

**A CRITICAL PERSPECTIVE ON A
TELECOMMUNICATIONS BILL OF RIGHTS**

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EXECUTIVE SUMMARY

State regulatory commissions have frequently used a “bill of rights” as a way of informing consumers about service they should expect from utilities, including telephone companies. Such a list might include “the right to a telephone directory” or “the right to a timely and accurate bill.” With the birth of local competition in telecommunications, several commissioners and consumer advocates realized that the idea of rights is a powerful tool for identifying and filling gaps in protections traditionally provided through ratebase, rate-of-return regulation. Their proposals for a “telecommunications bill of rights” typically include claims for individuals as both consumers and citizens.

As a consumer education tool, the idea of a bill of rights is straightforward. It packages similar claims in a way that is easily accessible. When one begins to look more broadly at rights and attempt to justify policy on the basis of rights, however, you are quickly on treacherous ground. The concept of “rights” is complex and emotionally charged. Rights represent allocations of power. They have costs as well as benefits. Anything that smacks of creation of new rights is almost guaranteed to meet resistance.

This research report elucidates the concept of rights in order to add to the understanding of state regulatory commissioners, their staff and other policy makers whether they support or oppose the idea of a telecommunications bill of rights. I briefly examine the origin of the notion of basic or natural rights and the more expansive one of human rights that are expected to evolve over time.

All rights may be considered claims, but not all claims rise to the level of rights. Claims, or allegations that something is due a person, may be viewed as a continuum from the least to most grounded in moral teaching, accepted by a community and inviolate. A right is created out of both beliefs about goodness (a normative dimension) and actual determinations of justice (a positivist dimension). It is a solid moral claim that requires fulfillment, and *is* indeed fulfilled through a well established process. It is honored by the

community and upheld in courts when the facts fit the claim of a right. It includes basic or natural rights but may not include “human rights,” since they are not necessarily enforceable. Rights may and often do conflict at a practical level, and it is among the weightiest jobs of the judiciary and other branches of government to find acceptable demarcations that support rights and limit their abridgments.

Some claims may be considered “entitlements,” or assertions of what *should* be a person’s due based on moral principles and a very high probability of realization through a well established process. Although honored by the community in the abstract, fulfillment is not guaranteed. A third form of claim may be labeled “expectations,” or principled claims the realization of which is somewhat chancier than entitlements.

“Demands” for the purposes of this paper will be defined as lowest on the scale of claims. Demands are assertions of what is due to an individual or group based on appeals to moral imperatives. They are more hopes, wants, and desires than well-founded expectations, and are limited in their support from the wider community, although put forward with urgency by interested parties who may label their demands as rights.

Based on the fundamental norms of individual liberty (including both citizen and consumer sovereignty) and community inclusion, plus the idea of progress, the research report tests claims in telecommunications policy against normative and positivist grounds (see Table 1). The discussion is meant to provoke serious thought on a bundle of claims that might be promoted as a bill of rights, not to be definitive. The report examines the ideas of citizen and consumer sovereignty, privacy and personal safety and finds they all have normative pedigrees and are actualized under a broad range of situations. The claims for universal service and progress, however, are found to need a deeper examinations of the relationship of normative assertions and positivist calls for proof, or the relationship of ideals and their implementation. The report also finds that the claims proposed by various commissions, while often phrased in mundane terms, are practical but not trivial. Many of the items in a telecommunications bill of rights are the humble tools for fulfilling vital rights or entitlements.

A “bill of rights” that is more than a consumer education tool can move beyond the symbolic only through a political process that involves all interests. A genuine right represents a compact that includes business and shareholder interests as well as individuals in their capacity as consumers and citizens. A commissioner or commission that wishes to articulate enforceable rights through a rulemaking process or to encourage state legislators to take up the idea in their deliberations will probably have to devote considerable resources to building consensus.

Whether or not a commission wishes to pursue establishment of a bill of rights in a legal venue, the concept provides one perspective on the evolution of regulatory regimes beyond ratebase, rate-of-return regulation. We are in a period of dynamic change in the relationship of the institutional arrangements for production and delivery of telecommunications services to individuals as consumers and citizens. The pendulum is shifting away from a high degree of government control that worked well throughout the 20th century but would be over-regulation in the new era. Yet we continue to seek a good society and individual autonomy. The research report recounts and recombines the rights, entitlements and expectations that apply to communications over a distance. Revising the social contract between producers and consuming citizens during the transition to competition calls for consideration of the appropriate tools of government oversight through a similar process of recombination and probably invention. A “claims and rights” perspective may help impose clear boundaries on the existing reach of commissions and other agencies, point to gaps in oversight, and help to identify new means of assuring old rights, whether through commissions, administrative agencies or other agents.

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All errors, inconsistencies, and opinions are of course my responsibility.

Introduction

Concerned about gaps in areas traditionally overseen through ratebase, rate-of-return regulation, state regulators have broached the idea of a telecommunications bill of rights enumerating the facets of service they believe consumers must have going forward into a competitive era. Lists of rights for telecommunications consumers were developed before the advent of competition. Typically they focused on such matters as requirements for establishing credit, the timeliness and accuracy of bills, and the selection of a long distance carrier. The idea of addressing proactively the challenges of multiple telecommunications providers and services through a bill of rights at the state level appears to have first been articulated in Indiana in 1995 in a “Consumer Bill of Rights in the Information Age.” The Indiana proposal broadly affirms claims such as a guarantee of universal service, a choice of vendors, and personal privacy.

Similar proposals have been put forward in several other states. Staff of the Vermont Public Service Board proposed a well-reasoned bill of rights in a recent proceeding. Commissioner Susan Wefald of the Public Service Commission championed legislation before the North Dakota legislature that would codify consumer rights in state law.¹ Commissioner Bob Rowe, Chair of the Telecommunications Committee, proposed a bill of rights in an article in the *NRRI Quarterly Bulletin*.² Commissioner Rowe’s discussion is notable for inclusion of rights that may accrue to individuals both as consumers and citizens, the approach I will also pursue in this paper. At an even broader level, proponents have put forward bills of rights encompassing all information technologies, subsuming telecommunications.³

¹ Susan E. Wefald, “Proposed Ideas for Legislation,” December 1998, (unpublished).

² See Appendix of “Examples of ‘Bills of Rights’” for bills used or proposed in South Carolina, Indiana, Vermont, North Dakota, and by Commissioner Rowe.

³ Charles M. Firestone and Jorge Reina Schement, editors, *Toward an Information Bill of Rights and Responsibilities* (Washington, DC: The Aspen Institute, 1995); and Bryan Glastonbury and Walter

“Rights” is one of the strongest words in the political lexicon. Do we really mean “rights” when we use this word? Clearly insofar as aspects of telecommunications are rights, they are instruments of more fundamental ones. The maxim that springs to mind is, “For want of a nail the shoe was lost; for want of a shoe the rider was lost; for want of a horse the rider was lost.”⁴ And for want of riders, the battle and the war may be lost. What would we expect a bill of rights to accomplish? What would constitute a reasonably complete and logically structured bill of rights? The idea of a telecommunications bill of rights is controversial. Under what circumstances and to what extent should one be implemented? I discuss those questions in this paper in order to aid state regulatory commissions who might want to use a bill of rights as a tool for managing the transition to competition in telecommunications.

Based on the fundamental norms of individual liberty (including both citizen and consumer sovereignty) and community inclusion, plus the idea of progress, the research report tests claims in telecommunications policy against normative and positivist grounds (see Table 1). The discussion is meant to provoke serious thought on a bundle of claims that might be promoted as a bill of rights, not to be definitive.

The most common use of a bill of rights is as a method for consumer education, providing succinct information on what can be legitimately expected from telecommunications service under competition. A bill of rights may be called for now that the old process of effectuating expectations from telephone service is eroding. FCC Chairman William Kennard, March 31, 1999, announced a campaign for a bill of rights for cable consumers to make them aware of their options in a deregulated marketplace.⁵ In the 1996 Telecommunications Act, Congress provided for an end to FCC regulation of cable rates April 1. With the date for deregulation looming, Kennard noted that although

LaMendola, *The Integrity of Intelligence: A Bill of Rights for the Information Age* (New York, St. Martin's Press, 1992).

⁴ Benjamin Franklin, *Maxims Prefixed to Poor Richard's Almanac*, 1757; George Herbert, *Jacula Prudentum*.

⁵ See Appendix for “Cable Consumer Bill of Rights Campaign.”

Congress expected there to be competition in the video programming marketplace within three years, this had not occurred.

Commissions no longer can enforce all their expectations for consumers through rate cases in most states, even for incumbent local exchange carriers (ILECs), which are mostly subject to price cap regulation. With the advent of new entrants, it is valuable to restate the claims of consumers and citizens that apply whether a service comes from an incumbent or an entrant.

In a larger sense, the concept of a bill of rights may serve as a framework to aid in designing new regulatory regimes. A majority of states have decided traditional ratebase, rate-of-return regulation is no longer appropriate for the incumbent providers of essential telecommunications services. Price caps and other alternative forms of regulation are being used instead. For new entrants and in the long run for all telecommunications providers, other options are being touted, including regulation along the lines of existing consumer protection law for competitive industries, and antitrust protections.⁶

Traditional regulatory mechanisms were a tool for assuring rights, and the rights themselves have not changed with lessened government oversight or different regulatory forms, although perhaps the priorities and methods to achieve them have. One way to evaluate alternative forms of oversight is by their ability to effectuate rights, a vantage point relatively unclouded by the presence of established institutional arrangements.

Consumers and citizens expect as a matter of course to be treated in ways consistent with their rights. They also have commensurate obligations, such as honest dealings and on-time payment of bills. I will not deal with the interplay of individual and corporate rights in this paper. Nor will I discuss how variations in market structure might substantially affect the extent and type of government intervention to support rights. The “hows” of effectuation of rights, including the essential question of enforcement, will be touched on but largely left to further research. Further NRRI work on regulatory regimes to

⁶ See for example “Procedural and Structural Implications of Protecting Consumer Sovereignty: A Unified Mission of Antitrust and Consumer Protection,” by Robert E. Burns, chapter 4 of Wirick et al., *Organization Transformation*, pp. 47-56.

succeed ratebase, rate-of-return regulation may tackle some of these issues, comparing such tools as price caps, antitrust, and consumer protection for their efficacy under differing configurations of market structure, technological convergence, and consumer demand.

Rights and Other Claims

The definition and effectuation of individual rights is an essential characteristic of a political system. The absence of individual rights marks authoritarian polities; the degree to which such rights are articulated and supported by law is a central feature of democracies.⁷ Modern democracies originate in a quest for a state built on representation of rights rather than exaction of obligations. The idea of “natural rights” (or basic rights) which have validity above and beyond ordinary law and which the state must safeguard originated in the 17th and 18th centuries. The French Declaration of the Rights of Man and our own U.S. Declaration of Independence and first ten articles of the Constitution were drawn up. Life and liberty are two of the most essential rights, as listed by John Locke. Property, identified by Locke as the third in a key triumvirate of natural rights, became the more general “pursuit of happiness” in the Declaration of Independence. The Declaration of Independence leaves open the possibility of further rights by saying the three stated rights are “among” others. The key presumption underlying effectuation of individual rights is a citizen’s freedom from interference by the state. If such intervention occurs it must be with special justification and with the advice and consent of the governed.

In recent times, the rights once asserted and enumerated by liberal individualists like Locke and Jefferson that were based on freedom from interference have been

⁷ See Stanley I. Benn, “Rights,” *Encyclopedia of Philosophy* 7 (New York: McMillan, 1967), 195-199; and Deborah A. Stone, *Policy Paradox and Political Reason* (Glenview, IL: Scott Foresman, 1988), 265-288.

amplified with assertions of positive benefits.⁸ The idea of “human rights” goes beyond natural rights and represents conceptions of human excellence. The United Nations “Universal Declaration of Human Rights” includes not only natural rights like freedom from slavery but claims that are less universally in effect, like the right to social security or desirable work, or participation in the cultural life of a community.⁹ The Clinton Administration’s proposed health care bill of rights may be another example.¹⁰ More germane to this paper is a “Bill of Rights for the Information Age.”¹¹ Supporters of human rights tend to link them to evolving conceptions of morality and justice, with morality considered a developing idea; the door is left open for an individual to have a right that is not generally recognized. The “new” right can only be realized if it is “a necessary condition for the attainment of some end generally acknowledged as good, to which, therefore the community was in a sense already committed.”¹²

This conception of moral evolution that includes recognition of new rights is of course problematic. Something can be universally recognized as “good,” in the sense of desirable, without necessarily being a right, if the community’s commitment is ambiguous or weak in strength and scope. Not everything every individual or group thinks it should have is a right. For example, while all American children might have a right to a public education, they do not have a right to an Internet connection from the classroom. There are those who might make that claim, but there is no national consensus that Internet access is a right.

The tension between moral roots and effectiveness is expressed in two broad traditions in the philosophy of rights. The normative tradition builds the concept of rights

⁸ Benn, 198.

⁹ See Appendix for U. N. “Declaration of Human Rights.”

¹⁰ See Appendix for “Health Care Bill of Rights.”

¹¹ See Appendix for “A Bill of Rights for the Information Age.”

¹² Benn, “Rights.”

from the authority of ethics and religion; the positivist tradition, from the authority of the state. A proponent of a normative approach to defining rights will say that someone may have a right that is never exercised or even that the law of the land would not back up. A positivist says, “show me.”¹³

To navigate the difficult shoals of normative and positivist traditions, let us assume for the purpose of this paper that all rights may be called “claims,” especially by those who are skeptical of the whole idea of a right, but not all claims rise to the level of rights. Let us view claims, or allegations that something is due a person, as a continuum from least to most grounded in moral teaching, accepted by a broad community, and inviolate. A right is created out of both goodness and justice: it is a solid moral claim that requires fulfillment, and *is* indeed fulfilled through a well established process. It is honored by the community and upheld in courts when the facts fit the claim of a right. It includes basic or natural rights but may not include “human rights,” since they are not necessarily enforceable. Rights may and often do conflict at a practical level, and it is among the weightiest jobs of the judiciary and other branches of government to find acceptable demarcations that support rights and limit their abridgments.

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¹³ See the chapter on “Rights” in Stone, *Policy Paradox and Political Reason*, pp. 265-288, especially pp. 266-7.

Most but not all of the examples of bills of rights given in the Appendix have the term rights in the body as well as the title. The items in Commissioner Rowe's proposal and the Indiana proposal, however, rely on the word "should," suggesting entitlements or expectations rather than absolute rights. Such variations need to be explored in depth before the rights status of claims can be ascertained.

