The framework of U.S. media policy
A primer

U.S. Legal and Political System

U.S. Constitution
- Supreme Law of the Land, can only be amended in complicated process:
  - Amendments must be proposed by both Houses of Congress with 2/3 majority or by constitutional convention of the states
  - Amendments must be ratified by 3/4 of states.
- So far 26 amendments ("Bill of Rights", 1791)
- State constitutions supreme state law
- U.S.C. preempts state constitutions

Separation of powers
- Congress holds all legislative powers
- The President holds executive power
- Judiciary power is held by the courts

Separation of powers ...
- System of checks and balances rather than division of labor
Federalism

- In a federal system, the constituent political units (states) delegate some of their sovereignty to a higher level (the federal government).
- U.S. Constitution prescribes:
  - Interstate and international telecom issues are federal jurisdiction.
  - All others (intrastate) are state or local jurisdiction unless assigned to federal level.

International coordination

- Many telecom issues require international policy coordination (e.g., satellite orbits, spectrum allocation, standards).
- Intergovernmental process, often mediated through international agencies, such as the ITU:
  - Bilateral agreements between two nations.
  - Multilateral agreements between several nations (e.g., WTO agreement of 2/97).

Media policy framework

<table>
<thead>
<tr>
<th></th>
<th>Radio/TV</th>
<th>Wireless</th>
<th>Telephone</th>
<th>Cable</th>
<th>IS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jurisdiction</td>
<td>FCC</td>
<td>FCC, some state</td>
<td>Local or state franchise</td>
<td>FCC, states, local</td>
<td>No specific regulation</td>
</tr>
<tr>
<td>Market entry</td>
<td>FCC license</td>
<td>FCC license or unlicensed</td>
<td>Limited certification requirement</td>
<td>Franchise</td>
<td>Unregulated</td>
</tr>
<tr>
<td>Prices</td>
<td>Unregulated</td>
<td>Unregulated</td>
<td>Federal and state price regulation</td>
<td>Basic prices in some locations</td>
<td>Unregulated</td>
</tr>
<tr>
<td>Third party access</td>
<td>None</td>
<td>Interconnection</td>
<td>Unbundling, interconnection</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

Sources of U.S. law

- Constitutional law
  - Created when judges interpret the language of constitutions in decisions and opinions.
  - U.S. Constitution.
  - State constitutions.
  - Home rule charters (counties, cities).
- Statutory law
  - Created by legislative body and recorded in codes and law books.

Selected statutes

- Wireless Communications Act 1912
- Radio Act 1927
- Communications Act of 1934
- Satellite Policy Act 1962
- Copyright Act 1976
- Cable Communications Policy Act of 1984
- Cable Television Consumer Protection and Competition Act of 1992
- Telecommunications Act of 1996
- Digital Millennium Copyright Act 1998

Sources of U.S. law ...

- Common law
  - Emanates from individual decisions by judges in cases not covered by statutory law.
  - Based on legal precedent. A judge can:
    - Adhere to precedent (stare decisis).
    - Deviate from previous case (distinguish case).
    - Overrule or reverse a precedent if the present circumstances would render its application unfair or unworkable.
  - Example in telecoms: law of privacy.
Sources of U.S. law ...

- Administrative law
  - Rules, regulations, and policies created by administrative agencies such as FCC.
- Actions of equity
  - Common law holds that damages (money) can right a wrong and that no action should be undertaken until an injury occurred.
  - Actions of equity allow injunctions before harm is done.

Other forms of law ...

- Criminal law and civil law
  - **Criminal** law applies to offenses against society as a whole (“the people”).
  - Prosecution must prove guilt beyond a reasonable doubt.
  - **Civil** law applies to cases where one party claims another party injured him/her individually.
  - Case must be proven by preponderance of the evidence.

Other forms of law ...

- Torts and damages
  - A tort is a civil wrong that creates a right for the victim to sue the perpetrator
  - Examples include negligence, slander, or libel
  - Plaintiff has to demonstrate damages:
    - General damages (e.g., loss of prestige)
    - Special damages (e.g., out-of-pocket expenses)
    - Punitive damages (non-criminal punishment)
    - Statutory damages (e.g., in copyright cases)
    - Treble damages (e.g., antitrust, advertising fraud)

Main agencies in telecoms

- At the federal level, telecom policy is influenced by multitude of agencies:
  - Congress and its committees/subcommittees
  - Independent agencies (FCC, FTC)
  - Executive branch (White House, DOC, DOJ, DOS, DOD)
  - Courts (U.S. Supreme Court, District Courts)
- Diffusion of authority often leads to conflict, rivalry, and strategic action

