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Address by the Hon. MICHAEL POWELL,
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DAVID LAWSON: As I'm sure you've all seen from your brochures, we've got a very distinguished group here to talk about media ownership, an issue that's been remarkably contentious and high profile in the last year or so.

Before we get to that, however, we've got a special treat for you. We're very pleased today to have with us a man who's really among the top dogs of communications policy, the Honorable Michael Powell, Chairman of the Federal Communications Commission. Chairman Powell's views on media ownership are quite well publicized. He's going to talk to us about something a little different today; today we're going to hear a little about the role of federalism, the Commerce Clause, and it's role in discussing how government should be involved in the Internet and next generation services.

With that, please give a warm welcome to Chairman Michael Powell.

CHAIRMAN POWELL: Thank you very much and thank you to the Federalist Society for inviting me today. When I walked in, I almost had a heart attack when it said we're going to talk about media policy because I, for one, am tired of talking about it. So we thought we'd branch out into something a little different today, so I appreciate your indulgence.

In the 19th century, Edison developed the modern electrical system bringing the light bulb within the reach of all Americans and changing the course of human events and wreaking havoc on the established gas lamp and candle making industries. Likewise, in the early 20th century, Henry Ford transformed America by bringing about efficient personal transportation to the masses, shaking up the established horse and buggy providers.

So here we are in the 21st century and we are experiencing a revolution of similar magnitude. We sit at the dawn of a digital revolution that inspires personal and political freedom, serves as a foundation for economic growth and prosperity, and is also shaking up the industry.

The proliferation, adoption, and use of digital technologies over the last decade are nothing short of breathtaking. Just look 10 years ago at 1993. The commercial

Internet was merely months old. There were less than 15 million cell phones in use in the United States. The 60 percent of Americans that subscribed to cable television typically had their choice of just under 30 channels. You could, of course, get a hundred channels over your satellite system, but that required a satellite dish that covered about three-quarters of your roof.

Today, over 100 million Americans pay to access the Internet each month, over 21 million of which do so over high-speed or broadband networks. There are 154 million cell phones in use in the United States. And today 85 percent of all American households pay for television, and with cable's digital upgrades enjoy as many as 150 channels. DBS subscribers, all 18-plus million of them now, have access to hundreds of television stations. Rather than that hulk-sized dish on your roof, it's now the size of a medium Domino's pizza.

So over the course of the last decade, broadband Internet access, WiFi, digital television, digital cameras, satellite radio, Internet telephony, Napster, KaZaA, Blackberries, streaming video, countless other digital technologies and services have all made their debut in the market. When you consider the industry through this light, that the digital revolution is turning every aspect of the communications industry on its head, it's not at all surprising.

But this growth did not come from nowhere. We have been experiencing a shift in this country away from the slow and limited analog communications networks of yesteryear to the high speed dynamic digital telecommunication networks of tomorrow. The benefits of the shifts are significant.

As we give way to bits, today's broadband digital networks are bringing to realization the promises of convergence that were promised to us in the late 1990s. Today's networks, whether they be cable, wire line, or wireless, are increasingly capable of providing every form of communication to the public—voice, video, and data—over the same network; a stark contrast with analog network ancestors, which were optimized to provide only one specific service to the public.

Indeed, the once cozy communications industry that was protected by state-sponsored monopolies is now experiencing intense competition, and it's coming from everywhere. Broadcast radio and television face competitive threats from satellite radio and direct broadcast satellite, which in turn competes with cable, which in turn competes with telephone companies, which compete with wireless providers, and all of which increasingly compete with the Internet.

Whether it is Matt Drudge or Google News taking on Dan Rather, or someone offering IP telephone in assault against baby Bells, the changes are real. This type of market instability, of course, is a boon for the public enjoying the fruits of the intense competition in the form of lower prices and increased innovation, personalization and new services, and applications.

The economy benefits as well. Falling barriers to entry empower small businesses to create jobs. Business continues to invest in these digital technologies to

increase productivity and fuel economic growth. In other words, the benefits of Schumpeter's creative destruction and Hayek's market forces are finally, after a century of government-sanctioned monopolies, taking hold in all segments of the communications industry, not as a result of government intervention, but simply because of technological progress and the great entrepreneurial spirit in our nation.

The upper level of this revolution has made it increasingly difficult for regulators to successfully traverse the legal and regulatory structure of the communications industry in these times. Yes, convergence throws a monkey wrench into the workings of the Telecom Act of 1996. Born only three years after the commercialization of the Internet, the Act did not, nor could it, grasp all that was to come in the digital age. It did not fully appreciate the monumental impact of a converged communication world. Thus, it preserved a balkanized legal regime built for an analog age.

