# THE INVISIBLE BARBECUE

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*Past legislation subsidizing the development of infrastructural technology has borne the mark of political corruption. The subject matter of the Telecommunications Act of 1996 falls within the same category of legislation that has fallen prey to this process in the past. In an effort to discern whether such forces are at work today, Professor Moglen undertakes a critical examination of the metaphors that pervade the current scholarly discourse on the subject of telecommunications law. Terms such as "Superhighway," "Broadcasting," and "Market for Eyeballs" reveal a great deal about the implicit assumptions at work behind the current scholarship and legislation, and serve to confine the debate in such a way that the full impact of the new law remains hidden. Professor Moglen concludes that the broader implications of the Telecommunications Act of 1996 need to be addressed, or the law will have a detrimental impact on our society and culture for decades to come.*

## I. A Special Mise-en-Scène

Having mobilized its economic power beyond any previous experience, and having triumphed in a long and sometimes uncertain war, the United States found itself with almost unbounded opportunities for the exploitation of new infrastructure technology across a vast geographic range. The single dominant organization in determining the shape of the postwar economic reorganization—and the exploitation of the new infrastructure—would be the federal government itself. Its control of essential public resources, said conventionally to be held in trust for the people, empowered it to decide the most basic features of the new political economy: the extent of private control of the new infrastructure; the winners and losers among the individuals and organizations contending for the profits of social change; and the rules, if any, constraining the new forms of political and economic power that change would create.

One result, perhaps predictable, was a flagrant efflorescence of political corruption. Through more than a decade of maneuver, the wealthiest individuals and corporations in America sought by organized and only sometimes overtly illegal bribery of parties and officeholders to secure advantage for themselves and destruction of their competitors. The primary desideratum was the passage of congressional legislation organizing the new infrastructure under private rather than public control, and making vast free transfers of public property into those private hands to subsidize the development. Money flowed into the political system in quantities never before imagined. Vast bribes were offered to legislators under various ingenious forms of transactional camouflage. Armies of lobbyists operated on Capitol Hill, building regional and inter-regional coalitions

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in support of plans the complexity of whose details surpassed the comprehension of the legislators themselves. But the more tangible inducements were sufficient, for the lobbyists controlled both the money and the nonmonetary facilities essential to the legislators' political survival.

The press, owned by the contending interests and those closely associated with them, went to great lengths to de-emphasize the story, not so much by failure to report (which could hardly occur in such a partisan environment), as by relentless omission of background and context. The result was a growing awareness throughout the electorate that the Congress and Executive were being bought, but without any clear understanding of the larger issues at stake, or a real glimpse of the future that was being constructed for them. Instead, of course, there were the promises: everyone would benefit from the enormous economic expansion the new infrastructure would bring about, as competition between titans delivered prosperity, richly expanded markets, and a new vast domain of American economic and cultural dominance.

And so—while the people were told no more than half-truths, and the press purveyed increasingly sophisticated justifications for the unleashing of private rapacity on the public patrimony—the contending interests went on buying and unbuying Congressmen, Senators, and party committees. In the end there was little left to steal and no one left to buy. In an atmosphere of increasingly acrid but unfocused public distrust, the Last Great Deal was made, and the Presidency of the United States became the prize whose continued possession by the party in power hinged on willingness to approve the deal.

Any resemblance between the past and the present is of course purely accidental. I am describing not the background and enactment of the Telecommunications Act of 1996, but rather the "Great Barbecue" of railroad legislation in the United States Congress from the Pacific Railway Act of 1862 to the Texas Pacific land grant and the Presidential Compromise of 1877.[1] But any reader who has already traversed the many lengthy and erudite contributions to this Symposium, and whose mind is therefore concentrated on current affairs, might be forgiven a sense of slightly disoriented familiarity.

A sense of deja vu at the factual level is understandable. The 104th Congress that ended with the Telecommunications Act began, among other similar matters, with one of the richest men in the world offering

1. The era of federal giveaways to industrial capitalism was first described as "the Great Barbecue" by Vernon Parrington in the uncompleted final volume of *Main Currents in American Thought*. See Vernon L. Parrington, Beginnings of Critical Realism in America: 1860–1920, at 23–26 (1958). For the most recent scholarship describing the events narrated here and collecting relevant primary and secondary sources, see Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 465–69 (1988). For a discussion of the complex interrelation between the Texas & Pacific railroad project and the maneuvering to decide the disputed presidential election of 1876 in favor of Rutherford Hayes rather than Samuel Tilden, see generally C. Vann Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction 51–185 (1966).

