

Rethinking Reform of the FCC: A Reply to Randolph May

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I. INTRODUCTION

Even the most strident opponents of regulation cannot fathom a world in which society does not—at some level—regulate the provision or consumption of information or communications. Even if markets function perfectly, we would still envision certain legal controls. A useful example of one such legal control is the

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First Amendment to the U.S. Constitution, which establishes firm boundaries on the government's ability to control information. Other forms of regulation may include the creation of a legal liability scheme if information is abused in some manner, such as libellous statements, copyright infringement, or identity theft. The absence of some form of regulation is unthinkable.

But as a society, we have gone much further in our attempt to regulate information than merely enacting prohibitions on certain government or private actions. Our federal, state, and local policymakers have created extensive regulatory structures that govern everything from the provision of cable and telecommunications services using public rights of way, satellite and wireless services that involve a high degree of international coordination or standardization, and various media services, with both positive and negative content regulation. Providers of media and communications services are licensed, subsidized, monitored, and sanctioned to specify just a few of the most commonly employed regulatory techniques. The problems and opportunities for which we see a regulatory role seem endless.

At the center of all this stands the Federal Communications Commission ("FCC"), a so-called independent federal regulatory agency that is composed of five commissioners, appointed by the President and confirmed by the Senate, not more than three of which are from the same political party.¹ The FCC is independent in the sense that, while it is subject to laws passed by Congress and court decisions, most of its actions cannot be directly overruled by the President through the administrative process. The FCC has an extensive array of responsibilities and obligations, a large budget and staff, and a prominent place in the heart of policymaking on media, technology, and communications. Further, because the FCC regulates several multibillion dollar industries that touch almost every aspect of our economic and social lives, its structure, remit, and activities are often subjected to severe scrutiny.

But some argue that having the FCC stand at the center of all this policymaking is the wrong approach. They make a compelling case in many respects. Why should five unelected officials establish forward-looking policies that govern media and communications in our republic? Would it not be better to remove the bureaucratic mystery surrounding policymaking and have these sometimes contentious issues resolved by the President or persons answering directly to the President? The President is accountable directly to the American public and is often regarded as a swift decision maker. If there is controversy, what better focal point than the President? It is in this intellectual climate that the *Administrative Law Review*

1. 47 U.S.C. § 154 (2000).

recently published Randolph May's essay on opportunities for reform of the FCC.²

While this Article functions as a reply to May's essay, I salute May's many contributions to an important debate, namely, how best to structure society's control over the creation, distribution, and consumption of information. May's contributions are commendable as an initial matter for their very existence and nature. We should not regard our policymaking and regulatory structures as strictly bound by the idealist but perhaps unworkable principles of the past. If conditions change or our learning changes to such an extent that we believe a new regulatory structure is called for, then we should not hesitate to call for change. May does this.

My aim in this Article is to expand on May's recent call for consideration of FCC reforms, criticize his methodology to some extent,³ and briefly present a framework within which reform of the FCC or any regulatory agency or organization can be evaluated. But my most important aim in this Article is to convey the following: Any discussion about reform of an agency with the size, importance, and history of the FCC should be based, in part, on empirical data about how regulators work, not anecdotal information that simply confirms our existing assumptions.⁴ Just as carefully as we scrutinize the regulator, we should also carefully scrutinize our own assumptions about regulatory structures and the regulatory process, and the empirical or logical methods by which we test those assumptions.

II. RANDOLPH MAY'S CALL FOR AGENCY REFORM

May offers two principal suggestions for reform of the FCC. He suggests (1) reducing the number of FCC commissioners from five to three or even one and (2) moving the FCC into the executive branch of government and removing its independent status.⁵ As justifications for his reform proposals, May argues that "with a five-member agency, it is more likely that, as a result of compromises made

2. Randolph J. May, *Recent Developments in Administrative Law: The FCC's Tumultuous Year 2003: An Essay on an Opportunity for Institutional Agency Reform*, 56 ADMIN. L. REV. 1307 (2004).

3. An important disclaimer is in order: May's essay does not generally claim to employ social science or similar investigatory techniques. Therefore, my criticism of May's approach is somewhat overstated—but purposely so. May asks for a debate and attempts to frame that debate by describing what he believes is an outdated regulatory structure and by drawing inferences from real-world situations he observes. Since his call for reform is based on a certain context established in his essay, it is appropriate to examine whether that context withstands careful scrutiny.

4. This Article tracks the claims contained in May's essay, which primarily calls for reform based on the need for more timely and coherent policies. This Article does not focus on doctrinal issues such as the questionable constitutional status of independent regulatory agencies or normative preferences about regulation or governance. In essence, this Article ignores the issues associated with agency reform and focuses exclusively on what one might call the *effectiveness* issue raised by May: Are there structural changes that, if implemented, would make the FCC more effective in accomplishing its mission?

