BOOK REVIEW

MARSHALLING THE ARGUMENTS FOR MARKETS IN THE DIGITAL AGE

Communications Law and Policy in the Digital Age: The Next Five Years, Randolph J. May, ed., Carolina Academic Press, Durham, North Carolina, 2012, 179 pages. $25.00. ISBN: 978-1-61163-212-5.

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The issue that communications law and policy faces over the next five years is not whether markets will play a significant role in the regulatory process. That ship sailed some twenty years ago when Congress authorized the FCC to award spectrum licenses by auction and later to forebear from common carrier regulation. Rather, the challenge lies in the extent to which other mandates will be added to the use of markets as regulatory surrogates.

Randolph May, Founder and President of The Free State Foundation, has assembled a short collection of nine essays from scholars and a Member of Congress who attempt to peer into the future of communications regulation. This goal is accomplished by stating the case for moving from the public interest standard of the Communications Act of 1934, as amended, and replacing it with greater reliance on markets forces.[1] Market failures that result in predatory actions and unfair trade practices would be addressed using traditional antitrust remedies. The book offers well-stated arguments that both liberty and consumer welfare would be served if the march toward a more market-driven regulato-

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1 Randolph J. May, *Introduction*, COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE: THE NEXT FIVE YEARS 3, 3-4 (Randolph J. May ed., Carolina Academic Press 2012).

ry paradigm were not compromised by attempts to graft legacy regulatory obligations—derived from traditional common carrier regulation—onto modern information services. In parallel with this reasoning, one of the essays also addresses "public media" by applauding the institutional diversity that characterizes public broadcasting at the station-level while decrying the focus on broadcasting as the medium deserving of so much current support and attention. Like any good assessment of what the future should look like, the book also serves as a brief compendium of how communications regulation arrived at where it is. Although it makes no pretense of providing a brief in support of countervailing views, the book offers a helpful set of arguments that even those who disagree with some of its premises and recommendations may find thought-provoking.

Why We Need a Free Market Approach for the Communications and High-Tech Sectors, Rep. Marsha Blackburn[2]

To set the stage, the book relies on an article adapted from an address by Rep. Marsha Blackburn (R-TN).[3] She does this succinctly by reciting three principles:

- First, the government's default position must be "Do No Harm."[4]
- Second, government needs to respect private markets.[5]
- Third, we need to streamline government rules and regulations to better reflect the competitive and dynamic characteristics that define communications and technology markets.[6]

From this statement of principles, the articles that follow offer supporting arguments and an occasional theme and variation, such as the foray into the future of public media. The collection of essays ends with an article by economist Bruce Owen in which he injects a dose of caution, if not reality, into the other authors' predictions and recommendations.[7] Indeed, if May's goal had been to temper enthusiasm for the approach instead of beginning with an articulate call to action, the Owen article would have been very similar to that by Rep. Blackburn. However, both the cheerleading and the reality check serve

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2 Rep. Marsha Blackburn, *Why We Need a Free Market Approach for the Communications and High-Tech Sectors*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 9. Rep. Blackburn is the Vice-Chair of the House Energy and Commerce Committee.

3 *Id.*

4 *Id.* at 13.

5 *Id.* at 13-14.

6 *Id.* at 14.

7 Bruce M. Owen, *Communications Policy Reform, Interest Groups, and Legislative Capture*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 149.

salutary purposes and provide context and content in support of the articles in between.

Placing Communications Law and Policy Under a Constitution of Liberty, Randolph J. May & Seth L. Cooper[8]

May and Cooper offer a tutorial on regulatory evolution in the digital age coupled with the enjoinder to be wary of well-intended regulators. The authors take their cue from twentieth century Nobel laureate Friedrich Hayek and lay out their theses:

> Hayek's minimal requirements for an effective market system in a society respecting individual freedom yield a set of basic insights for reforming communications law and policy for the digital age. These basic insights are: (1) a proper function of government is the protection of property and enforcement of contracts; (2) free markets, not government officials, should dictate the quantities of goods and services produced and the prices at which they are offered; (3) administrative agencies are very often overzealous in pursuing the public good, at the expense of individual freedom; and (4) costs imposed by new regulations almost always are underestimated, while new developments are not fully anticipated.[9]