U.S. Congress

- The power of Congress to regulate telecoms stems from the “Commerce Clause” of the U.S. Constitution.
- Within Congress, several Committees and Subcommittees draft policy.
- Its power is limited by the First and Tenth Amendments.
Congressional committees (exemplary)

U.S. Congress
- Energy & Commerce
- Telecommunications & Finance
- Judiciary
  - Courts, IP & Justice
  - Economic & Commercial Law
- Agriculture

OMB

Senate
- Commerce, Science & Transportation
- Communications
- Foreign Affairs
  - Terrorism, Narcotics & International Operations

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FCC mandate (http://www.fcc.gov)

- Established by the Com Act of 1934:
  "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color religion, national origin, or sex, a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act." (Title I, Section 1, Com Act 1934 as amended).

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FCC organization (http://www.fcc.gov/fccorgchart.html)

Federal Communications Commission
- M. Powell (Chair, R), K. J. Abernathy (R), M. J. Copps (D), K. J. Martin (R), Adelstein (D)
- Office of Technical Secretary
  - Office of Engineering & Technology
  - Office of General Counsel
  - Office of Managing Director
  - Office of Public Affairs
  - Office of Legislation & IG Affairs
  - Office of Inspector General
  - Office of Strategic Planning & Policy Analysis
  - Office of CBO
  - Several Others
- Wireline Competition Bureau
- Wireline Telecom Bureau
- Media Bureau
- Consumer & Government Affairs Bureau
- Enforcement Bureau

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FCC powers

- Regulation of market entry, e.g.
  - Licensing of radio, TV, and wireless services.
  - Certification of wireline common carriers.
  - Technical specifications of equipment.
- Operational supervision, e.g.
  - Programming requirements, ratings.
  - Prices and service conditions of telcos.
- Rulemaking and enforcement.

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FCC rulemaking

- Proposal for New Rules or Revisions
- Evaluation by FCC Bureau or Office
- Proposal for New Rules or Revisions
- Evaluation by FCC Bureau or Office
- Commission
- Notice of Inquiry (NOI)
- Report & Order (R&O)
- Memorandum Opinion & Order (M&O)
- Notice of Proposed Rulemaking (NPRM)
- Notice of Inquiry (NOI)
- Report & Order (R&O)
- Memorandum Opinion & Order (M&O)
- Public Comment
- Report & Order (R&O)
- Memorandum Opinion & Order (M&O)
- Commission
- Report & Order (R&O)
- Memorandum Opinion & Order (M&O)
- Public Comment
- Report & Order (R&O)
- Memorandum Opinion & Order (M&O)

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FCC rulemaking ...

- Proposals can originate from in and out of the commission.
  - MO&O issued if no changes are adopted.
  - RO&O adopts proposed rules, or changes the proposed rules and adopts, or makes no changes in the rules.
- FCC rules and regulations have the force of law and are s.t. court review.
- Orders & Notices published in F.R.

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FCC hearings
- Required in two circumstances:
  - During NOPR or NOI.
  - In cases requiring adjudication.
    - FCC denies a license application, renewal, transfer, or modification.
    - Revocation of license or issuance of cease-and-desist Order.
    - Two or more parties apply for same frequency.
  - Conducted by Administrative Law Judges.
- FCC “Rocket Docket.”

Powers of enforcement
- Letters are being sent by the FCC to ask for an explanation or to admonish.
- Consent Order is an agreement in which the consentee agrees to comply with specified laws, rules, and policies.
- Cease and Desist Orders command a licensee (holder of a certificate) to stop a specified action that violates license terms, communications law, FCC regulations, or a treaty.

Powers of enforcement ...
- Forfeitures are fines imposed by the FCC and can range from $10,000-100,000 per day up to $75,000-1,000,000 total.
- Court Action allows the FCC to prosecute violators of its rules through the Attorney General.
- Conditional or short-term license renewal.
- Denial of license renewal.
- Revocation of license of certificate.

Limits of FCC power
- No jurisdiction over radio services operated by U.S. government.
- Limited power over
  - TV networks.
  - Closed circuit TV and radio.
- Timing of programs, advertising, etc.
- Libel and slander issues.
- Antitrust enforcement (DOJ).

FCC funding and staffing
- Five commissioners:
  - Appointed by President upon confirmation by the Senate; Chair appointed by President.
  - Five year staggered terms.
  - No more than 3 from one political party.
- FCC funding
  - Budget FY 1999 $245 million.
  - 1/3 general tax funds, rest assessments.
  - Approximately 1,850 full time staff.

