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The Ghost of Telecommunications Past

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THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATION. By *Paul Starr*. New York: Basic Books. 2004. Pp. xii, 484. $27.50.

When the canon for the field of information law and policy is developed, Paul Starr's[1] *The Creation of the Media* will enjoy a hallowed place in it. Like Lawrence Lessig's masterful *Code and Other Laws of Cyberspace*,[2] Starr's tour de force explains how policymakers have made a series of "constitutive choices" about how to regulate different information technologies that helped to shape the basic architecture of the information age. In so doing, Starr displays the same literary and analytical skill he used in writing the Pulitzer Prize–winning *The Social Transformation of American Medicine*, the first-hand experience he gained as one of the founders of *The American Prospect* (a successful left-leaning policy magazine), and, presumably, the policy savvy gained from years as a Clinton White House aide.[3]

In short, Starr's *The Creation of the Media* explains how the different segments of the information industries — newspapers, the telegraph, the telephone network, and the radio industry — emerged into their modern form. In so doing, it weaves together a compelling narrative of how intellectual property policy (namely copyright and patent law), First Amendment law, antitrust law, telecommunications regulation, privacy protection, and government spending policy all came together to form a coherent and distinctive information policy.

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1. Professor of Sociology, Princeton University.

2. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999). In his introduction, Starr acknowledges the close connection between his work and Lessig's. *See* pp. 6, 403 n.4.

3. In a considerable stretch that sought to link his White House service and *the Creation of the Media*, one of his reviewers claimed that *the Creation of the Media* could be understood as an argument in favor of the Clinton health care plan that Starr helped to develop. *See* Nicholas Lemann, *Spheres of Influence: How the Government Helped Build America's Media Might*, NEW YORKER, Apr. 12, 2004, at 84.

To underscore its point, the book draws several pointed contrasts with European countries and Canada, which made fundamentally different policy choices from the United States that, in turn, gave rise to very different market structures. Finally, because Starr's historical account ends in 1941, his book leaves open for interpretation how to apply the various insights it offers to modern policymakers.

Starr's work comes at a fortuitous time for American information policy, as Congress is poised to reexamine the basic policy choices it made in enacting the Telecommunications Act of 1996.[4] Like Lessig, Starr's fundamental argument is that policy choices matter because they help shape network architectures, industry structure, and the path of technological and economic development. All too often, however, today's zeitgeist downplays the importance of such policy choices, suggesting that either technological or economic factors are solely responsible for the evolution of the information industries. To challenge this view, Lessig's *Code* underscored that the Internet did not emerge as a natural, fully formed instrument of communication nor would it have developed as it did (or at all) without government oversight.[5] In *The Creation of the Media*, Starr provides the historical counterpart to Lessig's *Code*, underscoring that Lessig's contemporary arguments are well rooted in history and that there is a compelling case for addressing information policy as a coherent whole, rather than simply as a collection of doctrines that work in individual contexts.[6]

For today's policymakers, the fundamental information-policy challenge is to develop a coherent regulatory regime for the Internet

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4. *See* Stephen Labaton, *Telecom: 8-Year-Old Basic Law May Be Outdated Already*, N.Y. TIMES, Dec 6, 2004, at C13.

5. In so doing, he challenged the policy consensus of the time — reflected in the Clinton Administration's Report on Electronic Commerce — that the government should avoid regulating the Internet with the notable exception of enforcing strong intellectual property rights. *See* WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 27-29 (1997). Despite the rhetoric of the Clinton Report, some policymakers, such as FCC Chairman Powell, acknowledged the force of Lessig's argument. *See FCC Commissioner Ponders Extent Of Regulation Among Rivals on Internet*, 77 ANTITRUST & TRADE REG. REP. 417, 417 (1999) (quoting then-FCC Commissioner Michael Powell as stating that "if you don't believe that [current] regulatory choices . . . have a direct and indirect effect on the development of the Internet, you're really missing something" (omission in original)). Others, in line with the Report's antiregulation rhetoric, expressed shock at the thought of regulating cyberspace. *See* Lawrence Lessig, *Innovation, Regulation, and the Internet*, AM. PROSPECT, Mar. 27, 2000, *available at* http://www.prospect.org/print/V11-10/lessig-1.html.

6. For a sampling of the debate on whether information policy constitutes a unique legal field, compare Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999), with Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207. For my argument for a coherent and broad vision of information policy, see Philip J. Weiser, *Law and Information Platforms*, 1 J. TELECOMM. & HIGH TECH. L. 1 (2002).

age. As Starr's historical narrative reminds us, the evolution of the Internet will not merely be the result of technological determinism and market ordering.[7] To be sure, technological forces and private commerce will be critically important in shaping the Internet's development. But like many of the technologies Starr discusses (newspapers, the telegraph, and radio), the Internet was nurtured by government subsidies and it developed as it did — as an open platform for innovation — because of regulatory decisions made by the government, such as ensuring that the telephone lines that carried Internet traffic did not favor certain applications or uses over others.[8]

Even though Starr's narrative closes with the end of the formative era for radio broadcasting in 1941, his analysis highlights a series of important issues that are relevant to today's information-policy debates. Notably, Starr argues forcefully that the American tradition of information policy embraced ways of facilitating next-generation technologies by preventing entrenched incumbents (e.g., Western Union, which controlled the telegraph) from blocking the emergence of a new upstart (e.g., AT&T, which sponsored the rollout of the telephone). Moreover, Starr explains that the United States declined to follow the model of other governments that took control of the early revolutionary technologies, such as the telegraph and the telephone, often as part of a "PTT" (Post, Telephone, and Telegraph) agency. Finally, Starr highlights how early policy decisions laid the foundation for the modern structure of the radio and television industries as well as their regulation.