$4 million as an advance against potential future book royalties to the Speaker of the House.[2] Each possessor of a VHF television broadcast license, including the gentleman who certainly did not publicly offer a bribe to Newt Gingrich, will now receive—at no cost and among many other benefits—another slice of the publicly-owned electromagnetic spectrum in return for adoption of new high-definition television (HDTV) technology. As I write it appears that actual use of this technology may not be required in this new portion of the spectrum.[3] But then, come to think of it, actual construction and operation of a railroad often failed to occur once federal property had been transferred, the last time a newly-subdued continent was parceled out to Robber Barons.

Naturally there are differences. The global Free Trade Empire the United States hopes to gain from the winning of the Cold War and the universal adoption of digital communications is not the precise analog of the agricultural and mining empire of the West, bound together by the railroads, that emerged from the Civil War. The Union Pacific is not the Internet; neither Collis P. Huntington nor Jay Gould was a figure of sufficient triviality to be successfully impersonated by Rupert Murdoch; and observers of all political persuasions will probably find it tolerably easy to distinguish between Ulysses S. Grant and Bill Clinton.

But I am not writing an essay about the evil and destructive consequences of Gilded Age political corruption. For now, the point is only that we have seen the American Republic go through major adjustments in basic political economy before as a consequence of exploiting new infrastructural technology. Intelligent bystanders readily perceive certain correspondences that would justify inquiry. It is difficult, if not impossible, to avoid the impression that there has been another barbecue going on.

## II. WHERE'S THE SMOKE?

Perhaps it is all so obvious that mention is scarcely necessary. In most cities of the world—Belgrade comes to mind, for example—it is

2. See David Streitfeld, $4 Million Book Deal for Gingrich: Political Opponents Decry Windfall from Murdoch Firm, Wash. Post, Dec. 22, 1994, at A1.

3. Within days of Robert Dole's resignation from the Senate in June 1996, the new Republican leadership of the Senate joined with Newt Gingrich in a letter demanding that the FCC issue free licenses for additional broadcasting spectrum, ultimately intended for high-definition television use. The letter instructed the Commission to issue such licenses as rapidly as possible, and only to existing licensed television broadcasters, to preclude any new competition in the television frequencies. See Joel Brinkley, Congress Asks F.C.C. to Begin Lending Channels for Digital TV Broadcasts, N.Y. Times, June 24, 1996, at D6. On December 24, 1996, the Commission adopted a technical standard for high-definition television broadcasting in the United States. See FCC Action Clears Way for Digital Television; Panel Endorses Video Format; New TVs Likely to Hit Market by 1998, Baltimore Sun, Dec. 27, 1996, at 2D. As of this writing, the FCC has not issued any order requiring broadcasters to use the new standard to broadcast HDTV signals on the newly-licensed frequencies.

generally thought to be primarily a political issue who controls the television stations. The delicate negotiations between wealthy individuals and the government over that question are not thought too banal for explicit comment. The connection between Silvio Berlusconi's ownership of television stations and his political activities was generally made the subject of pasquinade in Italy, at least elsewhere than on his own stations.[4] Educated readers among the tiny minority of Americans who actually acquired meaningful information concerning the Telecommunications Act might consider its long-term political significance both obvious and central to any intelligent discussion had it happened, say, in France, Israel, or Serbia. But those questions do not seem to have been of paramount interest in the discourse on this subject. Not that political economy is a subject on which the essays in this Review are silent. You have hardly read anything else. But it has been mostly political economy without cultural history, as though in analyzing how consent is obtained for systemic changes that redistribute wealth and power, one need not look beyond the theory of the firm, mechanical analysis of material incentives, and a gross equation of increase in aggregate output with social progress. Not even Marx and Engels were such staunch historical materialists.

I should be clear at this point that I have no intention to accuse anyone of anything. Heaven knows that the distinguished scholars whose works you have been reading are not Marxists. Nor has anyone intended to hide the crude political realities of a process whose results she or he broadly approves. The scholarship's rather indifferent attitude towards the larger political issues reveals a more subtle problem. We have ruled out certain issues, ranges of outcomes, possible modes of organization. Those decisions constructing the limits of the conversation are so broadly accepted among the "chattering classes," particularly those whose chattering is sponsored, that the mechanisms by which the alternatives are ruled undiscussable are themselves considered unworthy of investigation.

These unarticulated assumptions are buried in the language, flying too low for our radar. The metaphors in which this Symposium's participants express themselves are those in which we have all been speaking in the last several years. Beneath the surface of this apparently analytical rhetoric, so glittering and self-confident, are the realities, burning away unaffected.

