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Deregulating the Second Republic

Commissioner Andrew C. Barrett*

“The milestones into headstones change,” penned James Russell Lowell¹ in the years immediately following *Wabash Railway Co. v. Illinois*² and the passage of the Interstate Commerce Act of 1887.³ Indeed, as the nation marks the diamond jubilee of the Communications Act of 1934, interested fiduciaries have collated their wit, wise musings, and substantive concerns into one compact issue of this *Journal*. Successors will probably categorize our scratchings as “milestones,” “headstones,” or—at a minimum—a slim volume noting the general consternation of the bar, bench, and academy sixty years into a statutory regime.

But as brevity need not substitute for rigor, the Author proposes the following questions for analysis:

- (1) Given the recent calls for a redrafting of the Communications Act of 1934, has the time arrived to review the means by which we regulate the National Information Infrastructure (NII) and,

—if so—
- (2) What procedures should be addressed in implementing such a review?⁴

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1. JAMES RUSSELL LOWELL, *Sixty-eighth Birthday*, in POETICAL WORKS OF JAMES RUSSELL LOWELL 433, 433 (Cambridge ed. 1980).

2. *Wabash Railway*, 118 U.S. 557 (1886).

3. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

4. This Essay advocates a legislative response to the challenges facing the deregulation of the telecommunications industry. The Author presumes that the 104th Congress will take up the issue of information law reform in either the first or second session. For an

The goal of any redrafting of the Communications Act of 1934 should be to incorporate the intent of Congress.⁵ Clear, specific, and narrow standards are necessary as a matter of *prediction* and *process*.⁶ In the alternative, unclear standards shift political discourse from the floors of Congress to fax machines and ex parte contacts during the small hours prior to the sunshine period.⁷ Review of the legislative mandate underlying the Communications Act of 1934 could begin with extensive oversight hearings by the congressional committees assigned jurisdiction over technology, communications, and information law. From such hearings, a consensus on the changing character of the market *may* emerge and reactions to those changes *may* present themselves in the form of bills to amend the Communications Act of 1934. But to legislate those changes into the *ratio legis* of the statute, regulatory change *as an act of governance*—and not politics—requires “clear text” underlying the legislative mandate.⁸ Rational, ordered regulation is not served by discerning legislative intent or purpose from various, intermediate points of the

alternative, judicial-centered approach, see ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* (1992).

5. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, *reh'g denied*, 468 U.S. 1227 (1984). Lawyers assuming a regulatory paradigm based on Article I of the U.S. Constitution must presume, implicitly or explicitly, a deliberative model. As core curriculum in legal education teaches only a common *adjudicatory* model, common discourse becomes problematic in law review writings. Article III is no longer the primary source of regulation it was in the nineteenth century. Indeed, given the political question doctrine, the legislature may be the only forum for reform. *See Rust v. Sullivan*, 500 U.S. 173 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1987) (emphasizing the charge to the court of appeals to “seek a reasonable reading” of statutes to avoid constitutional infirmities).

6. Lawrence Friedman, *On Regulation and Legal Process*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 111, 112 (Roger G. Noll ed., 1985) (“Presumably, form can also change the affect of the rule.”).

7. For an early description of this problem, see the Beelar-Dirksen exchange on the floor of the Senate in 1959. *Proposed Administrative Procedure Reform: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on Judiciary*, 86th Cong., 1st Sess. iv-429 (1959); Charlotte P. Murphy, *Legislative Interest in Administrative Procedure During the 86th Congress*, 12 *ADMIN. L. BULL.* 132-36 (1959).

8. By narrowing the definition of standards, the Author refers to the academic tradition covering statutory construction and legislative drafting. *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (a rather ambitious proposal for the introduction of common law methodology into statutory interpretation); REED DICKERSON, *LEGISLATIVE DRAFTING* (1954); ERNST FREUND, *LEGISLATIVE REGULATION, A STUDY OF THE WAYS AND MEANS OF WRITTEN LAW* §§ 27, 46, 51, 56 (1932); ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION* (1965). For an effort to develop a “language of statutes” parallel in strength and utility to the “language of the case,” see WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION, POLITICAL LANGUAGE AND THE POLITICAL PROCESS* (1993).

deliberative process.⁹ Discourse must lead to disciplined drafting and the language of that drafting becomes the standard defining the legislative mandate of the Federal Communications Commission (FCC or Commission).