Bills and Taxonomies

To a large extent, articulating the claims for telecommunications consumers is simply a process of identifying and packaging existing ones. People and groups making demands like to make them into lists, preferably of ten items. Partly this is the influence of the Constitution, but it also seems to be something of a 1990s contagion. A recent search for titles including the phrase "bill of rights" turned up books currently in print propounding bills of rights for victims of crime, Catholics, high school students, children, taxpayers and senior citizens.¹⁴ An "Air Traveler's Bill of Rights" was recently proposed by the American Society of Travel Agents.¹⁵ Taxi cab riders in New York City find themselves facing a printed bill of rights which includes the "right" to a courteous, English-speaking driver, which is probably closer to an expectation.

Bundling claims as a "bill of rights" makes the whole seem more impressive than the individual parts, particularly since it feeds on the symbolic value of the original Bill of Rights. From an analytical perspective, before we can wrap up a bundle of claims, we are more interested in how to take them apart in a systematic way than how to put them together. Rules of statutory construction and the social scientist's desire to have an appropriate taxonomy call for deconstruction and rebuilding. We also need to pin down a

¹⁴ Amazon.com, accessed August 31, 1998.

¹⁵ "Congress' Radar Picks Up Soaring Airline Complaints," *Columbus Dispatch*, February 7, 1999, 3A.

suitable level of analysis. Some bills of rights are abstract and vague, while others are concrete and precise.

Classification

The dictionary says a “bill” is a written document, most often one that gives a list of particulars, like the itemized list of charges on the telephone bill.¹⁶ Sometimes it represents an offering, as in a restaurant’s bill of fare. The bills we are interested in here are those associated with legal status. For weaker claims (expectations and demands) such status may merely be sought, suggested, or proposed, such as bills introduced into legislatures, rather than endowed with the force of law.

In none of its denotated meanings does a bill have to embody a classification system. But the concept of a bill connotes a structure beyond a “laundry list,” or hodgepodge of semi-related items in no particular order without a clear beginning or end. A telephone bill, for example, is underlain by an accounting classification that includes local calls, toll calls, and other categories. As a step towards a more fully articulated telecommunications set of claims for telecommunications customers and citizens, we need to ask the nature of the classification of items within a bill or list and how the classification is applied.

Items in a bill may themselves be taken as categories, and for a bill that has legal effect, the items assigned to the category are cases brought into court and contributing to the development of case law. We may also look at the elements of a bill as items to be themselves assigned to a higher order classification. The various statements that compose bills of rights proposed or adopted at the state level are such items. At either level the partition, ordering and systematization necessary to constructing a typology are subject to afflictions that beset any such effort.

¹⁶ *New Webster’s Dictionary of the English Language*. A bill in the sense of a “poster” might not contain such a list.

Bill categories may be considered “heuristic-prescriptive” in that general or ideal requirements or prohibitions are proposed or enacted. Bills and laws seek to anticipate problems of assignment of cases by constructing insofar as possible monothetic categories. Although these categories may appear at the outset to be mutually exclusive and exhaustive, they in fact allow considerable flexibility. The ten articles in the Bill of Rights, which comprise some 20 different provisions, appear to permit a monothetic assignment of cases. But a real world situation may appeal to several different or other claims, and attorneys will often argue a case based on the most winnable statute or Constitutional provision, not necessarily the most applicable, thus sometimes overturning original conceptions of mutually exclusive categories.

The best constructed categories may have to be changed over time, and that is certainly true for statutory categories, including rights. For example, it appears that the framers of *the* Bill of Rights intended their list to be incomplete.¹⁷ The list of categories is increased as new are identified.¹⁸ A right might be identified in the penumbra of existing ones, such as the Constitutional right to privacy, which is not mentioned directly in that document. It may arise in the evolving conception of human rights, such as women’s right to vote. A claim might never ripen into a right, as with the proposed “equal rights amendment” to the Constitution. It is conceivable that a right could lapse, or at least that its meaning would change so much that it would be transformed into something quite different than the original. Lists of rights are, therefore, not exhaustive to begin with and certainly not over time.

When considering items for inclusion in a list of rights and other claims, we would like to see, insofar as possible, a neatly sorted, complete classification. Such a typology is heuristic, since it uses ideal types to make distinctions. One simple, heuristic

¹⁷ Michael J. Lacey and Knud Kaakonssen, editors, *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991* (Cambridge, UK: Press Syndicate of the University of Cambridge, Woodrow Wilson International Center for Scholars, 1991), p. 15.

¹⁸ Or prohibitions, or, of course, prohibition of prohibition, or, one of our favorite phrases in telecommunications regulation, “not inconsistent with.”

classification of claims could distinguish among individual liberty, inclusion in a community at any one time, and progress, or dynamic change in realization of claims for liberty and community. This notion corresponds to “I” and the “We” of Amitai Etzioni’s communitarian philosophy.¹⁹ Of course, even this seemingly forthright classification is somewhat arbitrary, since one can argue that, particularly in a democracy, the rights of an individual take priority and when added up coincide with the interests of the whole nation-state. The distinction has been widely used, however, and is useful for sorting principled claims and rights, entitlements, expectations and demands in telecommunications policy.

The “I&We” paradigm is at the core of Amitai Etzioni’s communitarian vision, which incorporates economic behavior into a social (and moral) context: “The individual and the community make each other and require each other.”²⁰ Etzioni proposes that individual decisions are codetermined by both pleasure and morals. Self-oriented, rational behavior occurs in the context of personality structure and society.²¹ Some sovereignty is surrendered for the sake of shared identity and commitment to internalized values. Communitarian thinking raises red flags for assurance of individual rights. Etzioni says communitarianism does not propose to limit individual rights, although he has suggested that minting of new ones be curtailed. He asserts that it is not a “rich list of legal rights” which endangers communities but a failure of the community to assure that citizens shoulder corresponding responsibilities.²² Individualism and commitment to the community as a whole are key parts of the American experience as reflected in its central documents, he says, although perhaps the balance between the two has swung too much in recent years to a focus on the individual.

¹⁹ Amitai Etzioni, *the Moral Dimension: Toward a New Economics* (New York: Free Press, 1988), 9.

²⁰ Ibid.

²¹ Ibid., 3.

²² Amitai Etzioni, *The New Golden Rule* (New York: Basic Books, 1996), 43.

Level of Analysis

Desirable aspects of telecommunications service can be expressed broadly or in great detail. For example, the Vermont staff identifies “the right to fair treatment by all providers,” a claim instrumental to consumer sovereignty. The South Carolina bill of rights includes “the right to be given written notice at least five days before the telephone service can be disconnected for your failure to pay your telephone bill,” also an instrument of consumer sovereignty but at a practical level. To evaluate the rights basis of claims, our focus is the cavalry rather than the nail, or the Vermont statement rather than the South Carolina one. Nor are we focused on the battle or war, although development of policies to allow competition to emerge has been called “telewars.”²³ Telecommunications service is one of many avenues for achieving basic rights, rather than one that stands on its own.

Normative and Positivist Tests of Claims

If one believes that a right represents a societal commitment to some good end for its individual members, arguments in favor of attributing rights status to entitlements, expectations, or demands may proceed through analysis of whether and to what extent the good end is based on a solid foundation of existing, overarching rights. If, on the other hand, one takes a logical positivist’s view, rights do not exist unless they can be observed in action. A positivist (or scientific) argument supporting the existence of a right must point to a written statement, such as a law or a public service commission order; a process by which the right is applied; the means to enforce it; and “case law,” broadly construed as the affirmation and conditions imposed in particular instances of assertion of the claim. To evaluate the various notions that may be advanced as rights for telecommunications customers it is appropriate to pursue both lines of argument. This of course tends to put us

²³ Thomas W. Bonnett, *Telewars in the States* (Washington, D.C.: Council of Governors’ Policy Advisors, 1996).

in the positivist camp but does allow for development of morally based claims into full rights over time.

To assess the degree to which a claim may be called a right several questions must be addressed:

- How direct and unambiguous is the connection to fundamental norms?
- Is a broad community already committed to realizing the claim as evidenced by: (1) legitimizing documentation and (2) articulation and enforcement through government agents and processes?

Table 1 offers an initial summary of the normative pedigree and practical effectuation of various claims that have been proposed in telecommunications bills of rights. We would like to systematically identify the *bona fides* for rights that might be asserted, explore their ancestry and thus elucidate the basis for claims that a bill of rights should be effectuated. This will answer the question of how direct and clear the connection is to fundamental norms. We would also like to examine existing implementation of claims, as evidenced by laws, orders, rules and enforcement measures. This will shed light on the extent and depth of community commitment. Only then can we assess the degree to which a claim rises to the status of a right.

In Table 1 the far left-hand column provides the initial heuristic classification of the claims of individuals, community inclusion, and progress over time. Normative criteria derivable from the heuristic classification for individual liberty include accountability to people as citizens through the political system, traditional liberties of privacy and safety, and the newer category of consumer sovereignty. Community inclusion refers most broadly to the commitment to be a nation-state. One of the underpinnings of nationhood is a communications system. Finally, the idea of change for the better over time is included as a driving American ideal.

The middle column of Table 1 shows some expressions of normative criteria in recently proposed telecommunications bills of rights. The examples are drawn from the

sources in the Appendix and expressed at a middle level of analysis (the cavalry rather than the nail). The last two columns summarize the positivist evidence for the strength of a claim, with references to legitimizing documents and identification of the agents or processes that effectuate the claims.

**TABLE 1
NORMATIVE AND POSITIVIST GROUNDS FOR TELECOMMUNICATIONS CLAIMS**

Normative Grounds		Claims in Telecommunications Policy	Positivist Grounds	
Fundamental norm	Normative Criterion		Legitimizing Document	Agent/Process
Individual Liberty	Citizen sovereignty	<ul style="list-style-type: none"> • Participation in telecommunications policy formulation and implementation 	Constitution Federal and state laws	Congress and state legislatures; administrative agencies responsive to elected officials
	Consumer sovereignty	<ul style="list-style-type: none"> • Assurance of honest, fair treatment by all providers • Just and reasonable prices • Quality commensurate with price • Access to information on products and services • Impartial redress of wrongs • Choice 	Consumer protection statutes Antitrust statutes	Federal Trade Commission (FTC) at federal level. State Attorneys General, regulatory commissions, and consumer groups at state level. Justice Department
	Privacy	<ul style="list-style-type: none"> • “Leave me alone” privacy. • “None of your business” privacy 	Fourth Amendment <i>Griswold v. Conn.</i>	Federal and state law enforcement agencies

TABLE 1 (Cont.) NORMATIVE AND POSITIVIST GROUNDS FOR TELECOMMUNICATIONS CLAIMS				
Normative Grounds		Claims in Telecommunications Policy	Positivist Grounds	
Fundamental norm	Normative Criterion		Legitimizing Document	Agent/Process
	Personal safety	<ul style="list-style-type: none"> • Access to emergency assistance • Access to legal assistance 	Constitution; Telecommunications Act (Section 254); <i>Miranda v. Arizona</i>	FCC State commissions
Community inclusion	Universal service	<ul style="list-style-type: none"> • Affordable essential service • Access to essential service • Available essential service • Reliable essential service 	Telecommunications Act (Sections 254 and 706)	FCC State commissions
Progress	Continual Pareto improvement Enhanced community	<ul style="list-style-type: none"> • Improving services • Expanded/enhanced universal service • Prices comparable to today's price or less • Increasing choice • Maintenance of privacy • U.S. a major player in global communications 	Telecommunications Act (Sections 254, 706 and others)	FCC Justice Department State commissions

Source: Author's construct.

Table 1 lays out the groundwork to answer the questions we have posed to assess the rights status of claims. It suggests that there is a direct connection between telecommunications claims and fundamental norms. It suggests that the claims are observable in legitimizing documentation and are assigned to government agents and processes. The next job is to elucidate the degree of clarity and connectedness of expressed claims in telecommunications policy (the middle column in Table 1) to normative principles, the extent and breadth of community acceptance of the claims, and the overall success of implementation processes.

Individual Liberty

Many of the claims included in lists of rights of telecommunications consumers derive from the individual liberties that constitute the essential nature of democratic government. Government by the people and protection of the individual from government interference without due process formed the foundation of democracy in the United States and elsewhere. In the twentieth century protection from corporate power as well as government power has been added to individual liberties.

Citizen Sovereignty

The normative criterion of citizen sovereignty is strongly related to the first of the expressed claims in telecommunications policy identified in Table 1 — participation in telecommunications policy formulation and implementation. The Indiana bill of rights and Bob Rowe’s proposal include, respectively, the claims that “consumers should be adequately represented in public policy decision-making on the information age” and that “citizens should be able to participate in policy decisions that affect them.” The institutions put in place through the Constitution are intentionally derived from the cause and effect connections the Founding Fathers and their descendants identified between individual liberty and government accountability and between accountability and the design of the machinery of government. Telecommunications policy formulation and implementation is

one of the many policy sectors subject to popular control by the national community. The conditions for rights status for the claim of participation in policymaking and execution of strong connection to norms, high community acceptance and commitment, and documentation are all unequivocally present.

Whether in fact the right to participate is translated into government accountability and the furtherance of individual liberty is another question. Accountability to the public on telecommunications policy is, however, subject to the same criticisms as for democracy in action as in other policy arenas. In general, Americans do not participate as much in their government as suggested by democracy's ideal and, again in general, a power elite or set of power elites has considerable ability to effectuate policy that may or may not be what "the public" would have wanted if they thought about it. Although participation is sometimes high, this evidence of a normative commitment waxes and wanes and is unevenly distributed. The public at large was for the most part inattentive and uninterested in the debate that preceded passage of the Telecommunications Act of 1996. Citizens not only have a right to participate; there is a commensurate responsibility. Unexercised, the right to participate does not support citizen sovereignty and personal freedom.

On the implementation end of the policy process, administrative agencies are expected to be responsive to and accountable to changing demands for government action, but bureaucratic power (by definition incompletely responsive to elected officials) sometimes limits achievement of accountability and responsiveness.²⁴ At other times, the ambiguity of directives and the sheer complexity of implementation can make it difficult to follow through on what is clearly in the abstract the public's right to accountability. This is the quagmire the states, the FCC and the Justice Department have entered into with passage of the Telecommunications Act. As stated by the Supreme Court in the recent decision on authority over interconnection pricing rules: "It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It

²⁴ See Kenneth J. Meier, *Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government* (Monterey, CA: Brooks/Cole, 1987).

is in many important respects a model of ambiguity or indeed even self-contradiction.”²⁵ The agencies charged with effectuating the Act’s provisions have been faced with making a piece of legislation full of contradictions workable at a highly detailed level, a job taken on with deep concern for responsiveness to the public but incomplete guidance and little assurance that the policies enunciated in the Act will work.

