

CHAPTER III: LESSONS FROM THE HISTORY OF COMMUNICATIONS REGULATION.

Human beings generally, and lawyers in particular, prefer to regulate based on analogy and precedent. This derives in part from the fact that few things are wholly novel, and in part from the general reluctance of regulators to engage in bold experiments. But whether from prudence or undue caution, we find many useful lessons from the history of regulation of modern electronic telecommunications — and modern electronic media — when considering the proper framework for regulating search and social media.

A. Digital Platforms Share Many Important Economic and Social Commonalities with Electronic Media and Electronic Communication.

Digital platforms are in essence the next evolution in communication, just as radio and television broadcasting represented an evolution in mass media, and broadband an evolution in communication over the telephone (Whitt 2018). This is not to say they are identical in all respects. To the contrary, as I will explain below, they differ in critical ways that make it impossible simply to copy provisions from the Communications Act or regulations from the FCC and apply them mechanically to digital platforms. Nevertheless, the similarities are enough to make the lessons, and especially the overall public-interest concerns, relevant when considering the appropriate regulatory framework.

Economically, digital platforms, mass media and telecommunications are all two-sided platforms that enjoy significant (albeit different) network effects. They provide the critical service of bringing together willing buyers and willing sellers. They also do far more. Because human beings are essentially communicating creatures, services involving transmission of information permeate all aspects of our society. Thanks to the benefits of network effects, the more people who use any specific platform the more valuable that platform becomes, and the higher the cost of exclusion from the platform. Additionally, each platform exhibits the classic property of network effects of extremely low marginal cost per new user, allowing a platform to scale up rapidly and achieve dominance. They therefore raise similar competition concerns.

Additionally, each industry raises the same broad public interest concerns with regard to representation, news, and exposure to diverse perspectives. Platforms rely on algorithms that help users find content and recommend to users related content. Even when these platforms employ “neutral” criteria, in the sense that they do not favor affiliates or favor paid content but instead generate purely organic search results, the selection criteria allow sophisticated parties to manipulate these results, with profound implications for our democracy as a whole (Martinez 2018). Indeed, just as broadcast and cable networks must employ some form of ranking and selection in

the presentation of their programming, search engines (broadly defined to mean any system of ranking and recommendation) cannot be truly neutral (Bracha and Pasquale 2008; Tufecki 2016). Just like electronic media, therefore, even when there is no explicit political agenda, the same concerns about excessive commercialism driving out potentially important but controversial content and the concern that individuals will simply screen out any information or perspective that disturbs their existing worldview remain just as relevant (if not more so) to the world of digital platforms (Sunstein 2018; Pariser 2011).

It therefore seems logical to draw on the experience with telecommunications and electronic media for basic inspiration as to which policies are most likely to work. In doing so, however, we must not fall into the trap of mechanically applying solutions from the telecommunications or mass media world to digital platforms. While digital platforms share many attributes of both telecommunications and mass media, they combine them in new ways. They have new capabilities. The manner in which users interact with these platforms, while in many ways similar to how users interacted with traditional media, is also wholly different. In some ways, a person sitting in her home watching a Twitch channel on her smartphone may appear indistinguishable from a second person watching a cable television network on television. But everything, from how the programming originates, to the business models of the programmer and the platform, to the manner in which the audience selects and interacts with the programming, is wildly different. Those who learn the wrong lessons from history are often worse off than those who fail to learn any lesson at all.

More importantly, we must view the challenge of digital platforms and the need to find a suitable regulatory structure that promotes the public interest as part of an ongoing response to the evolution of new technologies that upend previous economic and social expectations built on older means of communications. Human beings are a communicating species. Our laws are simply words communicating rules to each other. Commerce exists solely because of our ability to record commercial transactions. Our culture exists in the form of literature, art and the archives of electronic media. Small wonder that changes in the technology of communication — from the invention of the written word to the printing press to the telegraph to the internet — have the capacity to fundamentally reshape our society.