Approached as a matter of process and not as analysis of the procedural transcript, rational and ordered regulation may provide the means by which we address the fundamental changes confronting deregulated telecommunications. Indeed, the premises under which we labour may now lack empirical justification. Regulatory slack water—the point at which independent, incompatible actions by financial markets and the Commission destroy what both the regulator and markets strive to create—awaits the decision maker who dismisses the connections between (1) deregulation, (2) the endorsement of *competition* as the juridical principle underlying that public policy, and (3) the ability to create a nationwide information infrastructure. Absent public finance, private investment is necessary to expand American telecommunications into an information “superhighway.” The availability of private capital for national infrastructure is predicated on a predictable rate of return—the level of risk fixing the cost of the financing—as determined by the American, or indeed, *global* financial community. An accelerated rate of technological change,¹⁰ a constitutional regime¹¹ granting wide discretion to independent agencies, and the vacillation of public policy between the goals of “deregulation” and “reregulation” are three factors lending uncertainty to the capital markets.¹² These three phenomena converge to constrain capital—the less

9. The D.C. Circuit Court of Appeals stated a reluctance to rely on legislative history in construing unambiguous statutes. *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987), *cert. denied sub nom.*, *Connecticut v. FCC*, 485 U.S. 959 (1988).

10. This is not always the exclusive realm of the private sector. See Carl Weinschenk, *Long Time Coming*, *CABLE WORLD*, May 23, 1990, at 90; *Flat Screens, Crystal Diplomacy*, *ECONOMIST*, Apr. 30, 1994, at 70. But see Edward Baig, *The Incredible Shrinking Dish*, *BUS. WK.*, May 30, 1994, at 143; *Infrastructure in the Sky*, *ECONOMIST*, Mar. 26, 1994, at 101.

11. The *Second Republic* is a direct reference to the framework established by Theodore J. Lowi in his analysis of the New Deal, the Supreme Court's reaction to that national initiative, and the consequences of the congressional delegation of power that occurred after *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935). For the roots of administrative discretion see ROBERT CALLIS, *SEWERS* (1647) (discussing the constitutionality of the delegation to royal engineers under Y.B. 8 Hen. 5 (1519)). For context, see MORTON KELLER, *REGULATING A NEW ECONOMY* 7-11 (1990). For Lowi's current characterization, see THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 271-310 (2d ed. 1979).

12. The nexus between investment and regulatory uncertainty must be addressed in the wider context of regulation's effect within firm theory. See Roger G. Noll & Bruce Owen, *The Political Economy of Deregulation*, in *THE POLITICAL ECONOMY OF DEREGULATION*

capital available, the more limited the vision of tomorrow's "superhighway" available to both regulators and policymakers. And the connection between certainty and our regulatory structure is all the more important because the end product must serve both the American consumer and an American industry racing to preserve its comparative advantage against international competitors.¹³

Acknowledging administrative jurisprudence's increasing complexity, the Court deferred to agency competence in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁴ The title of this Essay references the Second Republic critiqued by Theodore J. Lowi, whose analysis of *Schechter* reached its apotheosis in *Chevron*. The Court foreclosed the judiciary's last substantive ties to what was once a judicial power—economic regulation.¹⁵ But this alleged juridical flight from regulation is deceiving. Indeed, the time has come for American governance to

32-40 (Roger G. Noll & Bruce Owen eds., 1983). For a related view, compare generally, Andrew C. Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 FED. COMM. L.J. 39 (1993); *Dial "R" for Risk*, ECONOMIST, June 4, 1994, at 84; *Making a Meal of Mergers*, ECONOMIST, Sept. 10, 1994, at 87. Such uncertainty may be derivative of the legislative mandate or the regulatory process. See ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 727 (1941) (discussing planning in the agency context); *Multimediators*, ECONOMIST, Apr. 16, 1994, at 1 (discussing the regulator's current dilemma); *Taking the Scenic Route*, ECONOMIST, Apr. 16, 1994, at 67 (discussing regulatory constraints on the information superhighway).

13. See Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LIT. 1263 (1993). Japan has predicted a "superhighway" connecting the island with ten years. The international market has quickened with North American developments. Cf. Gail Edmondson, *Wireless Terriers*, BUS. WK., May 23, 1994, at 117; *Europe's Would-be Champions*, ECONOMIST, Aug. 27, 1994, at 60; *Singapore: Not another Boom*, ECONOMIST, June 18, 1994. And, indeed, it is refreshing to see American business acumen rebound abroad. See *The Race to Wire the World*, U.S. NEWS & WORLD REP., May 23, 1994, at 18; *Where is the Consumer in Consumer Electronics?*, ECONOMIST, Sept. 24, 1994, at 65, 65 ("The world's consumer electronics makers have one last chance to protect themselves before America's revitalized computer industry grabs the burgeoning 'infotainment' market for itself.").