Other independent agencies
  - Primary jurisdiction over all matters regulating unfair or deceptive advertising in all media, including the broadcasting media.
  - Adopts policies for advertising directed at children, or claims made in commercials.
  - Enforces antitrust laws jointly with DOJ.
- Postal Rate Commission (PRC) and Board of Governors.
### Executive branch
- **President and White House.**
  - Power to assign frequencies for government use (Section 305 Com Act).
  - Power to establish priorities for the use of frequencies during wartime (Section 706 Com Act).
  - Influence through cabinet level offices.
- **State Department.**
  - Represents U.S. in international telecom policy negotiations and disputes.

### Department of Commerce (DOC)
- National Telecommunications and Information Administration (NTIA) serves as important policy advisor to President.
- National Institute of Standards and Technology (NIST).
- International Trade Administration (ITA).

### Department of Justice (DOJ)

### Department of Defense (DOD)

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### State powers & coordination
- **State powers:**
  - Powers not granted to the federal government are retained by the states.
  - "Police powers" provide broad authority to legislate for the protection of the "health, safety, morals, and general welfare of their citizens."
- **Coordination between states in various associations.**

### Public Utility Commissions
- **Established as “independent” agencies for intrastate telecoms.**
- **Evolved from other public tasks:**
  - Railroad Commissions (Texas).
  - Corporation Commissions (Arizona).
  - Public Service Commissions (Wisconsin).
- **National Association of Regulatory Utility Commissioners (NARUC).**
  - Committee on Communications.

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### Part III

**State and Local Governments**

### State legislatures
- Hold jurisdiction over intrastate telecommunications (except radio).
- Have regulated telecoms since 1900.
- Parallel policies to federal level until the 1970s.
- During late 1980s and early 1990s, several states passed sweeping deregulatory legislation.
Other agencies
- State and local cable television franchising authorities.
  - Conduct franchising process.
  - Regulate basic cable TV prices (if certified).
- Cities and municipalities.
  - Manage public rights of way (ROW).
  - Codes may influence the siting of network equipment, such as transmitter towers.
- Potential costs of fragmentation.

Part IV
The Courts

Role of the courts
- Settle disputes between litigants.
- Interpret statutes and policies.
- Power of judicial review.
  - Did government agency act procedurally correct and as required by law?
  - Did agency properly interpret its legal mandate?
  - Was the agency action reasonable?

Court system
- 52 court systems in the U.S.
  - Federal court system.
  - 50 states + D.C. court systems.
- Hierarchy of courts.

<table>
<thead>
<tr>
<th></th>
<th>State systems</th>
<th>Federal system</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme courts</td>
<td>State Supreme Courts</td>
<td>U.S. Supreme Court</td>
</tr>
<tr>
<td>Intermediate courts</td>
<td>Appeals Courts</td>
<td>11 Circuit Courts</td>
</tr>
<tr>
<td>Trial courts</td>
<td>Trial Courts</td>
<td>District Courts</td>
</tr>
</tbody>
</table>

Court system ...
- Trial courts.
  - Courts of original jurisdiction.
  - Collect facts of a case and issue first decision.
- Intermediate courts.
  - Serve as appellate courts for litigants who want to challenge a decision of a trial court.
  - Circuit Courts have generally 9 judges, 3 of which hear a case.
  - *En banc* hearing includes all judges.

Court system ...
- Supreme courts.
  - Courts of ultimate appeal.
  - Three ways to reach the U.S. Supreme Court:
    - Certification. A lower court refers a case upward to have a question of law answered.
    - Direct appeal by a litigant.
    - Writ of certiorari. Court accepts a case after petition by litigants losing in a lower court.
- International Court of Justice.
**Chain of appeals**

- Supreme Court of the United States
- D.C. Court of Appeals
- 11 U.S. Courts of Appeals
- U.S. District Courts with federal & local jurisdiction
- State Court systems

**Part V**

Other Domestic and International Players

**Other domestic participants** (exemplary)
- **Standardization bodies.**
  - American National Standards Institute (ANSI).
  - Institute of Electric and Electronic Engineers (IEEE).
- **Business associations.**
- **Consumer and citizen groups.**
  - Consumer Federation of America (CFA).
  - Black Citizens for a Fair Media (BCFM).
- **Research community.**