Since the right to participate (even if the right is not fully exercised or is inhibited in its effectiveness) is as close to what ordinary Americans would agree is really a right as we will probably come in this essay, this analysis probably shows that any claim subjected to a positivist test will be found wanting when you move beyond abstractions. Looking at the norm of participation (and thus public accountability) as a dynamic process, however, mitigates some of the concerns over effectuation of this claim. Participation in formulating policy and modifying, terminating or continuing programs that meet public needs is an ongoing, incremental bargaining process, in telecommunications policy as in other policy areas. In telecommunications, policy is as much the outcome of history as of technology and institutions.

The recent attempt of SBC, in arguments formulated and presented by Constitutional scholar Laurence Tribe, to argue that conditions on Bell operating company entry into in-region long distance were an unconstitutional bill of attainder failed at least in part because it simply did not take into account the history of telecommunications policy. Even before the Communications Act of 1934 and in the era of primarily state regulation, regulation of telecommunications was based on tradeoffs between government oversight and monopoly market structure. The Bell operating companies knowingly and willingly acceded to the restrictions placed on them by the Telecommunications Act of 1996 in order to have the opportunity to enter long distance. In January 1999 the Supreme Court

²⁵ AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721.

refused to consider SBC's argument, which would have ignored past bargains and the incremental nature of policy change.²⁶

Consumer Sovereignty

Under conditions of perfect competition, consumers would be perfectly sovereign. They would use their dollars to purchase exactly the array of goods they wanted in the price/quality combinations that suited them.²⁷ Businesses would be accountable to purchasers of their goods just as democratic government is accountable to citizens. But market structure is almost always less than perfect and companies attempt to manipulate demand in legitimate efforts to attract attention to their products, persuade customers to use them, and encourage them to come back for more. The rise of corporate power in the last 130 years or so has seen accompanying evolution of processes and institutions to counter that power on behalf of consumers. Democratic institutions were established to prevent infringement on individual liberty by government; laws governing treatment of labor and customers were developed to protect individual economic autonomy and give a fair shot at the pursuit of happiness by the little guy. Thus, there is a direct, relatively unambiguous connection between the fundamental norm of individual liberty for the sovereign consumer as well as the sovereign citizen.

Examination of existing and proposed telecommunications bills of rights reveals six claims related to the normative criterion of consumer sovereignty: Assurance of honest, fair treatment by all providers, quality commensurate with price, access to information about products and services, just and reasonable prices, impartial redress of wrongs, and choice of products and services.

²⁶ "High Court's Denial Likely Ends Bells' Bill of Attainder Claims," *Telecommunications Reports*, Jan. 25, 1999.

²⁷ Vivian Witkind Davis, Larry Blank, David Landsbergen, Nancy Zearfoss, Raymond Lawton, and John Hoag, *Telecommunications Service Quality* (Columbus, OH: The National Regulatory Research Institute, 1996).

Impartial redress of wrongs is public accountability writ small and subject to the same sort of arguments as for the sovereign citizen, albeit on a relatively trivial level. As noted above, citizens are able to change bad policy decisions on the macro — political — level. The process to correct mistakes and enforce violations of rights is essential on the level of individual customer transactions as well. The Vermont staff identified impartial redress of wrongs as a consumer right. Consumers have the ability to contact the telephone company, complain to the commission and receive adjustments for overcharges, undercharges or other service failures. In Colorado, the staff proposed a right to contact a consumer hotline staffed by each provider.

The idea of a right to choice of products and services is problematic. Besides the obvious communal restrictions on many choices, such as among brands of cigarettes for minors or where smoking is allowed for adults, consumers' ability to choose is limited by current states of technology, transportation systems, and market structure. This claim, perhaps more than some of the others put forward in telecommunications bills of rights, is linked to the opportunities for choice in the evolving telecommunications market. The Telecommunications Act is an instrument for effectuating that claim, which might better be expressed as a duty of government and industry to enable choice by establishing a competitive market. This proposed right is not directly and clearly related to normative criteria, or is at least as much related to accountability to the public through a political bargain as it is to consumer sovereignty. Nor is community commitment wholehearted and widespread. Many consumers were content not to have a choice for local telephone service (and the vast majority of consumers still do not have a choice whether they want it or not). Choice is an expectation, not a right, based on policies that encourage it.

Policies to encourage choice are a significant part of a commission's weaponry. They include arbitration of interconnection agreements and encouraging Bell companies to meet all requirements for entry into in-region long distance under Section 271 of the Telecommunications Act of 1996. They also encompass dialing parity and number portability. The Colorado staff's proposed bill of rights in 1995 included a consumer's ability to make and receive calls using any provider without dialing extra codes and to

keep their telephone numbers when they change providers if they remain within their same neighborhoods.²⁸

The other four items under consumer sovereignty fall squarely under traditional consumer protections that fulfill our requirements for direct, clear connections to fundamental norms. The first is honest, fair treatment by providers. The first item in the bill of rights proposed by Vermont PSB staff, for example, asserts consumer “control over what they are buying.” This includes fair treatment in the exchange between buyer and seller, an opportunity to exit from a purchase commitment, information about purchases (including quality aspects as well as price) and documentation of transactions. These are ideas that go back in written form at least to the Hanseatic League in the Middle Ages. The modern manifestation is the Uniform Commercial Code, all or parts of which have been adopted by 49 states.²⁹ The exception is Louisiana, which uses the Napoleonic Code. The second is just and reasonable prices, an idea that goes back to St. Augustine and for public utilities in this country has been within the purview of commissions. The staff proposes that customers have a right to know what they are buying, from whom and for what price. Quality commensurate with price is the third. The fourth is access to information on products and services. Information asymmetry is one of the most common and pervasive failings of a market, and the right to information about purchases is basic to consumer sovereignty. Information on billing, including company procedures, a timely and accurate bill and an itemized bill, are required in the South Carolina bill of rights, a pre-1996 compilation. Full information includes notification of proposed changes in rates and charges, according to the South Carolina bill of rights.

Barbara Alexander, as part of a thorough review of issues and policies in consumer protection of telecommunications customers during the transition to competition, identifies existing laws that are most likely to address consumer sovereignty for competitive

²⁸ “Colorado Staff Proposes Consumer Bill of Rights,” *Telecommunications Reports* 61, No. 38 (Sept. 25, 1995): 26-27.

²⁹ The American Law Institute and the National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code* (St. Paul, MN: West Publishing, 1991).

telephone services.³⁰ Her analysis shows that legitimizing documentation and authoritative articulation, two of our criteria for evaluating the extent to which a claim may be called a right, are present. The depth and breadth of consumer protection law and practice make it clear that community support is widespread and solid as well. Major federal statutes aimed at competitive businesses apply to unfair and deceptive business practices, granting of credit, and debt collection. In addition, federal legislation specifically protects telecommunications customers. (See Table 2.) Every state has laws similar to the Federal Trade Commission Act, usually administered by the Attorney General's office.³¹ In setting forth what businesses have *no right* to do, these laws imply key items in a list of legitimate consumer claims. However, given the division in the national community between business and consumer interests, these are probably better called entitlements or expectations than rights. The most difficult issue to be faced in assessing the rights status of consumer protection in telecommunications is enforcement. Commissions have traditionally had considerable responsibility and authority for assuring accountability of public utilities to norms of consumer sovereignty. As competition develops their domain has become less clearly bounded. This concern for enforcement authority and consequent gaps in consumer protection is at the heart of the notion that the time has come for a bill of rights for telecommunications consumers. The appropriate structure of government oversight in the era of telecommunications competition has yet to be designed. On the positivist requirement of enforcement, the status of claims for consumer protection is currently uncertain, making consumer protection look more like an expectation than an entitlement. A bill of rights can be a tool to shore up the entitlement status of consumer protection.

Privacy

³⁰ Barbara R. Alexander, *The Transition to Local Telecommunications Competition: A New Challenge for Consumer Protection*, submitted to Public Counsel Section, Washington Attorney General, October 1997.

³¹ *Ibid.*, 17.

Privacy has been explicitly identified as a right for over a hundred years, as outlined in a 1992 NRRI research report by Robert Burns, Rohan Samarajiva and Roopali Mukherje.³² A seminal article by Warren and Brandeis identified a right to

³² Burns, Samarajiva and Roopali Mukherje, *Utility Customer Information: Privacy and Competitive Implications* (Columbus, OH: NRRI, 1992), 35.

TABLE 2
FEDERAL TRADE COMMISSION AUTHORITY

Federal Trade Commission Act (15 U.S.C. §§ 41-58, as amended)

Under this Act, the Commission is empowered, among other things, to (a) prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress.

Fair Credit Reporting Act (15 U.S.C. §§ 1681-1681(u), as amended)

The Act protects information collected by consumer reporting agencies such as credit bureaus, medical information companies and tenant screening services. Information in a consumer report cannot be provided to anyone who does not have a purpose specified in the Act. Companies that provide information to consumer reporting agencies also have specific legal obligations, including the duty to investigate disputed information. Also, users of the information for credit, insurance, or employment purposes must notify the consumer when an adverse action is taken on the basis of such reports. Further, users must identify the company that provided the report, so that the accuracy and completeness of the report may be verified or contested by the consumer.

Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f, as amended)

This Act (Title VII of the Consumer Credit Protection Act) prohibits discrimination on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or good faith exercise of any rights under the Consumer Credit Protection Act. The Act also requires creditors to provide applicants, upon request, with the reasons underlying decisions to deny credit.

Fair Debt Collection Practices Act (15 U.S.C. §§ 1692-1692o, as amended)

Under this Act (Title VIII of the Consumer Credit Protection Act), third-party debt collectors are prohibited from employing deceptive or abusive conduct in the collection of consumer debts incurred for personal, family, or household purposes. Such collectors may not, for example, contact debtors at odd hours, subject them to repeated telephone calls, threaten legal action that is not actually contemplated, or reveal to other persons the existence of debts.

Telephone Disclosure and Dispute Resolution Act of 1992
(codified in relevant part at 15 U.S.C. §§ 5701 et seq.)

The Act requires the Commission to promulgate certain regulations respecting advertising for, operation of, and billing and collection procedures for, pay-per-call or "900 number" telephone services. The regulations must include certain provisions, such as price disclosure requirements, mandatory warnings on services directed to children, and required disclosures in billing statements.

Telemarketing and Consumer Fraud and Abuse Prevention Act
(codified in relevant part at 15 U.S.C. §§ 6101-6108)

The Act requires the Commission to promulgate regulations (1) defining and prohibiting deceptive telemarketing acts or practices; (2) prohibiting telemarketers from engaging in a pattern of unsolicited telephone calls that a reasonable consumer would consider coercive or an invasion of privacy; (3) restricting the hours of the day and night when unsolicited telephone calls may be made to consumers; and (4) requiring

privacy in 1890.³³ In the 1950s the Supreme Court identified a constitutional right to privacy and in 1965 held that the Bill of Rights, specifically the Fourth Amendment, creates “zones of privacy.”³⁴ The normative basis for a right to privacy is citizen and consumer sovereignty. The need to protect privacy in telecommunications has become more urgent with the increasing ability of technology to reach into our lives.

While this lineage suggests that privacy is indeed a right, Burns, Samarajiva and Mukherje are cautious and allow it only the status of an entitlement:

There is no consistency in the treatment of privacy in state constitutions and legislation....thus, the term ‘right’ will remain within quotation marks to signal it often is not quite a defined legal right in the full sense. However, there exists enough support for a claim that the ‘right’ to control the inflow and outflow of personal information is a social entitlement, approaching a right in the legal sense.³⁵

Burns et al. distinguish between “leave me alone” and “none of your business” privacy, corresponding to individual control over the outflow and inflow of personal information. The “leave me alone” aspect of privacy means that private conversations should be secure. Control of unreasonable intrusions on privacy, the “none of your business” aspect, has become more difficult with the inexorable advance of capability for collecting customer information, or. As expressed by the Vermont DPS, “Modern computing and telecommunications technologies have brought about a rapid drop in the costs of collecting, storing, manipulating, correlating and transferring information. These declining costs accelerate the increase in the capabilities of communications and computing technologies.”³⁶ The good side to this trend is “mass customizing” — ever-finer

³³ Warren and Brandeis, “The Right to Privacy,” *Harvard Law Review*, Dec. 15, 1890.

³⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁵ Burns, et al., *Utility Customer Information*, 40.

³⁶ Vermont DPS, 16.

differentiation of the market until it is a market of one — meeting the tailored needs of individual customers and doing it on a mass basis.”³⁷ The down side is that customers lose control over private information about themselves as the marketing information about them becomes more precise. Companies may know their calling patterns, numbers called, billing and credit information, demographic and personal information and services subscribed to. The Vermont proposal for a bill of rights includes a number of privacy protections, such as a requirement that protections remain intact across interconnected networks and competing, interconnected service providers. Similarly, the Colorado staff proposal included confidential numbers, conversations and data transmission and protection from unauthorized use of equipment, records and or payment history.³⁸ The New York Department of Public Service in 1991 developed and adopted eight privacy principles (see Table 3).

The positivist requirement of legitimizing documentation is met for the claim of privacy not only in Supreme Court cases, but more specifically in the Telecommunications Act of 1996. Section 222 of the Act and the FCC’s 1998 order effectuating it establish restrictions on use of Customer Proprietary Network Information, which includes any information about a customer’s network services and use of the services obtained by the company in the course of providing services to the customer.³⁹

State law also supports the claim of privacy. Barbara Alexander notes that several states have adopted privacy laws that prohibit a telephone company from disclosing customer calling patterns; what services were purchased from the company; and billing, payment, or demographic information about a customer without the

³⁷ Burns, et al., *Utility Customer Information*, 30-1, quoting Stanley M. David, *Future Perfect* (New York: Addison-Wesley, 1987). Cited in McManus, Telephone Transaction-Generated Information, 1.

³⁸ See Appendix for “Proposed Colorado Bill of Rights.”

³⁹ FCC, *Telecommunications Carriers’ Use of Customer Proprietary Network Information and other Consumer Information*, CC Docket 96-115, FCC 98-239, Order, Sept. 24, 1998.

