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Comments on "The Telecommunications Act of 1966," by Thomas G. Krattenmaker

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Comments on
“The Telecommunications Act of 1996,”
by Thomas G. Krattenmaker

LOFTUS E. BECKER, JR.*

INTRODUCTION

As always, it is hard to argue with what Dean Krattenmaker says. *The Telecommunications Act of 1996* is typically thoughtful, informed, and elegantly written. He knows the Act, he knows the field, he knows his strong points, and he disarms criticism by knowing (and saying) when he can make a case but not prove it.

So there is little that Dean Krattenmaker says that I could debate, and little that I will. However, his article leaves much unsaid, and I want to talk about what he doesn't say.

His evaluative comments are based on three critical assumptions — one of fact, and two of value. The first assumption is that the telecommunications market is sufficiently like the economic model of markets that it will work as theoretical markets should. A second, and more important, assumption is that we need not, as a polity, be concerned with what kind of a telecommunications system we want. What we should want is nothing more (and nothing less) than what a properly open market brings us. The final assumption is, or at least appears to be, that if we are forced to choose between subsidizing some kind of “universal access” to telecommunications and increasing the openness of the telecommunications market, we should choose the latter.

I am not sure that the factual assumption is true, and I am not at all sure that the values underlying the other two are mine — or should be our collective values. I do not expect that I can prove my points;

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indeed, I am not sure that any are provable. I do, however, hope to show that these parts of what Dean Krattenmaker leaves unsaid are, at least, open to serious debate.

Thus, I have three main points.

First, it is important that we think about what kind of a telecommunications system we want to have — and not only in terms of its technology and infrastructure, but also in terms of its content. Only if we know what we want can we sensibly decide how to get there, or even decide whether a given system of regulation is “successful” by the only measure that, in my view, really counts. Finessing this question by leaving the answer to the market is, for reasons discussed below, insufficient.

Second, even if one disagrees with my first point and concludes that judgments of content should ultimately be left to the free choice of autonomous individuals in a democratic society, the telecommunications market is ill-suited to achieving that end.

Finally, and particularly if one is persuaded by my second point, the goal of providing universal access may be far more important than increasing the openness of the telecommunications market.

I. THE IMPORTANCE OF ULTIMATE GOALS

Regulation has purposes: except perhaps to the most Kafkaesque of bureaucrats, regulation is not an end in itself. A discussion of means is not merely informed by but indispensably tied to the ends sought to be obtained. Before we can decide what parts of the new Act are wise or unwise, we should decide what kind of telecommunications system we want to develop. Before we can decide what kind of telecommunications system we want to develop, we need to decide what social functions we want it to serve.

Dean Krattenmaker’s article says practically nothing about this. Its focus is technological: telecommunications is simply a fancier and more efficient form of smoke signals¹ — a clever and insightful metaphor if one is concerned with the underlying technology, but I think misleading if one is thinking of the *functions* that technology serves in our present and future society. For telecommunications today is much more than a medium of entertainment and private communication. It is already per-

1. Thomas J. Krattenmaker, *The Telecommunications Act of 1996*, 29 Conn. L. Rev. 123, 126 (1996) (analogizing telecommunications and smoke signals).

haps the chief mechanism through which our society informs itself about the world around it, and carries on the discussion and debate essential to a properly functioning democratic society. Telecommunications, in short, is not simply a modern amalgam of the theater and the telegraph office. It is increasingly becoming our libraries, our schools, and our town meetings, and it behooves us to think what those institutions will contain.

Some will argue that even thinking about what kind of a telecommunications system we want is inconsistent with the First Amendment. Not so. Of course, the First Amendment does and should frequently make us wary of governmental action. No doubt the First Amendment forbids some actions that we might otherwise take to achieve what we think of as a desirable telecommunications system. But there are many others (such as government participation in the market) that are surely untouched by the First Amendment, which forbids government to censor but not to publish. And surely the First Amendment never forbids us from *thinking*.