5. May, *supra* note 2, at 1321.

in reaching a majority decision, the resulting order will lack clarity or even be internally contradictory.”⁶ He also argues, “Along with increased political accountability, presidential supervision should lead to decisions that are timelier, more internally coherent, and generally more consistent with other executive branch initiatives.”⁷

When I first read May’s essay, I reacted quite strongly to these claims. This is not because I am an uncritical institutional supporter of the FCC or someone who otherwise fears change. My reaction is based primarily on what I perceive to be unexplored assumptions about regulation or governance of complex systems generally. My concern is not that we are *too critical* of issues surrounding agency reform. Instead, my concern is that we are *not thinking critically enough* about regulatory structures and processes. I will share my concerns and address them in this Article.

III. EXPLORING THE NEED FOR AGENCY REFORM

As an initial matter we should explore whether, as May claims, conditions are ripe for reform of the FCC.⁸ May’s argument that it is time to consider reform of the FCC stems from two assertions: (1) during the tumultuous year of 2003, the FCC poorly handled two important policy issues before it, and (2) convergence and rapid change significantly altered the marketplace environment.⁹ I shall address each rationale in turn.

First, with respect to the year 2003, I agree with May that the FCC’s consideration of the two policy issues he discusses¹⁰ was marked by squabbling, delay, and generally poor policymaking. Otherwise, I will not generally explore or critique May’s description of those two FCC proceedings. However, subject to my earlier disclaimer, a broader, methodological critique surfaces: Are those two proceedings representative of the business before the agency during this time? Are

6. *Id.* (citation omitted).

7. *Id.* at 1323 (citation omitted).

8. *Id.* at 1307–08.

9. *Id.* at 1309.

10. Those were the *Triennial Review* and the media ownership proceedings. For the *Triennial Review*, see *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978 (2003) [hereinafter *Triennial Order*], *corrected by Errata*, 18 F.C.C.R. 19220 (2003), *aff’d in part and rev’d in part*, U.S. Telecom Assoc. v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (reversing major portions of the FCC’s *Triennial Order*), *cert. denied*, 543 U.S. 925 (2004). For the media ownership proceedings, see 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620 (2003), *aff’d in part and remanded in part*, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (remanding the FCC’s cross-media ownership limits decisions for justification or modification), *cert. denied*, 125 S.Ct. 2904 (2005).

they representative of a systematic agency pathology that requires a cure?¹¹ Here, I part company with May because the evidence appears anecdotal and highly subjective.¹²

Again, consistent with my initial disclaimer, we must realize that May is simply exploring opportunities for reform, albeit in a suggestive manner. But the criticism remains: Precisely why do the two selected proceedings, in May's words, "provide the opportunity and impetus" for considering reform of the FCC?¹³ Why are they, again in May's words, "important for what [they say] about the functioning of the agency"?¹⁴ In making these claims, we should first address the significant potential logical frailty in using two proceedings, from one year, out of the seventy years of the agency's existence and thousands of proceedings during that time. The two proceedings at issue may indeed say something larger about the structure of the FCC.¹⁵ Alternatively, they may simply describe those two proceedings as statistical outliers, atypical of the agency's performance during 2003¹⁶ and thus offer very little insight to those concerned with agency reform.

In any event, if we are to focus on one particular year, why not start with the FCC's critical assessment of its own performance during that year? Admittedly, an agency's self-appraisals will suffer from several problems such as insularity and bias. However, while painting a rather dismal portrait of an incompetent or

11. Could it be possible that an agency with the particular reformed structure and characteristics advocated by May would have experienced a similarly tumultuous year in 2003? What would that tell us about structural reform? May claims that a bad 2003 for the FCC "increased the sense" that the regulatory regime needs updating, but before we discuss changing the FCC's structure, should we not first conduct a rigorous empirical analysis of the links between agency structure and policy outcomes? May, *supra* note 2, at 1309. May suggests that the FCC's structure contributes to poor outcomes. *Id.* However, we must be careful when alleging causation, particularly when there may be other confounding factors (e.g., confusing legislation) that could be the real cause of the poor policymaking outcomes.

12. While the two proceedings selected by May as examples of the FCC's poor track record were certainly important and controversial, there were many other important proceedings and activities before the FCC in 2003, including the DTV transition, public safety communications issues, and the World Radio Conference, to name but a few. *See generally* FCC ANNUAL PROGRAM PERFORMANCE REPORT (2003), available at <http://www.fcc.gov/Reports/ar2003.pdf> [hereinafter 2003 FCC REPORT].

13. May, *supra* note 2, at 1309.

14. *Id.* at 1313.

15. Certainly, there are many reasons for adopting this viewpoint. Study of an unusual or atypical case can teach us much about a larger issue. For example, the two proceedings at issue were quite large in terms of their social and economic impact on society. One might argue that, if the FCC fails in such important cases, it does not matter what the outcomes are in average cases. These two examples might serve as what Stake calls an "instrumental case study"—a study of the particular that offers insight into a larger phenomenon. ROBERT E. STAKE, *THE ART OF CASE STUDY RESEARCH* 3 (1995).

