational core of that vision remains beyond the horizon. Old regulatory assumptions creating boundaries between cable and telephone prolong the promise of competition. As convergence of media intensifies, support of important subsidies such as Lifeline remain the obligation of a few, even as the idea of universal service expands to encompass broadband and Internet. Regulatory obligations lack symmetry across convergent media, so that some providers are selectively favored. It's time to move toward a modified common carriage regime for broadband, telephony, and Internet; to offer universal service as a bundle of choices; and, to share the burden of funding universal service among all of the players. That said, the Commission and the courts face difficult obstacles made all the more challenging by the narrow self interest displayed by most of the players. After five years, strategies to achieve deregulation must balance the demands of aggressive interests playing for high stakes.

Access

In Section 254, the universal service provision of the Telecommunications Act seeks to improve access for all Americans. And, though a relatively small portion of a large document, the commitment to access should be understood as carrying forward the highest ideals of a democracy. It is because Americans have built their edifice of democracy on the idea of freedom and justice for all – emphasizing the *all* – that access through universal service signifies more than a generous idea. In a society defined by information technologies and services, access to those media constitutes the gateway to democratic participation. For without access there can be no participation; and, without participation there can be no democracy.

Consequently, from time to time, national attention focuses on those Americans who might not have access to the same opportunities as their fellow citizens, and the resulting discourse takes on the supposition of a "gap."[3] The passage of the Telecommunications Act occurred coincidentally with national concern for the emergence of a digital divide. And, at this nexus, the Act does not disappoint. Interpreting original research conducted in the early 1990s that challenged the effectiveness of traditional universal service, the Act broke through to a new conceptualization of universal service as an "evolving concept." The new idea, that universal service should offer access in whatever configuration best suits the needs of Americans, fits perfectly with the dynamics of a rapidly evolving technological environment. Granted, all attempts to achieve the idea encounter massive hurdles. Yet, for democracy to derive its just powers from the consent of the governed, a communicative process must thrive. That process demands much of us for it demands that we insure equal and equitable access for all. Thus, as a good start as Section 254 offers, the follow through must be even more vigorous; and, that has yet to occur.

Course Corrections

As we look to the next round of discussions about how to best implement the Act, three goals should be stressed. First, level the playing field for genuine competition. Second, work towards regulatory symmetry across convergent media. And, finally, pursue access for all users vigorously.

As we go forward, we should bring two caveats with our critique. Teddy Roosevelt's caution should sober us – every law comes with inherent

limitations, and too much can be asked of it. Thus we are wise to carry on re-evaluation and debate. However, Cicero deserves the last word. The goal of law is to serve the good of the people; and, as we construct the terms of engagement for the information society, let us be clear in our goal.

Endnotes

[1] Cicero (60 B.C.?) De Legibus, bk. 3, ch. 3, sct. 8.

[2] Theodore Roosevelt (1902) Speech, 23 Aug., Providence, R.I.

[3] The language of gaps can be potent. In his second inaugural address, Franklin D. Roosevelt took the first step of his new administration by challenging the picture of America as the land of opportunity. He looked out beyond his audience and declared, "I see one-third of a nation ill-housed, ill-clad, ill-nourished"; and, in so doing tapped into the terror that America's promise could not be fulfilled.