It may well be that, having decided what kind of telecommunications system we would like to have, we will find the First Amendment severely limits our ability to use governmental power to get it. The First Amendment does not, however, eliminate such power. One might conclude, for example, that problems with the private market should lead to a substantial government (or government funded) presence in telecommunication.² And even if we are forbidden to act governmentally, exhortation and other private exercises of power are the essence of, not contrary to, freedom of speech.

Dean Krattenmaker says little about ultimate goals. He does refer to "our reliance on market mechanisms to appraise and allocate goods and resources,"³ and does reprise⁴ "four criteria for measuring whether telecommunications regulation serves . . . public . . . interest goals."⁵ Those are, in brief, that governmental institutions should have no control over content; that government should foster access by "any speaker

2. Although many oppose governmental presence in radio and television, I know of nobody who seriously opposes at least some governmental presence on the information superhighway, as when the government makes available the text of statutes, judicial decisions, regulations, and governmental information once routinely distributed in printed form, like Census Bureau data.

3. Krattenmaker, *supra* note 1, at 151.

4. Thomas G. Krattenmaker & L.A. Powe Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 Yale L.J. 1719, 1726-32 (1995) (enumerating four basic principles for government regulation of mass media).

5. Krattenmaker, *supra* note 1, at 151.

willing [and presumably able] to pay the economic costs" of reaching a "willing" audience; that government should "foster diversity," that is, let people bid for and receive the information they want and are "willing [again, and presumably able] to pay the economic costs of receiving it"; and finally, that government may not sacrifice any one of these three goals for the sake of any other.⁶

These regulatory goals are attractive (though some of their attractiveness may lie in their vagueness), but ultimately insufficient.

To the Twenty-First Century, the information superhighway — i.e., the telecommunications industry, — will be what books, newspapers, and libraries were to the Nineteenth and Twentieth.⁷ In other words, it will be virtually the only way that people learn about the world and how it works.⁸ Should the content of our libraries really be determined by the transient preferences of aggregated individuals? In one sense this sounds like the ultimate in democracy. But I doubt the ultimate in democracy is what we want.⁹

We do not want it in the political process. We could, if we were so inclined, eliminate elective legislatures and make all legislation a matter of general (electronically conducted) public referendums. But I, for one, would shudder to live under such a system, and I am not sure that a similar method for deciding what information about the world should be generally available to American citizens is adequate.

From a policy point of view, I am happily indifferent to whether

6. Krattenmaker, *supra* note 1, at 152.

7. Let me reemphasize that I am referring not only to audio and video transmissions (television, cable, and so forth) but also to data transmission by computer. I do not expect printed books to disappear, but I do expect that even public libraries will more and more rely on the Internet and related technologies to distribute information. Of course, I am to some degree overstating; no doubt people will continue to get some information by direct personal contact with others.

8. For many, it may be that today. Wayne Anderson reports that about half his Sacramento City College astronomy class believed the Government was engaged in a grand coverup of evidence of extraterrestrial visitors. Asked in their final writing assignment for the evidence supporting their views, only one cited a book; the remainder referred primarily to television programs, rarely distinguishing between fiction and (purported) nonfiction. "[N]early half of the members of this college class were unable to cite any other evidence except television entertainment on a science topic." Wayne R. Anderson, *What Constitutes Scientific Evidence*, SKEPTICAL INQUIRER, Sept.-Oct. 1996, at 59,60.

9. Dean Krattenmaker notes that he does "not like" the "post-World War II British model" of radio and television broadcasting, but his dislike appears to be entirely with process, not with what was broadcast. Krattenmaker, *supra* note 1, at 151. He nowhere asks, for instance, how well the British public was actually served by the broadcasting they had available, or whether we are better served by our own broadcasting system.