This Book Review proceeds in four Parts. Part I outlines the essential economic argument that Starr develops through his historical narrative. Part II suggests that Starr's focus on market-power concerns and the importance of an open architecture is a valuable starting point, but an imperfect guide to modern policymakers. Part III analyzes the complicated relationship between the public and private sectors' roles in the creation of the media, highlighting the significance of Starr's argument that the United States enjoys a tradition of public support for the media while, in contrast, it views skeptically the rationale for public ownership of the instruments of communication. In so doing, Part III explains that Starr fails to underscore the insights of public-choice theory, which highlights that private actors use governmental regulation as a tool for protecting their profits (or rents) and limiting competition. Finally, Part IV turns to the question of

7. Starr explicitly makes this point in his preface and introduction. *See* pp. xi, 3.

8. For a careful discussion of many of those choices, see Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1 (1999).

whether and how policymakers can learn from Starr's account to promote localism and diversity in media policy.

I. OF PLATFORMS AND NEXT-GENERATION TECHNOLOGIES

Contrary to those who view the media as equivalent to the reporting of news or, perhaps, the news and entertainment industry (with the ever-blurring lines between them), Starr embraces a very broad conception of the media, including the postal service, the telegraph, and telephone as fundamental instruments of the mass media. By conceptualizing the media in such broad terms, Starr develops a comprehensive portrait of American information policy and draws important parallels among the different industry segments. In particular, each segment of the media industry that Starr describes faced notable challenges related to the mass adoption of its "platform," both with regard to attracting users and application developers, and with regard to whether it would be undermined by an established incumbent. In general, Starr concludes, the adoption rate and success of new communications technologies in the United States makes our communications system the envy of the world and part of the secret of our nation's success.

A. *A Truly American Revolution*

Starr's account of American information policy argues that it constituted a true revolution from the established order. In particular, Starr suggests that the revolutionary spirit of 1776 embodied a democratic commitment to sharing information broadly throughout the American population (or at least among the enfranchised population of property-owning white men). Consequently, on Starr's view, the uproar in reaction to the Stamp Act in 1765 was no accidental point of disagreement between the colonies and the United Kingdom. Rather, Starr depicts the American commitment to the flourishing of a free press, and the aversion to the special taxation thereof, as a fundamental break from the continental tradition.

As Starr recounts with great eloquence, the United States took several steps to codify its commitment to a free press and a robust sharing of ideas. First, the United States established an extensive postal network that, on Starr's account, was a part of a constitutional strategy for democratic self-government.[9] And the extensiveness of the

9. P. 3; *see* U.S. CONST. art. I, § 8, cl. 7 (providing to Congress the authority "[t]o establish Post Offices and post Roads"). Notably, American constitutional scholars have rarely, if ever, appreciated that the Constitution's mention of this commitment is part of a deliberate strategy for self-government. Consider, for example, that Professor Tribe's canonical treatise devotes no discussion to this clause's significance. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000)

U.S. postal system quickly outstripped its European counterparts, with seventy-four post offices per 100,000 inhabitants by 1828 compared to seventeen offices in the United Kingdom and four in France (p. 88). Second, consistent with the First Amendment's commitment to a free press, Congress instituted a "common carriage" requirement for the postal system — providing for, in marked contrast to the European model, a categorical right of distribution and a prohibition against any form of censorship (pp. 88, 95). Third, the United States adopted a relaxed standard for defamation — centuries before the courts concluded that the First Amendment demanded one[10] — that allowed truth as a full defense to liability. Notably, this policy arose from the brilliant defense of publisher John Peter Zenger, in which his lawyer convinced the jury to nullify the official instructions and acquit Zenger on the ground that his published allegations that the royal New York governor had engaged in corruption were true (p. 59).

Finally, in a remarkable policy that turned on its head the European precedent of taxing newspapers to depress demand for them, Congress provided for a very cheap rate for mailing newspapers (pp. 16, 88). The impact of this policy was quite dramatic. In 1832, for example, newspapers accounted for ninety-five percent of the weight carried by the postal service, but generated only fifteen percent of its revenue (p. 90). In terms of readership, the impact was equally impressive — there were fifty newspaper subscriptions per 100 U.S. households by the 1820s, netting a subscription rate two to three times as great as Great Britain's (p. 88).

