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Constitutional Considerations for Proper Spectrum Policy: A Preference for Private Property Rights and Market Competition

by

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The U.S. government occupies substantial swaths of spectrum and, at the same time, through the Federal Communications Commission, it controls the spectrum allocated for use by private sector market providers. The government's use of spectrum for its own activities and its control over spectrum used by the private sector could – and should – be exercised more in line with foundational constitutional principles. This means that federal spectrum policy, to the extent feasible, should implement property rights-like regimes that rely on private market competition to maximize spectrum use and enhance overall consumer welfare.

Consistent with constitutional considerations, Congress and the FCC should reallocate more spectrum from government use to private commercial use for both licensed and unlicensed applications. For spectrum bands suited to commercial licensing, there should be a general preference for licensing on an *exclusive* basis. And in light of its responsibility to promote private property and private sector commerce, the federal government should not be permitted to use its allocated spectrum to compete against private providers by entering commercial wireless markets.

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Also, when Congress next revises the Communications Act, it should replace the vague "public interest" standard that governs the FCC's regulation of spectrum with a market-based standard that promotes freedom and flexibility in spectrum use. Even if Congress does not do so, the FCC should adopt rules or policies to constrain the capaciousness of the public interest standard by tying it to requirements for assessments of marketplace competition. A market-based spectrum approach, for example, would exclude application of "hard caps" on wireless providers' acquisition of spectrum licenses, and, similarly, it would reject "net neutrality" or "open access" restrictions that are unrelated to prevention of signal interference.

We understand that the Constitution does not expressly prescribe any particular economic system. Yet we believe it implicitly reflects the Framers' understanding that one of the essential functions of government is to protect and promote the natural right of individuals to acquire and use property. As James Madison, the principal first-line drafter of the Constitution, wrote in his 1792 essay *On Property*: "Government is instituted to protect property of every sort." Provisions such as the Due Process Clauses of the Fifth and Fourteenth Amendments, with their dictates that no person shall be deprived of "property" without due process of law, embody the constitutional concern for private property rights.

In our view, the Constitution also implicitly reflects the Framers' understanding that commerce primarily should be the domain of private market participants. A key reason for the Constitution of 1787's strengthening of the powers of the federal government, over and beyond those powers given to it by the Articles of Confederation, was to enable the citizens of the United States to be "a commercial people" – as Alexander Hamilton put it in *Federalist Nos. 24* and *34*. Among its pro-free enterprise provisions, the Article I, Section 8, Clause 3 Commerce Clause grants Congress the power to regulate foreign and interstate commerce, which Chief Justice John Marshall, in *Gibbons v. Ogden* (1824), described as the power "to prescribe the rule by which commerce is to be conducted." The federal government's primary responsibility regarding commerce is to promote it by even-handedly enforcing laws – including laws of property and contracts – not by serving as a direct commercial competitor to private market providers.

Unfortunately, federal spectrum policy in the early twentieth century strayed far from constitutional principles regarding the protection of private property and the facilitation of free market exchange. The Radio of Act of 1927 and the Communications Act of 1934 rejected private property ownership in spectrum and replaced it with an assertion of federal government control over the use of all the spectrum. The 1927 Radio Act, which established a "Federal Radio Commission," wiped out all vested rights of first occupancy in spectrum that previously had been acquired by radio stations. The 1934 Act established the FCC and reaffirmed the government's vast power, initially asserted in the 1927 Radio Act, to regulate spectrum use in the "public interest." Thus, the indeterminate public interest standard has been used by the FCC to implement regulations that largely reflected a "command-and-control" regime.

But towards the end of the twentieth century, federal communications policy moved at least partly in a free market direction. In 1993, Congress expressly authorized the first public auction for commercial cellular licenses. By auctioning licenses through a competitive bidding process, spectrum is allocated to private market wireless service providers that are the most likely to have the resources and strongest financial incentives to efficiently develop

networks that use the spectrum. Additionally, in Section 230(b) of the Telecommunications Act of 1996, Congress declared it to be the policy of the U.S. "to preserve the vibrant and competitive free market that presently exists for the Internet… unfettered by Federal or State regulation." Reliance on free market competition, to the extent that it is embodied in federal policy, has been integral to advancing U.S. leadership in wireless broadband Internet services that rely on spectrum, including 5G network services. The wireless industry has invested over $601 billion in private capital, with $30 billion invested in U.S. wireless networks in 2020 alone.

