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# The Politics of Competition: Review of Clifford Winston's Government Failure Versus Market Failure: Microeconomics Policy Research and Government Performance and Mark K. Landy, Martin A. Levin & Martin Shapiro, eds., Creating Competitive Markets: The Politics of Regulatory Reform

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**The Politics of Competition: Review of Clifford Winston's *Government Failure Versus Market Failure: Microeconomics Policy Research and Government Performance* and Mark K. Landy, Martin A. Levin & Martin Shapiro, eds., *Creating Competitive Markets: The Politics of Regulatory Reform***

Russell P. Hanser\*

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## I. INTRODUCTION

For a quarter of a century, debates over telecommunications policy have been dominated by deregulatory ideals. The growing force of deregulatory arguments reflects a confluence of multiple factors. Technological change has devastated old assumptions regarding the extent to which the industry is afflicted by natural-monopoly characteristics. At the same time, commentators in the academy, the industry, the think-tank community and the bar have developed a powerful critique of expansive government involvement in regulated industries. This critique is itself multifaceted, stressing both the ways in which markets often correct disturbances on their own and the ways in which well-intentioned policies can or do create more harm than good. Finally, these factors have coincided (whether or not coincidentally) with the ascendancy of a deregulatory politics, with Republicans holding the White House for all but eight of the past 25 years, and the one Democratic President, Bill Clinton, joining in praise for deregulatory reform.<sup>1</sup>

Given this potent array of promarket forces, one would expect telecommunications policy to have followed a firmly deregulatory path. Indeed, many see that expectation realized in the current policy framework. These observers point to consolidated ownership of key infrastructure assets, the eradication of once-central line-of-business and structural-separation requirements, a shift from rate-of-return rate regulation toward incentive regulation in the form of "price caps," and the elimination of many network-sharing requirements as applied to next-generation facilities. Reactions to these developments, of course, are mixed. Proponents of deregulation cite the tremendous growth in broadband deployment, the dramatic expansion of wireless service and the advent of the Internet and related applications (including but not limited to voice over Internet protocol ("VoIP"), file-sharing and streaming media), and attribute these developments to the government's light regulatory touch. Critics gaze on the past twenty-five years and perceive a steady march toward reassembly of the monopoly-era Bell System, with Regional Bell Operating Companies

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1. For example, upon signing the Telecommunications Act of 1996, President Clinton emphasized that the Act "fulfills my Administration's promise to reform our telecommunications laws in a manner that leads to competition and private investment ... and provides for flexible government regulation." See President Bill Clinton, Statement on Signing the Telecommunications Act of 1996, available at [http://findarticles.com/p/articles/mi\\_m2889/is\\_n6\\_v32/ai\\_18144964](http://findarticles.com/p/articles/mi_m2889/is_n6_v32/ai_18144964). President Jimmy Carter, for his part, presided over the Federal Communications Commission's first efforts to ensure that next-generation offerings remained outside the stringent regulations applied to telephone service. See, e.g., *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) (subsequent history omitted).

(“RBOCs”) merging and acquiring their long-distance competitors.<sup>2</sup> These critics are unimpressed with the competitive pressures exerted by new wireless and data offerings, which, they worry, are or soon will be controlled mostly by those who, in their view, already exert oligopolistic power over the traditional telephone network.

But what if all these observers—proponents and critics alike—are simply wrong about the state of regulation? For all the talk about a move to liberalized markets,<sup>3</sup> and all the growing strength of market ideals, various critical indicia suggest that the government’s presence in the telecommunications market is at least as pervasive today as it was twenty-five years ago. The Code of Federal Regulations contained about 600 more pages worth of communications regulation in 2007 than in 1983. Expressed in 2008 dollars, political contributions from telecommunications service and equipment providers rose from about \$1.4 million in the 1989-90 period (\$859,337 in 1990 dollars) to over \$4.3 million in the 2007-08 period. And membership in the Federal Communications Bar Association more than doubled between 1983 and 2008, from 1,190 members to 2,462 members. Each of these figures suggests that whether or not policy has moved in a market-oriented direction since 1983, government involvement still permeates the industry, and regulated entities are investing in lobbying efforts accordingly.

Two recent books shed light on the apparent tension between the ascendance of deregulatory talk, on the one hand, and the tenacity of regulation itself, on the other. In *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance* (“*Government Failure*”), Clifford Winston reviews numerous empirical studies of regulation and its alternatives, marshaling evidence that, from the perspective of welfare-maximization, economic regulation has quite often done more harm than good.<sup>4</sup> In *Creating Competitive Markets: The Politics of Regulatory Reform* (“*Creating Competitive Markets*”), editors Mark K. Landy, Martin A. Levin and Martin Shapiro collect essays that address in

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2. In recent years, Ameritech, Pacific Telesis, Southwestern Bell Telephone Company, BellSouth and long-distance carrier AT&T have joined together through one series of mergers, while another string of mergers has joined NYNEX, Bell Atlantic, GTE, MCI and WorldCom. See, e.g., John Dix, *Telecom: Back to the Future*, NETWORK WORLD (Jan. 4, 2007).

3. The terms “liberalization” and “marketization” are used herein to refer to the removal of government barriers to market-based economic interactions. As explained below, liberalization and marketization can coincide with an increase in the quantity and complexity of regulation in a given market. Thus, these terms will not necessarily be synonymous with the term “deregulation.”

4. CLIFFORD WINSTON, *GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMIC POLICY RESEARCH AND GOVERNMENT PERFORMANCE* (2006) [hereinafter *GOVERNMENT FAILURE*].

depth the political peril facing attempts at market liberalization, not only before but also—and especially—after that reform is enacted.<sup>5</sup>

Winston insists that policymakers must respond first and foremost to the imperatives of microeconomic efficiency. These imperatives, he argues, require fidelity to the unfettered market in almost all cases. The contributors to *Creating Competitive Markets* are also sympathetic to market outcomes, but warn that market liberalization is an inherently political project. For these authors, “deregulation” is a misnomer, as liberalization nearly always entails the replacement of one set of rules by another on the path to genuine competition. Thus, reform always preserves an important role for government—and thus for political gamesmanship and rent-seeking behavior, which too often undermine or even eviscerate attempted deregulation. Each book contains crucially important lessons for communications policymakers and, while neither is perfect, each deserves attention as the possibility of broad legislative reform continues to loom large.