As Starr explains, the U. S. government's early policy choices (or "constitutive choices," as Starr terms them) related to the regulation and promotion of newspapers provided critical support for this platform technology. But, encouraging the mass adoption of this technology still required an interested population and the presence of compelling content (or "killer applications," to use the modern term). In terms of content, the early American political tradition featured a series of succinct readable publications to engage the populace with an opportunity to participate in deliberative and reflective democratic self-government. From Thomas Paine's *Common Sense* to the *Declaration of Independence* to the *Federalist Papers* to the Constitution itself, important materials circulated far and wide among the American population, often as reprints in newspapers or as pamphlets (pp. 67, 68, 72). Moreover, in the early competition between the Jeffersonian Democrats and the Federalist Party (led by Adams and Hamilton), each of the political parties embraced newspapers — and set up nationwide newspaper networks — as the

10. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

principal means of building a popular constituency (pp. 84-85). Finally, in marked contrast to today's environment, the Founders promoted a very limited view of copyright, which fostered "a competitive market and broad public domain far more than it protected the interests of authors" (pp. 115-16). Taken together, these conditions help explain why the literacy rate in the United States outpaced that of its European counterparts (pp. 105-06).

B. *Of Morse and Bell*

The first major revolution in information technology was to deliver information not by newsprint, but by electric current. Samuel Morse, an American, gained fame as one of those who discovered that electrical impulses sent down a wire could be used to relay information. In Europe, the military, which controlled and managed the previous form of "telegraph" technology (i.e., the use of semaphores to relay information visually via encoded signals from one tower to the next), took control of the invention (pp. 153, 157). In the United States, however, there was not only an immediate appreciation for its civilian applications, but also a debate as to whether the government (which paid Morse to build the first telegraph line) should manage the technology as part of the postal service (pp. 162-63). In the 1844 election, which is best known for James Polk's expansionism (his slogan was "Fifty-four Forty or fight"[11]), Henry Clay championed a system of national improvements that included the governmental control of the telegraph (pp. 163-64). But, in the wake of Polk's victory, the government stayed out of the telegraph business and private firms raced to deploy this new technology.

The early development of the telegraph involved cutthroat competition between rival operators. Unlike a local newspaper that could cater to select audiences without sacrificing its potential value, a telegraph operation benefited from a network effect whereby the value of its business increased with the number of users connected to its network.[12] This dynamic meant that the network which accumulated the greatest market share — and then refused to interconnect with rival networks — would be likely to dominate the market, as customers would migrate in droves to the dominant network. In the case of the telegraph, Western Union soon benefited

11. The slogan referred to the northern-most part of the boundary of the disputed Oregon territory, which rested on the 54°40' North latitude line. Ironically, Polk ended up settling the dispute with respect to the northern boundary and spearheaded a successful military campaign against Mexico.

12. For a description and discussion of the network-effects phenomenon, see Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998).

from this tipping effect just as the Bell System would later benefit from this dynamic in the early 1900s with regard to the control of telephony. As to Western Union, however, no antitrust or regulatory authorities were in place to restrict it from exercising its monopoly power. As a consequence, Western Union agreed to carry only the Associated Press ("AP") on its telegraph wires, thereby creating a monopoly in national news at least until the early 1900s.[13]

Like the other trusts of the late 1800s, the abusive practices of Western Union exposed the vulnerability of the American people's support for unrestrained free enterprise and set the stage for the emergence of the regulatory state. For starters, regulatory authorities — often courts, but increasingly regulatory agencies — began to enforce a commitment to common carriage, thereby barring, for example, exclusive deals like the one that benefited the Associated Press (p. 188). Notably, this common carriage requirement did not require rival telephone networks to interconnect with one another,[14] creating a formidable incentive for companies to sign up as many customers as possible in a given community so that the entire community would "tip" to it. The Bell System, moreover, enjoyed a powerful competitive advantage: it made available access to its Long Lines division only to its local operating companies and not to rival independent companies (p. 205). Nonetheless, particularly in more remote areas ignored by the Bell System, the independent companies made considerable headway in the early 1900s after Bell's patents expired, and even challenged Bell's dominance by reaching a penetration level of one-half of the country (p. 205).

To address its increasing business and regulatory challenges, the Bell System brought in Theodore Vail, a former superintendent of railway mail in the postal service, who self-consciously modeled the Bell System on the postal service (p. 207). In particular, the postal service model gave rise to the slogan of "one system, one policy, universal service" and the commitment to "a system as universal and

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13. P. 186. A landmark antitrust decision further undermined the Associated Press's entrenched market position. *See* Associated Press v. United States, 326 U.S. 1 (1945).