TABLE 3

NEW YORK DEPARTMENT OF PUBLIC SERVICES PRINCIPLES ON TELECOMMUNICATIONS PRIVACY

- Privacy should be recognized explicitly as an issue to be considered in introducing new telecommunications services
- The interest in an open network should be recognized in evaluating alternative means for protecting privacy
- Companies should educate their customers as to the implications for privacy of the services they offer
- People should be permitted to choose among various degrees of privacy protection, with respect to both the outflow of information about themselves and the receipt of incoming instructions (inflow information)
- A telephone company offering a new service that compromises current privacy expectations would be obliged to offer a means of restoring the lost degree of privacy, unless it showed good cause
- Considerations of cost, public policy, economics and technology all bear on the pricing of privacy features, which must be determined case by case
- Unless a caller grants informed consent, subscriber-specific information generated by the subscriber's use of a telecommunications service should be used only in connection with rendering or billing for that service or for other goods or services requested by the subscriber and it may not be made otherwise available except as required by law
- Privacy expectations may change over time, requiring in some instances changes in telecommunications services; at the same time, changes in telecommunications services, technology and markets may lead to changes in customers' privacy expectations.⁴⁰

Source: Alexander, *The Transition to Local Telecommunications Competition*.

⁴⁰ Burns, et al., 127.

customer's written consent.⁴¹ In California, a telephone company may sell its subscriber list but may not disclose any unlisted or unpublished numbers. California allows the release of customer-specific information to credit reporting agencies, law enforcement officials and regulatory authorities for specific purposes.⁴² Most states, however, do not have generic privacy laws applicable to public utilities, according to Alexander.

Nor is the right to privacy unlimited, although community support can be adjudged both wide and deep. In the 1994 Communications Assistance for Law Enforcement Act, Congress attempted to ensure that privacy was protected while also ensuring that advanced digital technology does not prevent FBI surveillance through wiretaps.⁴³ The protection of individual privacy and the claim to personal safety, the next claim to be analyzed, also sometimes conflict in telecommunications policy.

Personal Safety

Analysis of telecommunications policy usually subsumes public safety concerns under universal service. Access to emergency service by dialing "911" is considered part of basic telephone service fostered under universal service programs.⁴⁴ To think of safety as a subcategory of claims under universal service understates its importance, however, and is identified here as a separate claim to draw attention to the essentiality of telecommunications to get help in today's society. This includes immediate threats to life and limb from fires, accidents, crimes, and illness.

⁴¹ Barbara Alexander, *The Transition to Local Telecommunications Competition: A New Challenge for Consumer Protection*, submitted to Public Counsel Section, Washington Attorney General, 1997. (Unpublished), 29.

⁴² Alexander, 29, citing California Public Utilities Code Section 2891.

⁴³ P.L. 103-414, the Communications Assistance for Law Enforcement Act. See the website of the Center for Democracy and Technology (<http://www.cdt.org/digi-tele>) for the status of implementation of the law and a discussion of privacy issues.

⁴⁴ FCC, Federal-State Joint Board on Universal Service, Report and Order, CC Docket 96-45, May 7, 1997, ¶ 72.

The normative criterion that provides a rationale for personal safety as a right originates in a right to life, meaning in its original sense an individual's right not to be tortured and murdered by the state.⁴⁵ Although charged with other connotations today, the right to life declared in our most fundamental document claiming independence meant safety from a king and his agents. A modern incarnation of this right is access to legal assistance through Miranda rules. Nowhere is it clearer than in the familiar "one phone call" requirement how telecommunications serves as the instrument of fundamental rights. The Miranda decision explicitly states that the protections from abusive police interrogation does not require the presence of a "station house' lawyer." The decision says "that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation."⁴⁶

Emergency services other than urgently needed legal assistance are linked more to conceptions of human rights than eighteenth century natural rights, and that puts it on shakier ground. Consumer protection law addresses the safety of products and services, not of individuals' access to products and services that could save life and limb.⁴⁷ The Presidential Advisory Commission that developed the health care consumer bill of rights (discussed in more depth below) identified as one right the "access to emergency health care services when and where the need arises," which can only happen with adequate telecommunications facilities and services. The Clinton Administration is promoting a legislated bill of rights for health care, based on the Advisory Commission recommendation, but it remains to be seen whether that will happen. The nation is divided

⁴⁵ William A. Galston, "Practical Philosophy and the Bill of Rights: Perspectives on Some Current Issues," in Lacey and Kaakonssen, editors, *A Culture of Rights*, pp. 216-217.

⁴⁶ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). In William B. Lockhart, Yale Kasamir and Jesse H. Choper, *Cases and Materials on Constitutional Rights and Liberties* (St. Paul, MN: West Publishing, 1970) 3rd edition, 266.

⁴⁷ Consumer Product Safety Act.

along traditional political lines on the issue of whether health care is a right or even an entitlement.

Access to emergency services is included in the definition of basic telephone service enunciated by the federal-state joint board and the FCC and implemented by the FCC and the states. If basic service is a right, emergency services are, too. But basic service, as will be discussed further below, is afflicted with controversy over further implementation, and neither Congress nor the Joint Board nor the FCC has referred to it as a right. Access to emergency services has a stronger claim as a right than some other components of basic service because of the strong normative link to personal safety. This is a claim that is evolving before our eyes as we seek to expand access to emergency services to mobile telecommunications users. As it does, new conflict between claims arises. Under new FCC rules cellular phones must be able to provide information on people's location, which is a great help for providing fast rescue services, but opens up the potential of misuse of the location information by law enforcement.⁴⁸

Community Inclusion: Universal Service

Inclusion of U.S. citizens in "one nation indivisible" is so ingrained in our national consciousness and policies as a right that it would hardly seem to require acknowledgment. Telecommunications today is a vital instrument to nurture community when much of our contact today, even with the people closest to us, does not occur face to face. In telecommunications, the policy expression of the norm of community is universal service. The Indiana bill of rights, for example, says "Consumers should be guaranteed equal and affordable access to essential information age services."⁴⁹ Many telecommunications bills of rights do not include universal service, however.

⁴⁸ John Markoff, "When Privacy is More Perilous Than the Lack of It," *New York Times*, April 4, 1999, Week in Review, 3.

⁴⁹ See Appendix.

Jorge Reina Schement convincingly expresses the normative basis of universal service:

Democracy's ideal — sovereignty and inclusion — thrives or withers on democracy's reality. To argue that a democracy can exist when its reality excludes individuals, who are nevertheless bound by its laws, is to claim a democracy in the making, or at worst to live an enduring hypocrisy. ...we tacitly acknowledge that for democracy to live up to its ideal, it must include all of its members from the core to the periphery. The key to the struggle and the promise has been and continues to be participation. In the information age, universal access to communications technology is the primary policy tool for enabling citizens to participate in those economic, political, and social activities fundamental to a good society.⁵⁰

The political value of universal service identified by Schement is an informed and involved citizenry who can receive a variety of opinions and distribute views through political dialogue beyond the confines of immediate communities. The economic value includes both access to jobs and network externalities that benefit owners, service suppliers and users. Under social value, Schement includes the need of individuals for access to information for self-development, help in developing and maintaining social relationships, and for the benefits that come from those relationships. Communications is a process of socialization, among other things, that promotes national loyalty and helps to overcome the fragmentation and isolation that often characterize our mobile society: "Communications creates society; and, in essence, the network creates the weave."⁵¹

Community commitment to universal service norms, and thus its status as a right in a positivist sense, is well documented. Universal service is not mentioned specifically in the Communications Act of 1934, although the Act was founded on a deal between AT&T and government that in return for treatment as a regulated monopoly AT&T would provide

⁵⁰ Jorge Reina Schement, "The Persistent Gap in Telecommunications: Toward Hypotheses and Answers," TPRC, Oct. 1998.

⁵¹ Ibid., 6.

“one system, one policy, universal service.” One interconnected system may have been the guiding motive,⁵² rather than access to that system by all Americans but the concept of universal service evolved towards the latter. In the Telecommunications Act of 1996, Congress explicitly called for universal service. Section 254 requires support for the preservation and advancement of universal service based on several principles (not rights): quality services available at just, reasonable and affordable rates, access to advanced services, access in rural and high cost areas, equitable and nondiscriminatory contributions, access to advanced telecommunications services for schools health care and libraries.⁵³

The Telecommunications Act of 1996 established a process to continue and improve universal service in the transition to an era of competition and thereafter. A federal-state joint board would recommend changes to the FCC, which would issue rules on implementation. Those steps were taken within the statutory deadlines, but further establishment of new means to meet the goal of universal service have been fraught with conflict.⁵⁴ The low-income program is now better targeted, but differing points of view among states have surfaced on subsidies for nonrural carriers serving high-cost areas. Authorizations for school and library funding for advanced services were first reduced from initial levels but later reinstated.⁵⁵ Universal service is supported through a collection of redistributive programs and there is no guarantee of funding. Full implementation will depend on dollars available and consumer reaction to explicit subsidies. In fact, it is doubtful that universal service will ever be a right in the strictest sense, if household penetration rates, now about 94 percent in the United States, are the measure to meet a

⁵² Milton L. Mueller, Jr., *Universal Service* (Cambridge, MA: MIT Press, 1997).

⁵³ Telecommunications Act of 1996, Section 254(b).

⁵⁴ See Edwin A. Rosenberg and John D. Wilhelm, *State Universal Funding and Policy: An Overview and Survey* (Columbus, OH: NRRRI, 1998).

⁵⁵ FCC, Universal Service Joint Board, Fifth Order on Reconsideration and Fourth Report and Order, CC Docket 96-45; FCC News Release, May 5, 1999.

positivist test. If the right is universal *availability* of basic telephone service, we can come closer. In either case, a person could not go into a court of law and successfully claim that they had a right to universal service. At this time, universal service even with its powerful claim as a requisite to democracy, is not a right but at best an entitlement aspiring towards legitimacy as a “human right.”

Quality of service expectations are related to universal service and an increasing concern for commissions as competition begins in the telecommunications industry. Having access to telephone service is less meaningful if installations are not made promptly, service is not quickly restored when it goes out, network reliability slips, or one of many other quality assurance “nails” is compromised. Over half the states have revised service quality standards in the last five years.⁵⁶

The Idea of Progress and the Dynamics of Claims

Bob Rowe’s bill of rights proposal appeals not only to today’s claims but asserts greater realization of them tomorrow. He calls for customers to receive “continually improving services at reasonable rates.” This is in the tradition of the human rights perspective that asserts the evolution of justice and morality. Recent amendments to the Kansas regulatory statute, referred to as declarations of public policy rather than rights, document the state’s expectations from telecommunications services (see Table 4). Only one of the five provisions deals with traditional consumer protection issues of fraudulent business practices and similar problems. The others declare policies to ensure every Kansan access to better telecommunications services at affordable and even reduced rates. The notion of progress has an American cast to it, at least until recently. Although fundamentally based on a general Western bent towards teleological Christianity, made more personal by the Reformation, Americans have been singled out for both derision and

⁵⁶ Michael Clements and Vivian Witkind Davis, “Recent Developments in Telecommunications Service Quality Regulation,” *NRRI Quarterly Bulletin* 19:3, fall 1998, pp. 269-280.

admiration for our optimistic expectation of ever greater personal and community success
— an attitude that the pursuit of

TABLE 4

STATE OF KANSAS DECLARATION OF POLICY

"It is hereby declared to be the public policy of the state to:

- (a) ensure that every Kansan will have access to a first class telecommunications infrastructure that provides excellent services at an affordable price
- (b) ensure that consumers throughout the state realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates;
- (c) promote consumer access to a full range of telecommunications services, including advanced telecommunications services that are comparable in urban and rural areas throughout the state;
- (d) advance the development of a statewide telecommunications infrastructure that is capable of supporting applications, such as public safety, telemedicine, services for persons with special needs, distance learning, public library services, access to Internet providers and others; and
- (e) protect consumers of telecommunications services from fraudulent business practices and practices that are inconsistent with the public interest, convenience and necessity."

Source: K.S.A. 66-2001, enacted in 1996.

happiness is almost guaranteed to be rewarded. Historian Henry Steele Commager is one writer who summarized this feature of the American character.⁵⁷ On the nineteenth century American, Commager said, "Nothing in all history had ever succeeded like America, and every American knew it. . . [H]e lived in the future. . . He planned ambitiously and was used to seeing even his most visionary plans surpassed; he came at last to

⁵⁷ Henry Steele Commager, *The American Mind* (New Haven: Yale University Press, 1950).

believe that nothing was beyond his power and to be impatient with any success that was less than a triumph.”⁵⁸ Commager’s assessment of the first half of this century is more tempered. After two world wars, he suggests that the typical American, “though less sure of progress was still confident that the best was yet to be . . . He knew that if there was indeed any such thing as progress it would continue to be illustrated by America, but he was less confident of the validity of the concept than at any previous time in his history.”⁵⁹ The Communications Act of 1934 was sired by the potential for communications ventures to prosper, creating jobs and improving quality of life at the same time. A broad range of interests saw the industry as an instrument for progress in an otherwise discouraging environment.

Fifty years later the American age of innocence is long gone and the capitalist ethic is worldwide. But particularly for the telecommunications and information industries, Americans of every political persuasion are “progressives” who want to believe “the best is yet to be.” What is the “information superhighway” but a new frontier for Americans to populate? And what is the Telecommunications Act of 1996 but an attempt to open markets to competition so that amazing new technologies can expand our horizons? Many social problems (like poverty, drug abuse, and educational standards) seem intractable and we know that the current remarkably enduring economic expansion cannot last, but the telecommunications and information industries are lands of promise.

In the spirit of American optimism, a proponent of a bill of rights may envision a future of continually improving and expanding choices of telecommunications services, expansion of universal service, stable or improving service quality (including maintenance of the simplicity of the present system to the end user), and all at prices comparable to today’s price or even lower. This is continual Pareto improvement: Social welfare will

⁵⁸ Ibid., p. 5.

⁵⁹ Ibid., p. 410-411.

improve without any individual being worse off.⁶⁰ Insofar as it is Americentric, it is also a formula for a continuing U.S. edge in the telecommunications industry internationally. Our lives are so comfortable and as Americans we are so prone to optimism that we expect ever greater electronic abundance, even as our natural resources decline. Although the revolution in information and communications technologies offers the tantalizing prospect of the “death of distance” and the birth of instant access to information for all, continued Pareto improvement can hardly be considered an unconditional right, even by the most fervid believers in the benefits of technology. The trajectory of progress is uncertain, depending as it does on events beyond anyone’s control. Catastrophes and discontinuities in socioeconomic trend lines are always lying in wait. The idea of progress is itself an expectation rather than a right, and whatever legislation or other government action supports progress will be policies to increase the expectation of positive change, certainly not rights.

What if the future holds retrogression rather than a steady march to the best of all possible worlds? The explosion of information pathways may call for redefinition of existing rights and extra efforts to protect them. At least two efforts have been made to propose an expansive bill of rights that would apply to the information society, beyond a focus purely on telecommunications. The Aspen Institute in 1995 put together “‘first principles’ in the application of democratic values to some of the most pressing issues inhering in the advent of a new information society.”⁶¹ Participants in the consensual effort of experts in the field identified principles for communication rights and responsibilities, information privacy, and information as property. Bryan Glastonbury and Walter LaMendola have also

⁶⁰ The Pareto criterion says that a situation Q is preferable to a situation R if at least one person is better off in situation Q and no one is worse off. Overall social welfare is improved. Well-functioning markets results in Pareto improvements and ultimately, under ideal conditions, a Pareto optimum. For example, see Edith Stokey and Richard Zeckhauser, *A Primer for Policy Analysis* (New York: W. W. Norton, 1978), pp. 270-273.