14. *Chevron, U.S.A., Inc.*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984). The current Court may be returning to more a traditional economic rights doctrine. See *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

15. Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 428-34 (1981). The character of nineteenth century law and its role in fostering the industrial revolution is still the subject of significant debate. For the purposes of this Essay, the Author assumes that a combination of common law reasoning—Karl Llewellyn's "Grand Tradition"—and its promotion of economy fostered the financing of national infrastructure. See JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM 71-108 (1967); STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION, THE CHARLES RIVER BRIDGE CASE 165-71 (1971); ELIZABETH BRAND MONROE, THE WHEELING BRIDGE CASE 3-19, 163-78 (1992).

address the question of whether the Commission, and its peers, have evolved into complex decision-making bodies not unlike Article III courts. Though lawyers—traditionally proponents of a legal culture centered on Article III of the United States Constitution—were confined to the limits of *Schechter* and *Chevron's* narrow *adjudicatory* model, the same profession has developed new *deliberative* skills to meet challenges unique to the legal landscape or the regulatory palatinate of Article I. As such, collegial Article III-type decision making is conducted by agencies wielding powers previously reserved to both Articles I and III. However, the transformation of independent agencies into true prudential, collegial, Article III decision-making bodies has not been accepted as the scholarly model or as the professional model explaining the Commission's legislative mandate.¹⁶ For agencies to function as collegial decision-making bodies, they must receive the legislative mandate in a statute employing rigorous categorization and precise language—that is, clear text.

In my fourteen years, I have concluded that the regulatory state's fine line between law and politics is fiber thin. This transfer of an interpretive legal power—wielded masterfully by Article III judges in the early nineteenth century—to federal agencies with nascent institutional decision-making conventions and fledgling empirical skills has been followed by yet another destabilizing period. After the transfer of the regulatory power, we as a nation have been unable to articulate public expectations of the independent agency.¹⁷ As such, the legislature, the executive, the judiciary, and the American public have varied and conflicting expectations of the Commission's role in the administrative state. This lack of a relevant

16. MARTIN SHAPIRO, COURTS—A COMPARATIVE AND POLITICAL ANALYSIS 111-15 (1981); Paul Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 260; *Rate-Making—A Judicial, Legislative, or Ministerial Function?*, 9 COLUM. L. REV. 341 (1909). Accepting the Article III model entails a parallel acceptance of the limits imposed by both prudence and candor. See generally Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. (forthcoming May 1995) (a rigorous, insightful, and thorough survey of judicial candor in Article III fora).

17. Professor Friedman questions the efficiency imparted by common law reasoning. The division between his position and that of Judge Richard Posner, may, in a limited sense, be evidence of a categorical split. If there is a difference between litigation addressing private rights and economic regulation, then Friedman's case study—the transformation of the fellow-servant principle—may be different in form and substance from the macro-issues presented by market structure and deregulation. Compare Friedman, *supra* note 6, at 129 and Arthur A. Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 451-61 (1974) with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 440 (4th ed. 1992) and *Theories of Economic Regulation*, 5 BELL J. ECON. 335, 335-51 (1974) and George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65-82 (1977) and Paul H. Thebaine, *Why is the Common Law Efficient?* 6 J. LEGAL STUD. 51, 51-63 (1977).

mandate should be a primary concern of any redrafting of the Communications Act of 1934.

Noting the need for predictability and reckonability in the ordering of national commerce,¹⁸ there are three points within the administrative structure of the Second Republic from which predictability can be drawn. Of least impact is the decision-making process employed by each Commissioner. But to the extent that regulators can employ a consistent and ordered decision-making process—perhaps by recourse to theories with public choice or public value foundations—the overall process may become predictable.¹⁹ The next most important source of predictability is the rulemaking of the Commission. Here the assumptions and formulae underlying rulemaking are all-important, and so is the use of standards within the rules themselves. Not unlike the use of narrow, specific standards within agency rulemaking, full delegation from Congress in the enabling statute is the greatest source of certainty *at law*. But full delegation must be executed with rigorous, narrow, specific standards in the legislative mandate *of the statute itself*.