From this foundation, they argue that consumer welfare flourishes most when markets are allowed to function and market failures are addressed through traditional antitrust remedies.[10] Digital technology and Internet Protocol ("IP") based networks have brought about an expanding plethora of choices to replace or improve existing services and opportunities to advance the development of services not yet conceived.[11] Traditional common carrier regulation, with its prohibitions on discrimination and unreasonable rates, is ill suited to an IP-era characterized by a wide array of service options, many of which are substitutable for each other. By the time traditional public interest regulation addresses a problem, the factual basis for the problem will have evolved to such an extent that the cure no longer adequately addresses the illness if, indeed, it ever could have done so. Moreover, May and Cooper posit that the cure will be worse than the malady, for the remedy will bring with it a loss of freedom that will lead to less innovation, fewer choices, and less overall consumer satisfaction.

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[8] Randolph J. May & Seth L. Cooper, *Placing Communications Law and Policy Under a Constitution of Liberty*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 17. Mr. May is the Founder and President of The Free State Foundation. Mr. Cooper is a Research Fellow with The Free State Foundation.

[9] *Id.* at 20.

[10] *See id.* at 21-22.

[11] *See id.* at 23-25.

Internet Policy Going Forward: Does One Size Still Fit All?, Christopher S. Yoo[12]

Yoo also builds on the philosophical foundation laid by Hayek and calls for a limited role for government in the regulation of 21st century communications. In doing so, he challenges the common assertion that the Internet has been—and should be—one network of networks open to all,[13] and goes on to question the wisdom of the FCC's *Open Internet Order*.[14]

In laying out these positions and positing private networking as an "exit option,"[15] Yoo asserts:

> The assumption that the Internet must remain open and universally interconnected also overlooks the fact that the imposition of government regulation rarely results in a stable equilibrium. Instead, the ultimate impact of such regulations can only be understood after the series of reactions and counter-reactions that the regulations are likely to stimulate are taken into account. Indeed, mandates of equal access to traditional telephone networks (along with attempts to use rates for interconnection to implement other social policies) stimulated demand for private bypass services that unless also regulated threatened to defeat the goals of the original regulation . . . .
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> Thus, those who advocate mandating open access in the name of preserving a unified Internet must consider the possibility that such a mandate might actually create incentives toward greater fragmentation. In addition, restricting network owners' ability to share surplus capacity threatens to increase the cost of broadband where it is available, while at the same time worsening the digital divide by reducing the geographic areas in which such service can break even . . . .
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> Most relevant for our purposes is the fact that mandating open interconnection implicitly presumes that the exclusive source of value to end users is raw increases in network size. Framing the issue in this manner fails to consider that end users typically place a premium on being able to reach a small number of locations and run a discrete number of applications.[16]

Long-time observers of the evolution of the Internet should hardly be surprised by Yoo's observations that the value of a network does not necessarily vary proportionately to the number of connections made on the network. However, at first blush, the proposition seems counterintuitive given the twentieth century's goal of ever expanding the reach of the public switched telephone network ("PSTN"). With the transition from the PSTN to an IP-based network,[17] Yoo's ideas will assume even more currency.

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[12] Christopher S. Yoo, *Internet Policy Going Forward: Does One Size Fit All?*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 51. Christopher S. Yoo is a Professor of Law and Computer & Information Science at the University of Pennsylvania, and a Professor of Communication at the Annenberg School for Communication.

[13] *Id.* at 52.

[14] *In re* Preserving the Open Internet; Broadband Industry Practices, *Report and Order*, 25 F.C.C.R. 17,905 (Dec. 21, 2010).

[15] Yoo, *supra* note 12, at 63-64.

[16] *Id.* at 63-64.

[17] *See, e.g.*, Pleading Cycle Established on AT&T and NTCA Petitions, *Public Notice*, 27 F.C.C.R. 15,766 (Dec. 14, 2013) (requesting comments on separate rulemaking petitions

Reconciling Breadth and Depth in Digital Age Communications Policy, James B. Specta[18]

According to Specta, the shift to IP-based communications, particularly the Internet, coupled with the increasing move to mobile as opposed to fixed systems, has set up a situation in which the market and regulation are increasingly out of step with each other. To the extent that the Internet is treated as an information service, Specta finds it incongruous to mix an unregulated information service with the regulatory clout accorded the agency in the regulation of mobile services under Title III.[19] On the other hand, if the FCC wins the appeal of its *Open Internet Order*,[20] the Commission's then preserved—and arguably enhanced—power under Title I of the Act[21] will allow it to proceed with an approach that fails to take into account the competitive realities of communications in the digital age.