## II. THE BOOKS

### A. *Government Failure*

In *Government Failure*, Clifford Winston offers a short overview of microeconomic research into the welfare effects of regulation in various fields. The conclusion drawn by almost every study cited, and by Winston himself, is that governmental involvement in markets, whether in the form of regulation or the enforcement of generally applicable competition law, has reduced rather than increased overall utility. Winston makes two central points. First, market failure is less common, less harmful and less intractable than supposed by many observers. Second, governmental efforts to redress market failure are likely to create net harms, or, where they create net benefits, to do so at a higher-than-necessary social cost.

Winston contends that “[m]arket failure is less common and less costly than might be expected,” in large part “because market forces tend to correct certain potential failures.”<sup>6</sup> For one thing, market competition is “robust” in that it “develops to prevent market power in input and output markets from being long-lived and often develops in markets that are believed to have ‘natural’ entry barriers.”<sup>7</sup> That is, the market itself can cure market failure. Thus, “the highly competitive U.S. environment has

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5. CREATING COMPETITIVE MARKETS: THE POLITICS OF REGULATORY REFORM 12 (Mark K. Landy, Martin A. Levin & Martin Shapiro eds., 2007) [hereinafter CREATING COMPETITIVE MARKETS].

6. GOVERNMENT FAILURE, *supra* note 4, at 76.

7. *Id.*

caused monopolies to be eroded, made it difficult for firms to maintain harmful collusive agreements, and led to mergers that ... provide efficiency benefits....<sup>8</sup> Moreover, Winston finds that even those market failures that *do* arise “do not appear to create large efficiency losses to the U.S. economy.”<sup>9</sup> Indeed, Winston argues that conditions often associated with market failure might at times *enhance* efficiency. For example, cartels “may reduce costs through shared advertising and research, which may tend to reduce prices rather than to increase them.”<sup>10</sup>

Winston then emphasizes the harm that results from government regulation, an outcome he refers to as “government failure.” Assailing “refusals to acknowledge that government interventions can have costs as well as benefits,”<sup>11</sup> Winston points to instances in which “government has created inefficiencies because it should not have intervened in the first place or ... could have solved a given problem or a set of problems more efficiently, that is, by generating greater net benefits.”<sup>12</sup> He is particularly concerned about government failure “when economic welfare is actually reduced or when resources are allocated in a manner that significantly deviates from an appropriate efficiency benchmark.”<sup>13</sup> For example, he faults antitrust regulators for blocking consolidations that would enhance overall efficiency; Winston observes that mergers can be procompetitive or anticompetitive, but views the historical record as demonstrating that “the authorities cannot evaluate mergers in a way that systemically enhances consumer welfare.”<sup>14</sup> Likewise, Winston cites studies purporting to demonstrate (1) that government efforts to curb monopolization generally failed to increase overall consumer welfare;<sup>15</sup> (2) that trade protections have generated benefits “fall[ing] far short of the losses to consumers”;<sup>16</sup> (3) that FTC investigations into alleged false advertising have raised firms’ costs without facilitating more informed decisionmaking by consumers;<sup>17</sup> (4) that securities-related disclosure requirements have “provided few benefits to investors”;<sup>18</sup> and (5) that Corporate Average Fuel Economy

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8. *Id.* at 20.

9. *Id.* at 73.

10. *Id.* at 18.

11. *Id.* at 2.

12. *Id.* at 2-3.

13. *Id.* at 3.

14. *Id.* at 18-19.

15. *Id.* at 16.

16. *Id.* at 24.

17. *Id.* at 29.

18. *Id.* at 31.

("CAFE") standards have prompted Americans to drive more, consuming more fuel on the whole while driving smaller, more dangerous vehicles.<sup>19</sup>

Winston's criticism is not limited to welfare-diminishing regulation. He also faults government actions that produce benefits that might have been achieved in a less costly manner. For Winston, a key example is the breakup of AT&T. He claims that while AT&T's divestiture of the RBOCs may have resulted in efficiency gains principally associated with equal-access requirements that opened long-distance markets to competition, this reform could have been promulgated by the FCC rather than the courts, and without the "large costs" that attended divestiture.<sup>20</sup> Similarly, he concedes that regulatory efforts to redress externalities have created some benefits, but argues that those benefits could have been captured at lower expense.<sup>21</sup> For example, he cites studies concluding that 1980's Comprehensive Environmental Response, Compensation, and Liability Act,<sup>22</sup> which established the "Superfund" environmental remediation program, "failed to allocate . . . resources to the environmental problems posing the greatest social costs."<sup>23</sup>

Needless to say, the findings that Winston describes leave him deeply skeptical about the merits of regulation. To Winston, the experience of the past 30 years "suggests that the welfare cost of government failure may be considerably greater than that of market failure."<sup>24</sup> Indeed, Winston argues that "the empirical evidence reveals a surprising degree of consensus about the paucity of major policy successes in correcting a market failure efficiently."<sup>25</sup>

Winston does, however, see cause for optimism for those seeking a reduced government role. Policymakers "have benefited from basic insights from economics research about those policies that clearly do not work and alternative policies that may be successful,"<sup>26</sup> and "have been less inclined to impose significant new economic regulations to influence behavior."<sup>27</sup> But these policymakers have been less willing to tear down *existing* regulatory structures.<sup>28</sup> To that end, he closes with two recommendations.

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19. *Id.* at 47-48.

20. *Id.* at 16.

21. *Id.* at 42.

22. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (Superfund Act), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

23. GOVERNMENT FAILURE, *supra* note 4, at 52.

24. *Id.* at 3.

25. *Id.* at 10-11.

26. *Id.* at 93.

27. *Id.* at 95.

28. Of particular note, Winston credits government for relaxing price, entry and exit restrictions in telephony and cable television, and shifting to incentive regulation. *Id.*

First, “policy-makers should pause and truly absorb the fact that government generally cannot be counted on to correct market failures efficiently by itself.”<sup>29</sup> Second, they must “acknowledge that the few microeconomic policies that have improved efficiency . . . stem from market-oriented approaches.”<sup>30</sup> Policy professionals, he claims, should apply these insights to a long-overdue program of paring back government involvement in the economy in the name of microeconomic efficiency.