14. The distinction between a customer's access to a network and a co-carrier's access to a network largely reflects (1) where interconnection may occur; (2) whether interconnection is comparable to what the carrier gives its own affiliates; and (3) what price the carrier may charge for interconnection. *See, e.g.*, Pacific Tel. & Tel. Co. v. Anderson, 196 F. 699, 703 (D. Wash. 1912) (holding that co-carrier was not entitled to interconnection); *see also* Inquiry Into the Use of the Bands 825-845 MHz & 870-890 MHz for Cellular Communications Sys., 86 F.C.C.2d 469, ¶ 56, at 496 (1981) (report and order) (stating that, in mandating interconnection for cellular providers, "[a] cellular system operator is a common carrier and not merely a customer" and ordering that interconnection arrangements should be designed to minimize "unnecessary duplication of switching facilities"); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 258 (2002) (discussing this issue).

as extensive as the highway system of the country which extends from every man's door to every other man's door" (p. 207). As Starr depicts Vail, his policy of universal service promised a regime of subsidized telephone service not unlike the cross-subsidies implicit in the postal system, which charges the same rate for sending a letter from New York to New Jersey as it does for sending one from New York to Alaska (p. 446). In this respect, Starr rejects Milton Mueller's argument that Vail never had in mind the system of cross-subsidies that has come to pervade our system of telephone service, which regulators are in the beginning stages of undoing.[15]

Coupled with his vision of a system serving the public interest, Vail made peace with the government by accepting a system of regulated monopoly. This stance gave rise to a regulatory compact whereby a private monopolist — namely, the Bell System — acted like the postal service by agreeing to serve all customers in a given area, provided the monopolist could generate reasonable returns for its shareholders. In terms of its behavior vis-à-vis the independent providers, Vail also made peace with the antitrust authorities, agreeing in the Kingsbury Commitment of 1914 to interconnect its Long Lines division with rival independent local providers and not to buy any more independent providers (p. 209). Moreover, as part of a different antitrust settlement, the Bell System agreed to divest its holdings in Western Union, thereby ensuring separate ownership of, and intermodal competition between, the telegraph and telephone networks (p. 209). The antitrust regulators could have gone farther, however, as they allowed the Bell System to keep Western Electric (Western Union's manufacturing arm), thereby enabling it to dominate the equipment manufacturing business until its breakup in 1984.

Unlike its European counterparts, the United States developed three alternative modes of communicating over long distances: the postal service, the Western Union telegraph service, and the Bell telephone service. In all cases, a distinctly American information policy promoted mass adoption of the particular technology (in the case of the Postal service, through subsidization of newspapers, and in the case of the other two, through early competition). In particular, this achievement reflected two distinct policy choices. First, in contrast to the European instinct for placing each service in a single government bureaucracy that concentrated power over related technologies, the United States declined to nationalize either the telegraph or telephone industry (or the radio industry once it

15. As Mueller states, when Theodore Vail championed "universal service," Vail did not mean "rate subsidies to make telephone service more affordable"; rather, he meant "the unification of telephone service under regulated local exchange monopolies." MILTON L. MUELLER, JR., UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM 92 (1997).

emerged). Consequently, the United States enjoyed a much more rapid adoption rate for the new technologies. In the case of telephony, the results of this strategy were particularly impressive — the American share of all telephones in the world stood at sixty-seven percent in 1911 and fifty-nine percent in 1929 (p. 211). In terms of long distance telephone service, the relative pace of technological change was even more remarkable: In 1927, it took Bell 1.5 minutes to place a long distance call, whereas it took more than an hour to place a call from Paris to Berlin at that time (p. 211).

The second major policy decision of the United States involved a series of legal measures — combining both patent and antitrust policy — to prevent an incumbent platform from gaining control over the next-generation platform technology. As Starr succinctly explains, an incumbent provider will often have the incentive to suppress a later invention that threatens to cannibalize its core product, making new entrants an important force in developing and deploying such innovations.[16] In terms of patent policy, the United States (as in the case of copyright) has generally appreciated (although less so in recent years) the delicate balance between facilitating entry by providing protection for inventors and not affording an overly broad property right that could be used to undermine later innovation.[17] In the case of the telegraph, for example, the Supreme Court famously narrowed the scope of the patent so that it did not sweep in later technological advancements, notably the telephone.[18] Conversely, patent protection afforded the upstart Bell the opportunity to compete against Western Union, which launched an aggressive challenge once Bell began deploying the new technology (p. 196). Moreover, the limited term of Bell's patent required it to face competition from independent providers who both raced to deploy new facilities — and thus spurred greater rates of deployment (p. 210) — as well as to improve on Bell's product, including innovations like automatic dialing (p. 203). Finally, antitrust policy enabled the independents to survive (albeit through oversight late in the competitive process), prevented Bell from maintaining control of Western Union in addition to its telephone operations, and deterred Bell from using its network to gain a dominant position in radio (p. 344).

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16. P. 193. The cannibalization phenomenon is well explained in CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA (1997).

17. *See* Mark A. Lemley, *The Economics of Improvement In Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997) ("One of the reasons that intellectual property rights are limited in scope, in duration, and in effect is precisely in order to balance these costs and benefits."); Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839 (1990).