L.A. Law, *Fawlty Towers*, the *Bill Cosby Show*, or other, similar fare is made available. What shows in our theaters can well be determined by the gate receipts. But not, I think, what appears in our libraries, our newspapers, and our school systems. Telecommunications is all of these, and these are too important for their content to be determined by the aggregate of transitory individual choices.¹⁰

Second, given my view of the importance of telecommunications, I am deeply troubled by the emphasis Krattenmaker's and Powe's criteria give to money. I am assuming here that "willing to pay"¹¹ includes "able to pay" — and if this assumption is correct, then the criteria limit votes in the National Telecommunications Policy Ballot to the well-heeled. Of course, the costs of viewing at least *some* television and cable transmissions will remain low enough that most people in the country can watch something. The political system will assure this for the foreseeable future. But the *content* of what everyone can view will, it appears, be determined by those with the deepest pockets, the market's electorate.

Dean Krattenmaker does want the government to foster "diversity" in telecommunications services, although his definition of "diversity"¹² is less inclusive than the dictionary's and (I think) his inclusion of diversity as a goal perhaps less attractive therefore. More fundamentally, however, diversity is not all it's cracked up to be. Certainly there is much on the (very diverse) Internet the presence of which I deplore not applaud—even though I heartily agree that government should not forbid it.

More fundamentally, however, I worry about the consequences to a society where everyone can easily avoid anything that makes him or her uncomfortable or angry. If conservatives listen only to Rush Limbaugh and liberals only to Mario Cuomo, we have lost much of the common ground that makes debate and discussion possible in a demo-

10. Judging from the Internet, a truly choice-driven television system would contain an enormous amount of explicit depictions of sex. Not only is there a lot of sex on the Internet now, but many sites devoted to smut are shut down not by fears of censorship, but because they are so popular that the server on which they reside becomes overloaded.

11. In this brave new world into which those with money will soon all be wired, one can talk if one is "willing to pay the economic costs" of the speech, and one may listen if one is "willing to pay the economic costs" of hearing the words. Krattenmaker, *supra* note 1, at 151. With respect to the first, Dean Krattenmaker emphasizes that this "does not mean that government must or should require others to subsidize the would-be communicator." Krattenmaker, *supra* note 1, at 151.

12. See Krattenmaker, *supra* note 1, at 151.

cratic society. At least occasionally, the two must be on the same program. If everyone hears only that news, and learns only those facts, that support his or her existing beliefs, we are well on our way to a social breakup that will rival Yugoslavia's. While some diversity is an appropriate goal, I think that one measure of a genuinely good telecommunications system would be to provide a significant degree of common information and understanding.

Finally, even if I believed that our telecommunications system should ultimately be determined (and modified) by transient consumer preferences, I doubt that the telecommunications "market" is well suited to achieving that goal, as I argue below.

II. WHAT SHOULD WE WANT?

What the world of telecommunications should look like is one of the hardest questions I can imagine, and I cannot pretend to provide an answer. I do wish, however, to make a few observations.

First, as I have said before, I think it is a serious error to think of radio and television — let alone the whole and increasingly converging world of telecommunications — as nothing but entertainment media. This may have been so in 1934 — but no longer. To be sure, much that is broadcast is solely entertainment, but increasingly our people get their news and much of their other information about how the world works through broadcasting and cable. If that information is flawed — if we are encouraging and expanding a system by which our people are uninformed or misinformed — we're in deep trouble.¹³ Telecommunications today is as much a medium of education (and a library) as it is entertainment.

Some would say that the answer is simply more choice, more sources of information, so that consumers who want good information can get it. Perhaps. But choice is not an unalloyed blessing.¹⁴ Unbridled choice in the 19th century produced cocaine and opium addicts. Should we be comfortable with a telecommunications system in which racists

13. And we may be. *See supra* note 9.

14. Choice imposes transaction costs: we have to decide which choice to make (and, for many of us, worry later whether we made the right one). One day a man went to the bookstore to buy an encyclopedia for his child. He found two, either of which he would have purchased had it been the only one available, but he returned from the store empty-handed, unable to decide between the two. For a fascinating study sparked by this experience, *see* Shafir, Simonson & Tversky, *Reason-Based Choice*, 49 *COGNITION* 11 (1993).