### *B. Creating Competitive Markets*

The essays collected in *Creating Competitive Markets* address “what occurs when economists’ ideals meet the realities of the highly political market design process.”<sup>31</sup> The contributors to *Creating Competitive Markets* have no fundamental quarrel with Winston—they appear to agree (or at least to assume for argument’s sake) that market competition is generally preferable to regulation—but they raise substantial questions about the specific ways in which deregulation has been pursued. In particular, they argue that deregulatory efforts have been too inattentive to the political forces that either prevent deregulation outright or—more insidiously—subvert and even reverse deregulation after it has been enacted. Market-oriented policymakers, in the view of these authors, have failed to acknowledge sufficiently that markets are legal constructs. All markets reflect an underlying web of legal rules, including those governing contract, property rights, taxation, international trade and immigration. Markets in transition from regulation to competition are even more thoroughly permeated by legal requirements, meant either to preserve regulation in specific industry segments or to smooth the migration toward a “deregulated” market. The contributors to *Creating Competitive Markets* stress that legislators and other policymakers have ignored the ongoing role of government at their own peril, and that the result in many markets has been the *de facto* collapse of marketization efforts. As Marc Landy and Martin Levin, two of the volume’s three editors, state in their introduction, “greater success is possible—but only if policymakers fully appreciate and face up to both the political and analytical difficulties of creating competitive markets.”<sup>32</sup>

While the essays presented in *Creating Competitive Markets* are too rich and varied to be summarized succinctly, the volume suggests that the failures of deregulation frequently can be traced to two interrelated factors.

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29. *Id.* at 98.

30. *Id.*

31. Mark K. Landy & Martin A. Levin, *Creating Competitive Markets: The Politics of Market Design*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 1, 12.

32. *Id.* at 1.



First, common notions of deregulation—and the word “deregulation” itself—improperly presume that the transition from a pervasively regulated market to a competitive market requires only a revocation of the complex rules formerly relied upon to counter a state-sanctioned monopolist’s power. The volume’s authors argue that “deregulation” almost always entails replacing one set of rules with another, and the new rules often require as much government oversight as the old ones. Second, because policymakers have failed to anticipate either the continued role of government or the implications of that role, they have failed to account for the political pressure that will be brought to bear by interests opposing liberalization even after reform has been enacted. So long as government maintains a central role in promulgating or implementing complicated transitional rules, parties opposed to reform will be able to undermine or reverse any deregulatory gains.

In the words of co-editors Landy and Levin, “efforts to create competitive markets do not deregulate; they redeploy regulation.”<sup>33</sup> In fact, argues contributor Peter H. Schuck, “the interpenetration of rules and markets is so extensive and subtle that the distinction seems to melt away conceptually.”<sup>34</sup> This is so, Schuck contends, because “effective market design—even when seeking deregulation and increased competition—requires lots of rules, perhaps even more rules than before.”<sup>35</sup>

This point is made most forcefully by contributor Steven Vogel’s essay *Why Freer Markets Need More Rules*. Vogel observes that markets are irretrievably “embedded” in other social and political constructs—“matri[ces] of policies, practices, and norms” that structure relationships among market participants.<sup>36</sup> For example, the Japanese labor market is “embedded in a political-economic system in which government policies discourage labor mobility, large firms favor new graduates over midcareer hires, employees are reluctant to defect from large firms to their competitors and social norms place a premium on employment stability and employee loyalty.” In contrast, “the American labor market is embedded in its own system, in which government policies encourage labor mobility, firms embrace midcareer hires, employees commonly defect to competitors, and prevailing norms encourage firms to lay off workers and employees to offer their services to the highest bidder.”<sup>37</sup> Under such circumstances, market liberalization entails not simply the removal of

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33. *Id.* at 2-3.

34. Peter H. Schuck, *Concluding Thoughts: How the Whole is Greater than the Sum of Its Parts*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 343, 347.

35. *Id.*

36. Steven Vogel, *Why Freer Markets Need More Rules*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 25, 27.

37. *Id.*

preexisting requirements of one sort or another, but a holistic reappraisal and reformation of the relevant institutional forces.

Put differently, the term “deregulation” connotes a targeted response to what is often a systemic, self-reinforcing regulatory structure not easily transformed by such targeted action. “One cannot simply get the government out of the way and expect greater competition to arise naturally.”<sup>38</sup> Thus, as policymakers have sought to limit government intrusion in various markets, they have often found a need to replace one set of rules with another. As Landy and Levin note, “[c]reating competitive markets is a process of market design, not merely deregulation,”<sup>39</sup> and “[m]arket design initiatives, successful or not,” can “embody rules and regulations that are often at least as numerous and complicated as those they displace.”<sup>40</sup>

Richard O’Neill and Udi Helman offer a real-world example of this phenomenon in an essay entitled *Regulatory Reform of the U.S. Wholesale Electricity Markets*. In a narrative that will seem familiar to readers conversant in telecommunications policy, O’Neill and Helman discuss how efforts to establish an open-access regime for the electricity transmission market became mired in political controversy as disputes arose over the terms of deregulation. “While policymakers initially thought” that “market institutions and rules would arise in a reasonably straightforward fashion” following the imposition of open access requirements, such requirements “have instead proven to be contentious and at times difficult to formulate and implement.”<sup>41</sup> The resulting mass of rules and requirements belied any suggestion that the electrical power transmission industry was being governed solely by the invisible hand of the market:

In the United States, the electricity markets have not been “deregulated” but rather have been subject to regulatory reforms that promote competition through open transmission access, market expansion, and efficient market design, while constraining market power under the Federal Power Act’s “just and reasonable” standard. In our view, the overlay of market rules is not simply a residue of unnecessary regulation but is a needed framework for the transition of the electricity industry from the market structures and cultural norms of the prior era of cost-based franchised monopoly regulation into the period of market competition.<sup>42</sup>

This transition, they warn, “is likely to be measured in decades,” as competition develops in the power-generation market, pricing mechanisms

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38. *Id.* at 29.