18. O'Reilly v. Morse, 56 U.S. 62 (1853).

II. MARKET POWER AND MAKING SENSE OF ANTITRUST POLICY

The history of the information industries narrated by Starr and the regulatory habits formed from that history continue to hold a strong grip on economic policymaking. In particular, this legacy explains the tradition of viewing vertical integration with great skepticism. Before endorsing this tradition, however, policymakers should consider the recent economic thinking that suggests that the efficiencies from vertical integration counsel for greater sympathy to it in analyzing how to regulate the modern day counterparts to Western Union and the Bell System (say, SBC and Comcast).

To understand the allure of restricting vertical integration, consider, for example, an antitrust decree from the late 1940s: the restriction on motion picture company entry into theater ownership. After a series of mergers and acquisitions, the motion picture industry became vertically integrated, with the studios also owning the outlets for showing the movies it produced. Consequently, if an individual was interested in seeing a Paramount movie, she would have to go to a Paramount theatre. This industry structure paralleled the early structure of the radio industry whereby if an individual was interested in listening to a broadcast of the World Series carried by the Mutual Broadcasting Company (as it was in 1939),[19] he would need to listen to a local Mutual affiliate. In many cases, however, this system gave rise to an unfortunate result: some individuals did not live near a Paramount theatre or a Mutual affiliate, and, thus, would miss the movie or the World Series.

The suspicion that vertically integrated companies would engage in anticompetitive mischief led to an early regulatory consensus in favor of vertical separation. This consensus, for example, guided the regulation of radio by the FCC (through the Chain Broadcasting Rules),[20] the regulation of the movie industry (through an antitrust decree that separated ownership of the theatres from the movie studios),[21] and the regulation of television programming (whereby programming suppliers could not be owned by broadcast networks and vice versa).[22] Although Starr highlights the penchant for anticompetitive behavior in the telegraph, telephony, and radio industries, it would be a mistake to translate this suspicion to these

19. NBC v. United States, 319 U.S. 190, 199 (1943) (recounting how the 1939 World Series was not broadcast in markets not reached by the Mutual Broadcasting Company).

20. *Id.* at 224-25 (upholding the Chain Broadcasting Rules); *see also* p. 380.

21. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (upholding the antitrust consent decree).

22. Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1051 (7th Cir. 1992) (invalidating financial interest and syndication rules).

industries' modern counterparts uncritically. In short, the tendency towards monopoly in those industries may well not apply to today's market environment and, even where industry concentration is a concern, the efficiencies created by vertical integration may well counsel a tolerant regulatory stance, at least in conjunction with a system of oversight or protective measures.[23]

In regulatory policy, the suspicion against vertical integration and the concern that established incumbents will thwart the success of new upstarts through dodgy, anticompetitive tactics continue to hold a powerful grip on policymakers. One modern exemplar of vertical separation is the *Computer Inquiry* rules, which continue to restrict the ability of telephone companies to enter into the markets for "information services."[24] Originally, these rules prevented entry altogether and later authorized such entry only through a structurally separated affiliate. In essence, this regulatory policy presumed that local telephone providers would enter into anticompetitive relationships like that between Western Union and the Associated Press. Over time, however, the FCC realized that these rules prevented consumers from benefiting from the significant efficiencies that vertical integration could bring — for example, the cost savings of providing voicemail services (an early "information service") through the same firm that offered telephone service. Consequently, the FCC ultimately allowed telephone companies to provide information services, insisting only that they afford common carrier–like access to their platform for all rivals in the information services market.[25]

In general, economists have retreated from the early suspicion of vertical integration drawn from conduct like Western Union's relationship with AP and Bell's refusal to interconnect its long distance network with the independent telephone companies' local networks. Take, for example, the local telephone network, which can

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23. *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW 200-02 (1976); *see also* Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 374 (7th Cir. 1986) (Posner, J.).

24. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 431-35, 450-52 (1980) (final decision) [hereinafter *Computer II*], *aff'd sub. nom.* Computer & Communications Indus. Assoc. v. FCC, 693 F.2d 198 (D.C. Cir. 1982); Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Servs. and Facilities, 28 F.C.C.2d 267, 270 (1971) (final decision and order) [hereinafter *Computer I*]. For a discussion of the *Computer Inquiry* adjudications, see JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 151-54 (2005).

25. For a discussion of the FCC's revised policy to account for integrative efficiencies, see Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85 (2003).

be used to provide voicemail or long distance calls, or to connect to a subscriber's telephone or computer modem (called "customer premises equipment"). In general, the owner of the platform technology (here, the local telephone company) will benefit from the efficient delivery of complementary applications, removing the need for any restrictive regulation of their vertical relations in many cases. Recognizing this benefit, current economic thinking is generally tolerant of — and often sympathetic to — vertical integration.