**International coordination**
- **Intergovernmental process.**
  - International meeting of national delegations drafts agreement ("protocol").
  - National legislatures have to affirm:
    - Adopt as drafted.
    - Adopt "with reservations" (i.e. adopt only partially).
    - Reject.
- **International agreements are generally enforced by national courts.**

**International agencies**
- **United Nations**
  - International Telecommunication Union (ITU).
  - United Nations Conference on Trade and Development (UNCTAD).
- **World Trade Organization (WTO).**
- **World Intellectual Property Organization (WIPO).**

**International agencies ...**
- **International standardization bodies.**
- **Regional economic organizations.**
  - EU (European Union).
  - ASEAN (Association of South-East Asian Nations).
  - NAFTA (North American Free Trade Agreement).
  - OECD (Organisation for Economic Co-operation and Development).
- **Financial institutions.**
  - The World Bank (IFC, IBRD, etc.).
**Part VI**

**Interaction & Policy Outcomes**

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**Formal influence channels**

<table>
<thead>
<tr>
<th>From</th>
<th>Congress</th>
<th>President</th>
<th>Courts</th>
<th>FCC</th>
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<tbody>
<tr>
<td>To</td>
<td></td>
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</tr>
<tr>
<td>Congress</td>
<td></td>
<td>Veto</td>
<td>Judicial review</td>
<td></td>
</tr>
<tr>
<td>President</td>
<td>Impeachment, overrule of veto</td>
<td>Judicial review</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Courts</td>
<td>Constitution, statutes, confirmation</td>
<td>Appointment of judges</td>
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<td></td>
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<tr>
<td>FCC</td>
<td>Statutes, budget, sunset, confirmation</td>
<td>Judicial review</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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**Informal influence channels**

<table>
<thead>
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<tr>
<td>To</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Congress</td>
<td>Individual contacts, policy initiatives</td>
<td>Judicial review</td>
<td>Briefings, reports</td>
<td></td>
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<tr>
<td>President</td>
<td>Moral persuasion</td>
<td>Individual contacts</td>
<td>Judicial review</td>
<td>Briefings, reports</td>
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<tr>
<td>Courts</td>
<td>Moral persuasion</td>
<td>Individual contacts</td>
<td>Briefings, reports</td>
<td></td>
</tr>
<tr>
<td>FCC</td>
<td>Investigation, letters</td>
<td>Individual contacts, policy initiatives</td>
<td>Judicial review</td>
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</tr>
</tbody>
</table>

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**Outcomes of policy**

- Constitutional amendments
- New or amended statutes
- Rules and regulations
- International agreements
- Decisions, opinions, settlements
- Voluntary agreements
- Programs, action plans, visions
- New institutions and organizations

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**Part VII**

**Synthesis**

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**“Media policy”**

- Set of governmental and collective policy measures specifically established for the media industries.
- Media industries also impacted by more generic policies like antitrust or trade policy.
Contextual factors

Should ...  
Can ...  
How (should) ...  
... the government establish media policy?

Media policy measures
- Licensing
- Indecency
- Price regulation
- Universal service
- Copyright

Players and organizations

- Participants in the telecom policy process ("players", "actors"):  
  - State, federal, international government(s)  
  - Regulated and unregulated industries  
  - "Public interest" and advocacy groups  
- Organizations involved in telecom policy making include:  
  - Government organizations (e.g., FCC)  
  - Non-government organizations (e.g., ICANN)  
  - Private organizations (e.g., PCIA)

Rules and meta-rules

- Media policy defines rules for the players in the industry  
  - Statutes, rules & regulations are formal rules  
  - Programs, policy statements or initiatives define more informal "rules"  
- Meta-rules are the rules that govern changes in the rules  
  - U.S. Constitution defines how to change laws  
  - Statutes enabling regulatory agencies

Positive/normative analysis

- Normative analysis prescribes what should be done and what instruments should be used  
  - Established (scientific) knowledge  
  - Values and beliefs  
  - Visions of the future  
  - Values and visions often legitimated with "knowledge"  
- Positive analysis explains policy actions as they took place, refraining from any normative judgment

Policy as a “strategic game”

- Players attempt to play the game within the existing rules and/or change the rules.  
- In most cases, several policy options exist (e.g., market-driven access to the Internet or government funding).  
- Policy-makers attempt to select the “best” course of action among the known alternatives.

Summary

- Media policy is a choice of action from among alternatives subject to specific circumstances and resource and information constraints  
- Media policy is a dynamic process between players in a specific legal and institutional setting  
- Media policy has its own costs and risks
Further readings


Further readings ...