39. Landy & Levin, *supra* note 31, at 21.

40. *Id.* at 5.

41. Richard O’Neill & Udi Helman, *Regulatory Reform of the U.S. Wholesale Electricity Markets*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 128, 135.

42. *Id.* at 150-51.

adjust to account for new market arrangements and regulatory mandates are gradually superseded by robust market institutions.<sup>43</sup>

Sadly, as *Creating Competitive Markets* makes clear, long deregulatory transitions pose great political danger to fledgling reforms. As Eugene Bardach writes in his essay *Why Deregulation Succeeds or Fails*, "however benign the motivation, the longer that second-phase [i.e., post-enactment] intervention continues, the longer it remains a target for rent seeking and other such distorting forces."<sup>44</sup> Thus, what Schuck calls "the interpenetration of rules and markets" inevitably leads to what Landy and Levin call "the interpenetration of *politics* and markets."<sup>45</sup> If market liberalization requires government agencies or other public entities to design and implement a new collection of rules and regulations meant to manage the transition to competition, then the enactment of reform is just the initial phase of a political process, *not* (as is often thought) the culmination of that process. As Eric M. Patashnik explains in his essay, *The Day After Market-Oriented Reform, or What Happens When Economists' Reform Ideas Meet Politics*: "Rather than a one-shot static affair, market-oriented reform must be seen as a *dynamic process* in which forces seeking to maintain or protect a reform may be opposed by forces seeking to undo it."<sup>46</sup>

According to *Creating Competitive Markets*, though, policymakers too frequently design deregulatory regimes that fail to account for post-enactment political maneuverings. "[T]he market lacks a reliable constituency," and "market participants ... have a strong incentive to focus on their own narrow goals, leaving the promotion of market efficiency to others."<sup>47</sup> This is especially problematic, the contributors argue, because many reforms leave in place ensconced interests intent on undermining marketization efforts. "Markets," Patashnik notes, are "inherently disruptive," and "create losers as well as winners."<sup>48</sup> While efficiency-enhancing reforms offer widespread benefits, the benefit per individual is typically small, whereas the losses suffered by those that were protected by the old regime can be substantial. As public-choice theorists have argued

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43. *Id.* at 151.

44. Eugene Bardach, *Why Deregulation Succeeds or Fails*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 331, 337.

45. Schuck, *supra* note 34, at 347; Landy & Levin, *supra* note 31, at 5 (emphasis added).

46. Eric M. Patashnik, *The Day After Market-Oriented Reform, or What Happens When Economists' Reform Ideas Meet Politics*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 267, 271 (emphasis in original).

47. *Id.* at 268. Put more colloquially, "'Let's eliminate deadweight losses' is rarely a winning campaign slogan." *Id.* at 270.

48. *Id.* at 269.

for fifty years, this allocation of harms and benefits renders reform vulnerable to attack by well-organized opponents.<sup>49</sup> Consequently, the “single greatest impediment to successful marketization policy is the sheer amount of political interference in the market design process.”<sup>50</sup>

The contributors to *Creating Competitive Markets* make a compelling case that these political impediments have in many cases posed insuperable obstacles to deregulatory success. “[T]he track record of regulatory redeployments to date is highly uneven, with at least as many failures as successes,” and much of the blame can be traced to the two points described above.<sup>51</sup> That is, the fact that many markets require significant oversight following liberalization, and the opportunities for political mischief raised by such continued stewardship, have led to the failure of well-meaning and even well-designed reform. As one contributor puts it, “the passage of bold, market-oriented reforms is no guarantee that reform goals will be achieved.”<sup>52</sup>

The specific “failures” cited in the book include efforts to introduce competition to public schooling,<sup>53</sup> to liberalize electricity markets in California and Ontario, Canada,<sup>54</sup> and to privatize the British pension system.<sup>55</sup> Readers of this journal may not be surprised to learn, though, that various contributors to *Creating Competitive Markets* reserve special disdain for the Telecommunications Act of 1996 (“1996 Act” or “Act”),<sup>56</sup> which is cited as a paradigmatic case of deregulatory failure. In *Reaching Competition Despite Reform: When Technology Trumps (De)Regulation and the New ‘Old’ Politics in Telecommunication Reform*, contributor Andrew Rich charts the course of reform both leading up to and following enactment of the 1996 Act. Rich argues that the Act resulted not from any public outcry but rather from extensive lobbying by the communications industry itself. In particular, RBOCs sought to enter the in-region long-distance markets, in which they had been forbidden from competing since the AT&T divestiture, while the major long-distance providers sought help

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49. See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

50. Landy & Levin, *supra* note 31, at 3.

51. *Id.*

52. Patashnik, *supra* note 46, at 269.

53. See Frederick M. Hess, *A Market for Knowledge? Competition in American Education*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 184.

54. See O’Neill & Helman, *supra* note 41, at 128. See also Darius Gaskins, *The Success and Limits of Deregulation in Network Industries: Freight Railroad and Electricity*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 113, 121.

55. See Alan M. Jacobs and Steven Teles, *The Perils of Market Making: The Case of British Pension Reform*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 157.

56. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

in efforts to compete in local markets.<sup>57</sup> “Without the public’s attention, the principal aim of key legislators was to find a compromise that balanced the short-term interests of all parties to the reform.”<sup>58</sup> And while legislators were interested in reform, Rich contends that they were *more* interested in serving the interests of corporate patrons.<sup>59</sup> Moreover, the debate was hampered by the absence of input from the public interest community, the research community and the Clinton administration, all of which might have counterbalanced the role played by private interests.<sup>60</sup> Ultimately, the law that was enacted contained broad language meant to mollify the regulated parties—a competitive checklist permitting RBOC entry into the long-distance markets on a state-by-state basis and an aggressive set of market-opening provisions designed to ease competitive provision of local service by long-distance carriers and new entrants—but “intentionally left the difficult telecom reform issues to the FCC (and, less intentionally, the courts).”<sup>61</sup>

The idea . . . was market-based reform, but its substance was eventually distorted and all but lost as the battle for telecommunications reform proceeded . . . . The new law that emerged from this intense policy fight lacked a true deregulatory spirit and would continue to be manipulated by dominant industries, especially in matters before the [FCC].<sup>62</sup>