(at least racists with money) can watch all the television they want and never have their assumptions challenged? I would not be.

Viewed from this perspective, I do not think that our existing system is very good. Viewed as libraries, schools, or information providers, radio and television are abominable. (And I have no reason to believe that the system's major faults result from a market failure that would be remedied by more "efficient" telecommunications markets.) I am not here referring to the constant complaints of "media bias" and the like, troubling though they sometimes are.¹⁵ I am referring to more subtle, and often much more pernicious, distortions — the elevation of quackery over science¹⁶ and the understandable but dangerous optimism that pervades television shows.¹⁷

The information superhighway has different problems. As many have remarked, there is a wealth of information on the Internet, most of it useless or downright wrong. Indeed, much of what is good on the Internet is provided by subsidized sources, either governmental or educational¹⁸ — a fact which I think reinforces my position that governmental presence may be an important component of a good and useful telecommunications system. The Internet as a significant commercial entity is still new enough that it is quite possible to speculate that market forces will at least allay much of this problem; already, a variety of sources are attempting to organize available information in a useful way,¹⁹ and perhaps they will succeed.

III. THE MARKET-BASED APPROACH

I do not wish to deny the enormous value of economic market theory, or downplay the great contributions that it has and presumably

15. The best studies I know of "bias" in broadcasting—which conclude that the media, whether PBS or private, overwhelmingly present mainstream establishment views—are collected in DAVID CROTEAU & WILLIAM HOYNES, *BY INVITATION ONLY: HOW THE MEDIA LIMIT PUBLIC DEBATE* (1996).

16. See, e.g., CARL SAGAN, *THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK*, 13-16, 373-377 (1995).

17. See Susan J. Diem et al., *Cardiopulmonary Resuscitation on Television—Miracles and Misinformation*, 334 *NEW ENG. J. MED.* 1578 (1996) (discussing unrealistic portrayal of CPR survival rates on television and ensuing public misperceptions).

18. Examples include the stunning collection of federal statistical data accessible through <<http://www.census.gov/main/www/stat-fed.html>>, or Cornell's Legal Information Institute at <<http://www.law.cornell.edu/lii.html>>.

19. For example, <<http://home.netscape.com/home/internet-search.html>> references an excellent collection of very different search engines.

will continue to make to our understanding and welfare. But microeconomics, like other branches of psychology,²⁰ is far from perfect,²¹ and like the other branches, often more powerful in retrospective explanation than in prediction.²² Thus, we should not be overconfident in predicting that any market in reality will do what that market is supposed to do in economic theory.²³

Market theory assumes, among other things, that human beings are rational decision makers with good information about the market in question. To the extent either assumption is wrong, the market will not work as it should. And there is good reason to question both assumptions.

Most of us, of course, like to think that we and our brethren are rational animals. But it is not just folk wisdom that questions this assumption.²⁴ An increasing number of studies of human choice has suggested that in important ways, irrational methods of decision making are rooted deep in the human brain, causing people to behave in ways which, in turn, cause markets to behave differently in practice from what market theory predicts.²⁵

Nor is there much reason to believe that we and our brethren are particularly well informed about the choices that we make. Of course, if one thinks of the telecommunications system as simply an amalgam of entertainment and individual communication, we are. We know well

20. Economics is one of many disciplines that attempts to understand and predict human behavior. That it relies heavily on mathematical tools to do this may make it appealing, but it does not make it any less of a psychology.

21. For example, Alan Greenspan persuasively predicted that the Reagan tax cuts would produce a substantial budget surplus. For a charming explanation of why his prediction was so badly wrong, see Alan Murray, *Another Dole Hurdle: Reverse Murphy's Law*, WALL ST. J., July 29, 1996, at A1.