The Supreme Court has held “that laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning . . . [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”²⁰ The needs of the consumer, small business, and big industry are parallel to the ordinary person. Moving from a regulated to a deregulated

18. KARL LLEWELLYN, *THE COMMON LAW TRADITION, DECIDING APPEALS* 17-18, 215 (1960).

19. Languages of law and economics—as common law reasoning or the Socratic, dialectic method—are the regulator’s tools. As the legal academy no longer promotes a common, unified professional language, less intellectual comity may exist between future lawyers. See Friedman, *supra* note 6, at 115. Assumptions and language will become more suspect as intellectual diversity promotes variation instead of the doctrinal scholarship formally fostering uniformity. But economics is still useful in promoting competition. See Ronald H. Coase, *Economics and Contiguous Disciplines*, 7 J. LEG. STUD. 201, 202-17 (1978); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975) (frameworks relevant to the current mandate). Given alternative mandates, other languages may enter the public discourse. See, e.g., Fred H. Cate, *Communications Policy Making, Competition, and the Public Interest: The New Dialogue*, 68 IND. L.J. 665 (1993) (employing a “new dialogue” through an “endless policy loop”). *Contra* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990). As one applies professional languages to statutory texts, that choice itself excludes certain options. See Theodore J. Lowi, *The State in Political Science: How We Become What We Study*, 86 AMER. POL. SCI. REV. 1 (1992).

20. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

industry entails some market turbulence. The concern should be over whether that turbulence is a factor of the transition *or* of the rules and statutes prompting that transition.²¹ Born of a legal regime based in delegation of powers (to independent agencies), and evincing broad, general mandates (in the form of legislative standards), the Communications Act of 1934 was emergency legislation rescuing a sector of the American economy from general market failure.²² The independent agency created by the Act, the Federal Communications Commission, shares this background consideration with other agencies of the same era—the Federal Power Commission (FPC), the Security and Exchange Commission (SEC), the National Labor Relations Board (NLRB), the United States Maritime Commission, and the Civil Aeronautics Board (CAB). Only one agency—the National Bituminous Coal Commission—was later abolished. Others found *subsequent* roles in the governing paradigm established by *Schechter*.

But a bureaucracy capable of making such transitions can not rewrite the law itself. And it is axiomatic that a tool fashioned for one chore performs a subsequent task with structural difficulty. Indeed, much of criticism directed at the FCC in the 1950s, 1960s, and 1970s, was issued by those noting this fundamental premise.²³ The Commission founded to order radio chaos and to act in lieu of the antitrust laws with respect to the emerging telephony monopoly, has spent much of the intervening sixty years deciphering what the legislature wants it to do as the underlying market has changed. Concurrently the Commission tried to manufacture the tools required to complete its original legislative mandate.²⁴ Indeed, the

21. In addressing the former, Congress passed the Natural Gas Policy Act of 1978, litigated as *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982) (holding the one-house legislative veto provision of § 202(c) unconstitutional).

22. See generally ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM* 122-23 (1989). Lowi notes *Schechter's* impact on congressional autonomy (Article I powers) and teaches that the process of delegation without clear, precise, mandates is "*legiscide*." Arguably, the same model—perhaps a form of "*juriscide*"—has been employed in reverse to Article III courts. See LOWI, *supra* note 11, at 273-77. Compare *Mistretta v. United States*, 488 U.S. 361 (1989).

23. A list of the more important criticisms includes WALTER GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* (1956); FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); Ronald H. Coase, *The Economics of Broadcasting and Public Policy*, 56 *AMER. ECON. REV.* 440 (1966); Louis L. Jaffee, *The Independent Agency—A New Scapegoat*, 65 *YALE L.J.* 1068 (1956).

24. In this aeneid, it has been aided by the publishing bar and the academy. The trade and general press have assisted as well. *Economist* has published four sturdy surveys over the past year which give a general view of the market changes affecting our industry. See *Feeling for the Future*, *ECONOMIST*, Feb. 12, 1994, at 5 (television); *The Mathematics of Markets*, *ECONOMIST*, Oct. 9, 1993, at 3 (finance); *Saw it on the Radio*, *ECONOMIST*, Oct.