As the market evolves and increasingly converges at a lightening pace, implementing the Act in a way that stays faithful to yesterday's balkanized industry and law has proved to be a difficult challenge. Moreover, the Act is marked sometimes by rigid specifications predicated on 100 year old phone service that must awkwardly be applied to a dynamic, fluid, innovative market place.

While implementing the 1996 Act is challenging, there is a looming struggle of constitutional proportions. That is the impact of the Internet on federalism and communications policy. The rise of the Internet is going to severely challenge federalism as it has been traditionally applied in communications regulation. We already hear the growing sounds of discord.

The battle over Internet taxation in Congress is just one example. But some states, not all, but some, have begun asserting authority under state law to regulate the Internet. California and Minnesota being notable examples.

Courts have begun taking up the question, as marked by a recent Minnesota District case striking down the state PUC's effort to regulate voice over Internet services, finding it preempted by federal law. Many, many have argued fiercely for defining emerging Internet services as telecommunications services in order to lay claim to a strong regulatory role for states and a basis for heavier regulation. Indeed, the recent Ninth Circuit case is a prime example of this effort and points out the serious implications of the approach for broadband policy. Feeling bound by an earlier decision from the Ninth Circuit in the year 2000 which determined that cable broadband service should be heavily regulated under the same regime we regulate telephone service, the Court vacated our rule without even considering its reasoning. So law made from the bench in the year 2000, when broadband services were less than two years old and only a small percentage of people subscribed to the service, trumps a year-long FCC review on the subject.

As noted by Circuit Judge O'Scannlain in a begrudging concurrence, he stated, "It cannot be denied that the Court's holding today effectively stops a vitally

important policy debate in its tracks.” He further recognized that simply by “beating the FCC to the punch, the Court’s decision aggrandizes, rather than delimits, the Court’s power of an admittedly complicated and highly technical area of telecommunications law.”

Now for a moment, putting aside my view about what the best approach to the Internet is from a federal perspective, one that is unflinchingly supportive of maintaining an Internet free from governmental regulation, I want to address this trend where some state efforts to heavily regulate the Internet like the telephone system have arisen. There is a real danger that as the Internet continues to command a central position in communications and in commerce, the lurching assertions of differing state regulatory regimes could threaten its very viability and could severely, even if inadvertently, undermine the efficient development of national economic opportunity.

The issue must now be confronted more directly rather than having a regulatory framework for the Internet develop in a piecemeal and uncoordinated fashion. I submit this challenge is not novel. Our founding fathers made clear that one central purpose for forming our constitutional union was to preserve and advance economic activity among the states and with foreign nations.

Thus, federal supremacy was established by the Interstate Commerce Clause in Article I, Section 8, one of its chief purposes being to avoid the economic balkanization that characterized the Union under the Articles of Confederation.

I believe that the current debate over the division of responsibilities between the states and the federal government is not simply a question of statutory classification, but one with profound constitutional implications. Thus, I think Interstate Commerce Clause jurisprudence can be instructive in helping develop respective roles between state and federal governments.

But to begin, one must understand fully the characteristics of the Internet itself. It differs dramatically from the telephone network which is cited too breezily as a valid analog for Internet regulation. The Internet is a global network. It was designed by the Defense Department to be robust in the event of attack. Its central genius is to connect multiple networks using a common protocol that allows communications over any type of platform.

Routing is achieved by breaking data into packets and allowing those packets to travel along whatever path is optimal, which might carry a bit halfway around the world before reaching its destination. Thus, the network is not dependent on particular pathways in the manner that many phone networks are, for it can move data across the network to servers and routers throughout the world.

The Internet was quickly exploited by the invention of the Web. Simple interfaces permitted information and data to be delivered from almost anywhere to anywhere. No one owns the central infrastructure, unlike the phone network, and

thus anyone can utilize the structure to engage in information activity. This is a powerful paradigm shift.

Rather than having the brains of the network reside centrally in the hands of institutions, as they do in the telephone network, the Internet is a dumb network where the intelligent power is distributed to the ends of the net to individuals. Thus, no matter where you might reside, no matter what your interest, you can attach your own computing equipment to the net and communicate with virtually anyone, or publish news for anyone to access around the world, or form communities of interest that extend beyond all borders, or to teach and learn from great distances, or sell goods to buyers anywhere and everywhere, no matter what your physical location.