⁶¹ Firestone and Schement, *Toward an Information Bill of Rights*. See Appendix for principles identified.

enunciated “A Bill of Rights for the Information Age” aimed at bending “knowledge industries” to fulfillment of human rights and needs.⁶²

Although progress and its effectuating principles are not rights, there is a relevant right at work — dynamic accountability through the political system. Progress is an expectation formed from the process of maintaining accountability and only enforceable through the same process that purchased the expectation. All stripes of politicians and virtually all interests in current telecommunications policy debates appeal to the idea of the fruits of progress to be expected from the evolution of the telecommunications and information industries. The Telecommunications Act of 1996 codifies those hopes, setting a pro-innovation policy framework within which they can be realized. But how to achieve the policy goals of the Act is subject to disagreement. We are divided as a nation today on how to make the claims for progress a reality, as evidenced by continuing court battles over enforcement of the Act’s provisions encouraging interconnection and competition. Shifts in political will are as unpredictable as other factors that will affect progress as currently defined, and may not always favor evolution of telecommunications as we imagine it today.

Current debate over how to promote deployment of advanced telecommunications infrastructure is a case in point. Although both Sections 254 and 706 of the Telecommunications Act of 1996 seem to promise deployment of advanced technologies, the Act is ambivalent if not schizophrenic on the subject. (As pointed out by the Supreme Court in its January 1999 decision on FCC authority over interconnection pricing, the Telecommunications Act is hardly a model of clarity.) Both Sections 254 and 706 say advanced telecommunications should be available to all Americans. The means implied in Section 254 and the first paragraph of Section 706 are active, while in the second paragraph of Section 706 the means are passive, extending only to removal of regulatory barriers.

⁶² Bryan Glastonbury and Walter LaMendola, *The Integrity of Intelligence: A Bill of Rights for the Information Age* (New York: St. Martin’s Press, 1992).

A Public Goods Perspective on Deployment of Advanced Technologies

One approach to analyzing the conflicting approaches to this sort of progress is to look at the problem from a public goods perspective. A key determinant of just what becomes policy when (relevant to the discussion of implementation below as well as to this discussion of the interplay of ideas of progress and ideas of means) is the “publicness” of a good or service, a concept that has underlying validity but is also subject to interpretation according to political philosophy. A rights activist, finding some publicness inherent in a good or service, is more likely to call for government intervention to prevent depletion or expand supply of the good than one who takes a more limited view of rights. In other words, a progressive has a more generous view of government’s role and a conservative a more limiting one. A progressive will see evolving rights and entitlements that a conservative may call expectations or demands.

Simply by including section 706 in the Telecommunications Act of 1996, Congress surely was attributing some measure of publicness to advanced telecommunications capability. Section 706 asserts a national interest in telecommunications services that can be provided only by broadband technologies. In an era of emphasis on competitive markets and privatization over regulated monopolies and government action, in what sense are advanced telecommunications networks public?

Public policy analysts distinguish between public and private goods on the basis of rivalry of consumption and excludability of use, as shown in Table 5. Rival goods are consumed individually; nonrival goods, jointly. For some goods it is feasible to exclude people from use; for others, infeasible.

Pure private goods are both rival and excludable, which allows their purchase and sale at market clearing prices. If a household buys a telephone handset, the household members consume it and nobody else can — the rivalness criterion. The seller was able to keep others from using that handset — the excludability criterion. In a perfectly functioning market buyers and sellers will in their individual transactions unwittingly allocate

goods in a way that is best for society as well as for themselves. But the invisible hand does not work for many goods.

Pure public goods are those which are nonrival and nonexcludable. The classic example is national defense, which is nonrival (jointly consumed) because I can receive the benefits of the U.S. armed forces and all their battle-ready machinery of war without any other U.S. citizen having any less of those benefits: my consumption makes no difference to the amount of the good available for the consumption of anybody else in the country. National defense is nonexcludable because I cannot be prevented from taking advantage of it, even if I am a tax dodger.

Rival, nonexcludable goods comprise resources held in common, such as large deposits of oil or ocean fisheries. The combination of rivalness and nonexcludability leads to “the tragedy of the commons,” in which common resources are depleted and destroyed.

Finally, nonrival, excludable goods are sometimes called marketable public goods. It is possible to prevent use of such goods, or charge a toll for their use, because control over their scarcity creates a bottleneck that makes them excludable, even though so much of the good is available that consumption would be nonrival. The public switched network may be classified as a marketable public good. Incumbent providers are capable of controlling bottlenecks in the public switched network. Both before and after the AT&T divestiture there was more than enough capacity in the public switched network to make consumption nonrival.

This picture is too simple, of course. Goods are not quite so easily classifiable and their status may change over time. Congestion is one variable that affects where particular goods actually fall in the matrix in Table 5 at particular times. The ambient air was until recently a pure public good. Whatever uses and abuses of this resource that humanity could dream up could be absorbed with no hint of rivalness. Increased pollution has made this good more rival, moving it towards the lower lefthand quadrant. Congestion in the lower lefthand quadrant leads to the “tragedy of the commons,” where nonexcludable but rival goods suffer depletion.

TABLE 5 PUBLICNESS OF GOODS			
		Rivalry in Consumption	
		Rival	Nonrival
Excludability in use	Excludable	Pure private good (example: CPE)	Marketable public good (example: public switched network)
	Nonexcludable	Common resource (example: air)	Pure public good (example: national defense)

Source: David L. Weimer and Aidan R. Vining, *Policy Analysis: Concepts and Practice* (Englewood Cliffs, NJ: Prentice Hall, 1989).

It is the upper quadrants that are of interest in this paper. For marketable public goods, heavy use that leads to crowding and slowdowns pushes the good towards rivalness and into the upper left quadrant. For private goods, congestion is related to positive or negative externalities. That is, in the amounts produced, the good is causing effects, either good or bad, that go beyond its market. Air pollution is an example of a negative externality and society might prefer to have less of it. An apiary is often used as an example of a positive externality because the bees in the apiary may pollinate the flowers next door with benefit to both the beekeeper and the horticulturist. Society might be better off with more of a good with positive externalities.

Policies for the public switched network both before and after divestiture were based on the premise that social benefits would not be fully realized from treatment of the network as a private good. Not only is it possible for a telephone network to be built with the capacity to be nonrival, but it can be done using copper technology. The more people who are added to the network the greater the social benefits. The notion of one company, one system, one policy (universal service) took this into account. Under the 1996 amendments, interconnection requirements (in sections 251 and 252) limit excludability,

and universal service programs recognize the continued social benefits of making basic services available to everybody.

Where does advanced telecommunications capability fall in the public/private typology? Table 6 suggests alternative classifications based on physical and economic characteristics of the service as interpreted by claimants. The claims status for rival and nonrival and congested or uncongested services is shown in parentheses. Advanced capability might be treated as a pure private good. Whoever wanted to deploy such services would build exclusive facilities for its own customers. Claims for the good would be on the order of demands. Or it might be considered a marketable public good like the existing public switched network, in fact an extension of the public switched network or an “advanced public switched network,” deserving the status of an entitlement or a right. A third possibility begins with the assumption that advanced data services are a marketable public good with significant congestion. A rights activist may see this public good as an entitlement, although in fact access to the good is restricted by congestion. A fourth perspective is founded in a belief that it is a private good with significant positive externalities, perhaps with the implication that full availability is expected. Although options 3 and 4 seem similar, they spring from different perceptions of the social benefits of advanced services and suggest different public policy approaches.

Supporters of options 2, 3, and 4 all believe that advanced telecommunications capability is to a greater or lesser degree a “merit good,” a less precise term than private or public good that means, in essence, a good of societal benefit that the market will not produce enough of, and an entitlement or warranted expectation, though not necessarily a right. If the capabilities on which advanced services are based were purely a private good you would expect to see many separate data networks. The market would decide how many and how much capacity they had, just as it is doing for Internet service providers. Positive externalities are considered minimal under this option: Individual supply and demand are expected to interact to result in as much of the good as society wants. The FCC’s 1998 Notice of Inquiry on Section 706 did not rule out this possibility, saying, “We

intend to rely as much as possible on free markets and private enterprise to deploy advanced services.” In February 1999, the FCC

TABLE 6		
CONCEPTIONS OF PUBLICNESS AND CLAIMS FOR ADVANCED TELECOMMUNICATIONS CAPABILITIES		
	Rival	Nonrival
Excludable: uncongested	(1) Private good (demand)	(2) Marketable public good (right)
Excludable: congested	(4) Private good with significant externalities (expectation)	(3) Congested marketable public good (entitlement)

Source: Author's construct based on Weimer and Vining.

concluded that deployment was indeed proceeding quickly enough without government intervention.⁶³

The second option sees advanced services as an outgrowth of the existing public switched network and its historic treatment as a natural monopoly. The public good view of the existing public switched network is that, once created, the network's capacities, capabilities, and quality are available to all but are somewhat rivalrous because of potential congestion problems. And it is certainly excludable—users with special needs can and do construct private networks. This point of view assumes that continued deployment of advanced telecommunications capability throughout the public switched network including into the last mile is the speediest route to making advanced services available to all Americans. Any other option, it is feared, could lead to bypass of the public network and relegation of significant numbers of customers into “have nots” for good quality data services long into the future.⁶⁴ This option, however, raises the specter not

⁶³ FCC, Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion*, CC Docket 98-146, Feb. 2, 1999.

⁶⁴ See for example Mark Cooper and Gene Kimmelman, “The Digital Divide Confronts the Telecommunications Act of 1996,” February 1999 (www.stateandlocal.org). Just how high the quality should be is an area of debate. Over 90 percent of the U.S. population already had access to the Internet via a phone call, according to a 1998 study. Tom Downes and Shane Greenstein, “Universal Access and

only of an increasingly antiquated ILEC network bypassed by all the “advanced new stuff” but continuation of an outdated framework of natural monopoly and heavy regulation. A policy alternative that could address both the advantages of one network accessible to all and the drive towards deregulation and lessened regulation might be separation of network and retail operations, as initially proposed by LCI, and ordered by the Pennsylvania Public Utility Commission for Bell Atlantic.⁶⁵

Options 3 and 4 elucidate some of the schizophrenia of the Telecommunications Act as a whole and Section 706 in particular over conflicting societal goals. Option 3 is a public policy perspective that considers advanced telecommunications capabilities a marketable public good. The overriding concern for those who start from this vantage point is that congestion in supply will make advanced telecommunications capabilities seem like a private good (by making it more rival), when Americans have a right to it.⁶⁶ Social benefits would be maximized, such claimants are likely to assert, not slowly and probably incompletely through the market, but by encouraging deployment of new technology that could make data networks quickly available to all Americans. This is already happening through funding for advanced services to schools, libraries, and rural health services under the Act. The FCC and Joint Board envision evolution of the services included under basic universal service. Supporters of Option 3 expect inclusion of advanced services soon, not later, and to be worthy of a push from public funding.

Option 4, on the other hand, is an expression of faith that the most efficient way to encourage advanced telecommunications capability is through its treatment as a private

Local Commercial Internet Markets,” June 4, 1998. Unpublished. But many of those Internet connections are of low quality.

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⁶⁶ Commissioner Bill Gillis of Washington, for example, Chair of the NARUC Committee on Consumer Affairs, proposes that there are “collective consumer rights” that include both “private rights and collective rights.” He finds inadequate any approach to deployment of advanced services that does not account for the benefit to consumers of “a nation with a strong national economy and the opportunity to reach anyone they desire by either voice or data transmission when they desire.” E-mail to Vivian Witkind Davis, August 23, 1999.

good with positive externalities. The overall emphasis in the Telecommunications Act on the goal of competition relies on the assumption that society will be better off if the telecommunications sector can be allowed to function as a market. Demand, as far as supporters of this option are concerned, is not to be pushed, but simply met as it develops. This is expressed in section 706 by the types of remedies that are to be considered if the diffusion of advanced services is not proceeding quickly enough. The remedies are not active interventionist ones, like grants, subsidies or tax preferences, representing a progressive rights-forcing approach, but a more conservative one of removal of barriers that are preventing the market from working.

From Principled Claims to Grounded Rights

We have examined the ideas of citizen sovereignty, consumer sovereignty, privacy, and personal safety, and found they all have normative pedigrees and are actualized under a broad range of circumstances.

One conclusion that can be drawn at this point is that the claims proposed by various commissions, while often phrased in mundane terms, are practical but not trivial. For example, the Colorado staff's statement (before the 1996 Telecommunications Act) cited above that customers have a right to keep a telephone number when providers are changed if the customer stays in the same neighborhood operationalizes one aspect of consumer choice in a newly competitive telecommunications arena. Without number portability, consumer sovereignty, an entitlement, is compromised. Similarly, the Supreme Court's decision in the *Miranda* case detailed the procedural safeguards that must be employed so as not to deprive an individual of freedom, including "the opportunity to exercise these rights" before and throughout a police interrogation.⁶⁷ The aphorism that comes to mind in considering telecommunications claims is not "For God, for country, and for Yale," which moves from the sublime to the parochial, but the nail to war analogy. Many

⁶⁷ *Miranda v. Arizona*, in Lockhart, Kasmir and Choper, 268.

of the items in commission bills of rights are the humble tools for fulfilling vital rights or entitlements.

As we came to the consideration of the concepts of universal service and progress, however, we found a need for deeper examination of the relationship of normative assertions and positivist calls for proof, or the relationship of ideals and their implementation.

Early in this paper I distinguished between the normative and positivist points view as a handy way to test the degree to which various current claims in the telecommunications arena may be considered well-established rights rather than well-intentioned demands. Positivists point out that if rights exist at all, they represent allocations of power in a polity between individuals and government, and if rights evolve, so must the accompanying distribution of power. This does not ordinarily occur without resistance. Just as with basic or natural rights, the articulation and effectuation of new “human rights” is a political process and calling something a right is often a political tactic, declaring in effect, “Yes, this is generally acknowledged as good, nobody will deny it directly (although they might leave open the option of construing the application narrowly), and the community is already committed.” Labeling something as a right may merely call attention to such a claim or may be a way of elevating it on the political action agenda for an authoritative written statement, such as a law.⁶⁸ The undoubted role of a “bill of rights” as a political symbol is a good reason to maintain a wary eye for local claims dressed up as everyone’s. This point of view is fully advanced by Stuart Scheingold, who offers a decidedly cynical view of the relationship of politics and rights. The “myth of rights,” he says, takes advantage of the American predisposition to have faith in a legal paradigm that is in fact infused with political relativism.⁶⁹ Adopting the complete detachment of the positivist point of view from the hurly burly of rights activism, however, is not helpful for a

⁶⁸ Stone, *Policy Paradox and Political Reason*.