The basic intuition behind the argument for greater tolerance of vertical integration is that a monopolist can reap the entirety of a monopoly profit in the platform market (say, by marking up the price of telephone service) and thus has no need to "leverage" its monopoly into a second market. In addition to this negative argument, a monopolist actually has a positive incentive *not* to leverage its monopoly where it would exclude efficient applications providers (say, those offering innovative ways to use your telephone) because those providers will enhance the value of the platform and thus enable the platform monopolist to reap even greater profits. To be sure, there are a number of notable exceptions to the principle that a platform monopolist will embrace efficient competition in the applications market.[26] In particular, the imposition of price regulation in the platform market gives rise to an incentive for the monopolist to dominate adjacent markets and reap the monopoly profit in those markets (as was established in the antitrust litigation against AT&T).[27] Similarly, the threat that an entrant in the applications market will challenge the platform monopoly itself provides a formidable incentive for the monopolist to prevent successful entry into the applications market (as was established in the antitrust case against Microsoft).[28] But such exceptions, as antitrust law generally recognizes, do not warrant categorical suspicion.[29]

Despite the suggestion that platform providers should welcome and rely on outside entry into applications markets, many of them decide to enter such markets themselves. To understand why such

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26. For a discussion of this principle and its exceptions, see *id.*

27. Litton Syss., Inc. v. AT&T Co., 700 F.2d 785 (2d Cir. 1983); MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1105 (7th Cir. 1983); United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

28. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 38 (D.D.C. 2000) ("In this case, Microsoft early on recognized middleware as the Trojan horse that, once having, in effect, infiltrated the applications barrier, could enable rival operating systems to enter the market for Intel-compatible PC operating systems unimpeded. Simply put, middleware threatened to demolish Microsoft's coveted monopoly power."), *aff'd*, 253 F.3d 34 (D.C. Cir. 2001).

29. I say "generally recognizes" because one notable restriction on vertical relations remains in place: the rule against minimum resale price maintenance. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); *see also* POSNER, *supra* note 23, at 177-78 (criticizing *Dr. Miles*).

vertical integration might be efficient, consider the insights of Nobel Prize–winning economist Ronald Coase related to the importance of transaction costs.[30] In one notable example related to Coase's work, a platform provider — say, a television network — should be concerned that applications (in this case, television programs) outside of its control will be subject to strategic holdout come renegotiation time. In the language of new institutional economics ("NIE"), the school of thought that developed the implications of Coase's focus on transaction costs, this sort of holdout scenario underscores the challenge of what economists call a "bilateral monopoly" relationship.[31] For NBC, for example, its relationship with Warner Brothers (which produces *ER*) poses just this sort of concern. There are, to be sure, a number of mechanisms for ensuring fair dealing between applications providers and the platform owner, but one of them is to increase the closeness of the vertical relationship.

Closer vertical relationships also can be used as a form of risk sharing between the platform owner and the applications provider. Consider, for example, the case of the movie theaters and studios outlined above. In the event that a movie is seen as a risky proposition, say, because it will require some time for word-of-mouth support to spur demand, the interests of the theater owners and the studios will not be aligned. One response to this lack of alignment would be a special deal to ensure that theater owners are compensated for their early investment of showing a movie that may not generate immediate revenue. But the need to continually negotiate such arrangements may be inefficient (on account of transaction costs), thereby making the entry of the movie studios in the theater business (at least through measures like partial ownership) a plausibly attractive and economically efficient strategy.

The increased sensitivity to the argument that vertical integration gives rise to undeniable efficiencies is a hallmark of modern antitrust and regulatory policy. In the case of the television business, for example, it was the force of this very argument that ultimately led the FCC (with some judicial prodding) to lift the restrictive rules concerning network entry into programming markets, known as the "finsyn rules."[32] In that case, the results were impressive: the development of a series of new broadcast networks (such as Fox, the WB, and UPN). But because regimes like finsyn were overly restrictive and unnecessary does not mean that all concerns about

30. *See* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW (1988).

31. *See* OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE (1996).

32. *See* Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992) (invalidating the finsyn rules).

vertical integration are entirely off base or that no protective regulation is ever necessary. It does mean, however, that such regulations must be tailored carefully to address actual marketplace harms and not speculative concerns without any basis in fact or economic theory.

III. PUBLIC OWNERSHIP AND PUBLIC CHOICE THEORY

Starr's narrative underscores a uniquely American approach to information policy: embracing common-carriage regulation and resisting public control. In our times, however, this policy is being tested as advocates of different stripes argue that the American failure to lead in the adoption of broadband technology stems either from too much regulation or too little public support. In this Part, I first review Starr's insights about the role of public regulation and the public commitment to universal service. After so doing, I then evaluate the merits of the cases for public ownership of or common-carriage regulation for broadband platforms.

A. *Universal Service Revisited*

As outlined in Part I, Starr argues that Theodore Vail's commitment to universal service included a vision of subsidized telephone service. In particular, he points to Vail's commitment to bringing telephone service "to every man's door" and references in AT&T's Annual Report to regulated rates that would make available affordable telephone service for all (p. 446). Starr does not, however, emphasize a powerful rationale for Vail to have endorsed cross-subsidies as part of his universal service strategy: it constituted a formidable part of the regulatory compact and long provided Bell with a powerful defense against competitive entry.[33]