## III. A Few Straws in the Wind

So let us take a few of those metaphors and try to locate the ways in which the metaphors themselves constrain our imaginations, remove potential objectives, and obscure the perception of political contingencies. Then, perhaps, we will be able to frame questions that would broaden the incidence of scholarship.

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4. See Frank Viviano, Berlusconi Can Keep His Media Empire, Italian Voters Decide, S.F. Chron., June 12, 1995, at A8, available in LEXIS, News Library, Curnws File.

A. *The Superhighway*

> Railroads are the great public highways of the world, along which its gigantic currents of trade and travel continually pour. . . . They are the most marvelous invention of modern times. . . . There is scarcely a want, wish or aspiration of the human heart, which they do not in some measure help to gratify.[5]

Here we are on familiar cultural ground again; our Great Barbecue too has been constantly advertised in these terms. When did the phrase "the information superhighway" become ubiquitous for denoting the full range of the new digital communications technology? By 1995 its presence was being widely deplored by those whose sensitivities to cliche are well-developed,[6] but I don't believe I ever saw it criticized for its pervasive political content.

It is naturally superfluous to point out that American culture glorifies the road. Identifying one's product or proposal with the image of the open road is a sure bet among our most adept cultural promoters. But the vision of the "highway" has more than undifferentiated positive appeal. The highway is the domain of individualism, the medium of physical liberty, the antithesis of community. The highway is also, as Justice Byron Paine's paean to the railroad reminds us, primarily a pathway of commerce.

Did the widespread metaphor of the highway constrain our thought, dictating our questions about the Telecommunications Act? Suppose instead that, beginning in the early 1990s, we had all referred to the new telecommunications technology as "the Universal Education System." This would have captured a different range of meanings, neither more nor less correct as a characterization of the new technology. But the shift of metaphor would surely have affected the political climate. Suppose along with the Telecommunications Act Congress had considered in 1995 a bill to turn the public schools over to private profit-making organizations seeking advertising opportunities. Such a "reform" of the existing public educational system would have been highly controversial, I think, and if media companies and others with an interest in the outcome had been pouring money into the war chests of candidates, issues of social justice and democracy would probably have been raised. But the Telecommunications Act of 1996 concerned only "the Information Superhighway," not "the Universal Education System," so of course no one needed to consider such questions or attend to the larger political implications.

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5. Whiting v. Sheboygan & Fond du Lac R.R. Co., 25 Wis. 167, 219–20 (1870) (Paine, J., dissenting).

6. See, e.g., Martin Peretz, Cambridge Diarist: Al Pal, New Republic, Feb. 17, 1997, at 42, 42 ("What Gore first defined as the information superhighway is already a cliché, not because it is banal but because it is so powerful.").

No doubt there are interesting problems best identified by thinking of the new communications technology as analogous to other systems for transporting goods. Such an approach encourages concerns with efficiency and security of carriage, application of competition law, relations with the regulatory agencies, and interactions with general commercial law. That metaphor, in short, yields the questions asked by the participants in this Symposium. The metaphor of goods carriage also assists one in assuming that the things carried are the property of the shipper, objects in the process of sale. Such an implicit support for the continuance of traditional intellectual property law is an invaluable subsidy to those who profit by the nonreform of these antiquated doctrines.

But the metaphor obscures other questions that become identifiable when the technology is thought of as the system of universal education. Immediately, inquiry is led to issues of equality of access, locus of editorial control, development of the labor force, and the relevance of the technology to the actual conduct of electoral politics. The issue of equal access, for one, is raised in the preceding essays; I don't mean to suggest that metaphors so rigidly control our thinking that nothing can be perceived unless the ideological frame predisposes one to see it. But this is merely one of the forms in which the vocabulary and imagery of scholarship has worked to underemphasize the political redistribution in progress.

### B. *The Broadcaster-Consumer Model*

Most of the essays in this volume share a set of categories for dividing the convergent systems of interpersonal communication. The categories employed are a familiar component of the larger social discussion of telecommunications "reform." They have an implicit political content which the scholarship tends uncritically to accept.

The basic distinction, maintained in the preceding essays, is between "telephony" and "broadcast." Switched communications between peers are conceived as private, but everything else tends to be seen as the purview of broadcast. This dichotomy expresses an unarticulated intention to cast the information society in an industrial mold. We can all call Aunt Sally, but only a few of us are "broadcasters," industrial producers of signal, which all the rest of us merely consume.