The radical changes created by these technological evolutions take time to emerge. The telegraph was commercialized beginning in 1837 by Samuel B. Morse, but its power to revolutionize presidential elections, military strategy and news reporting did not become clear until the Civil War (Wheeler 2008; Wheeler 2019). The invention of the telegraph and its global deployment created, for the first time, the capacity for instantaneous global communications (Standage 1998). The telephone brought the reality of two-way instantaneous global communication directly into people's

homes, while the radio (and then television) enabled millions of people to participate in the same event for the first time in human history.

Technology is neither intrinsically good nor intrinsically evil. It concentrates the power of human beings to do both good and harm. In 1872, Walt Whitman would celebrate the telegraph in his poem “A Passage to India” as an instrument of divine will to bring about universal peace and harmony.

Lo soul, seest thou not God’s purpose from the first?
The Earth to be spann’d, connected by network,
The races, neighbors, to marry and be given in marriage,
The Oceans to be crossed, the distant brought near,
The lands to be welded together.

Four years later, the owners of Western Union would use their control over the telegraph to manipulate the election of 1876, ensuring (after considerable contention) the election of Rutherford B. Hayes (Lasar 2011). It became increasingly clear over time that while the telegraph potentially enabled new sources of news, created new opportunities for commerce, and vastly influenced the course of world events, control of the telegraph created an information gatekeeper capable of manipulating the news, manipulating commerce, and manipulating world events. By deciding which messages received priority over others, or simply by blocking messages or access to the telegraph altogether, control of the telegraph conveyed outsized and unprecedented power. Such unregulated power in private hands was ultimately deemed incompatible with the needs of society, and by the beginning of the 20th century the telegraph was being regulated as a common carrier.⁴³

Those who have followed the development of the internet and the rise of digital platforms over the last 30 years will recognize the pattern. We recoil in horror at the ability of governments and malicious actors to use social media to organize genocide, orchestrate riots, and foment racial and political violence (BSR 2018). We see around us the ability of both governments and individuals to undermine confidence in our institutions of democracy through cheaply manufactured and distributed fake news (Farrell and Schneier 2018). But we forget that 80 years ago the Nazi regime used a combination of the radio and telephone to organize and perpetrate Kristallnacht. The revival of the Ku Klux Klan, the formation of new racist hate groups, and the rise of lynchings of African Americans in the 1920s were a direct response to movies such as *The Birth of a Nation* and radio broadcasts from hate-mongers such as Father Charles Coughlin.

⁴³ See *Western Union Tel. Co. v. Call Publishing Co.*, 181 U.S. 92 (1901).

Again, this is not to say that digital platforms are indistinguishable from these previous innovations in communications and mass media, or that we should mechanically apply the old solutions to today’s digital technology. Anyone using the internet today understands that digital platforms are as different from the telephone or cable television as those technologies were from the telegraph. But these differences should not obscure the important lessons the last century and more of regulation of electronic media have to teach us. Accordingly, a brief overview of the lessons of the last 100-plus years of regulation of electronic media will inform the regulatory framework for digital platforms.

B. Two Streams of the Communications Act — Telecommunications and Media.

The successes and failures of nearly 100 years of regulation of electronic communications and mass media provide valuable insight into how to regulate digital platforms to promote the public interest. I shall draw on these directly in Chapter IV, and provide here a brief overview by way of introduction.

1. *Enduring Fundamental Values Drive Communications Regulation.*

The history of communications in the United States began long before the advent of modern electronic communications. The Constitution explicitly granted Congress the power to “establish post offices and postal roads.” James Madison, writing in the *Federalist Papers*, found this power so obviously good that he spent little time defending it. “The power of establishing postal roads . . . may, by judicious management, become productive of great public convenience. Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care.”⁴⁴

For the last 240 years, Congress has followed an explicit policy of promoting widespread and affordable access to the means of communications. In the 18th and 19th centuries, this meant the establishment of a national postal service with regulated rates. As the telegraph and the telephone became increasingly important means of communications, Congress explicitly adopted the goal of making these means of communications universally available and affordable. FDR called on Congress to create the Federal Communications Commission to provide a single point of federal regulation for the “utility” of communications (Paglin 1989). Section 1 of the Communications Act of 1934 (codified today at 47 U.S.C. §151) clearly states what Congress intended the new agency to accomplish:

⁴⁴ *The Federalist Papers* No. 42.