16. A related methodological question: Why is the year 2003 representative? Longitudinal studies of the FCC's practices would likely offer a more realistic picture of how the agency's structure affects policy outcomes. This is particularly true because we are considering wholesale changes in the FCC's structure and not merely focusing on the introduction of a new regulatory technique or process.

unresponsive agency, May makes no mention of the FCC's annual self-appraisal reports ("Reports"), issued every year by the FCC and available to the public on its Web site.¹⁷ The Reports track FCC performance in certain key areas such as spectrum, competition, homeland security, and modernization of internal practices. The Reports are exhaustive and specify data that illuminate the issues May addresses in his essay. For example, May criticizes the FCC for extraordinary delays in one particular rulemaking proceeding (a six-month delay),¹⁸ but the FCC claims that, in Fiscal Year ("FY") 2003, the average time period between adoption of a decision and that decision's release to the public was a mere ten days.¹⁹ The delay increased to fifteen days in FY 2004.²⁰ So, we are left with two accounts of the FCC's timeliness: May's qualitative account of the time delays associated with one or two particularly large and important proceedings, and the FCC's more quantitative account of its average speed of disposal of matters before it. Both accounts inform the debate. But calls for reform cannot be taken seriously unless they deal with both the illustrative and qualitative type of account and the exhaustive and quantitative type of account.

Not only does May criticize the FCC's timeliness in two proceedings, he also suggests that its decision-making ability is correlated with its number of commissioners, claiming that "it is more likely that, as a result of compromises made in reaching a majority decision, the resulting order will lack clarity or even be internally contradictory."²¹ But May provides no further reasoning or data to support his otherwise contestable claim. Contrast the recent empirical studies that address this precise issue. For example, in one recent study, researchers compared the effectiveness of a five-member committee versus individual decision making on monetary policy issues. The study found that groups make better decisions than individuals.²²

17. See, e.g., 2003 FCC REPORT, *supra* note 12.

18. May, *supra* note 2, at 1314.

19. See 2003 FCC REPORT, *supra* note 12, at 30.

20. See FCC ANNUAL PROGRAM PERFORMANCE AND ACCOUNTABILITY REP. 67 (2004), available at <http://www.fcc.gov/Reports/ar2003.pdf>.

21. May, *supra* note 2, at 1321 (citation omitted).

22. Claire Lombardelli, James Proudman & James Talbot, *Committees Versus Individuals: An Experimental Analysis of Monetary Policy Decision-making* (Bank of England, Working Paper No. 165, 2002), available at <http://ssrn.com/abstract=340560>. The Bank of England study also follows earlier empirical work which undercuts the notion that individuals make decisions in a timelier manner than groups. See Alan S. Blinder & John Morgan, *Are Two Heads Better Than One?: An Experimental Analysis of Group vs. Individual Decisionmaking* (Nat'l Bureau of Econ. Research, Working Paper No. 7909, 2000), available at <http://ssrn.com/abstract=242143>. But see David Schkade, Cass R. Sunstein & Daniel Kahneman, *Are Juries Less Erratic than Individuals?: Deliberation, Polarization, and Punitive Damages* (Univ. of Chicago Law School, John M. Olin Law & Econ. Working Paper No. 81, 1999), available at <http://ssrn.com/abstract=177368> (indicating that juries make more unpredictable and varied

Even if one were to discard potentially unrealistic laboratory-style empirical work and simply focus on reported actual outcomes and comparisons, there is no evidence to suggest that multimember commissions perform worse than executive branch agencies. If one considers a reviewing court's rate-of-reversal of agency actions a proper measure of the quality of regulatory actions, then there exists ample data upon which to review real world outcomes. The answers from a 1992 review are not terribly surprising: (1) federal agencies tend to do well in court generally and (2) "there [is] no substantial difference . . . between the executive and independent agencies."²³

I am not endorsing a particular viewpoint on whether the FCC would make better and timelier decisions if it was managed by one chairperson instead of a five-member commission. More study and consideration are clearly needed. I also suspect the answer would be highly contextual, depending on the precise nature of the issue in question and the affected parties. But one thing is certain, the concept of "less is more" in the context of agency decision making has not been demonstrated with any degree of persuasiveness.

With respect to May's second rationale for reform—the current fast-changing state of the marketplace—nothing about this particular era of convergence and change warrants FCC reform in its own right. It is only the notion that the agency is out-of-step and unable to cope with the changed marketplace that would support the contention that reform is needed. But here again, I part company with those who claim that an agency born of New Deal thinking about problem solving is poorly suited to tackle problems in today's environment. At the very least, I look for more evidence.

I find a high degree of generational exceptionalism in May's description of the FCC as a once "sleepy backwater government agency" now confronting a new climate of "rapid technological change . . . propelled by the digital revolution" in which there are "rapid-fire business successes and failures" and resulting "breakdown of existing regulatory service distinctions."²⁴ While there are obviously

decisions than individuals when it comes to damage awards). Unlike juries, the Bank of England study employed economically-literate students from the London School of Economics in a policy environment, a setting more similar to the communications-literate FCC commissioners.

23. See Martha Anne Humphries & Donald R. Songer, *Law and Politics in Judicial Oversight of Federal Administrative Agencies*, 61 J. POL. 207, 210 (1999) (citation omitted) (describing a 1992 study covering federal agencies before U.S. Circuit Courts of Appeal for 1979, 1983, and 1987). Of course, we must be careful when we say that any statistic measures the quality of decision making. There could be factors other than the intellectual quality of an agency decision that result in success or failure in court. For example, federal agencies may have more litigation resources than private litigants. Also, as Humphries and Songer demonstrate, federal judges may let their own policy preferences influence their decisions. *Id.* Similarly, many provisions of federal law provide deference to administrative agencies' decisions. Finally, there may be procedural reasons (e.g., the doctrine of standing) why the quality of federal agency decisions are not tested at all.