⁶⁹ Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven, CT: Yale University Press, 1974).

policy practitioner. Whether the practitioner is inclined to support amplification of rights or opposed, a jaundiced eye impedes effective argument.

Bills of rights, however worthy they appear, move beyond the symbolic only through a political process that involves all interests. The focus of this paper has been on people as consumers and citizens, but a genuine right represents a compact that includes business and shareholder interests as well. A look at one defunct and one current effort demonstrates some of the challenges of pushing claims towards rights status.

The Indiana Story

In anticipation of what became the Telecommunications Act of 1996, Indiana Utility Regulatory Commission opened a proceeding to consider prerequisites for competition.⁷⁰ A coalition of consumer groups called “Residential Customer” developed a set of 10 conditions or guarantees that consumer groups felt needed to be in place before competition arrived. After much debate, a majority of parties were able to agree upon a proposal. The list was incorporated into a proposal presented in 1995 by Mark Cooper on behalf of the American Association of Retired Persons. Cooper said, “For any transitional framework to be politically viable it must give consumers confidence that they will be no worse off in the short run and will, in fact, be better off in the long run. This is the critical purpose of the Consumer Bill of Rights — to give consumers confidence that the transition to competition will indeed work for them and not just for the phone companies.”⁷¹

The bill of rights was included in a final report filed with the Commission, but the Commission did not take further action. With passage of the Telecommunications Act of 1996, the generic docket has been superceded by specific dockets dealing with portions

⁷⁰ Telephone interview with Jerry Polk, Citizens Action Coalition of Indiana, Sept. 15, 1998, and e-mail from Sandy Ibaugh of the Indiana Utility Regulatory Commission, Sept. 30, 1999.

⁷¹ Mark Cooper, “Prepared Remarks,” *Investigation on the Commission’s Own Motion into Any and All Matters Relating to Local Telephone Exchange Competition within the State of Indiana*, Cause 39983, September 28, 1995.

of the Act. There have not been many orders in the docket. To all intents and purposes, says Polk, the docket is, if not dead, at least “comatose.”

Although there is no official Commission endorsement of a bill of rights, it is still being used as a negotiating tool by consumer groups, says Polk. For example, in a recent Ameritech alternative regulation proposal consumer groups were using the concept of a bill of rights as a starting point for discussion.

Efforts to Legislate a Health Care Bill of Rights

Concerns for health care parallel those in telecommunications. Price, access and quality are all areas for discussion of claims. Perhaps some lessons may be drawn from recent efforts to develop a health care bill of rights at the federal level, where the Health Care Quality, Education, Security and Trust Act (S 1712) was introduced but not passed by Congress in 1998. The legislative effort is the culmination of two years of work by a 34-member commission created by executive order of the president in 1996. The commission was co-chaired by the Secretary of Labor and the Secretary of Health and Human Services. The commission represented a broad spectrum of health care interests, including providers, consumers and unions. Meetings were held in open session and public testimony was taken. The commission’s guiding principles were that “all consumers are created equal,” “quality comes first,” “preserve what works,” and “costs matter.” The commission said a bill of rights would “establish a stronger relationship of trust among consumers, health care professionals, health care institutions and health plans by helping to sort out the shared responsibilities of each of these participants in a system that promotes quality improvement.” The commission’s eight-point “Bill of Rights and Responsibilities” includes seven items covering information, choice, access (including to emergency services), participation in decisions, respect, privacy, and an efficient process for resolving conflict. The eighth point states responsibilities of the consumer. The enumeration of each right includes a statement of how it should be ensured.

President Clinton included a call for a health care bill of rights based on the Commission’s recommendations in his 1999 State of the Union address and stumped the

country to gain support, but the Senate rejected Democratic provisions in a proposed bill. The Senate in July 1999 passed a more restrictive patient rights bill that was written by the Republican majority. The House is expected to consider legislation this fall to regulate the managed health industry. The proposed House bill aims to ensure that people enrolled in health maintenance organizations have access to emergency rooms, specialists, and referrals to doctors outside their networks. It allows patient lawsuits against H.M.O.s. The House legislation has bipartisan sponsorship and is supported by the American Medical Association but opposed by the insurance and H.M.O. industries.⁷²

Implementation Choices

Our two examples show that labeling claims as rights and attempting to strengthen them is a difficult process fraught with disagreement over methods and goals. Some interests in the community at large are likely to see righteous claims as demands on them that endanger the fulfillment of their own claims. They naturally fight the growth in power and scope of antipathetic claims. In Indiana, the attempt to institute a bill of rights was beaten back to a mere reference point. It remains to be seen whether the Clinton health care bill of rights, which appeals to many consumers but not much to providers, will be reified in law.

Claims derived from one normative principle can be reinforced without aggregation in a larger bill of rights. For example, Rep. Edward Markey (D Mass.) announced in April 1999 that he would introduce a bill to protect consumer privacy on the Internet. Markey said his bill would encompass “the right of individuals to know what information is being collected about them online, the right to know how that information is being used and the right to take legal action if it is misused. “I’m giving all rights to the individual and leaving nothing in doubt as to what the responsibilities of industry are,” Markey said.⁷³ If the

⁷² “Medical Group Lends Support to House’s Managed Care Plan,” *New York Times on the Web*, August 24, 1999. archives.nytimes.com/archiv, accessed August 30, 1999.

⁷³ Jeri Clausing, “Lawmaker Plans Bill to Protect Consumer Privacy Online,” *New York Times*, April 8, 1999.

Markey bill passes, it will be another step in the evolution of the right of privacy, enabling the effectiveness of the right to keep up with the ability to subvert it.

Claims can also be better secured without labeling them rights. The process of developing new universal service requirements and the funding to support their fulfillment is a case in point. The Federal-State Joint Board on Universal Service and the 1997 FCC order on universal service promoted the entitlement or expectation of affordable basic telephone service available to everybody without using the term “right.” Instead, the Joint Board and the FCC referred to “principles.”

If a Commission does wish to consider a “bill of rights,” it is most likely to be as part of its program of consumer information and education. This is how most states are using a bill of rights now. The NARUC “No Surprises Packages” Work Group has prepared a white paper that details proposals for states to consider in providing appropriate consumer protections and consumer education about telephone service.⁷⁴ Francine Sevel at the NRRI has provided detailed guidance to commissions on consumer information and education.⁷⁵ A commission may want to have a bill of rights that applies to all utility services, particularly given current concern with the rights of electricity customers after industry restructuring. Arguably, incorporating a well-constructed bill of rights into a commission’s consumer information and education program will help consumers realize they continue to have claims well-grounded in norms in a period when it may be difficult to sort out the basis and practical impact of these claims. It should be relatively easy for a commission to decide on a list of “rights” tailored to the commission’s own concerns and procedures that can be distributed to consumers and maintained on the commission web site. Although I have given a number of examples of statements about telecommunications

⁷⁴ NARUC “No Surprises Package” Work Group, “White Paper ‘No Surprises Package’ Regarding Customer Information About Telecommunications Services, *NRRI Quarterly Bulletin* 19:3, fall 1998, 253-8.

⁷⁵ See “Transforming the Public into Educated Ratepayers,” in David W. Wirick, Robert E. Burns, Vivian Witkind Davis, and Francine Sevel, *Organizational Transformation: Ensuring the Relevance of Public Utility Commissions* (Columbus, OH: NRRI, 1998), pp. 57-73.

rights, and more are in the Appendix, I have deliberately refrained from recommending a specific list. Articulation of a list of rights is not the job of one person.

The commission that wishes to go beyond consumer education to develop enforceable rights through a rulemaking process or to encourage state legislators to take up the idea in their deliberations will likely devote considerable resources to building consensus, as in the Indiana and health care examples. The commission will need to decide early on who should be involved in the effort and through what process, beginning with informal exchanges of ideas through conferences and workshops. A strong bill of rights must be the product of wide-ranging discussion and consideration in the appropriate state or group of states to articulate community commitment. Such a process would involve federal and state regulators, industry (broadly construed) and consumers. At this time, the odds are not good for adoption of an order or law articulating consumer and citizen rights, even though it could well be argued that such a document would merely ratify what is already well accepted by the community and backed by the power of the state. A single legislative adoption or commission order would set an example that would move the idea along: If a health care bill of rights is adopted at the national level or if even one state is successful in formally establishing a broad telecommunications bill of rights by order or law (as opposed to an unofficial bill of rights), that model may make it easier for others to move the idea forward.

Besides consumer education and efforts to shore up and even advance claims for individuals in the telecommunications wars, a bill of rights may be used to help commission transformation from the old world of monopoly regulation to the new frontier of competition. Embedded in rights are policy goals and a commission might well ask how it can better mobilize internal resources to meet its responsibilities based on expectations, entitlements and rights; and to listen to and act on conflicting demands. The staff of the California Public Utilities Commission articulated many of these issues in a 1998 report.⁷⁶

⁷⁶ Staff of the California Public Utilities Commission, "Consumer Protection: Roles and Responsibilities," *NRRI Quarterly Bulletin* 19:4, winter 1999, pp. 407-424. The article was adapted from *A Staff Report on the California Public Utilities Commission's Consumer Protection Role and*

The staff quoted the Commission’s Vision 2000 Report, which said “Our mission is to assure consumers access to universal, reasonably priced, safe, reliable and environmentally sound public utility services while contributing to the economic prosperity of California.”⁷⁷ Citing Bob Rowe’s proposed bill of rights, the staff said, “the Commission should proactively protect consumers by establishing rules and enforcing them, educating consumers, improving the complaint process, offering mediation services, and facilitating competition.”⁷⁸ The staff detailed strategies and actions to accomplish the commission’s mission. For example, they recommended that the utility divisions be responsible for assuring that service providers are complying with commission orders and that enforcement responsibilities be centralized.

A 1996 NRRI research report gives guidance to commissions on how to manage change to better align structure and process with new policy goals. A 1998 report frames the choice for commissions as “deep change or irrelevance” and discusses trend in commission staffing, procedural and structural implications of protecting consumer sovereignty, transforming the public into educated ratepayers, funding, assessment of commission performance, and the creation of high-performance public service.⁷⁹

The focus of this paper has been on the rights of individual citizens and consumers. Corporations that are rightfully wary of incompletely apprehended but possibly far-reaching consequences of a formal bill of rights have legitimate demands, expectations, entitlements, and rights of their own. The employees and stockholders of the various players in the telecommunications industry have a right to pursue happiness as measured by material success, tempered by incentives at least to avoid harm to those who do not belong to the immediate corporate communities. Providers may wish to review their own

Responsibilities, San Francisco, CA: California Public Utilities Commission, 1998.

⁷⁷ California Public Utilities Commission, *The California Public Utilities Commission Approaching the Year 2000: A Report on Our Process for Change: Vision 2000*, p. iii, San Francisco, CA: CPUC, 1996.

⁷⁸ “Consumer Protection: Roles and Responsibilities,” p.409.

⁷⁹ Wirick et al., *Organizational Transformation*.

claims, as well as their societal obligations, and the obligations customers assume in using telecommunications services. These include carrier-to-carrier claims. For example, the expectation or entitlement of “a fair return on a fair value of investment” is today being supplemented by “a fair opportunity to enter and exit markets.” The underpinnings of this new principle include such “nails” as specific administrative, technical and pricing requirements of interconnection agreements, and a level “battlefield” of competition.

Successor Regulatory Regimes

The term “public utilities” seems old fashioned today when applied to telecommunications. However, the idea that there exist services essential to the health and welfare of a community (perhaps including gateway service to the Internet) is not out of date. Revising the social contract between producers and consuming citizens during the transition to competition calls for consideration of the appropriate tools of government oversight through a similar process of recombination and probably invention. Price caps and other alternative forms of regulation have been created and tried out as partial replacements to traditional regulation.⁸⁰ Antitrust is often mentioned as a supplement or substitute for ratebase, rate-of-return or other semi-traditional regulatory forms. Consumer protection modeled on the FTC is becoming a vital tool of state commission regulation. Perhaps a “claims and rights” perspective can impose clearer boundaries on the existing “turf” of commissions and other agencies, point to gaps, and help identify new means (presumably kinder and gentler ones, in the spirit of “regulation lite”) whether through commissions, administrative agencies or other agents.

The appropriate alternative to ratebase, rate-of-return regulation depends on other variables besides the claims we wish to make effective. Market power is a critical determinant of appropriate government oversight. In the absence of choices of a provider,

⁸⁰ Jaison R. Abel and Michael E. Clements, *A Time Series and Cross-Sectional Classification of State Regulatory Policy Adopted for Local Exchange Carriers* (Columbus, OH: NRRI, 1998).

commissions tried to act as the agents of various components of the “public interest” to achieve such expectations as reasonable prices, high quality and technological development and deployment. The definition of markets and market power in an increasingly deregulated global economy is a piece of the strategy, as is the design of adaptive regulatory regimes.⁸¹ It is hoped that NRRI research will help frame the debate over new regulatory regimes, with the states and other contributors helping to deploy the troops who will win the battles.

Summary and Conclusions

I have pursued two lines of argument to see what they can tell us about the role of claims for telecommunications in the United States as we move towards government oversight suited to a more competitive era. I have shown that many of the desirable ends put forth as items in a bill of rights for telecommunications customers are instruments to attainment of well-accepted citizen and consumer rights. I have shown that written documents and formal processes legitimize these rights to a greater or lesser extent. I have elucidated the varying perceptions people of different political stripes have about how public a good is and the relationship of that perception to notions of rights status. Finally I have given examples of the perils of promoting warranted claims into grounded rights.

We are in a period of dynamic change in the relationship of the institutional arrangements for production and delivery of telecommunications services to individuals as consumers and citizens. The pendulum is shifting away from a high degree of government control that worked well throughout the 20th century but would be over-regulation in the new era. Yet we continue to seek a good society as well as individual autonomy. To do so we must adjust the complex relationship of “I&We.” Etzioni and the communitarians see a role for regulation in this evolution:

⁸¹ Forthcoming NRRI research reports will address both these areas.