This is a metaphor only. As a metaphor it captures some aspects of the reality it describes. But one of the most important properties of the new technology is that it eliminates the previously high cost of reaching a large audience. Any individual can, through the use of network media such as the World Wide Web, reach an audience far larger than the owner of several small television stations, and at no cost. The form of communication achieved is no doubt different, and it is obvious that the individual UseNet news post has not achieved parity with a television advertisement for an athletic shoe. But the metaphor of the broadcaster and the consumer conditions us to accept the maximum possible inequal-

ity as a natural necessity: a few talk and the rest merely listen. Spectrum need not be allocated around this conception; the historical justifications for doing so are among the forms of reasoning vitiated by the rise of complementary carriage technologies and the resulting death of "scarcity rationales."

Naturally, the broadcaster model is favored by those whose economic interests it favors. The broadcasters and the politicians each have something to offer the other, and both eschew thoughtways that would reduce the value of what they have to trade. That's how barbecue guest lists are made. But scholarship has a duty to transcend such self-serving limitations of discussion.

To be sure, broadcasters have been seen, much like railroads, as businesses "'affected with a public interest.'"[7] This view arose, as with the railroads themselves, only in small part because they have been built on public real estate. At bottom, I think we can all agree, they are so "affected" because they have become essential social facilities. As far as broadcasters are concerned, the public interest is that they are the primary news distribution system for all but a few. Broadcasters through most of the period since 1934[8] responded to this perception of a public interest affecting their business by occasionally trying to act like journalists. The presence of a money-losing news department dignified a television network. It was taken to constitute some sort of guarantee that the network understood its own importance, and intended to respond benevolently to those who were dependent on it. Privilege begat *noblesse oblige.*

Broadcasters waxed publicly proud of their role. The First Amendment seemed to them to mean that Congress shouldn't mess with the people's right to speak, or with their right to be the press. The people have some rights, and "the press" has others. Like the distinction between "telephony" and "broadcast," come to think of it. Metaphor structures conception.

And what of the alternatives? The technological changes we experience *could* tend towards the reduction or elision of the distinction between broadcasters and consumers. Like the "Universal Education System," an alternate metaphor of "Every Person Her Own Producer" would capture a different but no less true aspect of technological possibility.

If we are one generation away from a society where everyone can feasiblely contribute to informing the people and debating the issues without mediation, is this a good time to confirm and expand the award of free communications privileges conveying enormous unequal advan-

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7. Munn v. Illinois, 94 U.S. 113, 126 (1876) (citation omitted).

8. 1934 was the year in which the Communications Act passed, establishing the FCC. See Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–613 (1994)). The Telecommunications Act of 1996 is an amendment to the 1934 Act. See Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56 (to be codified at scattered sections of 47 U.S.C.).

tage to a few individuals and organizations? Is it relevant that those holding the privileges then sell to politicians the communications advantages awarded to them, as well as donate money to the campaigns and personal fortunes of the legislators? Trying to answer these questions will lead one straight to the barbecue. But the metaphor of the broadcaster, uncritically accepted, makes the questions seem less important to ask. After all, thus it has always been. Why should tomorrow be different? Besides, we all hope Rupert Murdoch will contribute to the Cyberlaw Center we would like to build at our law school. The rather oppressive embrace of the consumer by the broadcaster has truly carried us, haplessly, into "The Sponsored Life."[9]

C. *The Market for Eyeballs*

This graceful metaphor, seemingly a fugitive from the repertoire of bioethics hypotheticals, is frequently heard in scholarly conversation about the Telecommunications Act, though it appears more seldom on the page. The basic idea it expresses has become conventional. Deregulating the market for eyeballs, allowing components of the telecommunications industry access to one another's core businesses for the presentation of consumers to advertisers, is welcomed by other contributors to this Symposium, with or without reference to the illuminating metaphor.

Again there are political assumptions buried inarticulate in the metaphor, ones which scholarship should devote itself to recognizing and critiquing. There is, first, the amplification of the broadcaster-consumer model. The consumer, in this metaphor, is further reduced to a passive receptor, an eyeball, whose sole function is to take cognizance of advertising. But the passivity described in this metaphor does more than parallel the assumption underlying the division of the world into broadcasters and consumers. More generally, it supports a bias in favor of "push" over "pull." Once we have been characterized as eyeballs rather than active intelligences, after all, media designed to force images and information at us, rather than to respond to our requests, seem perfectly natural. The model of "consumer choice" (another metaphor that would repay recursive analysis) becomes the television remote control. Call it, to maintain the anatomical theme, "the market for eyeballs and forefingers."