As an alternative, Specta posits a system based on the draft Digital Age Communications Act[22] that would "adopt[] a competition law standard, borrowed from the Federal Trade Commission Act, authorizing the FCC to make rules and issue orders to prevent 'unfair methods of competition' and 'unfair or deceptive practices.'"[23] Such an approach, he submits, is less likely to become obsolete, less likely to be gamed by participants, and will still "provide a measure of certainty and stability for industry participants."[24]

Restoring a Minimal Regulatory Environment for a Healthy Wireless Future, Seth L. Cooper[25]

Cooper recounts the path to constraints over the last several years. He begins

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filed by AT&T and the National Telecommunications Cooperative Association to respectively "facilitate the 'telephone' industry's continued transition from legacy transmission platforms and services to new services based fully on the Internet Protocol ('IP')" and "'examine the means of promoting and sustaining the ongoing evolution of the Public Switched Telephone Network' from TDM to IP").

18 James B. Specta, *Reconciling Breadth and Depth in Digital Age Communications Policy*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 67. James B. Specta is a Professor and Associate Dean of International Initiatives and Director of the Executive LLM Program at Northwestern University School of Law.

19 *See, e.g.*, Telecommunications Act of 1996, 47 U.S.C. §§ 301, 307-310 (2006).

20 *See* Joint Brief for Verizon and MetroPCS at 2-4, Verizon v. F.C.C., No. 11-1355 (D.C. Cir. July 2, 2012).

21 *See* 47 U.S.C. §§ 251-261, 271-276.

22 Digital Age Communications Act of 2005, S. 2113, 109th Cong. (2005).

23 Specta, *supra* note 18, at 76.

24 *Id.* at 75.

25 Seth L. Cooper, *Restoring a Minimal Regulatory Environment for a Healthy Wireless Future*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 79. Seth L. Cooper is a Research Fellow at The Free State Foundation.

by outlining the steps designed to lessen regulatory burdens in order to spur the development of new services and markets. Cooper concludes by asserting the steps that are necessary to manage competition prospectively. His twisting path recounts:

- Forbearance of Title II regulation on wireless services (1994);[26]
- Wireless broadband Internet access service declared to be a Title I information service and therefore free from Title II common carrier regulation (2007);[27]
- Open Access requirements imposed on the 700 MHz C Block (2008);[28]
- Open Internet Order provided for industry-wide regulation of service providers to include transparency and no-blocking requirements (2010);[29]
- Data Roaming Order imposed obligations to pass traffic for competitors who had not built facilities (2011);[30] and
- The FCC staff's Order in Harbinger/SkyTerra showed a willingness to restrict competitors (2010), a trend that continued in the agency's approval of the assignment of certain Qualcomm licenses to AT&T (2011).[31]

Cooper finds the move from reliance on markets to one of "markets plus" a

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[26] *See In re* Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 F.C.C.R. 1411 (Feb. 3, 1994).

[27] *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 F.C.C.R. 5901 (Mar. 22, 2007).

[28] *In re* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, *Second Report and Order*, 22 F.C.C.R. 15,289 (July 31, 2007).

[29] *In re* Preserving the Open Internet *Report & Order*, *supra* note 14, at 17,905.

[30] *In re* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Second Report and Order*, 26 F.C.C.R. 5411 (Apr. 7, 2011).

[31] *In re* SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee; Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC, *Memorandum Opinion and Order and Declaratory Ruling*, 25 F.C.C.R. 3059 (Mar. 26, 2010); *In re* Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations, *Order*, 26 F.C.C.R. 17,589 (Dec. 22, 2011).

disturbing trend.[32] Absent a change in the Communications Act, he calls upon the FCC to apply a light regulatory touch while recognizing the dynamism of wireless services and the critical role of wireless in the digital economy. Such an approach would reinstate the "firewall" between Title I information services and more intrusive common carrier style regulation.[33] Consistent with the first-do-no-harm principle espoused earlier, Cooper concludes that:

> Under a light-touch regulatory approach, the FCC should not pull policy levers because the agency believes its polices can improve market performance. Regulation should be limited to those instances where there is a demonstrable market failure or anti-competitive harm to consumers, where the benefits of establishing clear and narrowly targeted regulation outweigh the costs, and where no less intrusive means are available.[34]

Thus, Cooper urges that, short of a rewrite of the Communications Act, if the Commission were to use its forbearance authority extensively to accord relief, it would incentivize service providers to make available competing cross-platform offerings.