The result, Rich notes, has been a process in which parties have done battle at the FCC over how best to implement the Act’s core political compromises. The FCC has made decisions reflecting its own policy preferences, losing parties have appealed and courts have rejected the FCC’s rulings, initiating the cycle anew. Thus, “the law has generated more rules and more conflict between industry and regulators than before.”<sup>63</sup> Rich allows that conditions in the telecommunications industry have improved in some respects, but he attributes those improvements to new technologies—in particular the growth of wireless and VoIP offerings—rather than to the Act.<sup>64</sup>

Given the persistent and pervasive role of politics in all phases of the market-liberalization process and the plight of deregulatory efforts that fail to account for this role, the contributors to *Creating Competitive Markets*

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57. See, e.g., Andrew Rich, *Reaching Competition despite Reform: When Technology Trumps (De)Regulation and the New “Old” Politics in Telecommunications Reform*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 247, 251.

58. *Id.* at 250.

59. See, e.g., *id.* at 255.

60. See *id.* at 255-58.

61. *Id.* at 262.

62. *Id.* at 249.

63. *Id.* at 248.

64. *Id.* at 249.

believe that policymakers must be far more sensitive to the ways in which policy design can shape the political forces that will reinforce or undermine reform after its enactment. Reformers must “adopt a more self-consciously political understanding of their roles,” must “think like statesmen, not merely technicians, and [must] follow more the dictates of Machiavelli than Adam Smith.”<sup>65</sup> Specifically, reformers should favor policy frameworks that are self-reinforcing, even if these strategies are suboptimal when viewed solely from the perspective of economic efficiency. “Future attempts at deregulation must do better in anticipating potential political obstacles to reform, even at the cost of departing from ‘first-best’ options, in order to keep the deregulation train on track.”<sup>66</sup>

One lesson drawn by Landy and Levin is that policymakers must resist the impulse to smooth out the market’s rough edges during the transition from regulation to competition. Rather, reformers should “accept the constraints imposed by imperfect knowledge, and limit the ambition of the market design.”<sup>67</sup> Such regulatory modesty will circumscribe the extent of postreform government involvement and thus limit the prospects for rent-seeking and backsliding. The more reformers resist the temptation to micromanage markets, the less intricate the policy frameworks they develop will be, and the less subject to politicking before implementing agencies such as the FCC.

The collection’s most central point, however, is that successful reforms must seek to restructure not only markets and industries but also the array of institutional forces that arise in response to—and come to reinforce—a particular policy framework. Regulatory systems, the contributors argue, nurture permanent political alliances among entities that benefit from the existing regime. These alliances become recalcitrant political blocs with homogenous, static preferences and close relationships with the regulators and legislators that oversee their industries. As Michael E. Levine states in his essay *Regulation, the Market, and Interest Group Cohesion: Why Airlines Were Not Reregulated*: “[T]he existence and nature of regulation reinforces the stability of the regulatory regime in a kind of positive feedback loop. Regulatory regimes tend to emerge from circumstances that put most or all firms in the same boat and reduce their diversity of economic and political interests.”<sup>68</sup> These static alliances pose

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65. Landy & Levin, *supra* note 31, at 20.

66. Edward Iacobucci, Michael Trebilcock & Ralph A. Winter, *The Political Economy of Deregulation in Canada*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 290, 311.

67. Landy & Levin, *supra* note 31, at 3.

68. Michael E. Levine, *Regulation, the Market, and Interest Group Cohesion: Why Airlines Were Not Reregulated*, in *CREATING COMPETITIVE MARKETS*, *supra* note 5, at 215, 242.

a danger to reform, even long after it is enacted. To the extent deregulatory activity eliminates an inefficient advantage enjoyed by a particular bloc but leaves that bloc intact, it is likely to elicit a concerted and powerful response from a well-organized interest with a firm grasp on the relevant levers of power.

Thus, a reform is far more likely to meet with success over the long term if it aims to realign political forces in the course of realigning economic forces. "Durable market-oriented reforms do more than destroy an existing policy subsystem. They generate a self-reinforcing process in which the identities and organizational affiliations of relevant interests change and key economic actors adapt to the new regime. In sum, durable market-oriented reform *reconfigures* political dynamics"<sup>69</sup> It does so principally by "upset[ing] existing coalitional alignments and caus[ing] relevant actors to adapt to a changed environment."<sup>70</sup> In the case of the airline industry, Levine shows that deregulation smashed existing coalitions by opening new business opportunities and creating new market niches. "[W]hat had been an almost unanimous coalition of perceived industry interests changed over time as new firms entered and old firms adapted in different ways to the pressures of new competition."<sup>71</sup> The unanimous "industry position" on key issues gave way to the diversity of interests represented by specific carriers with specific business plans and specific needs.<sup>72</sup> The unanimous position of municipalities dissolved as different cities made differing investments to compete for service under the liberalized regulatory regime. And even the unified customer position ceded ground as customers in different regions and with different consumption preferences faced different options following deregulation.<sup>73</sup> One critical result of this political reconfiguration was that traditional power structures could not act effectively to undermine or reverse liberalization, and reformers were better able to resist the counter-assault of those who benefited under the previous regime. For Levine and his co-contributors, the lesson can be generalized to other regulated industries:

[O]nce a change in circumstances creates deregulation, [formerly allied] firms diverge in character and interests as they pursue different strategies and seek different niches in the deregulated markets. These different firms are harder to organize and align, and the industry loses political coherence and influence. In such circumstances, as in the case

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69. Patashnik, *supra* note 46, at 269 (emphasis in original).

70. *Id.* at 285 (emphasis in original).

71. Levine, *supra* note 68, at 224.

72. *See id.* at 225-26.