24. May, *supra* note 2, at 1307–09.

changes afoot, they do not appear to be happening in such a rapid manner that the FCC cannot keep pace. There existed a similar environment of exceptionalism when then-Secretary of Commerce Herbert Hoover addressed the regulation of radio in 1924, ten years before the FCC was created:

There are certain minimum regulatory powers in the Department of Commerce. They are inadequate to meet the shifting situation that this developing art constantly presents. Nor could any legislation keep pace with the changes imposed by scientific discovery and invention now going on in radio. . . . With the development of the art this problem has become one of the most complex technical character ever presented to the Government for solution. At every succeeding conference we have had more and more difficult problems to solve, and those which we present today are of a complexity greater than ever before.²⁵

But are these descriptions of change and complexity, renewed every generation it seems, really that authentic?²⁶ We must all fall victim to this type of thinking at times—the thinking that ours is a unique age that requires new ideas and new structures for solving problems.

May also paints a portrait of the FCC and similar regulators as being born out of a flawed understanding of dispassionate regulatory expertise. He makes a very good point: we should not expect regulators to be insulated from the political process. But we cannot let our thinking about the silly ways that certain early regulators conceived themselves as dispassionate administrative scientists be equally as singular. Surely, the FCC possesses expertise in numerous areas covered by its statutory remit. Moreover, much of the FCC's work is accomplished in a nonpolitical environment and in a neutral manner. In other words, it was wrong during the New Deal era to place sheer faith in the concept of administrative science, just as it is wrong today to think there is no science to administration. So, while we should perhaps be interested in studying the use of "electioneering-style tactics" before the FCC,²⁷ we must also analyze how often and in what particular contexts those tactics are employed.

May takes dead aim at James Landis as the leading proponent of unrealistic

25. Herbert Hoover, Secretary of Commerce, Address Before the Third National Radio Conference: Recommendations for Regulation of Radio (Oct. 6, 1924), *available at* <http://earlyradiohistory.us/1924conf.htm>.

26. Karl Popper wrote of this tendency, criticizing those scholars:

Contrasting their "dynamic" thinking with the "static" thinking of all previous generations, [and believing] that their own advance has been made possible by the fact that we are now "living in a revolution" which has so much accelerated the speed of our development that social change can be now directly experienced within a single lifetime. This story is, of course, sheer mythology.

KARL RAIMUND POPPER, *THE POVERTY OF HISTORICISM* 160 (2nd ed. 1960).

27. May, *supra* note 2, at 1317.

thinking about the capabilities of the administrative state.²⁸ But Landis was more critical in his thinking about regulation than May credits him for. Landis was often severely critical of regulatory agencies. For example, in a report to President-elect Kennedy in 1960, Landis completely savaged the FCC, claiming that it “drifted, vacillated and stalled in almost every major area.”²⁹ Sounding almost like an earlier version of May, Landis further noted that the FCC “seems incapable of policy planning, of disposing within a reasonable period of time the business before it, of fashioning procedures that are effective to deal with its problems.”³⁰ Landis even advocated structural reforms remarkably similar to those advanced by May, calling on policymakers to increase the power of chairmen over collegial bodies and making those chairmen directly accountable to the President.³¹ In fact, in his influential work on regulation, Justice Stephen Breyer noted that such structural approaches to agency reform (e.g., calls for single agency heads accountable to the President) are commonly advanced, and he cited similar reform proposals that go back as far as 1937.³² Justice Breyer said of such proposals, “The major weaknesses in these and other similar proposals for structural change, however, is that they are designed to be policy neutral. They assume that improved agency structure will automatically bring about improved performance. Yet there is little evidence that this is so.”³³

Further, the FCC may have been born during the New Deal era, but the agency that exists today is in numerous structural, procedural, and cultural ways not a New Deal agency. Since its birth, the FCC has, among other things, (1) had its structure changed in 1983 from seven commissioners to the present five,³⁴ (2) had its remit expanded, such as the addition of satellite communications in 1962,³⁵ (3) been subjected to new legal constraints such as the Administrative Procedure Act (“APA”) of 1946,³⁶ (4) seen the intellectual climate surrounding the field of regulation shift remarkably due to the influence of the “Chicago school” in developing the public choice theory of economic regulation,³⁷ and (5) been subject

28. *Id.* at 1313.

29. STAFF OF S. COMM. ON THE JUDICIARY, 86th Cong., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 53 (Comm. Print 1960) (James M. Landis, primary author).

30. *Id.*

31. *Id.* at 65.

32. Stephen Breyer, Regulation and Its Reform 354 (1982).

33. *Id.* at 356.

34. Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 805 (codified at 47 U.S.C. § 154(a) (2000)).

35. *See* Communications Satellite Act of 1962, 47 U.S.C. § 701 (2000).

36. *See* Administrative Procedure Act of 1946, 5 U.S.C. § 551 (2000).