[T]o make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service, with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting safety of life and property.

This statement provides us with three of the four fundamental values inherent in our national communications policy: service to all Americans; consumer protection (adequate facilities and reasonable charges); and public safety/national defense. Further examination of the provisions of the Act and the legislative history of the 1934 Act identify a fourth principle: enhancing competition to prevent bottlenecks in communication.

Given the regulation of telephone service as a “natural monopoly,” many will find it surprising that fostering competition in communications is a fundamental value. Nevertheless, regulation as a monopoly service was always considered a second-best option to direct competition. At the beginning of the 20th century, the Department of Justice launched an antitrust challenge to American Telephone & Telegraph’s increasing monopoly over long-distance telephone lines and its practice of using its control over long distance to crush local service rivals. This culminated in the 1911 “Kingsbury Commitment,” which, among other remedies, sought to overcome what we would now call the problem of how network economics creates bottleneck facilities. Under the Kingsbury Commitment, which was subsequently adopted by the Interstate Commerce Commission when Congress expanded the jurisdiction of the ICC to telephone and telegraph service, any existing local service could interconnect with AT&T’s long-distance network in order to compete with AT&T (Wu 2010).

This effort to foster competition in local telephone service ultimately proved too little, too late, though Congress continued to try to promote competition where possible. The legislative history of the Communications Act of 1934 reflects Congressmembers’ hope that progress in “radio telephony” and telegraphy would provide competition to AT&T’s national long distance monopoly and provide for competition at the local level (Paglin 1989). Congress also prohibited any combination of “direct or indirect” common control of a communications facility and a radio license if “the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce.”⁴⁵

⁴⁵ Communications Act of 1934 Section 314 (codified at 47 U.S.C. §314).

Congress applied these fundamental values to broadcasting as well as telecommunications. The Federal Radio Act of 1927 (FRA), incorporated into the Communications Act of 1934, reflected similar values in its provisions. For example, the Radio Act required the commission to distribute radio licenses so “as to provide a fair, efficient, and equitable distribution of radio service to each” of the “several states and communities.” As broadcasting was free, concern over rates and practices was not an issue. But the Radio Act (and subsequently the Communications Act) repeatedly required that the FCC grant licenses only where grant of the license would serve “the public interest, convenience and necessity.” Congress sought to limit the power of network effects in broadcasting as well, authorizing the commission to regulate the practices of “chain broadcasting” (the term at the time for broadcast network programming and station-affiliation practices). In the period following the adoption of the FRA, and even more so after passage of the Communications Act of 1934, the newly formed FCC fleshed out the meaning of serving the “public interest” and established rules based on the same fundamental values of universal service for all Americans, competition, consumer protection, and public safety.

In addition, because of broadcasting’s power to capture public attention and shape broad public opinion, its regulation (and regulation of subsequent electronic mass media) would acquire an additional value: protecting democracy by requiring coverage of local and national news, promoting diverse sources of news reporting, and prohibiting licensees from favoring specific political candidates. Through its power of license renewal, the FCC also acted to curb the use of broadcasting for promoting violence (particularly on the basis of race or religion), or as a tool for personal harassment (Columbia L. Rev. 1939).