Commission has begun to see itself as an independent agency of an older Progressive tradition, which focuses on the means by which infrastructure, and not mere economic sectors, is regulated.²⁵

Anniversary issues are known for dire predictions and fantastic visions. There will be those cheering, or lamenting, the end of regulation as we know it. Such may be the case, but absent the extension of *Schechter* to limit the reach of the regulatory state or the return of congressional government asserting the same, one is forced to address the Second Republic on its own terms. If we are to meet the challenge of the changing global economy, then our course must be within the current administrative state's analytic framework. Common ground can be found in two theoretical areas: (1) the organization of agencies has varied over time—perhaps as a function of the activity regulated—and (2) the specificity of congressional, legislative mandates has weakened. As an ailing industry in the 1930s, telecommunications was subjected to regulation by an agency guided with abstract, universal, discretionary, and proscriptive legislative standards.²⁶ A statute orienting the Commission toward a role in regulating national information networks and servers—and *not an ailing, pre-Information Age industry*—would be drafted more along the lines of the Interstate Commerce Act of 1887 which sought to regulate underlying infrastructure.²⁷ Accordingly, a redrafted Communications Act of 1996 requires concrete, specific, rule-bound, and proscriptive standards. This approach calls for precise language and rigorous categorization—it calls for clear text. Categorization is not easy. Is a newspaper on-line still “print,” is it a broadcast, or is it something else? Is “network” an applicable category in the post-cable broadcast industry? These are *categorical* problems implicit with technical change. The legislative mandate of any law reform must match the categorization to both the structure of the market and the underlying purpose of the statute itself; this coupling of categorization and market structure with drafting—when accompanied by

23, 1993, at 18 (telecommunications); and *The Third Age*, *ECONOMIST*, Sept. 17, 1994, at 3 (computer industry).

25. See HORWITZ, *supra* note 22, at 10 (1988). Defining agencies established prior to 1916 as institutions *to formulate general rules for structural sectors* of the economy, Horwitz labelled the Commission's *initial* purpose as asserting price-and-entry controls for the protection of key industries in the 1930s. *Id.*

26. LOWI, *supra* note 11, at 98-99.

27. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 10101-11917 (1988 & Supp. IV 1992)). Though superficially modeled on railroad precedent, communications law drafters in 1934 could not draw on the same rich state regulatory tradition to classify and define statutory lexicon. Unlike radio technologies, switch, engine, and rail were “mature” technologies by the time they were regulated.

precise nomenclature—supports a textualist methodology respectful of the legislative mandate. Only by meeting these two criterion will Congress ensure that the new delegation of power to the Commission conveys, in Lowi's words, "the full ambit of authority" to the Commission.²⁸

Given the lawyerly, shared tradition of elusive, malleable reasoning at the common law, the use of narrow standards to foster predictability and certainty may seem counterintuitive.²⁹ Indeed, the flexibility of common law reasoning has entered our discourse through legislating drafting with nomenclature like "common carrier" and "universal service" (which began life as market hype coined by Theodore Vail in his promotion of the new National Bell Telephone Company in 1880 and is now being applied in the common law tradition to subsequent forms of technology).³⁰ And even when the issue of vagueness is tried in an Article III court of law, such review is performed under an adjudicatory model tailored, post-*Schechter*, to the needs of private rights litigation and not necessarily for the needs of economic regulation.³¹ Accepting the private rights paradigm for the adjudicatory model does not mean that paradigm meets the needs of the deliberative model. Post-*Chevron*, the Supreme Court has partially blocked Article III as a source of standards. Absent the grant of such authority to the Commission *sua sponte*, Congress must guide the independent agency by means of standards explicit to the statutory mandate. And though there is a pronounced shadow land where adjudication addresses both private rights and economic regulation,³² the dichotomy between regulation and

28. LOWI, *supra* note 11, at 96. Such a quid pro quo, mutual consideration between Congress and independent agencies, requires federal officials to respect the autonomy of Article I, perhaps through textual interpretations of statutes. See POPKIN, *supra* note 8, at 336, 354-64 (general survey of the textualist approach).

29. LLEWELLYN, *supra* note 18, at 17-18.

30. KENNETH GOIRDON & JOHN R. HARING, OFFICE OF PLANS & POLICY, FEDERAL COMMUNICATIONS COMMISSION, THE EFFECTS OF HIGHER TELEPHONE PRICES ON UNIVERSAL SERVICE 2 (Working Paper No. 10, 1984); JARICE HANSON, CONNECTIONS: TECHNOLOGIES OF COMMUNICATIONS 57-87 (1994) (discussing Vail's promotions); see *Rogers v. Head*, 79 Eng. Rep. 226 (K.B. 1611); *Rich v. Kneeland*, 79 Eng. Rep. 282 (K.B. 1613) (for the derivation of "common carrier").