37. Maxwell L. Stearns, *Restoring Positive Law And Economics: Introduction To Public Choice Theme Issue*, 6 GEO. MASON L. REV. 709, 720 (1998) (“[T]he earliest and perhaps most notable Chicago School contribution to public choice was to recast business regulation from an ‘imposed upon’ to an ‘acquired’ model.”).

to more aggressive Presidential and Congressional oversight since the Reagan era.³⁸ And, of course, one cannot discount all the internal changes—some minor, some not so minor—that have occurred over the past seventy years. We should appreciate the significant differences from the agency that James Landis and Justice Felix Frankfurter would have recognized.³⁹

May suggests that a regulator residing within a political branch of government is more accountable than an independent regulatory agency. He argues that “locating the FCC in the executive branch would introduce more political accountability for policymaking determinations.”⁴⁰ But precisely why does housing certain FCC policymaking functions in the executive branch increase accountability? The argument appears, on the surface, to be logical. One could imagine that, because the President is the only federal official voted on by all members of the electorate, his decisions on media and communications policy matters would be subject to great scrutiny by the press and public.

The concept of accountability stems from what concerns people and how those in power see themselves bound to address those concerns. So, how can we test May’s claim? How can we judge whether an executive branch agency would be more accountable than an independent agency? And to whom would the agency be accountable? Do members of the public even realize that the FCC is today not directly controlled by the President? Does the public already *mistakenly* hold the President accountable for the actions of the FCC?⁴¹ There are no polls of which I am aware that track popular beliefs about the independent nature of the FCC; although recent poll data suggest that a majority of the public ignores even the most heated media regulation debates.⁴² So many questions remain unanswered that I cannot

38. See James F. Blumstein, *Regulatory Review By The Executive Office Of The President: An Overview And Policy Analysis Of Current Issues*, 51 DUKE L.J. 851, 858–60 (2001) (describing the far-reaching Reagan-era initiative that centralized presidential oversight of regulatory policy-making).

39. May, *supra* note 2, at 1312 (providing the perspective of J. Frankfurter).

40. *Id.* at 1322.

41. It is this notion of an “accountability mismatch” that Mariana Prado innovated and conceptually explores in her recent paper. Prado notes that “the President can play with the electorate’s perception. He may simply claim responsibility for popular policies and blame agencies for unpopular policies.” Mariana Mota Prado, *Independent Regulatory Agencies and the Electoral Accountability of the President 11* (2004) (paper prepared for the SELA Conference, June 12, 2004) (citation omitted), <http://islandia.law.yale.edu/sela/SELA%202004/MotaPradoPaperEnglishSELA2004.pdf>.

42. Seventy-two percent of poll participants in July 2003 indicated that they had heard “nothing at all” about the FCC’s media ownership proceeding. Twenty-three percent had heard “a little.” Press Release, Pew Research Center for the People & the Press, *Strong Opposition to Media Cross-Ownership Emerges* (July 13, 2003), <http://people-press.org/reports/print.php3?PageID=721>. The number of people aware of the proceeding seems quite low and supports May’s hypothesis that elevating media policy matters to the presidential level might increase public awareness and accountability. However, when contrasted with the polling status of executive branch departments on similar issues, the FCC might not fare so poorly. In other words, it is the *comparative* standing of the

predict with confidence whether increased executive control over FCC policymaking would increase accountability.

We also must consider the follow-on effects, which may include further, not less, politicization of, and chaos in, the regulatory structures. As a prominent critic of presidential control over the regulatory process, Cynthia Farina points out,

The new presidentialism arms the President to insist that he, uniquely, possesses the constitutional prerogative, democratic mandate, and managerial competence to direct the administrative state. These claims of singular entitlement and ability to control the regulatory agenda establish a norm of confrontation, rather than collaboration. By raising the stakes for other actors in the system, such hegemonistic claims may trigger an oversight arms race. Indeed, many would say that this is exactly what happened in the 1980s, as Congress reacted to what it perceived as aggressive unilateral White House deregulatory initiatives with a variety of equally aggressive countermeasures. . . . If we encourage political actors to regard regulatory oversight as a battle for the soul of the administrative state, we may be unpleasantly surprised at the weapons each turns out to have available in its arsenal.⁴³

I do not necessarily endorse Farina's viewpoint, but her observation hits the proper methodological tone. The regulatory environment—that space or arena in which debates occur and decisions are taken—is not static. A legal shift of control over the FCC's policymaking functions to the executive branch would be followed by countershifts and not just from Congress. Regulatees, consumer groups, courts, and even FCC employees will likely react in different and perhaps unpredictable ways. I question whether we can predict policy outcomes, particularly successful policy outcomes, with any degree of certainty.

IV. EXPANDING THE CONTEXTUAL SETTING OF THE REFORM DEBATE

In this Part of the Article, I intend to abandon my overly harsh methodological critique of May's essay and instead champion his spirited call for fresh thinking about "reforming the original experiment."⁴⁴ But instead of focusing on the FCC and its experience in 2003, I will head in the opposite direction⁴⁵ and explore the FCC's regulatory environment in the context of other structures that affect policy.