This paradigm shift has profound implications for our civilization. As one broadband report by the National Academy of Sciences put it, broadband is a means to multiple diversions encompassing family, work, and society generally. In addition to enabling entertainment and e-commerce applications, broadband can enrich the Internet's exploitation as a public space making electronic government, education, and health care applications richer and more compelling and useful. And it can provide new modalities of communication, notably within communities or families. Broadband commands attention because it enables dramatically different patterns of use that offer the potential for significant changes in lifestyle and business.

So in short, the Internet is the foundation of our societal prosperity in the information age. Just as the railroad was vital to the movement of oil, coal, and steel in the industrial age, the Internet is essential to the movement and access to information in the information age. Our national interests are squarely implicated and should remain front and center as we evaluate the impact of state assertions of power over the Internet.

Let me expand on the concerns and problems raised by state regulation of the Internet as a way of starting a discussion that I hope can lead to a harmonious division of responsibility. Traditionally and legally, communications regulation has been regulated at both the state and federal level. The general organizing principle for dividing that responsibility has simply been distance. Local phone calls are regulated primarily by the states. Long distance phone calls that extend beyond state boundaries are regulated by the FCC. Yet these distinctions are quickly being obliterated by Internet communications.

The Internet is inherently a global network and by its design does not confine transport to narrow, artificial, legal boundaries. Many have written about the death of distance in describing the effects of the Internet. A person in West Virginia can find medical help in New York. A purveyor of clothes can find customers in London. A local radio broadcaster can find listeners around the world. Distance in the modern information era becomes a substantially weaker impediment to the access and fruits of civilization.

Moreover, cyberspace is a sort of suspended place, not meaningfully identifiable by location. When you access Amazon.com, for all intents and purposes, you're in the store no matter where you actually are physically. So you are in the store from your home, from your office, from an airport terminal, from a hotel, from school, from the library, from overseas, and from Starbucks, having a cup of coffee.

Just as the Supreme Court observed in *Reno v. ACLU*, "The Internet is a unique and wholly new medium of worldwide human communication located in no particular geographical locale, but available to anyone, anywhere in the world." Location has been used as a central tenet for according, to uniquely state-centered interests, and it, too, is going to be increasingly questionable as a basis for state regulation.

The vanishing of location and distance as meaningful legal constructs plays havoc with the respective roles of the federal jurisdiction and state jurisdiction in common communications law. Clearly, the very nature of the Internet is to explode the limitations of both time and space that have heretofore severely limited social and personal activities to local areas.

Whatever we do, we must forcefully resist any effort to force a round Internet into a square regulatory hole just to validate economic, regulatory, and taxing authority. State assertions of uniquely local concern are going to have to confront the inherent interstate and global character of the network.

Commerce Clause cases have also focused on the importance of legal uniformity and regulation. I believe, like railroads and other transportation systems generally, the Internet desperately needs to enjoy a fairly uniform regulatory treatment. Just as the Internet's magic rests on uniform protocols and is unimpeded by variations in technical platforms, regulation will need to be uniform and unimpeded by the different state legal platforms.

It's like the battle over operating systems: development has long been impeded in the past because it would only run on a Macintosh, or a Windows computer, or a Unix computer. The growth of the Internet, by contrast, has flourished in large measure because it can run on any platform. We don't want different state operating systems with Internet businesses that have to run one way on one state's regulatory system and be expected to run a different way on another state's regulatory system.

It is also arguably futile to invest enormous resources trying to parse a seamless global network and its bits that fly at the speed of light around the globe into parochial parts. Just like interstate trucking cannot survive if it must pass through multiple incompatible regulatory regimes as it transverses from New York to Seattle, the Internet, too, would be impeded by doing so.

Let me quote from a great Supreme Court case, *Wabash v. Illinois*, in which the Supreme Court discussed this concern in railroads. It stated, "It cannot be too strongly insisted that the right of continuous transportation from one end of the

country to the other is essential in modern times to that freedom of commerce from restraints which the state may choose to impose upon it that the Commerce Clause was specifically intended to secure. This clause was among the most important of the subjects which prompted the formation of the U.S. Constitution. It would be a very feeble and almost useless provision if at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing commerce. "We must therefore hold that it is not and never has been the deliberate opinion of a majority of this Court that a statute of state which attempts to regulate the fares and charges by railroad companies within its limits is a valid law."

To date, uniformity has been preserved not by federal regulatory regime or harmonious state regulations, but through unregulation. The common denominator has been a free market with few, if any, legal restraints and impediments. I personally believe that the market is the best standard on which the Internet runs. But as regulatory issues arise, we must be cognizant of the disrupting effect of new, competing, and divergent regulatory standards.