Proposed FCC Incentive Spectrum Auctions: The Importance of Re-Optimizing Spectrum Use, Michelle P. Connolly[35]

Continuing with the compilation's theme of first-do-no-harm, respect markets, and streamline regulations to reflect the dynamic nature of wireless information services, Connolly offers advice about the very complex exercise contemplated in the incentive auction initiative now being planned by the FCC to make available additional spectrum for wireless services using portions of the spectrum currently allocated for and assigned to UHF television broadcasting.[36] In so doing, she warns:

> [A]ny attempt to impose limits on payments to winning TV broadcaster bidders or set minimums for government revenue from the auction would break the auction mechanism.
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> The auction mechanism works to make the TV broadcasters bid based on their willingness to undertake certain actions, and in turn, to make those wishing to purchase the right to use the released spectrum bid based on the economic value of the spectrum to them. If the government imposes financial limits, or ownership limits on the auction, it breaks this mechanism. If the mechanism is interfered with sufficiently,

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32 *See* Cooper, *supra* note 25, at 103.

33 *Id.* at 103-04.

34 *Id.* at 105-06.

35 Michelle P. Connolly, *Proposed FCC Incentive Spectrum Auctions: The Importance of Re-Optimizing Spectrum Use*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 107. Michelle P. Connolly is Professor of the Practice within the Duke University Economics Department, and the former Chief Economist of the FCC.

36 *See In re* Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Notice of Proposed Rulemaking*, 27 F.C.C.R. 12,357 (Sept. 28, 2012).

> the auction will not only yield smaller revenues, but it will guarantee that spectrum will be allocated in an inferior manner.[37]

In short, Connolly's advice is very much in keeping with the theme that markets should be allowed to operate and that markets plus regulatory restrictions intended to implement other policies should be avoided.

Reforming the Universal Service Fund for the Digital Age, Daniel A. Lyons[38]

The United States has long wrestled with how to expand the benefits of modern technology to under-served areas that are costly to serve. In the nineteenth century, the same concern resulted in the creation of incentives for canals and railroads. The twentieth century saw ambitious programs for rural electrification, interstate highways, and subsidized telephone service. After the breakup of the Bell System, telephone subsidies emerged from the shadows of complex ratemaking into the only slightly more illuminated world of the Universal Service Fund ("USF").

Lyons lays out the case for the reform of USF. While carrier beneficiaries of USF regulation are understandably concerned about lost revenue associated with recent revisions to the USF program,[39] Lyons argues for more change. He notes how the USF program can encourage what he classifies as inefficiencies and support for outmoded technology, and he further calls for changes that he submits would advance the movement to widespread competitive digital networks.[40] In so doing, he encourages the development of a program that avoids paying subsidies when subsidies are unnecessary and would eschew calculations based on embedded costs in favor of reverse auctions to promote the development of broadband networks.[41] He also champions direct subsidies to consumers in targeted underserved areas who would then choose their broadband providers.[42] To these ends, he argues that:

> America's migration to broadband networks presents a once-in-a-generation opportunity to bring transformational change to an outdated, mismanaged, and schizophrenic assistance program. Policymakers should capitalize on this brief window of

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37 Connolly, *supra* note 35, at 121.

38 Daniel A. Lyons, *Reforming the Universal Service Fund for the Digital Age*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 123. Daniel A. Lyons is an Assistant Professor at Boston College Law School.

39 *See, e.g.*, *In re* Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund, *Report and Order and Further Notice of Proposed Rulemaking*, 26 F.C.C.R. 17,663 (Oct. 27, 2011).

40 *See* Lyons, *supra* note 38, at 129-30.

41 *Id.* at 131-34.

42 *Id.* at 131-32.

> opportunity by adopting market-based initiatives whose goal is to assist those who cannot afford basic broadband Internet access. And it should provide that assistance directly to affected consumers, rather than supporting carriers as their proxies in ways that distort broadband competition. . . .
>
> Similarly, the Commission should commit to slowly but firmly phasing out the High-Cost Fund assistance given directly to carriers, by steadily decreasing the amount of annual subsidies available until the program is eliminated. . . .
>
> Finally, Congress should abandon the fund's increasingly arcane contribution methodology. The existing contribution system relies on anachronistic distinctions between interstate and intrastate service and between telecommunications and information services, which are largely irrelevant in the broadband age.[43]

Accordingly, for Lyons, the transition to IP networks offers the opportunity to move from what he sees as a flawed system of subsidies to a program that would better serve areas and people in need of assistance.