Before we consider structural reform of the FCC, we should first critically examine the overall policy environment in which the agency operates. Otherwise, we

independent versus executive agencies we should be interested in, not simply the low standing of the independent regulatory agencies.

43. Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 235 (1998).

44. May, *supra* note 2, at 1312.

45. May's essay considers structural reform of the FCC at the agency level. Heading in a different direction, one could examine reform issues at a microlevel by reviewing the FCC's procedures and practices, or at a macrolevel, as this Article briefly attempts, by reviewing the regulatory and policy environment beyond the agency.

run the danger of wrongly viewing regulation as merely an isolated, binary activity: the regulator acting on the regulatee. What are the factors—political, social, economic, and legal—that unduly constrain or overindulge the FCC? Perhaps, if reform is indeed required, we should first examine what some have called the “institutional endowments”⁴⁶ that, at least in some cases, can be predictive of regulatory success or failure. May mentions one and suggests others.⁴⁷ Combined, they raise the question of whether the FCC needs reform or whether we should first rethink other aspects of the regulatory and policy environment. Some elements of that larger environment include: previous FCC decisions, international organizations, Congress, and federalism.

A. *Previous FCC Decisions*

There is, perhaps, no greater constraint on FCC behavior and action than the agency’s previous actions. We tend to think of the agency as an undifferentiated whole, but the FCC is composed of serial mini-administrations, each of which leave their stamp on media and communications policy. Even setting aside legal obligations for the FCC to follow precedent or explain its departures therefrom,⁴⁸ there exist practical reasons why previous FCC decisions are so constraining. Take, for example, the issue of standards setting. If the FCC sets a technological standard for a consumer device and then millions of those devices are sold in the marketplace, a subsequent mini-administration has little choice but to accommodate that standard for a period of time. Thus, the FCC’s previous decisions have contributed to certain market structures that are difficult to undo or substantially amend through simple administrative reform.

B. *International Organizations*

Media and communications are global businesses. Increasingly, we are also seeing global regulatory structures, ranging from the trade-specific World Trade

46. Brian Levy & Pablo T. Spiller, *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*, 10 J.L. ECON. & ORG. 201, 205 (1994). Levy and Spiller describe five endowments: (1) executive and legislative institutions, (2) judicial institutions, (3) customs and broadly accepted norms that constrain behavior, (4) the contending social interests within a society, and (5) the administrative capabilities of the nation. *Id.* at 205–06. Levy and Spiller generally conclude that those governance structures which constrain administrative discretion and induce private investment produce the best outcomes. *Id.* at 202–03.

47. May, for example, acknowledges that the FCC is often faced with “ill-defined and sometimes contradictory statutory mandates.” May, *supra* note 2, at 1308. May also describes numerous court battles faced by the FCC, highlighting the fact that the agency does not always have the final say in policy matters. *Id.* at 1313.

48. See *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

Organization (“WTO”)⁴⁹ to the Internet Corporation for Assigned Names and Numbers (“ICANN”).⁵⁰ Increasingly, the FCC may find itself unable to make policy in a particular area because that role has been assigned to another, more internationally-focused entity. Similarly, the FCC may be required to compromise its efforts in order to achieve some form of regulatory coordination with an international organization. This is an interesting area for those interested in reform, posing important questions: Are global regulatory structures more effective in an interconnected world? Do global regulatory structures impede the effectiveness of the FCC?

C. Congress

The actions of Congress have an obvious effect on FCC performance. Normative policy preferences, for the most part, are established by Congress and merely implemented by the FCC. Similarly, the FCC’s statutory remit can be expanded or narrowed by Congress, as can particular procedures⁵¹ or legal standards or presumptions.⁵² Particularly since the 1996 Act,⁵³ Congress specifies not only the policy goal, but also increasingly specifies the methods, timing, and legal standards by which the FCC seeks that goal.⁵⁴ Perhaps one area of reform to explore would be a loosening of these legislative constraints, applied in an *ex ante* fashion by Congress and often without serious study. This is particularly true in situations where—if you endorse May’s viewpoint—we are experiencing a period of rapid technological change.

Another useful area for reform to explore would be a complete rewrite of the nation’s laws pertaining to media and communications, particularly in light of the recent developments associated with wireless and Internet delivery of information. May’s essay suggests that the laws which govern these industries are deficient from both a substantive and procedural perspective.⁵⁵

49. The WTO is a multilateral trading system in which, for telecommunications purposes, member states agree to certain enforceable commitments, typically related to market access by foreign competitors. See World Trade Organization, <http://www.wto.org> (last visited Mar. 16, 2006).

50. ICANN says it is “responsible for coordinating the management of the technical elements of the [Domain Name System] to ensure universal resolvability so that all users of the Internet can find all valid addresses.” ICANN Information, <http://www.icann.org/general/> (last visited Mar. 18, 2006).

51. See 47 U.S.C. § 160(c) (2000) (requiring the FCC to act on certain “forbearance” petitions within one year and ninety days of their submission).

52. See *id.* § 312(d) (putting the burden of proof in FCC license revocation proceedings on the Commission).

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

54. See Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 820 (1988) (describing the congressional trend of narrowing administrative agency discretion).