22. Indeed, it may be that, like weather forecasting (an equally mathematical discipline), the period over which accurate economic predictions can be made is distinctly limited. See James Gleick, *Chaos* 11-23 (1987) (describing the discovery of the link between aperiodicity and unpredictability, or sensitive dependence on initial conditions, arising from Edward Lorenz's computerized weather model).

23. Dean Krattenmaker does not seem to be exceptionally confident about his predictions. He explains that several features of the new Act are "indisputably 'good,'" but he never claims that they will improve our welfare in any way, only that they "should." Krattenmaker, *supra* note 1, at 152.

24. "[E]very member of the human race, from Jojo the cave man right down to that final culmination of civilization, namely me, has been as eccentric as a pet coon — once you caught him with his mask off." Robert A. Heinlein, *The Rolling Stones* 59 (1952).

25. The growing body of literature is summarized in MASSIMO PIATELLI-PALMARINI, *INEVITABLE ILLUSIONS* (Massimo Piattelli-Palmarini & Keith Botsford trans., 1994). The book includes an excellent bibliography. *Id.* at 231-236.

enough whether we enjoyed watching the Olympics, or whether the phone call from Uncle Fritz was sufficiently clear and free from interference.²⁶ But we know very little about the quality of the information that comes into our homes — and our minds and, from there, influences if not determines our votes and public behavior.²⁷

If the theory is weak, what about the practice? Existing examples of what open markets produce are not entirely encouraging to me. After all it is Congress, which increasingly is beginning to look like an open, unregulated market in legislation,²⁸ that gave birth to the Telecommunications Act with which Dean Krattenmaker is so deeply disappointed. The savings and loan debacle was the direct result of deregulating savings and loan institutions.²⁹ And the ridiculous (at least from a consumer's point of view), constantly changing, and unknowable system of airline fares may be economically efficient — it should be, if market theory is correct — but is for airline travelers frustrating, wasteful of time, and aggravating.

Even if markets work well in general (and I have no doubt they sometimes do, although I think their efficacy is often overrated), I am dubious about their utility in setting telecommunications policy. It is important to remember that the market model follows the golden rule: he who has the gold makes the rules.

Although we have seen a few, very limited experiments in "pay per view" television, for the foreseeable future much of the available video fare will be funded, primarily, by advertising revenues. And advertisers don't want eyes, they want wallets. The gross number of viewers a program attracts is far less important than the number of viewers with loose cash to spend on the advertised product. The same is increasingly true of so-called public broadcasting, which has been devoting more and more of its time to advertising³⁰ and raising more and more of its revenues from viewer and listener contributions.

26. We do not know — in most cases — who else is listening in, as many have later found to their dismay, a problem that will be exacerbated in the future.

27. See sources cited *supra* notes 16-17.

28. Cf. Krattenmaker, *supra* note 1, at 131 n.45 (suggesting that the new Act might be largely explained as an amalgam of the interests of large contributors to legislators with the power to shape the Act's contours).

29. Of course, it was not deregulation that forced taxpayers to foot so much of the bill. That was a result of deregulating the industry but continuing to provide federal insurance at rates perhaps appropriate for the industry in its regulated state but highly unrealistic otherwise.

30. So far, of course, most of this advertising is "goodwill" advertising, typically less obnoxious, but also less informative and less entertaining, than the advertising one can see on NBC.

We can see and hear the results every day. Anyone worrying about how to fillet that freshly-bought salmon can choose among half a dozen cooking programs (and even an entire cooking channel on cable). We can easily hear how Martha Stewart would have us rework our gardens, learn how to renovate that charming Colonial house in the country, or find out how many inches of powder and base are at the ski resorts. But a viewer who wants to learn how to deal with the welfare bureaucracy, how to find a new job after being fired, how to help kids dodge bullets and drug dealers on the way to school, or how to protect against a threatened eviction is simply out of luck. Can anyone seriously maintain that the present mix serves all our people well, and not just the middle class and wealthy? If not, is there any reason to believe that more reliance on market choice will improve matters?