Regulations, far from being a threat to a free society, can serve, up to a point, to shore up social formulations of the good, but if pushed further, undermine the good society. Regulations are best judged on the basis of their specific merit or within the context in which they are introduced, rather than embraced or condemned.⁸²

The research report recounts and recombines the rights, entitlements, and expectations that apply to communications over a distance. Revising the social contract between producers and consuming citizens during the transition to competition calls for consideration of the appropriate tools of government oversight through a similar process of recombination and probably invention. The discussion is in no way definitive. Individual commissioners and staff have often sharply different opinions on the nature and applicability of rights. I hope that a “claims and rights” perspective clarifies debate on the existing reach of commissions and other agencies, point to gaps in oversight, and helps to identify new means of assuring old rights, whether through commissions, administrative agencies, or other agents.

⁸² Amitai Etzioni, *The New Golden Rule*, 44.

APPENDIX

EXAMPLES OF BILLS OF RIGHTS

BILL OF RIGHTS FOR RESIDENTIAL CUSTOMERS SERVED BY TELECOMMUNICATIONS UTILITIES

South Carolina Public Service Commission 1991 Order

The South Carolina Public Service Commission wants telephone utility customers to know their rights and responsibilities and whom to contact for assistance when they have questions or problems. Therefore, the Commission is making this statement available to customers of telephone utilities for which it has regulatory authority.

- As a general rule, you have the right to establish telephone service if you satisfactorily establish your credit and not member of your household is indebted to the telephone utility or any other telephone utility, if you provide the telephone utility with necessary and reasonable access to your property, if you are within the operating area of the company, and if your utilization does not pose a hazardous or dangerous condition.
- You have the right to advice from your telephone utility as to what facilities and services are available in your area.
- You have the right to a telephone directory published at regular intervals, listing the name, address and telephone numbers of customers, except public telephone and telephone service unlisted at a customer's request.
- You have the right to establish your credit in any one of the following ways: 1) you may provide a letter of good credit from a reliable source; 2) you may show that you have been a customer of the same telephone utility and have not had two consecutive 30-day arrears, or more than two non-consecutive 30-day arrears in the past 24 months; 3) you may provide a satisfactory guarantor or cosigner, who is also a resident customer of the same telephone utility with good credit, to guarantee payment of your bills if you do not pay them; or 4) you may make a cash deposit with the utility.
- If you are required to make a cash deposit, the maximum amount cannot exceed an amount equal to an estimated two (2) months (60 days) bill for a new customer or an amount equal to the total actual bills of the highest two (2) consecutive months based on the experience of the preceding six (6) months for an existing customer.

- You have the right to be notified, in writing, of any proposed changes in rates and charges for your telephone service.
- You have the right to a timely and accurate bill.
- If equal access is available, you have the right to select the Long Distance Carrier of your choice provided the carrier is operating within your service area.
- You have the right to be given written notice from the utility at least five (5) days before your telephone service can be disconnected for your failure to pay your telephone bill.
- If the telephone utility has overcharged to undercharged you, and it is found that an error has occurred with six months of the most recent billing, the error shall be corrected, and adjustment made thereof.
- You have the right to contact the telephone utility at all hours in case of emergency of unscheduled interruptions in your telephone service.
- You have the right to have any questions or complaints considered by your telephone utility and you have the right to prompt and courteous treatment of the telephone utility.
- If you need assistance with a complaint against your telephone utility that you cannot resolve by dealing with the telephone utility on your own, you have the right to call on the Utilities Division of the South Carolina Public Service Commission.
- If you are unable to resolve your complaint by working with the telephone utility or with the Commission's Utilities Division, you have the right to file a formal complaint against the telephone utility and request a hearing before the Commission.

Source: South Carolina Public Service Commission, "Order Issuing Bill of Rights," *In Re Drafting of Bill of Rights for Residential Customers Served by Telecommunications Utilities*, Docket 90-604-C Order 91-445, May 21, 1991.

PROPOSED INDIANA CONSUMER BILL OF RIGHTS

*Testimony by Mark Cooper before the
Indiana Utility Regulatory Commission in Docket 39983, 1993*

Universal Service

All consumers will have an equal and affordable opportunity to subscribe to basic local telephone service as a separate and distinct service, where basic local telephone service includes at a minimum, and currently at a maximum, unlimited voice-grade usage of the network(s) within the current local calling area⁸³ single party service, touch-tone, a directory listing with delivery of that directory, as well as access to emergency services,⁸⁴ access to operator services, access to Telecommunications Relay Service,⁸⁵ access to directory assistance, and access to the long distance networks. Low income consumers and consumers who reside in high cost areas may require support to ensure Universal Service. This support shall be competitively neutral and cost based.

⁸³ INECA fully supports the concept of the Consumer Bill of Rights and the continued availability of flat rate pricing for the universal service offering as an option. However, INECA is concerned that the nature of competitive environments and the use of usage sensitive compensation arrangements could make flat rate pricing to end users unviable (see INECA position, Section IV, Local Exchange Service, Local Rates).

INECA's support of the phrase "*unlimited voice grade usage of the network(s) within the current local calling area*" or the references to "*flat*" in the phrase "*affordable flat monthly rate..*" is based on the belief that the Consumer Bill of Rights does not and will not restrict the development of usage sensitive pricing as an option should market conditions or usage based compensation arrangements place the ILEC at a competitive disadvantage.

⁸⁴ These include 911 and E911 which facilitates communications with hearing and speech impaired persons over the telecommunications network(s).

⁸⁵ TRS is a service which facilitates communication with hearing and speech impaired persons over the telecommunications network(s).

Affordable Pricing of Basic Local Service

All consumers will have the opportunity to subscribe to basic local telephone service at an affordable flat monthly rate based on the cost of providing such service.^{86 87}

Disclosure

All consumers will be provided with information which clearly describes a service and the pricing the other terms on which it is offered prior to subscribing to the service. All consumers affected will be notified in sufficient time prior to a change in service or price to permit the consumer to terminate or select an alternative to the changed service.

Privacy

All consumers have a right to personal privacy with respect to the content of their telecommunications, will be able to reject intrusive communications and technology where technologically feasible, and will have complete control of and protection from any use of personal records and information unless the express confirmed consent of the consumer is given or unless the use is required by law. All telecommunications providers must provide to consumers a clear and concise written statement describing how customer specific information will be used, maintained, and disclosed.

Consumer Choice and Fair Competition

When the introduction of competition into the local exchange is deemed appropriate, i.e., when it is economically efficient and will result in lower local exchange prices and higher quality of service^{88 89} for consumers, all consumers will have a choice of vendors from

⁸⁶ Residential Consumers interpret this provision to mean that flat monthly rates should track the true costs of basic local service as they decline over time in response to increases in efficiency, technology, and utilization of the network for providing other additional services.

⁸⁷ NITCO, and Tri-County object to a requirement that they continue to provide a basic local service option at flat monthly rates during of after a transition to competition. The ITA and AT&T abstained from voting.

⁸⁸ Residential Customers believe this provision to mean that implementing local exchange competition should result in downward pressures on basic local service rates from competitive market pressures. Residential Consumers believe that lowering rates for some services, such as toll, while raising local exchange rates is not a result of "competition" but "redistribution."

⁸⁹ Sprint/United (S/U) believes that competition is appropriate if some local exchange prices increase as long as the overall prices are lower. S/U also objects to mandating improved or sustained quality of service at current levels as a precondition of implementing competition, believing it should be left

which they can purchase telecommunications goods and services. Consumers in a competitive environment will receive protection from anticompetitive practices such as (but not limited to) slamming, unwarranted bundling of services, deceptive marketing practices, and cross subsidization.

Public Participation

All consumers will have the opportunity to be adequately represented in governmental decision-making on telecommunications policy at both the state and federal level.

Oversight and Enforcement

All consumers will have the protection afforded by effective regulation of monopoly and near-monopoly telecommunications services until and as real and significant competition develops for such services. Consumers will have ongoing protection from anticompetitive practices in the transitional and post-transition marketplace. All consumers will be entitled to aggressive monitoring and enforcement of consumer safeguards adopted by state and federal regulators.⁹⁰

Quality of Service

All consumers will have access to service which meets or exceeds quality of service standards promulgated by state and federal regulators.⁹¹ At a minimum, the quality of service for a new entrant shall be no less than the quality of service required by the Commission to be provided by the incumbent LEC. All consumers will be seamlessly and fully interconnected regardless of provider(s). No consumers will have to change their telephone numbers solely as a result of changing providers within their local exchange area.

Problem Resolution

All consumers will have prompt and easy access to appropriate and adequate means for resolving service, billing, privacy, and other problems they encounter with telecommunications services and providers. Clear information explaining how and where

to "market forces."

⁹⁰ LTC believes real and significant Competition is losing any customer in LTC's exchange. LTC believes no one else has the right to define this for them.

⁹¹ Sprint/United believes a service quality requirement is inappropriate, as the market will decide the level of quality it demands.

consumers can seek resolution of their problems must be provided by vendors of telecommunications goods and services.

Usability

All consumers will have access to information on all options available for telecommunications services at no additional charge and will be provided clear and easily understood instructions for the use of telecommunications services.

Source: Dr. Mark Cooper, American Association of Retired Persons to the Members of the Executive Committee of the Indiana Utility Regulatory Commission, Testimony, *In the Matter of the Investigation on the Commission's Own Motion Into Any and All Matters Relating to Local Telephone Exchange Competition Within the State of Indiana*, Cause No. 39983, presented September 28, 1995.

COLORADO STAFF PROPOSAL FOR A CONSUMER BILL OF RIGHTS

Proposal before the Colorado Public Utilities Commission, 1995

Improved service, dialing parity among local exchange service providers, and service-provider number portability are among the consumer "guarantees" proposed by the Colorado Public Utilities Commission staff. The PUC will be seeking public comment on the proposed "Telecommunication Consumers' Bill of Rights" for the competitive local exchange market at meetings across the state from Sept. 26 to Oct. 26. Testimony from the meetings will be considered in the commission's proceeding to draft rules for local exchange competition. State legislation enacted earlier this year authorizes such competition beginning July 1, 1996 (TR, March 13 and May 8). The PUC staff's proposed Bill of Rights contains 10 articles:

1. "All consumers will have an increased choice of telecommunications provider(s) and services within reasonable time frames."
2. "All consumers throughout the state will have an equal opportunity to access basic and advanced telecommunications services within reasonable time frames. There will continue to be free access to '911' in each county."
3. "All consumers will receive better quality services at prices comparable to today's price or less. Eligible customers as determined by state law will receive discounted prices through the Link-Up and Lifeline programs."
4. "All consumers will use a telecommunications network which is set up so that it appears seamless to the consumer. The consumer will be able to make and receive calls using any provider without dialing extra codes or experiencing a reduction in transmission quality."
5. "All consumers will be able to keep their telephone numbers when they change provider(s) if they remain within their same neighborhoods. This number will be listed in a central directory."
6. "All consumer choices of providers and services will not be changed without the authorization of the consumer."
7. "All consumers will be provided with easily understood descriptions of telecommunications services, how to use the services, and how much such services

will cost. Consumers will be notified by their provider(s) about any pending changes in prices and services."

8. "All consumer conversations and transmitted data will be confidential. All companies will respect the consumer's right to a nonlisted, or/and nonpublished number. The consumer will be protected from unauthorized use of his or her equipment, records, and/or payment history."
9. "All consumers having problems with their provider(s) and/or services will have the ability to contact a consumer hotline staffed by each provider. These hotlines will afford consumers the opportunity to resolve problems."
10. "All consumers will receive effective consumer protection by PUC complaint resolution, efficient monitoring, and effective enforcement by the Colorado Public Utilities Commission."

Source: "Colorado Staff Proposes Consumer Bill of Rights," *Telecommunications Reports*, Sept. 25, 1995.

VERMONT STAFF POSITION PAPER ON CONSUMER PROTECTION AND PRIVACY ISSUES

Excerpts from 1997 Staff Proposal to the Vermont Public Service Board

Consumers shall have the right to know and control what they are buying.

- Companies must provide comprehensive notification of all services, options and rates at the time of a service order.
- Companies must cooperate with DPS in construction of a generic rate display matrix.
- Companies must provide a written record to the consumer of an order within five days of securing that verbal order.
- Companies must regularly notify consumers that, upon request, they can receive a Service Options Guide at no charge, containing clear and easily understandable descriptions of all service options that are relevant for the customer's service class.
- Companies must provide notification of changes in terms and conditions.
- Companies must engage in honest and fair marketing practices.

Consumers shall have the right to know from whom they are buying.

- No LEC shall submit a primary LEC change order unless the LEC has first obtained express authorization from the customer.
- Companies shall provide full disclosure on bill of Provider's name, address and telephone number.

Consumers shall have the right to know the full price of the goods and services that they are purchasing.

- Full disclosure on bill and/or contract of full price.
- The Board shall direct LECs and the DPS to work together to structure a standardized bill template which would provide the framework for an unbundled bill.
- There shall be no "free" offers, unless the offers are in fact "free."

Consumers shall have the right to reasonable payment terms.

- Companies must adhere to Board Rule 3.300.

- Companies must credit customers for payments immediately.

Consumers shall have the right to fair treatment by all providers.

- Full disclosure on bill and/or contract.
- Consumers will not receive any adverse or unfair treatment by the company in retaliation for their participation in the complaint process via Rule 2.300 and Board proceedings.
- Consumers will not be disconnected from their service for harassing company personnel.
- Companies must not attempt to evade responsibility for consumer complaints and must not refer dissatisfied customers to other providers.
- Companies must provide prompt, courteous, competent and convenient customer service.

Consumers shall have the right to impartial resolution of disputes.

Consumers shall have the right to reasonable compensation for poor service quality.

- Directory Assistance error or omissions.
- Telephone Directory-listed number errors or omissions.
- Liability Limitations.

Consumers shall have the right of access to basic local exchange service as long as basic local exchange service charges are paid, regardless of whether they have paid any charges for non-basic local exchange services.

Consumers shall have the right to be free of improper discrimination in prices, terms, conditions, or offers.

- Providers must adhere to a Code of Conduct which shall set forth standards of conduct governing the relationship between provider and customer.
- Companies shall apply the Board's rule on deposit payments in a fair and equitable manner to all customers.

Consumers shall have the right to privacy by controlling release of information about themselves and their calling patterns and by controlling unreasonable intrusions upon their privacy.

- Consumers should be able to control the right to choose the degree of privacy they desire for their telephone number.
- Information related to a customer's telephone number must be protected when it becomes available by capture of automatic numbering identification (ANI).

- Consumers should be notified about their privacy rights and the ways in which their personal information may be used.
- Providers may release information to a 3rd party only with the written consent of the subscriber.
- Consumers must be assured that privacy protections remain intact across interconnected networks and competing, interconnected service providers.
- Providers must present new services with privacy implications for review before they market these services to the public.
- Consumers must be given the opportunity to block unwanted services on a per-call and per-line basis at no extra charge.
- Consumers must be able to control unreasonable intrusions upon their privacy.