From the 1910s until the 1970s, the commitment to use cross-subsidies to ensure affordable telephone service became an important justification for and goal of public regulation of telephony. To the Bell System, it also became a valuable counterargument to efforts by competitors to enter otherwise contestable telecommunications markets. As AT&T argued, if MCI, for example, was permitted to enter the high-profit central-district business markets, that entry would undermine the source of AT&T's cross-subsidy for more remote areas. Commenting on universal service policy in the 1970s, Richard Posner highlighted how the Faustian bargain between the regulators and the incumbent monopolist could be explained by public

33. For a telling of AT&T's abilities in this area, see BRUCE M. OWEN & RONALD BRAEUTIGAM, THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS (1978).

choice theory, namely, the economic analysis of politics. In short, the incumbent provider's interest in protecting its economic rents dovetailed with the regulator's interest in protecting subsidized telephone service through a cross-subsidy regime that was implicit in the rate structure and thus not necessarily transparent to consumers who were paying above-cost rates. As Posner put it, this program of "taxation by regulation" is a form of public finance (i.e., a tax-and-spend program by another name) that deprived consumers of competition in return for benefits whose costs were not transparent.[34]

Starting in the 1960s, courts, regulators, and antitrust authorities began to question the wisdom of the regulatory compact entered into in the 1910s. In short, this reexamination reflected both the conjecture that technological change could facilitate new forms of competition and the insight, largely generated from public choice theory, that regulation itself distorted markets and deprived consumers of valuable benefits that competition would bring. The Department of Justice took the first major step towards a new regime in its antitrust action against AT&T. Ultimately, this action led to the antitrust court's judgment that the promotion of universal service goals did not justify Bell's refusal to interconnect on equal and nondiscriminatory terms. More fundamentally, in the Telecommunications Act of 1996 ("1996 Act"),[35] Congress undermined Vail's vision altogether by rejecting the notion of a franchise monopoly — prohibiting state regulators from barring competition to an incumbent monopolist,[36] facilitating entry by rival upstarts,[37] and ordering the transition from an implicit universal service program to an explicit one.[38]

The unwinding of an almost century-old system of regulation continues to involve a series of difficult legal reforms, technological changes, and marketplace challenges. As Starr might put it, policymakers are at a crossroads that will afford them the opportunity to make a series of constitutive choices that will shape the future structure of the telecommunications industry. Notably, the course of what legal strategy to pursue involves difficult judgments about the nature of technological changes, the prospects for marketplace competition, and optimal network architecture.

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34. Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 29 (1971).

35. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

36. *See* 47 U.S.C. § 253.

37. *See* 47 U.S.C. §§ 251, 252.

38. *See* 47 U.S.C. § 254.

B. *The Logic in Favor of and Warnings Against Public Control*

In enacting the 1996 Act, Congress did not confront the most important issue now facing telecommunications policy: how to address the burgeoning broadband market. In 1996, policymakers focused on the traditional voice telephone market and the Internet barely registered on their radar screens.[39] Consequently, the FCC, the courts, and other policymakers have struggled to make sense of this new technology. To put matters simply, and somewhat simplistically given the availability of hybrid models, policymakers confront at least three fundamentally different visions of how to regulate this market: embracing a role for public ownership of (or financing for) the new broadband infrastructure, regulating this new communications platform as a common-carrier service akin to traditional telephony, or developing a new model closer to the Internet's unregulated origins.

In some countries around the world, particularly those where the government still owns the PTT, the logic for public investment in broadband technology is either seen as impeccable or unavoidable. Even in the United States, which has traditionally resisted public ownership of communications technologies since the issue was debated in the 1844 presidential election, some have argued for public financing of the new broadband infrastructure. In particular, a group of engineers who view fiber optic technology as the ideal mode for broadband connectivity have endorsed a "new paradigm" of end-user-owned telecommunications whereby the public would finance and own the broadband facilities.[40] As they see it, the network of the future can be built only if it is recognized as a natural monopoly and built by the government.

As Starr's account reminds us, the U.S. government did indeed provide important support for new innovations in information technology — ranging from providing patent protection for inventions like the telephone to funding the initial telegraph line. The government did not, however, ever enter into the communications business other than to serve as the mail carrier for the country. The salutary aspect of this policy is that government provision of telecommunications presents a potential conflict of interest by placing the police power and its associated regulatory oversight in the hands of a marketplace competitor. In the case of regulated private

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39. Philip J. Weiser, *Law and Information Platforms*, 1 J. TELECOMM. & HIGH TECH. L. 1, 11 (2002) ("[T]he Act barely contemplated the importance of the Internet and did not disturb a category-based regulatory strategy (e.g., one with distinct approaches for broadcast, cable, and telephone networks)."); *id.* at 11 n.51 (collecting sources).

40. *See* IEEE-USA, REPORT FROM THE WORKSHOP: THE DECADE'S (R)EVOLUTIONARY TELECOMMUNICATIONS PARADIGM (Mar. 2003), *available at* http://afn.johnson.cornell.edu/publish/WSR/WSR.pdf.

telephone companies, the government may yield to political pressures and protect incumbents from entry, but it faces only indirect pressures to do so. Where the government itself is the bureaucracy interested in avoiding competition, there is a considerable risk that it will use its police power to protect its investments. The fact that governments can be tempted into using their monopoly on the police power to anticompetitive ends should caution them against entering into markets like broadband. This caution, however, may well not apply when no private provider is interested in offering service or, as in the case of the plans by some cities to deliver wireless Internet access, at least if the cost of delivering the service is quite low and thus unlikely to trigger this conflict of interest.