In the electronic broadcast media, therefore, regulators focused on a specific list of public-interest goals that depended on the exclusive broadcast licensee to serve as a “trustee” of the license for the good of the local community.⁴⁶ The FCC adopted a mix of structural and conduct regulations to encourage the production of local and national news coverage and development of local and national programming from diverse perspectives. The objective of these regulations was less to promote economic competition than to reflect what communication lawyers short-handed as concern for “localism” (meaning production of local programming that reflected the interests and concerns of the local community) and “diversity” (meaning representation of diverse viewpoints from

⁴⁶ Congress and the FCC initially imposed these obligations as a consequence of the “unique physical properties” of radio, *i.e.*, that the technological limitations at the time made it impossible for more than a few broadcasters to operate in any geographic area at any specific time. This “scarcity rationale” justified regulation of speech in a manner usually considered inconsistent with the First Amendment. With the advent of cable television, however, regulation of electronic mass media moved beyond the scarcity rationale. I explore this and other First Amendment details in the section on content moderation in Chapter V.

a variety of sources and, following *Office of Communications of the United Church of Christ v. FCC*, efforts to encourage racial diversity in programming).⁴⁷

By contrast, the FCC regulated wireline (and later wireless) communication under a “natural monopoly” theory designed to keep rates just and reasonable, promote universal access, and maintain overall quality and stability of the network. Following a series of antitrust lawsuits in the 1950s and 1960s, the FCC began a lengthy series of proceedings designed to open the phone network to competition at various levels of the network — such as long distance, network equipment, and “enhanced services” such as data processing (Wu 2010).

2. The Telecommunications Act of 1996 — The Great Experiment in Regulating Through Competition and Convergence.

Congress passed the Telecommunications Act of 1996 in an effort to eliminate the remaining “natural monopoly” regulation of local telecommunications service and broadly encourage competition in traditional electronic media, voice telephony, and data services (Kearney and Merrill 1998). This effort to replace regulation with competition met with mixed success (Kimmelman and Cooper 2017; Cooper 2015; Cooper 2014; Benkler 2010).

On paper, the 1996 act’s underlying plan was straightforward. Congress generally modeled the statute on successful efforts by the FCC to open various segments of the voice and nascent data market to competition.⁴⁸ The act required incumbent local monopoly telephone networks (called “incumbent local exchange carriers,” or “ILECs”) to open parts of their physical network on a regulated, wholesale basis to competitors (a process called “unbundled network elements” or UNEs). All telecommunications providers were required to interconnect with each other, at rates at least initially monitored by the FCC and state authorities to ensure they remained “just and reasonable.” By shifting regulation to the network level and limiting that regulation to providing access for would-be rivals, Congress intended that competitors would quickly emerge even in segments of the market that had previously been considered a “natural monopoly.” To increase competition further, the 1996 act removed limits on vertical integration and encouraged existing incumbents in different lines of business (particularly incumbent cable operators and ILECs) to compete with each other through “convergence” of voice, data and video services.

⁴⁷ 359 F.2d 994 (D.C. Cir. 1966) (“*UCC I*”). See also *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) (“*UCC II*”). It is not my purpose in this article to revisit the long debate over the merits of the “public trustee” model and the structural regulation of the broadcast system. Rather, I will attempt to limit discussion to the observable effects of the regulation in terms of the industry structure created and the changes in the industry structure when the FCC and Congress began substantial deregulation in the mid-1980s.

⁴⁸ I describe those mechanisms that offer a direct model for platform competition in greater detail in Chapter IV.

Certain services, such as voice, did see intense competition, with resulting benefits to consumers. However, the enormous complexity of the regulatory scheme, combined with a political environment increasingly hostile to regulation, ultimately defeated the broader efforts to introduce broad-based competition. Industry lobbyists, with a healthy boost from an activist conservative judiciary, worked hard to make “deregulation” synonymous with “competition.”⁴⁹ For example, in *Fox Television Stations, Inc. v. FCC*,⁵⁰ a panel of the D.C. Circuit reversed the FCC’s determination during the Clinton administration to leave media ownership rules intact; the ruling vacated broadcast/cable cross-ownership limits as impossible to justify and remanded all other rules for further consideration. The court stated the mandate of the 1996 act “might better be likened to Farragut’s order at the battle of Mobile Bay (“Damn the torpedoes! Full speed ahead.”) than to the wait-and-see attitude of the Commission.”⁵¹