Public Media Policy Reform and Digital Age Realities, Ellen P. Goodman[44]

Far from giving up on public media, Goodman celebrates the diversity offered in the mix of broadcast station licensees associated with what has long been called "public broadcasting."[45] At the same time, she asserts that the time has come for moving away from broadcasting as the primary focus for public support of public media. Seeking to maximize innovation, she envisions a decentralized approach that would begin with:

> [A] delineation of public media functions that track the architecture of digital networks and the goal of innovation, and (2) an overhaul of the Public Broadcasting Act of 1967 to support this functional approach, liberating the support of public media from a particular distribution platform (broadcasting) and institutional structure (existing public broadcast entities).[46]

Although the editor's choice of including such an essay may seem like a diversion, it is, in fact, in keeping with the book's emphasis on reforms needed in both law and policy in the digital age. Indeed, one could argue that such reforms are required if public media are to survive in times of both rapid technological change and fiscal constraint.

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[43] *Id.* at 130, 133-34.

[44] Ellen P. Goodman, *Public Media Policy Reform and Digital Age Realities*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 137. Ellen P. Goodman is a Professor at the Rutgers School of Law – Camden.

[45] *See id.* at 137 n.1.

[46] *Id.* at 139 (footnote omitted).

Communications Policy Reform, Interest Groups, and Legislative Capture, Bruce M. Owen[47]

While his fellow contributors explain what should happen in communications law and policy, Owen notes what has happened and why change may not unfold either quickly or along the lines that others suggest would be beneficial. In short, he attempts to inject a note of reality into the discussion. He recognizes the grip that the FCC holds on spectrum allocations,[48] the problems associated with the current system of subsidies under the USF,[49] the efforts that have been laid to facilitate expanded regulation of media content,[50] "and the consequences of widespread acceptance among the public of the notion that every conceivable fear of market failure in the communications industry can and should be treated prophylactically by aggressive federal legislation and regulation."[51] However, Owen offers little salute for the proposition that regulatory agencies such as the FCC are directly captured by special interests. Instead, he would have readers look to Capitol Hill.[52] According to Owen:

> It is rather legislative oversight and budget committees and their chairs that are (willingly) captured by special interests in the first instance. One could equally say that legislators capture the special interests, seeking campaign funding. The behavior of regulatory agencies simply reflects the preferences of their congressional masters.[53]

Owen further asserts that:

> Any significant changes in policy will require corresponding changes in the constellation of groups whose interests the Commission and the congressional committees serve, or changes in technology that must be embraced within the pre-existing balance of power reflected in policy. . . .
>
> The FCC, Congress, and administrations of both parties continue to design new interventions in the communications industries. The likely effect of such interventions will be to render industry structure less responsive to competitive forces and to attenuate technical innovation.[54]

Any look into the future must be made using an imperfect lens. However, Randolph May has assembled a worthy summary of arguments from the perspective of those who believe passionately in the value of liberty and the power of markets to direct the evolution of communications services in the digital

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47 Bruce M. Owen, *Communications Policy Reform, Interest Groups, and Legislative Capture*, *in* COMMUNICATIONS LAW AND POLICY IN THE DIGITAL AGE, *supra* note 1, at 149. Bruce Owen is the Gordon Cain Senior Fellow at the Stanford Institute for Economic Policy Research and a Professor in Public Policy and Director of the Stanford Public Policy Program.

48 *Id.* at 161-64.

49 *Id.* at 164-66.

50 *Id.* at 166-68.

51 *Id.* at 151; *see id.* at 170-72.

52 *Id.* at 159.

53 *Id.* at 149-50.

54 *Id.* at 160.

age. As Moore's Law continues to yield more opportunities for the development of IP-based devices and services, the case for reliance on markets to govern the choices and distribution of new services will likely grow even stronger.[55]

[55] *See* Michael Kanellos, *Moore's Law to Roll on for Another Decade*, CNET.COM (Feb. 10, 2003 2:27 PM PST), http://commcns.org/15t6SvY (explaining that Moore's Law, "which states that the number of transistors on a given chip can be doubled every two years," is expected to continue for at least another decade).