Consumers shall have the right to join with other consumers for mutual benefit.

Source: Vermont Department of Public Service, "Investigation into Service Quality Standards, Privacy Protections and Other Consumer Safeguards for Retail Telecommunications Service." Position Paper in Docket No. 5903, April 4, 1997.

NORTH DAKOTA TELEPHONE CUSTOMERS' BILL OF RIGHTS

Proposed by Commissioner Susan Wefald in 1998 as amendments to state law

It is the public policy of the state of North Dakota that every North Dakotan will have access to excellent telecommunications services at affordable prices. As the state makes the transition from monopoly to competitive telephone markets, North Dakotans will be protected from business practices that are inconsistent with the public interest. Therefore,

All North Dakota telephone customers shall have:

- The right to know price, terms, and conditions of service, either through access to public tariffs, or through a written disclosure notice. (new statute needed)*
- The ability to purchase essential local exchange service separate from other services. (already in law - NDCC § 49-21-01.4)
- Protection regarding disconnection of telecommunication services. (already in law - NDCC § 49-21-01.4)
- Use of the long distance company of their choice for both in-state and out-of-state long distance calls by dialing "1" plus the number. (new statute needed)
- The ability to stop telemarketing calls, by placing their name on a list maintained by their local telephone company. (new statute needed)

All North Dakota telephone customers shall have the right to contact the North Dakota Public Service Commission for impartial resolution of disputes regarding:

- Switching of carrier without customer consent (slamming) and adding services without customer consent (cramming). (new statute needed)
- Billing. (new statute needed)*
- Quality of service. (new statute needed)*

Customers of U S West, SRT Communications, and North Dakota Telephone Company shall expect the North Dakota Public Service Commission to:

- Only deregulate specific services when there is effective competition. (already in law - NDCC § 49-21-02.1)
- To administer the price cap law (U S West and SRT) or set prices (NDTC), until there is effective competition. (already in law - NDCC § 49-21-01.2, 49-21-01.3)

* Note: Only U S West, SRT Communications, and North Dakota Telephone Company customers receive this protection now.

Source: Commissioner Susan E. Wefald, North Dakota Public Service Commission, "North Dakota Telephone Customers' Bill of Rights," December 1998 (unpublished).

TELECOMMUNICATIONS CUSTOMERS' BILL OF RIGHTS: A PROPOSAL FOR DISCUSSION

*Excerpts from an article by Commissioner Bob Rowe of the
Montana Public Service Commission*

- Local service should be available at an affordable flat rate.
- All customers should receive basic telephone service at affordable rates, and also affordable access to advanced services.
- Customers should receive high-quality service.
- Customers should be able to resolve their complaints simply and effectively.
- Citizens should be able to participate in telecommunications policy decisions which affect them.
- Customers should receive accurate information on prices and terms.
- Customers' privacy should be protected and enhanced.
- Customers should receive the benefits of effective competition.
- Customers should be protected from unfair and abusive practices.
- Customers should receive continually improving services at reasonable rates.

Source: Commissioner Bob Rowe, Montana Public Service Commission, "Telecommunications Customers' Bill of Rights: A Proposal for Discussion," *NRRRI Quarterly Bulletin* 19, No. 1, 25-27.

CABLE CONSUMER BILL OF RIGHTS CAMPAIGN

*Announcement by FCC Chairman William E. Kennard.
The campaign was designed to educate consumers about their options
after the end of direct FCC regulation of cable rates April 1, 1999.*

Eight options consumers will continue to have:

From your cable company:

- Consumers should expect a fair deal from their local cable company, with reasonable rates that fairly reflect the costs of doing business.
- Consumers should expect an explanation from their cable companies whenever rates for the programming service tier are raised, particularly when cable companies attribute price rises to increase in the cost of obtaining programming.
- Consumers are entitled to write or call their cable companies whenever they have complaints about the cable services being provided on the various channels, or about program cost increases, and they should expect a speedy response.

From your local government:

- Consumers are entitled to file complaints with their local government (i.e. city, town or county) regarding basic tier cable rate increases and service quality.

From the FCC:

- Consumers are entitled to provide their own inside wiring for cable hookups.
- Consumers will soon be entitled to purchase and use cable set-top boxes at competitive market prices.

Additionally:

- Consumers have a right to contact local state and national consumer advocacy groups with grievances that are not being adequately resolved by their cable providers.
- Consumers unhappy with their local cable company should explore competitive alternatives for video programming service available from direct broadcast satellite and other providers.

Source: "FCC Chairman Kennard Launches Cable Consumer Bill of Rights Campaign." FCC press release March 31, 1999.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Abbreviated version of Declaration adopted by the United Nations, 1948

Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.

- Article 1 Right to equality
- Article 2 Freedom from discrimination
- Article 3 Right to life, liberty, and personal security
- Article 4 Freedom from slavery
- Article 5 Freedom from torture and degrading treatment
- Article 6 Right to recognition as a person before the law
- Article 7 Right to equality before the law
- Article 8 Right to remedy by competent tribunal
- Article 9 Freedom from arbitrary arrest and exile
- Article 10 Right to a fair public hearing
- Article 11 Right to be considered innocent until proven guilty
- Article 12 Freedom from interference in family, home, and correspondence
- Article 13 Right to free movement in and out of the country
- Article 14 Right to asylum in other countries from persecution
- Article 15 Right to a nationality and freedom to change it

- Article 16 Right to marriage and family
- Article 17 Right to own property
- Article 18 Freedom of belief and religion
- Article 19 Freedom of opinion and information
- Article 20 Right of peaceful assembly and association
- Article 21 Right to participate in government and in free elections
- Article 22 Right to social security
- Article 23 Right to desirable work and to join trade unions
- Article 24 Right to rest and leisure
- Article 25 Right to adequate living standards
- Article 26 Right to education
- Article 27 Right to participate in the cultural life of a community
- Article 28 Right to social order assuring human rights
- Article 29 Right to participate in community duties essential to free and full development
- Article 30 Freedom from state or personal interference in the above rights

Source: Sara Bullard, "Out of the Ashes of War: A Vision of Human Dignity and Rights," Ford Foundation, New York City (Vol. 29, No.3). The full version of the Universal Declaration of Human Rights is available at www1.umn.edu/humanrts.

CONSUMER BILL OF RIGHTS AND RESPONSIBILITIES

Excerpts from proposed "Patients' Bill of Rights," 1997

1. Consumers have the right to receive accurate, easily understood information and some require assistance in making informed health care decisions about their health plans, professionals, and facilities.
2. Consumers have the right to a choice of health care providers that is sufficient to ensure access to appropriate high-quality health care.
3. Consumers have the right to access emergency health care services when and where the need arises. The standard for need is that a "prudent layperson" could reasonably expect the absence of medical attention could result in placing the consumer's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ.
4. Consumers have the right and responsibility to fully participate in all decisions related to their health care.
5. Consumers have the right to considerate, respectful care from all members of the health care system at all times and under all circumstances.
6. Consumers have the right to communicate with health care providers in confidence and to have the confidentiality of their individually identifiable health care information protected.
7. Consumers have the right to a fair and efficient process for resolving differences with their health plans, health care providers, and the institutions that serve them.
8. Greater individual involvement by consumers in their care increases the likelihood of achieving the best outcomes and helps support a quality improvement, cost-conscious environment. Consumer responsibilities include: taking responsibility for maximizing healthy habits, such as exercising, not smoking, and eating a healthy diet; using the health plan's internal complaint and appeal processes to address concerns that may arise; and making good-faith efforts to meet financial obligations.

Source: President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, November 1997.

A BILL OF RIGHTS FOR THE INFORMATION AGE

Excerpts from a proposal by Bryan Glastonbury and Walter LaMendola, 1992

1. Human rights, as declared in the Universal Declaration of Human Rights, should be reasonable and prudently considered in all processes of [information technology] development, use, and application. . . .
2. Decisions which directly affect a human being may not be made by an information technology device alone. . . .
3. Humans affected by information technology device-aided decisions should be fully informed at all times, and have an incontrovertible right to appeal all such decisions through the courts of law or through formal appeal processes.
4. Personal data is the property of the person who is the subject of the data. . .
5. Unintended or unrecognized consequences of any type resulting from the applications of information technologies are the responsibility of those who have implemented the application, and subject to remedy and compensation for actual or perceived damages. . . .
6. If information technology devices or applications displace human workers, they should be compensated and provided retraining within their local communities. . . .
7. All information technology devices and applications should be accompanied by a full, complete, and understandable written statement of operating instructions, the functions and performance of the device or applications, and any known or suspected hazards connected with use. . . .
8. All information technology applications should conform to best equal opportunities standards, as should the information technology industry.
9. An independent commission should be established to register and review the context and use of all networks and databases containing personal material. . . . The commission should have power to seek modification, ban or proceed to court action in relation to any failure to meet appropriate standards or the terms of this Bill of Rights. . . .

10. All information technology applications and devices for which a purpose or use is surveillance should be regulated in the public interest. . . .
11. Specific legislation should be passed to ensure the protection of personal data, prevent unauthorized access to computer systems, and protect the copyright or patent rights of information technology designers. . .
12. Customers in any country should have the right to purchase equipment or programs from manufacturers at the lowest price the manufacturer offers in any location. . .
13. Information technologies should be confined to developments for peaceful uses and should be freely transferrable to all countries. . . .
14. An independent body, linked to the commission identified in 9 above, should be established to keep this Bill of Rights under review, . . .
15. The rights of individuals stated in this Bill should be the entitlement of all people of whatever country.

Source: Bryan Glastonbury and Walter LaMendola, *The Integrity of Intelligence: A Bill of Rights for the Information Age* (New York: St. Martin's Press, 1992), 192-4.

AN INFORMATION BILL OF RIGHTS AND RESPONSIBILITIES

Excerpts from results of a project of the Aspen Institute's Communications and Society Program undertaken at the suggestion of the Markle Foundation and Jorge Reina Schement, 1995

I. Communications Rights and Responsibilities

First Principles

Access

The emerging information society should be characterized by the open flow of information among all individuals and institutions.

Connectivity

The development of a national information infrastructure requires enhanced connectivity of all willing individuals and institutions to a network of ultimate connectivity.

Affordability

There should be equitable and affordable access to public information resources. The opportunity for practical universal access requires affordability to achieve equity.

Literacy

A democratic society needs to assure the existence of an informed and literate citizenry, as well as the protection of free expression and robust civic discourse.

Nondiscrimination

Neither skill nor status should bar an individual from full participation in the social dialogue and information transactions of the information society.

Security

In this new communications environment, protection of communications security, privacy, and reliability is necessary.

Participation

Democratic decision making is essential for the effective development of the new information infrastructure. Citizens should be encouraged to participate in the design and development of infrastructure technology and policy.

Diversity

In order to promote the goal of a rich and open information and communications environment, government has the responsibility to ensure:

1. a wide range of choices of communication media that provide access to information and communication services;
2. a wide range of choices of means for individuals and institutions to have voice in participating in the public dialogue;
3. a wide range of relevant political, economic, and social information;
4. that citizens may obtain the education and skills necessary for participation in the information society;
5. an environment conducive to the encouragement of free expression.

Information Resources

In order to compensate for the limitations of the market economy, and to support education, advance the arts and sciences, encourage public debate and discourse, and support civic endeavors, government has the responsibility:

1. to ensure the existence of a civic arena within the network, that is, to support electronic forums that encourage public dialogue and enrich democratic debate;
2. to support, without editorial interference, the ongoing viability of public libraries, the repositories of information democracy;
3. to make universally available in accessible form the political, economic, and social information necessary to the maintenance of an informed citizen and consumer.

Citizenship

Ethical participation in the information society requires that institutions and individuals have responsibility:

1. to make use of information and communication systems and services in ways that are consistent with the common good;
2. to establish, access, and use the information system in ways that do not result in damage to that system or its users;

3. to be informed participants in society;
4. for truthfulness and honest disclosure (within the protections of personal and institutional privacy);
5. to attribute authorship where appropriate in accordance with custom and contractual obligations;
6. to respect the rights of others to dissent from majoritarian opinion.

II. Information Privacy

First Principles

Collection

There should be limits on the ability of information keepers and processors to collect personal information. Information should only be collected when relevant, necessary, and socially acceptable.

1. Information should be collected directly from the individual whenever possible.
2. When not collecting information directly from the individual, notice, access, correction, and other rights should be provided if the information is used to determine rights, benefits, and opportunities.

Notice/Transparency

Individuals providing information to an information keeper and processor have the right to receive, at the time that information is provided, a notice of information practices describing how the information will be used, maintained, and disclosed.

Access and Correction

Individuals have the right to see and have a copy of any information about themselves maintained by others, consistent with the First Amendment and with other important public and private policy interests.

Use

Information may only be used for a purpose that is identified and described at the time that the information is collected.

Disclosure

Disclosures other than those described at the time of collection may be made to third parties only with the consent of the individual or where required by law.

Accuracy

Information keepers and processors must take appropriate steps to assure the accuracy, completeness, timeliness, and security of the information.

Enforcement

Rules about the collection, maintenance, use, and disclosure of information should be enforced through suitable mechanisms, such as administrative processes, professional standards, civil actions, criminal penalties, government or private ombudsmen, and other means.

Oversight

there is a need for an independent federal entity to conduct privacy oversight and policy-making activities.

III. Information as Property

First Principles

Facilitate Transactions

The development of standard practices, policies, rules, and laws concerning information should facilitate commercial, intellectual, artistic, and social transactions within the broadest community of creators, producers, disseminators, and users of information which:

- advance democratic values,
- promote free expression,
- further creativity and knowledge,
- allow broad access,
- maximize participation,
- facilitate trade and commerce, and
- respect privacy rights.

Legal Framework and Limitations

In an evolutionary period, emerging information property rules should be sensitive to the need both for predictability and for adaptability to change. Law should serve as an

overarching framework awarding property rights to information and recognizing limitations on those rights.

Information Commons

Emerging, laws, regulations, and judicial decisions should assure an expanding common pool of facts and ideas that nourish creativity and the advancement of knowledge.

Role of Government

Government information should not be subject to property rights.

Encourage Creativity and Investment

Evolving law and practices should encourage private and public investments to add value and enhance utility to data and further production of a wide range of new creative works.

Industry Structure

There must be constant attention to the evolution of industry structure so that property rights in information (or in the enhancement of information) do not yield bottlenecks or other anticompetitive consequences that frustrate the achievement of the general principles stated above.

Source: Charles M. Firestone and Jorge Keina Schement, *Toward an Information Bill of Rights and Responsibilities* (Washington, D.C.: Aspen Institute, 1995), 133-143.