Following the election of George W. Bush, the FCC explicitly embraced deregulation as the means to facilitate competition. Michael Powell, President George Bush’s first FCC chairman, explained the FCC’s new philosophy at his first official press conference:

I do not believe deregulation is like a dessert that you serve after people have fed on their vegetables and is a reward for the creation of competition. I believe that deregulation is instead a critical ingredient to facilitating competition, not something to be handed out after there is a substantial number of players in the market.⁵²

For the next decade, the FCC followed this recipe of steady deregulation and permitting ever-increasing concentration in just about every market under its jurisdiction. Efforts to stimulate competition by introducing potential new services such as broadband over powerlines failed to flourish. As the FCC eliminated unbundling obligations and deregulated interconnection rates, incumbents squeezed out rivals. Ultimately, two ILECs, Southwestern Bell and Verizon, acquired the largest competing national providers, AT&T and WorldCom respectively⁵³ (Kimmelman and Cooper 2017). In most markets in the United States, consumers have a choice between two vertically integrated wireline providers of broadband, subscription video, and voice. Many Americans lack

⁴⁹ The role of an activist judiciary bent on imposing a specific economic philosophy on all regulatory activity regardless of congressional intent is generally underappreciated. Advocates and historians generally ignore the impact of constant judicial reverses on agency action generally. As an advocate of 20 years’ experience, I can state that the primary question concerning the FCC’s Office of General Counsel was rarely, “What did Congress intend,” but rather, “What will the D.C. Circuit permit?”

⁵⁰ 280 F.3d 1027 (2002).

⁵¹ *Id.* at 1044.

⁵² See Stephen Labaton, “New FCC Chief Would Curb Agency Reach,” *New York Times* (February 7, 2001). Available at: <https://www.nytimes.com/2001/02/07/business/new-fcc-chief-would-curb-agency-reach.html>

⁵³ Southwestern Bell would rename itself AT&T.

even this choice (Bode 2018). Deregulation led not to the promised land of competition, but to a national oligopoly and regional duopolies.

Just as deregulation produced consolidation rather than competition, it also compromised consumer privacy. Deregulation undermined network reliability, to the detriment of public safety. In rural areas of the United States, access to traditional telephone services has actually regressed from where they were prior to passage of the 1996 Act (MN PUC 2019). Nor were these voice services replaced by broadband or advanced mobile services. As of this writing, rural America continues to languish on the wrong side of the digital divide. Mobile service in many sparsely populated areas is unreliable or non-existent. Where rural broadband is available, it is generally slower, less reliable, and more expensive than in more densely populated areas (Smith 2018). Redlining, the practice of not investing in communities of color or low-income communities, has returned. In cities such as Detroit and Cleveland, suburban and expensive urban neighborhoods enjoy high-speed access or even fiber-to-the-home. By contrast, residents in poorer, predominantly African-American neighborhoods, make do with aging DSL (NDIA 2017).

The relaxation of media ownership rules, both in the 1996 Telecommunications Act (which eased existing limits on broadcast ownership and cross-ownership) and subsequently by the FCC (through explicit deregulation and waivers to permit mergers and acquisitions), had a similar deleterious effect. The anticipated competition the FCC said justified these steps never emerged. Instead, deregulation of the electronic mass media created a massive consolidation wave, with adverse impacts on the production of local news and media diversity generally (Feld 2018a).