55. May, *supra* note 2, at 1308 nn.3–4.

D. Federalism

States play a prominent role in both the media and communications sectors. For example, often subject to broad federal guidelines, state and local governments typically franchise cable operators and authorize telecommunications providers, and they specify the terms and conditions under which broadband and wireless facilities are emplaced. Perhaps curbing the power of state and local authorities to make or impede certain media and communications policies would increase the effectiveness of the FCC.

Based on the foregoing, even a brief exploration of the environment in which the FCC operates reveals numerous areas where reform could proceed ahead of, or in conjunction with, institutional agency reform. But a review that solely focuses on the FCC, even if it is empirically rigorous, will be incomplete and perhaps misguided if it is not situated in the wider legal and policy context.

V. OFCOM ON THE POTOMAC

Our review of models for reform should also not be limited to the United States. One useful model may be the United Kingdom's Office of Communications ("Ofcom"), a regulator with which I have some familiarity.⁵⁶ Ofcom was created on December 29, 2003, as a result of a complete structural overhaul of how the United Kingdom regulates the media and communications industries.⁵⁷ Ofcom replaced five other legacy regulators that previously governed differing industry sectors. Ofcom is therefore what some call a "converged regulator."⁵⁸

Here is the comparison point for May's call for reform: Ofcom is not a collegiate policymaking body that functions in the same manner as the FCC. Ofcom has a more corporate structure. Ofcom has two leaders, called the "Chief Executive" and the "Chairman."⁵⁹ Ofcom is also not bipartisan or multipartisan like the FCC.

56. In 2003, I cofounded OfcomWatch, a Web site that monitors the regulatory activities of Ofcom. As a comparatively new regulator, Ofcom is not well known within the United States. Ofcomwatch Home Page, <http://www.ofcomwatch.co.uk> [hereinafter *OfcomWatch*].

57. See generally Ofcom Communications, About Ofcom, www.ofcom.org.uk/about (last visited Mar. 18, 2006).

58. Ofcom was actually created by the Office of Communications Act of 2002 but was provided with greater structural clarity, remit, and procedures at the end of 2003. See Office of Communications Act 2002, ch. 11, <http://www.opsi.gov.uk/acts/acts2002/20020011.htm> (last visited Mar. 18, 2006); Communications Act 2003, ch. 21, Pt. 1, <http://www.opsi.gov.uk/acts/acts2003/20030021.htm> (last visited Mar. 18, 2006).

59. Ofcom's nine-member board differs from the FCC's five-member board for several reasons. First, the Ofcom board functions more like a corporate board and leaves the day-to-day media and communications regulation to the Chief Executive. Further, Ofcom's board adheres to a code of conduct in which all board members are deemed to have agreed to all decisions, and dissenting viewpoints are not revealed, either internally or externally. Finally, except for its current Chairperson, Lord Currie, the Ofcom board generally acts behind the scenes and is not a focal point for policy

By contrast, the appointment of Ofcom's Chief Executive is controlled by the government in power in the United Kingdom, currently Tony Blair's New Labour government. So, Ofcom possesses the two structural characteristics—small leadership and part of the political branch—advanced by May for possible reform of the FCC.

The similarities between Ofcom and the model of structural reform May suggests for the FCC raise the questions: Is Ofcom more accountable, quick-acting, and coherent than the FCC? Would structuring the FCC to resemble Ofcom improve the U.S. media and communications regulatory system? I will attempt a brief answer to these questions, mindful of the dangers when comparing institutional structures across legal cultures.⁶⁰ I will also temporarily discard the methodological rigor that I applied to May's analysis of the FCC.

Because Ofcom was only created in December 2003, it is probably too soon to remark on whether Ofcom is an optimal regulator from an effectiveness standpoint. But in my opinion, by simply replacing five legacy regulators and serving as a single source for media and communications regulation, Ofcom represents a significant structural improvement over the legacy regulators. By having one regulator instead of five, citizens, consumers, and regulatees are probably more likely to know where to turn for information.

With respect to accountability, Ofcom is very responsible to New Labour and its key ministers who cover media and communications policy: Prime Minister Tony Blair, and Secretary of State for Culture, Media and Sport Tessa Jowell.⁶¹ The links between Number 10 Downing Street and Ofcom are clear, and because there has never been a separation of powers in the United Kingdom, no person seriously questions whether New Labour directly controls media and communications policy. They do—despite occasional disclaimers to the contrary.⁶²

But I have criticized Ofcom for a lack of accountability and transparency *to the*

matters. See Office of Communications, The Ofcom Board: Functions and Role, http://www.ofcom.org.uk/about/csg/ofcom_board/role/#acontent (last visited Mar. 18, 2006).

60. See ROGER COTTERRELL, *COMPARING LEGAL CULTURES* 13 (David Nelken ed., 1997) (“One of the enduring problems of comparative law has been its inability to demonstrate convincingly the theoretical value of doctrinal comparisons separated from comparative analysis of the entire political, economic and social (we might call it contextual) matrix in which legal doctrine and procedures exist.”). In other words, Ofcom is part of a British policymaking establishment, aimed at British citizens and consumers, and acting within the British (and larger European) business and intellectual climate. A simple structural comparison to the FCC, while useful in some respects, ignores the many other variables that may explain policy preferences and outcomes.

