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Applying Hayekian Principles to Communications Policy

by

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I spent part of the holidays re-reading F. A. Hayek's [The Constitution of Liberty](#), while, at the same time, thinking about the continuing need to reform the nation's communications laws and policies.

When Hayek, the famous Austrian school economist, published *The Constitution of Liberty* in 1960, he was not focused on reforming communications law and policy. Nevertheless, the fundamental principles he espoused have much relevance in thinking about that topic today.

To show why this is so, I want first to set forth a few excerpts from the book that fairly capture overarching central themes of Hayek's work:

"There are two reasons why all control of prices and quantities are incompatible with a free system: one is that all such controls must be arbitrary, and the other that it is impossible to exercise them in such a manner as to allow the market to function adequately."

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“If there is to be an efficient adjustment of the different activities in the market, certain minimum requirements must be met; the more important of these are, as we have seen, the prevention of violence and fraud, the protection of property and the enforcement of contracts, and the recognition of equal rights of all individuals to produce in whatever quantities and sell at whatever prices they choose.”

“It would scarcely be an exaggeration to say that the greatest danger to liberty today comes from the men who are most needed and most powerful in modern government, the efficient expert administrators exclusively concerned with what they regard as the public good.”

“There is a strong presumption against such [general regulations of economic activity] because their over-all cost is almost always underestimated and because one disadvantage in particular – namely, the prevention of new developments – can never be fully taken into account.”

With these excerpts in mind, we may extract several key principles relevant to establishing welfare-enhancing policies in today’s competitive, fast-changing, technologically dynamic communications marketplace:

- A proper role for government is the protection of property and the enforcement of contracts.
- The free market, not government officials, should dictate the quantities of goods and services produced and the prices at which they are sold because the decisions of government officials necessarily will be arbitrary in relation to those of the market.
- Even if they are well-intentioned, the government “experts” at administrative agencies are, by definition, almost always overzealous in pursuing what they claim as the public good at the expense of individual freedom.
- The costs imposed by new regulations almost always are underestimated, while new developments are not fully anticipated.

Finally, I want to suggest what should be obvious: Communications law and policy, as it stands today, departs substantially from these Hayekian principles. And the [FCC](#), the administrative agency charged with implementing the communications laws, regularly acts just in the way Hayek suggested such an agency would — overzealously and arbitrarily regulating in the name of the “public good,” while downplaying the costs imposed by its regulations and failing to anticipate new developments.

With Hayek's themes and principles in mind, a communications reform agenda for the coming year should focus on the following items:

- Prevent broadband Internet services from being subjected to public utility-style regulation and rolling back such regulation where it already has occurred, for example, with respect to the FCC's imposition of net neutrality mandates.
- Free up additional spectrum through authorization of incentive auctions and removal of current FCC rules that unnecessarily restrict licensees' freedom to use their spectrum more flexibly and to transfer it more easily through workable, transparent secondary markets.
- Curtail outdated video regulations such as the FCC's program carriage rules that allow the FCC to dictate the placement of a program channel on a cable operator's system. In a recent FCC administrative law judge's decision, the program carriage regulations were (mis)used by the judge to arbitrarily abrogate negotiated contract rights in mid-term, substituting the government's judgment concerning program channel placement for that of a cable operator's. This government intrusiveness regarding program content selection certainly implicates the cable operator's free speech rights.
- Eliminate, as contemplated by Senator Jim DeMint's newly-introduced "Next Generation Television Marketplace Act," the obsolete regulatory regime in which the government requires that cable and satellite video providers "must carry" certain kinds of channels with particular kinds of program content, restricts the number and kinds of media outlets that may be commonly owned, and establishes a compulsory license regarding retransmission of certain kinds programming, all the while offending First Amendment principles.
- Reform the FCC's broken merger review process in which the agency exercises its largely unfettered discretion under the inherently indeterminate public interest standard to impose conditions on the merging parties unrelated to the transaction before the Commission and which are not justified by competition analysis related to the specific transaction before the agency.
- Oppose efforts to get the UN's International Telecommunications Union World Congress on Information Technology (WCIT-2012), to be held in October 2012, to adopt policies that, under cover of the ITU, sanction control and regulation of the Internet in various ways, including regulation of transmissions and content that governments deem offensive.

There are other topics that could be highlighted, and there are certainly issues within issues in the topics listed above. So, the listing is not intended to be exhaustive. But what I intend to show is that there is a Hayekian approach to communications policy that respects contracts and private property, constrains otherwise unbridled administrative discretion, and promotes free markets and the rule of law.

This approach is the surest — and, in the end — the only sure way to advance prosperity and protect liberty at the same time.

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