Nowhere has the confusion between deregulated markets and competitive markets caused greater harm than in the cycle of deregulation, re-regulation, and subsequent deregulation of the cable industry. Despite a recommendation by the Carter administration to adopt common carrier regulations, the Cable Act of 1984 effectively preempted both state and federal regulation of nascent cable services. In less than a decade, the cable industry grew to a highly concentrated industry based on local monopolies and tight control of both sides of the cable two-sided platform. In addition to charging monopoly prices to consumers, cable operators used their control of customer “eyeballs” to demand ownership interests in video programming; used control of programming to prevent the emergence of competitors; and used their control over network attachments to exact additional fees for network devices such as cable boxes and remote controls. They also began to extend control into the previously independent market for video cassette recorders (VCRs).

The Cable Competition and Consumer Protection Act of 1992 briefly reversed some of the worst abuses of cable operators. Congress mandated the FCC develop a common interface for

cable systems, televisions and VCRs. This opened the customer premise equipment (CPE) market to competitors. As a result, the 1990s saw a surge in the availability of “cable-ready” televisions that combined VCRs and eliminated the need for a set-top box. Numerous regulatory changes effectively curbed the ability of cable operators to leverage their control of customers to prevent rivals from obtaining necessary programming. This, coupled with a further change in the law in 1999 giving direct broadcast satellite (DBS) providers access to local broadcast programming, allowed DBS providers DISH and DIRECTV to emerge as serious subscription video competitors. Direct rate regulation arrested the cycle of annual cable rate increases.

Unfortunately, the Telecommunications Act rolled back rate regulation, as well as restrictions on entering related communications markets. Although the 1996 act contained a statutory provision designed to update the successful interconnection regime for home equipment to include digital devices, the FCC failed to implement it. Cable went on to enjoy the general deregulation that accompanied the implementation of the act and its aftermath. As a result, cable providers retained their position as the dominant multichannel video programming distributors (MVPDs) and re-established control over adjacent markets such as set-top boxes (STBs) and digital video recorders (DVRs). Perhaps most detrimental to consumers and competition generally, cable operators became the dominant providers of residential broadband internet service. This has allowed cable operators to maintain monopoly profits by raising the cost of broadband to offset losses from declining cable subscribership and allows cable operators to advantage their vertically integrated services over those of competitors accessed via the internet. For example, by “zero rating” its own streaming video service, Comcast gives itself an advantage over other streaming services, for which the subscriber must either incur overage charges or limit broadband use generally.

These trends offer useful lessons for seeking to promote competition and protect consumers in complicated, networked markets. In particular, by comparing the failure of network unbundling in the United States with its more successful implementation in Europe (Benkler 2010), we learn a number of critical lessons applicable to digital platforms:

- Regulation should focus on eliminating or mitigating those elements that create monopoly, rather than focus on behavior modification.
- Rules should be as “bright-line” (*i.e.*, clearly delineate permissible from impermissible conduct rather than rely on adjudicating disputes after they arise) and self-executing as possible.

- Although agency oversight remains crucial to ensuring the effectiveness of rules, private litigants need private rights of action as well as agency enforcement to protect against political capture or loss of political will.
- New technologies are never a panacea for old problems, and they don't displace the need for regulation or structural remedies. Absent a watchful regulator, these markets lend themselves to concentration, cartelization, and segmentation.
- Installed customer base, access to the home, bundling, and the contest for users benefit existing incumbents in their efforts to take over adjacent markets.
- Sometimes, there is no substitute for rate regulation or other "natural monopoly" regulation.

Competition does not, in and of itself, provide adequate protection for consumers. Indeed, as the history of telecommunications following the 1996 act demonstrates, competition can create new consumer problems that require new regulatory protections. For example, the regulations that enabled consumers to switch their long-distance provider easily also enabled bad actors to switch consumers' long-distance companies without their consent (aka "slamming"). In addition, when a service is so critical as to rise to the level of a public utility, a sector-specific regulator is needed to ensure that all members of the public have affordable access to reliable services. Recent failures in the phone system with regard to rural call completion (Feld 2013) and "sunny day" 911 outages (Berman 2017) are a consequence of the introduction of competition throughout the voice supply chain. The critical nature of these services underscores the need to have a sector-specific regulator capable of acting swiftly to address these problems.