31. Broadly worded statutes precluding predictability are clarified by a narrow interpretation defeating future charges of vagueness. *Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1982); see also *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). Vagueness becomes a problem when a statute "does not give fair warning of the proscribed conduct or if it is an unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion." *Keeffe v. Library of Congress*, 777 F.2d 1573, 1581 (D.C. Cir. 1985). But see *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (undue delegation doctrine used a canon of statutory interpretation).

32. See, e.g., *Dirks v. SEC*, 463 U.S. 464 (1983) (holding that the SEC's narrow construction—that simple neglect or nonfeasance under the Securities Investor Protection

nonregulation is only theoretically problematic. In daily matters, the lines are clearer. Fostering a superhighway is economic regulation; ALJ proceedings with respect to licensing are adjudication over some bundle of private rights.³³

Legislative standards, certainty, predictability, and reckonability can collide in unassuming statements. An example of uncertainty and unreckonability was recently offered by my respected colleague of fourteen years Delano Lewis, Co-Chairman of the National Information Infrastructure (NII) Advisory Council and president of National Public Radio (NPR). During an interview discussing the need to address universal service in the drafting phase of law reform, Lewis's position was paraphrased:

Whether *or not* the council weighs in on pending telecommunications legislation, the group's *real impact and influence* could be felt once policymakers begin to implement new measures, if they pass.³⁴

By implicitly avoiding the legislative process and implying an interpretive function post-drafting, Mr. Lewis inadvertently placed the NIIAC in the position of the Federal Communications Commission, an independent agency with both Article I and Article III powers. Add NIIAC "to the mix," and Article II joins the process. While this is the norm in other countries, it may contravene American rule of law. To the extent Lewis sees the council as a body to advise Secretary of Commerce Ron Brown, these remarks are benign and the spirit of the council beneficial. But as the article's subject was the future of universal access—a policy goal defined in an Act and through a legislative mandate to the Commission—Mr. Lewis seems to imply the NIIAC would engage in *ex parte* proceedings after the Congress completed its legislative mandate to the Commission. This is public administration by fax machine and a most pernicious source of uncertainty. It would be better to lobby Congress as an executive

Act § 14(b)—was not void for vagueness).

33. But even the Court's very necessary focus on individual rights brings uncertainty to economic regulation. Juridical principles used to review social regulation—when used by lawyers in regulatory discourse—impart destabilizing uncertainty and contravene the tradition of progressive, economic, early nineteenth century jurisprudence. As such, a juridical fora which once imparted certainty and predictability to economic affairs now imparts uncertainty to the same. STEPHEN BREYER, *REGULATION AND ITS REFORM* 13-36 (1982); Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 552-60 (1979). The need for more specificity in administrative standards was argued by HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962).

34. Jeffery Silva, *Universal Access Turning Out to Be Very Thorny Issue*, RADIO COMM. REP., May 9, 1994, at 10, 10 (emphasis added). See also *Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 144-47, 182-86 (1994) (statements of Reed E. Hundt and Larry Irving).

department—under Article II—and to establish one’s thoughts in the statute’s clear text. To do otherwise is contrawise to Article I of the Constitution.³⁵ Under *Schechter*, complete delegations with narrow standards reviewable only by Article III courts and Article I oversight hearings isolate economic regulation from the intense political pressures surrounding social regulation.

Why is this a market impediment? When describing the classical model of appellate pleading and adjudication, Karl N. Llewellyn wrote a telling excursus on predictability and reckonability as values of traditional jurisprudence.³⁶ The law ought to be predictable so as to allow the citizen to order his or her affairs. Contradict this simple maxim—as one could argue has been the norm under the Second Republic—and one citizen is left confused as to the state of the law. Allow this contradiction *industry-wide* and whole markets will be impeded. Capital is not released from Wall Street; joint venture ships are cancelled; emerging technologies are deferred. Predictability at regulatory law is not only critical, it is largely ignored by the social, rights-based jurisprudence taught in law schools and practiced in the nonregulatory realm.³⁷

35. See generally U.S. CONST. art. I, § 1, cl. 1; § 7, cl. 2; § 8, cl. 18. Mr. Lewis does describe the “endless policy loop” cited by Cate, *supra* note 19, at 666-69. Though this process-based argument satisfies the academic need for characterization, Professor Cate may have overlooked some structural issues. See Cate, *supra* note 19, at 675-77. Compare LOWI, *supra* note 11, at 92-97. Ultimately, even such “policy without law” must meet the broad confines of *Schechter* and *Chevron*.