73. *See id.* at 227.

of U.S. airlines, the deregulated regime can withstand fragmented or disputed challenges by even very distressed interests.<sup>74</sup>

Thus, Levine contends that the success or failure of regulatory change “clearly depends on recognizing and addressing, through institutional design, the present and future political forces that will aid, obstruct, or shape its implementation and operation.”<sup>75</sup> Or, as Patashnik writes, the prospects of a given reform are significantly related to the extent to which it “shapes the *identities and organizational affiliations of relevant social actors.*”<sup>76</sup>

### III. AN ASSESSMENT

Read individually and (especially) together, *Government Failure* and *Creating Competitive Markets* offer several lessons for communications policymakers in Congress and the FCC alike. But while these policymakers should heed the advice presented, they should also take care to maintain a critical distance from the authors’ foundational assumptions.

#### A. Perils

To begin with, both books reflect in part specific descriptive or normative assumptions that influence the analyses presented. This influence is in no way fatal in either case—as explained below, these works have much to offer policymakers—but it cannot be ignored by those seeking to rely on the authors’ insights.

First, *Government Failure* gives insufficient weight to distributional concerns as appropriate drivers of policy analysis. Winston makes clear that he is interested only in overall welfare, not in issues relating to equitable distribution of resources.<sup>77</sup> Thus, for example, he complains that mine safety regulations produce more cost than benefit, without addressing just who bears those costs and benefits, and how they would be reallocated if the existing regulations were revoked.<sup>78</sup> He issues the same complaint regarding airline noise mandates, with the same disregard for the allocation of costs and benefits.<sup>79</sup> But Winston’s aggressive indifference to distributional concerns is most vividly illustrated by his brief discussion of “environmental justice.” Winston notes that Hispanics and African Americans are more likely than Caucasians to live in areas where pollution is suspected of posing health concerns, but dismisses these concerns by

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74. *Id.* at 242.

75. *Id.* at 216.

76. Patashnik, *supra* note 46, at 272 (emphasis in original).

77. GOVERNMENT FAILURE, *supra* note 4, at 10.

78. *Id.* at 39.

79. *Id.* at 46.



explaining that such “sorting” has “lowered housing prices for the poor—a benefit that could dissipate if improvements in air quality cause wealthier people to move in and drive up rents for residents who do not own a home.”<sup>80</sup>

Winston is not alone in defining the aims of public policy exclusively in terms of overall welfare-maximization. Many believe that regulation should be concerned first and foremost with efficiency, and that all distributional concerns are best accounted for in the generally applicable taxation system.<sup>81</sup> Whatever its merits from an economic perspective, though, this approach is likely to prejudge some of the key issues in telecommunications policy. To take the most prominent example, the foundational purpose of the universal service regime is to effectuate wealth transfers from some subscribers (consumers of interstate telecommunications services, private-carriage telecommunications and interconnected VoIP) to others (as of this writing, principally those living in rural, insular and other high-cost areas). Critics concerned only with efficiency would write off such cross-subsidies as the inefficient result of political rent-seeking by powerful interests.<sup>82</sup> This analysis might be accurate, but it begs the most relevant questions from the perspective of public policy, which are whether universal service gives rise to positive externalities that benefit all users—rural, urban, rich and poor—alike, and whether distributional concerns in their own right require such service even where it is inefficient. If either question can be answered affirmatively, then government subsidies can be justified as a matter of policy, rather than merely being explained away as a matter of politics. If not—but only if not—then the subsidy must be explained as a matter of politics divorced from public policy. A single-minded focus on efficiency, in short, assumes that which must be proved. However they might ultimately come down on the issues, communications policymakers should not fall into the same trap.

Second, in his effort to advocate the merits of the unfettered market, Winston fails to grapple fully with the possibility of actual, persistent market failure. Winston’s case, sadly, is marred by repeated instances in which he departs from the empirical record and relies on tenuous claims in an effort to deny categorically the value of public action. He argues, for example, that mine owners have “a strong financial incentive” to keep their mines safe, because miners are paid a premium for the risks of mine work. Thus, he suggests, owners will seek to prevent accidents that might

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80. *Id.* at 78.

81. *See, e.g.*, CHARLES FRIED, *RIGHT AND WRONG* 106 (1978); Robert H. Frank, *Why is Cost-Benefit Analysis So Controversial?*, in *COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES* 81 (Mathew D. Adler & Eric A. Posner eds., 2001).

82. *See* Iacobucci, Trebilcock & Winter, *supra* note 66, at 303-04.

“increase the perceived risks to health from working in a mine.”<sup>83</sup> Perhaps so. But perhaps mine owners, having entered into their contracts with workers, will assume that future catastrophes are *already* priced into the labor market and act simply to minimize their other safety-related costs.

That instance is hardly unique. Winston cites a study showing that dolphin-safe tuna labeling requirements had a positive effect, but dismisses the role of the requirements themselves by suggesting, without any support, that “eco-labeling was driven by market forces rather than government policy.”<sup>84</sup> He cites another study stating that the benefits of seatbelt mandates and related requirements were “completely offset by drivers taking more risks,”<sup>85</sup> but does not address the extent to which the additional risk-taking was *caused by* the new safety requirement. There is some evidence that additional protections prompt some individuals to act more recklessly.<sup>86</sup> But unless the additional risk-taking can be traced *exclusively* to the new safety measures—an issue he does not address—even more deaths and injuries would presumably have resulted *absent* the new requirements. He discusses yet another study suggesting that prescription drug requirements “*may* give patients a false sense of safety and induce them to consume stronger medicine to obtain the benefits of more aggressive treatment,”<sup>87</sup> but provides no evidence for this supposition, nor does he suggest that the study’s author provided any such support. In short, where the data does not prove as much, Winston often asks the reader to assume with him that government involvement is either unnecessary or harmful.

Of course, to point out these weaknesses is not to doubt the superiority of the market over regulation in most cases. As co-author Bryan Tramont and I have argued with respect to telecommunications: “[C]ompetitive markets generally do far more than regulation to place new technologies at the disposal of consumers. Experience has shown that when providers have both the incentive and the ability to compete for consumers’ communications dollars, they will develop and deploy the technologies that the people demand.”<sup>88</sup> Nevertheless, Winston’s missteps underscore the importance of assessing markets in their particulars, and remaining open-minded to the possibility of market failure. To be sure, the once-dominant assumption that telephony is throughout the country a classic natural

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83. GOVERNMENT FAILURE, *supra* note 4, at 39.

84. *Id.* at 34.

85. *Id.* at 37.