Now, Congress and the FCC should further align spectrum policy with constitutional principles favoring private property and private sector market competition. One way to accomplish this is to get federal agencies to relinquish, or if not relinquish then share, government spectrum that it is underutilizing. The federal government occupies significant amounts of mid-band spectrum that ought to be reallocated for timely rollout and optimization of commercial 5G networks. By way of examples, federal agencies should prioritize the 3.1-3.45 GHz band for examination and timely repurposing. Additionally, the Commission should establish an auction commencement date for the 2.5 GHz band. And the 4.9 GHz band holds promise for repurposing and licensing.

We do not suggest that constitutional principles provide specific answers to technical and engineering-informed policy questions about which bands are best suited for licensed or unlicensed use. But once the FCC has determined, through careful application of its spectrum engineering expertise, the optimal approach for use of specific bands, constitutional principles can shed light on policy implementation.

For those bands suitable for commercial licensing, federal spectrum policy generally should prefer licensing on an *exclusive* rather than on a shared basis. An essential characteristic of property ownership is the owner's exclusive right to determine how the property will be used. Exclusivity accords spectrum licensees stronger investment incentives because they are better able to control resource development and seek financial returns compared to users of shared spectrum. Yet in some instances, sharing may be the only viable approach because relocation of government users could jeopardize national security, law enforcement, or some other key government function.

Moreover, we recognize that some spectrum may be better suited for *un*licensed use, just as certain land and water resources are not ideally suited for private acquisition but best serve as common property. Unlicensed spectrum uses involving fixed wireless technologies like Wi-Fi have become increasingly important, and they are likely to be even more so as we move further into an "Internet of Things" or "IoT" world. In this regard, the FCC's newly initiated Notice of Inquiry regarding "Spectrum Requirements for the Internet of Things" is an important forward-looking proceeding intended to examine the role of both unlicensed operations and licensed spectrum in an IoT environment. These unlicensed uses support commercial and other private sector activity, and they also often serve a complementary role in connection with private wireless broadband network functions.

However, entry by federal agencies into commercial wireless markets to compete against private providers would be in substantial tension with constitutional principles favoring private property and private sector commerce. Government entry as a market competitor

inevitably does *not* promote private sector investment in infrastructure, production of goods, or delivering of services – but instead inhibits them. Private market providers understandably are reluctant to compete against the government that regulates them. There is a legitimate concern that government will use its regulatory powers, including its control over spectrum, to advantage its own commercial services and disadvantage those of private sector rivals. Thus, potential entry into the 5G market or other wireless markets by the Department of Defense or any other federal agency using government-allocated spectrum should not be permitted.

Finally, for too long, FCC control of spectrum has been governed by the indeterminate "public interest" standard that too easily allows the Commission to restrict or condition spectrum use arbitrarily and without a reasoned basis, and, at times, in a way that raises serious First Amendment concerns. Replacement by a market-based standard that at least partly constrains the Commission's unfettered invocation of the "public interest" standard would promote more flexible use and inhibit the erection of regulatory barriers to acquiring and transferring spectrum licenses.

Consistent with a market-based approach, Congress and the Commission should not impose "hard cap" limits on the number of spectrum licenses that private market providers can acquire through auctions or secondary market transactions. Nor should Congress and the Commission impose on licensed spectrum use "net neutrality," "open access," or other restrictions unrelated to preventing signal interference.

Under a market-based approach, the Commission could address alleged claims of anticompetitive harm through case-by-case adjudications that place the burden of proof on parties seeking regulatory intervention and which are informed by microeconomic analysis focused on evidentiary assessments of marketplace realities and consumer welfare.

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Previous Publications in this Series on the Constitutional Foundations of Communications Law and Policy

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