36.

Our institution of law-government would be highly satisfactory, as a human device, if at this stage it could commonly offer, on the scale of ‘certainty’ of outcome, a reckonability equivalent to that of a good business risk. Surely . . . we should be able to hope for that level of reckonability by the time one reaches the [appellate stage].

See LLEWELLYN, *supra* note 18, at 18. Here agencies parallel appellate courts; indeed, the Federal Communications Commission is often the springboard of litigation bound for Article III fora.

37. In Aman and Mayton’s *Administrative Law*, the conventional wisdom is presented as, “once admitted, as it must be, that some delegation is proper, these matters, of precision in language and important *social values*, come down to matters of degree, and not matters of principle. The judge has to understand whether a delegation is of a primary social choice (and not a more trivial matter best committed to administrative routine) and whether the terms of the delegation are not too open-ended.” ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 31 (1993) (emphasis in original). This does not discount social choices, but underscores that a system oriented toward social choice theory may not consider the economic soundness of those choices. Social choice theory may leave fallow whole areas of analysis. Even within these circles, the current academic regime is engaged in a contentious debate. MARY ANN GLENDON, *RIGHTS TALK, THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 76-170 (1991); PHILIP SELZNICK, *THE MORAL COMMONWEALTH* 91-118 (1992).

If the role of telecommunications in our economy has shifted from one of many economic sectors to one of a fundamental, structural foundation of the entire economy, then Congress may need to revisit the role of telecommunications regulation. As with the hearings on airline deregulation by Senator Edward M. Kennedy (D-Mass.) in the 1970s, such a congressional effort should begin with hearings designed to investigate the changes in the economy and to suggest ways of redrafting the Communications Act of 1934 to meet those changes. The preparations for redrafting should be comprehensive in scope and, in order to garner the best analysis in the country, should be organized twelve to eighteen months in advance to allow for public and private institutions to compile their studies.

Such hearings could consider many alternatives to the current scheme of regulation. Predictability would be fostered by drafting concrete, specific, rule-bound, and proscriptive legislative standards that:³⁸

1. Incorporate specific FCC doctrines compatible with the emerging market.³⁹
 2. Substitute words of narrow breadth for those currently used of wider breadth.⁴⁰
- and —
3. Are the product of rational, articulated competition theory (and subsequent technical classification) reinforcing congressional economic or social choices.⁴¹

38. LOWI, *supra* note 11, at 98-99.

39. As for the delegation of power with a *sua sponte* mandate, such delegation may invoke constitutional concerns. The question would be whether the legislative mandate, in the spirit of *Chevron*, would be within even the wide ambit of *Schechter*. What is now the *Schechter-Chevron* pale was first discussed in James Wallace Bryan, *Constitutional Aspects of the Senatorial Debate on the Rate Bill*, 41 AMER. L. REV. 801, 811 (1907) (Pay particular attention to the author's counterattack on the legal arguments present on the floor of the Senate by Joseph B. Foraker (R-Ohio) on February 28, 1907.).

40. POPKIN, *supra* note 8, at 353. Such drafting could look to *Commonwealth v. Massini*, 188 A.2d 816 (Pa. Super. Ct. 1963) and *Central Television Serv., Inc. v. Isaacs*, 189 N.E.2d 333 (Ill. 1963) for initial guidance on statutory interpretation while narrowing to terminology to meet the needs of the superhighway. For instance, the statutory role of "universal service" may be moribund. See HANSON, *supra* note 30, at 69. In its inquiry, the legislature may wish to define the term in light of technological change by determining how it interacts with the goal of greater competition and the fiscal requirements of the National Information Infrastructure (NII) initiative. Such a definition may involve public choice analysis. Alternatively, public value theorists would point to some overarching *ratio legis*. See, e.g., CARL L. BECKER, MODERN DEMOCRACY 11-12 (9th ed. 1952) (connecting the daily workings of communications lawyers to larger movements).