86. See Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677 (1975).

87. *Id.* at 36 (emphasis added).

88. Bryan N. Tramont & Russell P. Hanser, *Facing Tomorrow’s Challenges: Looking Forward, Looking Back*, 16 COMMLAW CONSPECTUS i, iv-v (2007).

monopoly has rightly been laid to rest: the local and long-distance networks alike are characterized by numerous competing providers in the great majority of geographic markets, competing against one another using a variety of platforms, including not only traditional copper wires but also fiber-optic cables, coaxial plant, licensed and unlicensed wireless spectrum, power lines and satellites. Further, the next-generation digital broadband networks that are replacing analog narrowband facilities appear to offer even greater opportunities for competitive deployment, offering as they do substantial revenue opportunities associated with the voice/video/high-speed data “triple play.” But the prospect of natural monopoly remains real in specific geographic and product markets—for example, in particularly rural areas still served by a single independent incumbent local exchange carrier (“ILEC”)—and policymakers should not overlook this prospect.

Furthermore, even absent natural monopoly, there are some problems the market will not address. As Tramont and I argued, “markets can fail where needs are felt by only a relatively small number of consumers, or where services involve costs or benefits not borne by the purchaser (i.e., where there exist economic ‘externalities’).”<sup>89</sup> Such failures, we suggested, justify a government role in ensuring that the telecommunications market meets the needs of Americans with disabilities and addressing the needs of law enforcement with regard to the interception of communications sent over next-generation networks.<sup>90</sup>

Third, communications policymakers will want to sift carefully through the criticisms leveled against the 1996 Act by Rich and *Creating Competitive Markets*’ other contributors. In some respects, the criticism is warranted: the Act did indeed leave great power in the FCC’s hands, and it appears that the FCC did in fact over-reach on more than one occasion. A central example cited by Rich is the Act’s unbundled network elements provisions, which directed the FCC to make parts of the ILECs’ networks available for use by competitors at cost-based rates but failed to provide much guidance about which elements were to be made available and how the rates would be set. The FCC interpreted these requirements broadly, initially finding that virtually all of the network was subject to unbundling, and at extremely low rates based on “long-run total element incremental costs,” or “TELRIC.” These rules were subject to almost eight years of litigation and revision. The Supreme Court ultimately upheld the TELRIC methodology in 2002,<sup>91</sup> but FCC findings on the scope of unbundling were repeatedly narrowed until finally upheld in court in 2006.<sup>92</sup> Here, whatever

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89. *Id.* at vii (2007).

90. *Id.*

91. *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 523 (2002).

92. *See Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

one thinks of the underlying policy choices, Congress's failure to provide additional clarity harmed consumers and providers alike.

In other areas, though, the Act deserves some credit for promoting competition. For example, Rich's effort to divorce the success of wireless and VoIP offerings from Congress's decisions is unfair. The wireless industry has succeeded in significant part because it has been immunized in many respects from both federal and state regulation; that immunity stems from legislation enacted in 1993 and from Congress's decision in 1996 to leave the 1993 regime in place. VoIP services could not have succeeded but for the tremendous growth in broadband deployment in recent years.<sup>93</sup> That growth surely has resulted first and foremost from technological advance, but it also can be attributed in significant part to the 1996 Act. The Act directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,"<sup>94</sup> and limited the FCC's ability to regulate telecommunications offerings that involve information processing. Seizing on these directives, the FCC has significantly pared back regulations that it found had inhibited investment in next-generation networks.<sup>95</sup>

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93. See, e.g., 47 C.F.R. § 9.3 (recognizing that "interconnected voice over Internet protocol" offerings permitting communications with traditional telephone networks will generally rely on broadband connection at end user's location). According to the FCC's most recent figures, as of June 30, 2007, there were more than 100 million "lines" in service in the United States offering speeds of 200 kilobits per second in at least one direction. These included "lines" provisioned over wireline, cable, wireless, fiber, satellite, powerline, and other platforms. In December 1999 – the earliest period for which the FCC has figures available – there were just over 2.75 million such lines in service. See Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, High-Speed Services for Internet Access: Status as of June 30, 2007 at Table 1 (March 2008), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC280906A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC280906A1.pdf); Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, High-Speed Services for Internet Access: Status as of June 30, 2003 at Table 1 (Dec. 2003), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/hspd1203.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1203.pdf).

94. See 47 U.S.C. § 157 (2000).

95. See, e.g., Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, 22 FCC Rcd 18705 (2007); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14853 (2005) (subsequent history omitted); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, 19 FCC Rcd 15856

Further, while Winston understates the prospect of natural monopoly, *Creating Competitive Market's* contributors in some cases appear to give that prospect too *much* credence in the context of communications regulation. Vogel, for example, notes that incumbents' control of the critical infrastructure in Britain necessitated a continuing governmental role in communications deregulation.<sup>96</sup> Similarly, O'Neil and Helman assume that telecommunications liberalization requires open-access mandates, and Bardach agrees.<sup>97</sup> But the recent history of American telecommunications points to a future of intermodal competition, in which wireline carriers, cable operators, wireless providers, satellite companies and others compete against one another using their own networks, with little or no reliance on government-mandated access to other providers' networks. This competition—due in part to the 1996 Act's efforts to eradicate stultifying line-of-business restrictions—undermines claims that ongoing intensive government stewardship of the communications market is indisputably necessary.<sup>98</sup>

Finally, these two books do not fully address what may ultimately be the most pressing question for decision-makers who are persuaded by their core messages: just how far from the ideal framework should policymakers be willing to veer for the sake of political sustainability? Should policymakers pursue any framework that would be preferable to the existing regime, however suboptimal it might be, so long as the sacrifice is deemed necessary to ensure the reform's longevity? If politics and policy were static, one would assume that the answer would be "yes"—that once decisionmakers have determined what sacrifices are necessary, they should take the proverbial "half a loaf" and institute partial reform. But policy and

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(2004); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, 19 FCC Rcd 20293 (2004); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (subsequent history omitted); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 18 FCC Rcd 16978 (2003) (subsequent history omitted).