IV. THE IMPORTANCE OF UNIVERSAL ACCESS

Finally, I would like to make a few observations about "universal service," a goal to which Dean Krattenmaker expresses some sympathy³¹ but which he concludes is so deeply in conflict with his goal of "properly functioning competitive telecommunications markets" that its inclusion in the 1996 Act is not merely a bad, but a genuinely "ugly" feature of the Act.³²

In essence, Dean Krattenmaker's argument is that "[u]niversal service, as defined in the new Act, and competitive markets cannot coexist, where the goods produced have many substitutes or where the technology is dynamic";³³ that telecommunications technology is indeed dynamic; and that therefore we should sacrifice universal service to preserve competitive markets.

I do not want to make a major issue of the possibility of coexistence, though I would observe that the point is not quite as obvious as Dean Krattenmaker would have it.³⁴ Nor do I dispute his point that the

31. Krattenmaker, *supra* note 1, at 166. He does find it offensive that just what "universal service" we seek to provide can grow over time. *Id.* at 144.

32. Krattenmaker, *supra* note 1, at 164-166.

33. Krattenmaker, *supra* note 1, at 164-166.

34. In text, Dean Krattenmaker tells us that "we have already learned" that "we cannot" give pro-social subsidies in the manner the Act commands "unless we dictate that that industry be monopolized." Krattenmaker, *supra* note 1, at 166. In the footnote, however, history only shows that such pro-social subsidies "virtually always" become competitive handicaps. *Id.* at 166 n.216.

Moreover, his argument is overstated. He argues that under a tax-based subsidy system

definition of "universal service" is vague and subject to change over time.³⁵ I do, however, wish to reemphasize that universal service — if I am right in thinking that the "services" involved will touch the heart of how information is distributed throughout the next century — is not just a question of cheap access to Beavis and Butthead, but the linchpin of our maintenance of an informed citizenry. We cannot live, we cannot survive, without this. If we are indeed forced to choose between universal service and an open competitive market in telecommunications, I have no doubt where my choice lies.

V. CONCLUSION

Increasingly, radio and television (and similar services like cable) are not merely luxuries for entertainment; they are a critical part of the structure of common information that binds our society together. In my view, therefore, it is important that we think about what kind of telecommunications system we would like to have, instead of simply finessing the question³⁶ by leaving it to so-called open markets and transient consumer choice. If we ask that question, I think we will conclude that there is a significant part for government to play in the telecommunications arena, both in providing content and in moving towards a goal of broad-based access to basic services.

Markets are sometimes good but never perfect. The telecommunications market has been particularly imperfect in the past, and there is no reason to believe that further "openness" will remedy those failings. Additional competition may be beneficial for other reasons, but it is no panacea. Judging the 1996 Act simply in terms of its success in removing barriers to competition is judging on an incomplete scale.

companies will have an incentive to move to technologies that are "(a) not as efficient as existing telecommunications services but (b) not subject to the tax." Krattenmaker, *supra* note 1 at 165. Of course, the economic incentive is only to move to services that are not subject to the tax; only sometimes (namely, when the cost of the inefficiency was less than the tax and there was no more efficient, untaxed alternative) would any rational company choose (a).

35. I can understand Dean Krattenmaker's concern over the vagueness of the term, though it is hardly less clear than many other terms historically left to administrative filling out, such as the "unfair labor practices" the NLRB is to prohibit. I am, though, puzzled by his apparent distaste for allowing the term to expand over time. Surely a wise legislature defining, for instance, a minimally adequate education in 1900 would have been well advised to allow the concept to vary as times changed.

36. Bridge players, particularly those lucky in love, will be well aware of the dangers of finessing.