Of course, any state's individual regulatory interventions may not in themselves impede the flow of interstate Internet commerce. But the cumulative affect of 51 jurisdictions could be severely damning to the growth and innovation of the network. Entrepreneurs and Internet innovators are spending enormous amounts of time and money, at great risk, to create applications that will prosper in the new information economy.

I know of no one who thinks of a business model involving the Internet as strictly limited to local activity. Sellers want as many customers as possible. Suppliers want as many retailers as possible. Purveyors of news and messages want to command the largest audiences possible.

It seems to me there is little point in being in the Internet business or space if you have no interest in reaching beyond your own borders. Multiple and perhaps conflicting sets of rules could combine to render Internet intervention too costly or too complicated to pursue. This is especially true in its infancy, as small businesses and entrepreneurs look for new ways to challenge existing dominance by others. They can't take on large regulatory offices and legal staffs. They can't divert capital to multiple and onerous regulatory requirements, tariffs in every state, different tax regimes, different competition requirements.

At this nation's stage to move in this direction could suck the life force out of the Internet development and leave our national economy and social interest lagging the world in this new economic age.

The New York District Court in the case of American Library Association, voiding a New York law about the Internet, explains the unique nature of the

Internet, highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach, and possibly was unaware were being assessed. Typically, states' jurisdictional limits are related to geography. Geography, however, is virtually meaningless on the Internet.

There is also a related point to make on the chilling effect that would blow on the Internet if heavy regulation, particularly state regulation, were imposed. Few states, I dare say none, have worked out careful policies for the Internet and Internet applications. If they enter the space, they will spend many years dealing with the unique and difficult questions presented. Some states will move forward aggressively; other states will take years or decades, or perhaps fail to make much progress at all.

If we embrace a major economic regulatory role for state governments, we will suffer its chilling affect on the next development, for it will take decades to reach a coherent structure, if that is even possible. The risk overhanging the effort will dissuade innovation and investment.

As the New York Court expounded further, the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation, that taken in its most extreme, could paralyze development of the Internet all together.

I also believe we must realize that not all that is going on through the Internet is beneficial for society. As we swallow the hard lessons of the terrorist attack of September 11 and put more energy into protecting the homeland, it is frighteningly evident that the Internet is a favorite tool for developing weapons to harm others and provides the means for organizing and coordinating attacks against the United States. Worse yet, the Internet itself can be a weapon. The dependence of our banking systems, airline control systems, electric and communications infrastructure, put those things at risk by someone intent on harming America by destroying its economic infrastructure. This has been the calling card of terrorist groups like Al Qaeda, who see American economic prowess as an evil to be buried. This uniquely national concern must be interwoven and protected as we debate jurisdictional responsibility.

Now I don't mean to suggest that there is no possible role for the states as the Internet evolves. I only caution that a precipitous rush to regulate at the state level could severely impact important national interests, many of which the Constitution establishes as supreme. States are thus cautioned about asserting power in this area.

I do believe that we can work together with our state colleagues to develop respective roles that will allow state government to protect uniquely local interests without impermissibly hindering interstate commerce and national interests. I think states do have important roles in areas of their traditional police powers, for sure. Health, safety, welfare concerns may give rise to uniquely state interests, and it might be proper for them to play a role.

Economic regulation, however, presents severe challenges to the interests of the Union and interstate commerce and should be limited. This debate cannot be allowed to diverge into some ideological state rights battle. The Constitution unequivocally established federal supremacy in areas substantially affecting commerce and other areas that are unquestionably implicated by the Internet.

Indeed, from a constitutional perspective, the very formation of the Union was predicated in part on protecting and advancing commerce among the states and with foreign nations. Moreover, we just can't be allowed to contort the very character of the Internet to assert power over it.

As the *Wall Street Journal* said recently, "We are all for federalism, but if an email transaction sent from Nashville to Phoenix via servers in Dallas and St. Louis isn't interstate commerce, then what on earth is?"

I want to conclude by emphasizing that my comments should not be read by anyone to suggest federal regulation as opposed to state for the Internet. The Internet has thrived under free market principles and will continue to do so if we do not introduce regulatory impediments. I wholeheartedly embrace the Internet paradigm of minimal regulation that has ushered in the Internet, unleashed entrepreneurial energy, and produced the fastest growing and perhaps most important invention in history.

No regulator, either federal or state, should tread over the Internet without absolutely compelling justification for doing so. Innovation and capital investment absolutely depend on this premise.

The great advances of civilization, Milton Friedman observed in *Capitalism and Freedom*, have never come from a centralized government. I think that lesson in history should guide us more than ever as we move forward into the future.

Thank you very much. It's been a pleasure to speak with you.