96. Vogel, *supra* note 36, at 34-35.

97. O'Neill & Helman, *supra* note 41, at 134; Bardach, *supra* note 44, at 337.

98. Furthermore, while Rich laments the overall increase in consumers' communications-related spending since the Act, this increase is to be celebrated if consumers are getting more value from their dollars; without information on what is being purchased, claims about overall spending tell us little. See, e.g., Iacobucci, Trebilcock & Winter, *supra* note 66, at 300-301.

politics are *not* static. As policy failures become more and more obvious to the public, attention is focused and political pressure mounts, bolstering the prospects for more aggressive reform. Thus, an effort to compromise today may in fact undercut the prospect for a better outcome tomorrow. Conversely, a refusal to cooperate “today” on this basis could prolong inefficiency and visit real harm on the affected parties. Savvy decision makers must account for the dynamic interrelation between politics and policy and the importance of timing reform to maximize effectiveness.

### B. Promise

Notwithstanding the criticisms leveled above, *Government Failure* and *Creating Competitive Markets* are extremely valuable works that will reward careful readers. Communications policymakers should heed their lessons.

First, of course, by highlighting the harms that can be wreaked by well-intentioned government interventions, these books remind policymakers of the exacting scrutiny that should be applied to proposals for expanding the government’s role in communications markets. The two volumes underscore not only the costs attending regulation itself but *also* the costs of the market-creating rules that attend liberalization; in doing so, they present a more comprehensive argument than is typically found in most policy advocacy. Together, these volumes counsel not only deregulation, but a specific *type* of deregulation—namely, deregulation that minimizes postreform government involvement in market-making efforts. *Government Failure* urges deregulation, but *Creating Competitive Markets* suggests that the choice to further liberalize communications markets would be only the first of many relevant decisions. Policymakers seeking further liberalization face a choice between rules that subject market participants to the rough-and-tumble of competition and rules that carefully calibrate the transition, offering protections from this tumult along the way. The contributors to *Creating Competitive Markets* demonstrate that even if the latter choice were preferable on efficiency grounds, there are strong reasons to consider the former, which will minimize the opportunities for rent-seeking within, and/or reversal of, the new policy regime. In short, in the process of creating competitive communications markets, policymakers should resist the temptation to “perfect” those markets using mechanisms that keep the government at the center of economic interactions.

Second, *Government Failure* and (especially) *Creating Competitive Markets* highlight the importance of ensuring that deregulatory reforms are general in their aims and specific in the means they employ to fulfill those aims. Deregulators seeking to ward off the rent-seeking activity that attends “second-phase” regulatory intervention should work to minimize the need

for such second-stage activity. Perhaps the best way to do this is to shun efforts to micromanage market transition in favor of modest reform, and to limit as far as possible the postenactment role played by agencies and other implementing bodies. Discrete reforms should minimize the scope of second-phase oversight, and detailed instructions should minimize the power wielded by the implementing agency.

Indeed, the principal flaw of the Telecommunications Act of 1996 may have been that it flouted both of these precepts. The Act codified immensely ambitious objectives, but was maddeningly vague about how they were to be achieved. Thus, the Act set out a litany of specific market-opening measures to be applied to incumbent local exchange carriers (mandating, among other things, competitors' access to unbundled network elements, interconnection and resale at state-mandated rates),<sup>99</sup> but offered precious little guidance on critical issues such as how the states were to set those rates, leading to years of litigation ultimately reaching the Supreme Court. So too, the Act set forth a detailed fourteen-point "competitive checklist" listing obligations an RBOC would need to fulfill before being permitted to offer in-region long-distance service in a particular state,<sup>100</sup> but failed to clarify many terms in sufficient detail, resulting in repeated instances in which observers were unable to divine whether a particular application would be granted or denied—and, again, in extensive litigation. The books reviewed here suggest that reform would have worked better had the reformers adopted fewer requirements and been more forthcoming about how those requirements would be satisfied, thus minimizing the prospects for postenactment political interference with deregulatory ends. Those contemplating new telecommunications legislation would do well to heed these lessons.

Third, *Government Failure and Creating Competitive Markets* seem to support a functional approach to regulation based on the service provided rather than the identity of the provider in establishing regulatory categories. In his analysis of the airline industry, *Creating Competitive Markets* contributor Michael E. Levine notes that "deregulation generated markets that looked like other real-world, mostly competitive markets, warts and all."<sup>101</sup> As described above, this "warts and all" competition forced providers to differentiate themselves from one another, and in so doing helped to dislodge existing alliances that might otherwise have subverted reform efforts. Interplatform competition could have a similar effect in telecommunications, where regulatory entitlements and subsidies have previously led to entrenched, ossified coalitions that have arguably

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99. 47 U.S.C. § 251(c) (2000).

100. 47 U.S.C. § 271(c)(2)(B) (2000).

101. Levine, *supra* note 68, at 236.

foreclosed efficient reform in areas ranging from intercarrier compensation to universal service to video entry. It is often said that the 1996 Act eliminated line-of-business restrictions, permitting providers to enter one another's markets, but more work remains to be done. For example, states and localities have delayed wireline providers' entry into the video markets, the FCC has declined to afford providers of interconnected VoIP services direct access to telephone numbers and interconnection rights and ILECs' telephony offerings are subject to far more regulation than incumbent cable providers' offerings. Whatever the merits of the underlying policy questions, one lesson of *Creating Competitive Markets* is that a market in which all compete against all is *politically* superior to a market in which roles are assigned by regulation: the former will disrupt existing coalitions and diminish the prospects for back-sliding, while the latter will preserve political preferences based on a party's long-standing interests. Put differently, even if convergence was not an ideal outcome from a policy perspective (and there are many reasons to believe that it *is*), it is likely an ideal outcome politically, in that policies promoting convergence will be more durable than their alternatives.

#### IV. CONCLUSION

Some twelve years after the Telecommunications Act of 1996, telecommunications policy is marked by extensive regulation, at least some of which reflects outmoded assumptions about the nature of the market and the technology that drives its development. As networks and market structures continue to evolve, the existing communications policy framework is likely to come under increasing scrutiny and increasing pressure for reform. *Government Failure* and *Creating Competitive Markets* offer important lessons for how such reform should be implemented. Those charged with drafting and implementing it would do well to consult these volumes with open, if critical, minds.