41. The role of such a theory must be to provide the Commission with the very benchmark, the "Golden Rule" of statutory interpretation provided Article III judges. *Green v. Bock Laundry Mach. Co.* 490 U.S. 504, 527-30 (1989) (discussing the application of the

Sea-changes are tense periods for policymakers; they are merely the lawyer's landscape. Storms from Lake Michigan, the Midwest's great inland sea, sweep Chicago *each* winter. Cayuga's waters churn *every* spring and autumn, wrapping upstate New York's pebbled shores in thick fog and still water. What is important for the regulator is not the fury of the sea-change. It is the conditions below, in the lakes' silent depths. Like Washington lawyers, lakeland mariners have tools with which to order change. For regulators, the most important tool is to know the limits of one's craft. Where do *Schechter* and *Chevron* end? They end where questions of popular will begin. Competition theory—as a legal, not an economic doctrine—is in need of definition and the legislature must provide the forum. Not only has the market changed, but Washington itself is now focused on the central question of who we are as an American people. And as the American people have been wind-blown by post-war demographics, the global economy, and the Cold War's surrender, so now their public servants are buffeted by a parallel sea-change. Such fundamental queries affect all areas of governance and they are too important to be left to unrepresentative fora.⁴²

No market is a fixed structure and markets trading securities, stocks, bonds and credit in advanced technologies are most apt to change. As the market changes, so must the mandate from Congress. To do this, Congress should probably revisit the statute—with a comprehensive review—more than once every six decades. In addition to the cart load of policy papers, think-tank treatises, newsletters, and blurred facsimiles that will cross congressional desks during this legislative reform, two monographs written at the beginning of the “commission movement” may hold a message for those grappling with change. When Henry Bruère, Director of the Bureau of Municipal Research, City of New York, reviewed that municipality's

“Golden Rule” to the Federal Rules of Evidence). Congress may want to do some substantive fact-finding before it drafts the standards underlying the Commission's future mandate. The Commission recently utilized this fact-finding to establish auction criteria for PCS spectrum. John McMillan, *Selling Spectrum Rights*, 8 J. ECON. PERSP. 145, 147, 151-60 (1994); *Revenge of the Nerds*, *ECONOMIST*, July 23, 1994, at 70.

42. BECKER, *supra* note 40, at 65-100. For the legal foundations of competition theory, see JOEL DIRIAM & ALFRED E. KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* (1954); ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* (1988). But greater questions loom. Perhaps the silent depths are better reflected by public philosophical debate. Compare GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992) with ISAAC KRAMNICK, *REPUBLICANISM & BOURGEOIS RADICALISM* (1990). Wood cites Carl Becker in a polemic that has recently come to Washington by way of the heartland. For a summary, see Gordon S. Wood, *Hell Fire Politics*, N.Y. REV. OF BOOKS, Feb. 28, 1985, at 29; KRAMNICK, *supra*, at 1-40, 261-95.

initial foray into regulation, he noted that independent agencies were the cautious solution to a problem attracting more crazed arguments for state ownership. Reform was cautious, deliberative and thoughtful. A half century before, America's first regulator wrote two review articles on the growing problems presented by the clash of interests surrounding railroad rate regulation. Stating that chaos was the state of the nineteenth century deliberative model, he reminded American intellectuals, "The most important material interests of the American people are deserving of better care than an honest confession of ignorance."⁴³

The force of change may require a sunset provision in the redraft of the Communications Act of 1934; this would bring the Congress back to the three core criteria every five to six years. Examining these three criteria periodically will bring to regulation Llewellyn's "Grand Tradition" of *The Common Law Tradition, Deciding Appeals*.⁴⁴ Though *Chevron* and *Schechter* have pulled Article III out of regulation, the common law tradition provides a model for congressional drafters sharpening their wits and pencils for law reform. And we should not find it odd that a treatise describing the certainty and reckonability of the appellate process holds a certain light to the legislative and regulatory dialectic, for "the better and best law is to be built on and out of what the past can offer; the quest consists in a constant reexamination and reworking of a heritage, that the heritage may yield not only solidarity but comfort for the new day and for the morrow."⁴⁵

43. Charles Francis Adams, Jr., *Railroad Inflation*, 107 NORTH AMER. REV. 130, 164 (1869); Henry Bruère, *Public Utilities in New York*, 31 ANN. AMER. ACAD. 535, 535 (1908).

44. LLEWELLYN, *supra* note 18.

45. *Id.* at 37-38 (this section provides a discussion of the means by which an adjudicatory model produces certainty and reckonability; it remains for the current communications law bar to provide a similar model for the deliberative fora). As for James Russell Lowell, the entire text was penned, "As life runs on, the road grows strange; With faces new, and near the end; The milestones into headstones change; 'Neath everyone a friend." LOWELL, *supra* note 1, at 433.