61. See 10 Downing Street, Her Majesty's Government, <http://www.number-10.gov.uk/output/Page1371.asp> (specifying the United Kingdom cabinet ministers) (last visited Mar. 18, 2006).

62. Interestingly, Ofcom's executive, Stephen Carter, recently claimed that his agency is “unashamedly technocratic.” Stephen Carter, Chief Executive Officer, Office of Communications, Address to Incorporated Society of British Advertisers Annual Conference: Ofcom Two Years On (Mar. 9, 2005), <http://www.ofcom.org.uk/media/speeches/2005/03/isba#content>.

public and regulatees on numerous occasions. Ofcom's Web site is often confusing to the casual visitor.⁶³ Ofcom has no codified set of regulations. Ofcom has no rules governing *ex parte* presentations about contested or controversial matters. Ofcom does not permit reply comments in policy-making proceedings. Ofcom is overly secretive with respect to its documents, even in the face of the United Kingdom's Freedom of Information Act,⁶⁴ which was implemented in January 2005.⁶⁵ Ofcom regularly holds meetings with so-called stakeholders and does not invite or otherwise inform the public. Finally, Ofcom appears to "sell" already formulated policy answers to the public and regulatees, rather than consult in a meaningful way.⁶⁶

Does Ofcom act in a timely manner? Because Ofcom is a new regulator, it may be much too soon to consider this question. I will offer one example, however, because it is the United Kingdom's comparison proceeding to the FCC's media ownership review.⁶⁷ This is Ofcom's strategic review of PSB. Ofcom's PSB review was initiated on November 6, 2003,⁶⁸ partially completed on February 8, 2005, with the release of Ofcom's Phase 3 report, and will continue into summer or autumn 2005 as the regulator continues to consult on matters related to the United Kingdom's distinct nations and regions.⁶⁹ The PSB review was initially supposed to be a twelve-month review, so it appears that Ofcom acted in an untimely manner.⁷⁰ In terms of comparing the timeliness of Ofcom as a regulator controlled by New Labour with one manager with the timeliness of the FCC as an independent agency with five commissioners, the PSB review only tells a small story, but it nevertheless probably stands for the proposition that, when you ask or raise important questions

63. Posting of Russ Taylor to <http://www.ofcomwatch.co.uk/2005/03/ofcom-v-fsa-on-complaints> (Mar. 29, 2005, 22:09 GMT) [hereinafter Posting 1].

64. Posting of Russ Taylor to <http://www.ofcomwatch.co.uk/2005/09/ofcom-should-publish-its-foi-decisions> (Sept. 7, 2005, 12:13 GMT).

65. Posting of Russ Taylor to <http://www.ofcomwatch.co.uk/2006/01/ofcom-2005-year-in-review> (Jan. 1, 2006, 17:02 GMT).

66. *OfcomWatch*, *supra* note 56; *see also* Posting 1, *supra* note 63.

67. The public service broadcasting ("PSB") review has three phases and attempts to answer some of the same basic questions as the FCC's media ownership proceeding. For example, it attempts to answer what marketplace solutions and governmental regulations will work together to best deliver quality media to citizens and consumers. The PSB review feeds into the United Kingdom government's 2006 review of the BBC Charter, a process that commenced in December 2003 and will not conclude until mid-2006. *See* U.K. Department of Culture, Media and Sport, BBC Charter Review Timetable, <http://www.bbccharterreview.org.uk/home/timetable.html> (last visited Mar. 18, 2006).

68. *See* Press Release, Office of Communications, Ofcom Commences Full Review of U.K. Public Service Broadcasting (Nov. 11, 2003), http://www.ofcom.org.uk/media/news/2003/11/nr_20031106 (last visited Sept. 18, 2005).

69. *See* OFFICE OF COMMUNICATIONS, OFCOM REVIEW OF PUBLIC SERVICE TELEVISION BROADCASTING, PHASE 3 - COMPETITION FOR QUALITY 2 (Feb. 8, 2005), *available at* <http://www.ofcom.org.uk/consult/condocs/psb3/psb3.pdf>.

70. *See* Office of Communications, *supra* note 59.

of public policy, resolution of those issues will take time. The particular structure of the agency may only be a small factor in determining the timing of policy measures.

We will know much more about Ofcom and its effectiveness in the coming years. Some of that knowledge may address the issues raised in May's essay—what are the connections, if any, between agency structure and successful policy outcomes? I suspect the answer will never be clear. The policymaking environment contains too many variables, both known and unknown (e.g., technological advancements), to enable us to fashion “a model agency for the digital age.”⁷¹ Regulators—no matter what their structure—will likely continue to disappoint their critics.

VI. CONCLUSION

May hits the right tone in his essay. We should consider reform of the FCC, and reform of all institutional structures that govern the media and communications sector. Consideration of reform, however, cannot proceed unless we first come to a consensus, based partly on empirical evidence, that reform is needed and that the FCC is the entity to which reforms should be targeted. Similarly, efforts to reform the FCC will be fruitless if they are not part of a comprehensive reform strategy that considers the wider legal and policy environment in which the FCC operates.

71. May, *supra* note 2, at 1325 (quoting former FCC Chairman William Kennard).

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