Once unpacked, the idea of the market for eyeballs reminds us that the ultimate resource being tapped by the "liberalized" or deregulated communications enterprises is human attention. The environment in which most people live and work is dominated by communications artifacts, from the television that consumes hours of every average American day to the networked computer that constitutes the center of an increasing proportion of work lives. Those artifacts both engage our attention and coerce it. The rules that determine how content is allocated among

9. The phrase comes from the title of Leslie Savan's perceptive book, *The Sponsored Life: Ads, TV, and American Culture* (1994).

those carriers are to a remarkable extent constitutive of the fabric of our lives.

In this context, the "market for eyeballs" metaphor signifies and justifies rules that turn over this basic texture of our lives to the competitive hum of instructions to consume. Friendly software built into your Microsoft operating system will soon contain "push" technology to show you forty unsolicited advertisements an hour on the computer in your office,[10] while the commercial video feed in your child's school mingles "news" about the latest Disney movie to be discussed in English class with a juice advertisement your child's peers wrote in order to win the scholarship that makes it possible to go to a better school.[11] The cultural historians of the future will cast about in the printed detritus of our time for a sufficiently arresting image of how we rushed to use the new technology to smother the quiet uniqueness of our inner lives beneath the roar of advertising bilge. One or more particularly insightful writers will, I predict, seize on the quaintness of that expression of 1996, when the whole thing began: "the market for eyeballs." Says it all, don't you think?

## IV. Picking the Bones

What troubles and disappoints me, then, about the contributions to this collection is the thinness of the political and cultural description they offer of the fateful moment through which we have just passed. Their language of description—the jargon of lawyers' political economy—both implies and seems to enjoin political passivity. It relegates us to the role of "consumer," reifies the "broadcaster" as a social power in the future as well as the past, and celebrates as though unproblematic the dominance of commerce and entertainment over education and empowerment as uses of the new media. The language itself embodies the assumptions and exclusions the legislation furthered. The legislation, as I have suggested, was the outcome of political finagling on a scale of rapacity and flagrant corruption unseen in America for well over a century. And if the language of our scholarship reproduces the statute's cultural assumptions, is our scholarship so tainted as well?

It is hard, on the basis of the papers one reads here, to be optimistic. The authors have not asked how the Telecommunications Act could have strengthened the hard-pressed American educational system at the expense of the muck merchants. They have not asked how the intellectual passivity encouraged by our beloved broadcasters could be reversed by the design of new media, and how those new media—rather than presently existing commercial television—could have been fostered by a dif-

10. Wired, Mar. 1997, at 12.

11. See Melanie Wells, Marketers Go to School; Companies Test New Ground to Sell Products; Ad Pitches Target Teen Consumers, USA Today, May 9, 1996, at 1B; Snapple Beverage Corp., 'Make A Snapple® Commercial Contest' Offers $30,000 in First Time Ever Scholarships on Channel One, PR Newswire, Feb. 19, 1997, available in LEXIS, News Library, US File.

ferent legislative act. They have not critiqued the biased and partial metaphors of "the superhighway," "scarcity," "consumer choice," or the "market for eyeballs." They have not even asked, by and large, whether the Telecommunications Act made the relations between corporate wealth and electoral politics even more unhealthy than they were before. They have treated political economy as though it were not, even in part, about how culture secures the power of the few over the many.

But in 1996 our culture was corruptly given away, probably for at least one generation, to those who had the money to buy our politics. The buyers' resulting measure of control over the way we think will pay them swingeing and unjust dividends, which they will use to corrupt our politics further. The writers who have participated in this Symposium have had fine seats at this greatest of barbecues; they were there from the slaughtering to the final greasy slurp. Yet they have returned from the feast to tell us that they were unable to smell the smoke, or to see the carcasses of future opportunity that have vanished down the gullets of our new Robber Barons. Their bewilderment would probably amuse us, and cause some rumination on the quality of the whiskey and cigars, were it not so likely that the aftereffects of this barbecue would resemble those of the last:

> Suspicious commoners with better eyes than manners discovered the favoritism of the waiters and drew attention to the difference between their own meager helpings and the heaped-up plates of more favored guests. It appeared indeed that there was gross discrimination in the service . . . . Then at last came the reckoning. When the bill was sent in to the American people the farmers discovered that they had been put off with the giblets while the capitalists were consuming the turkey. They learned that they were no match at a barbecue for more voracious guests, and as they went home unsatisfied, a sullen anger burned in their hearts that was to express itself later in fierce agrarian revolts.[12]

Parrington's concern should be ours. The Second Great Barbecue will shape our culture for decades to come. If it breeds further social inequality, the bitterness and anger of the losers will be furious indeed.

12. Parrington, supra note 1, at 23–24.