The pitfalls of a government policy that limits entry, like the presence of a monopolist that can act anticompetitively to limit entry, is that it disrupts the experimentation and technological forces that characterize competitive markets.[41] Even if the market only yields a single provider, as was the case for the telegraph market and the market for telephone service for most of the 1900s, the possibility of a next-generation technology, or a new mode of competition, may either serve to keep current incumbents on their toes or provide consumers with considerable benefits. In video markets, for example, broadcast television initially confronted the competitive threat of cable television, which itself later faced the entry of satellite television. Thus, whereby seventy-seven percent of television viewers watched broadcast television in 1980, only around fifteen percent do today — a smaller percentage than those who watch satellite television.[42]

In the video marketplace, new technological innovation continues to provide consumers with important benefits. Not only did the entry of satellite television bring important benefits to consumers both in terms of product quality and reaching those not previously served by cable providers, it also forced cable providers to upgrade their systems in response. The economic argument that a next-generation technology — as opposed to a rival platform using the same technology — will provide more significant consumer benefits is often

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41. *See, e.g.*, Howard A. Shelanski, *Competition and Regulation in Broadband Communications*, *in* BROADBAND: SHOULD WE REGULATE HIGH SPEED ACCESS? 157, at 177 (Robert W. Crandall & James H. Alleman eds., 2002) (emphasizing that facilities-based competition provides opportunities for experimentation and facilitates independent innovation).

42. Ben Compaine, *Domination Fantasies*, REASONONLINE, Jan. 2004, *at* www.reason.com/0401/fe.bc.domination.shtml ("Today, about 90 percent of households with television sets subscribe to a multichannel service, primarily cable and DBS, which is up from about 23 percent in 1980."); *see also* Tenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 F.C.C.R. 1606, ¶¶ 6, 7, at 1609-10 (2004).

associated with the Austrian economist Joseph Schumpeter, who described this process as one of "creative destruction."[43] But these Schumpeterian dynamics could be squelched if today's incumbent can prevent the deployment of an innovative technology through anticompetitive conduct (for example, as Microsoft attempted to do with Netscape's entry into the browser market)[44] or if established incumbents can, as public choice theory would predict, successfully push for regulation that bars or restricts effective entry (for example, as the television broadcasters did when faced with the advent of cable television).[45]

C. *Wither Common Carriage?*

Aside from whether the government itself should sponsor the broadband buildout, the second significant regulatory policy question is whether the common-carriage model developed in the early years of telephone service should be extended to this new technology. Although complicated by questions of statutory interpretation and administrative law, the Supreme Court is now considering this basic question in *Brand X Internet Servs. v. FCC*.[46] In short, the question for policymakers is whether the regulatory model used for the telephone or the one designed for the Internet — or some combination of the two — is the right fit for regulating broadband Internet access.

I have discussed the law and economics of broadband regulation at length elsewhere,[47] so I will merely point out that the historical pattern of competition, consolidation, and then regulation may well not hold in the broadband context. In particular, it is clear that there will be at least two distinguishing characteristics for broadband platforms vis-à-vis their telephone forbearers: first, there are currently two rival platforms, DSL and cable modems, with other plausible rivals gearing up (using different forms of wireless technology); second, there is no

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43. Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 576-83 (2003) (discussing the Schumpeterian perspective).

44. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 38 (D.D.C. 2000), *aff'd*, 253 F.3d 34 (D.C. Cir. 2001).

45. Thomas Hazlett, for example, has similarly described this regime as "a textbook example of anti-competitive regulation." Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 420 (2001); *see also* Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, LAW & CONTEMP. PROB., Winter 1981, at 77 (criticizing the early regulation of cable television).

46. 345 F.3d 1120 (9th Cir. 2003), *cert. granted*, 125 S. Ct. 655 (2004).

47. *See* NUECHTERLEIN & WEISER, *supra* note 24, at chs. 4-6; Farrell & Weiser, *supra* note 25; Philip J. Weiser, *Toward A Next Generation Regulatory Regime*, 35 LOY. L. REV. 41 (2003) [hereinafter Weiser, *Next Generation*].

price regulation of broadband in effect, thereby removing a major incentive for monopoly leveraging–type behavior. As I have argued elsewhere, these two important characteristics of broadband suggest that the FCC should adopt a next-generation regulatory strategy that would move away from its legacy regulatory strategy to a more nuanced regulatory model.[48] In so doing, regulators should view with care and skepticism any attempt by broadband providers to justify discriminatory treatment of unaffiliated content providers, for such conduct could undermine the Internet's ability to serve as an open platform for innovation.[49]

IV. MAKING SENSE OF THE MEDIA OWNERSHIP DEBATE

For most casual observers of media policy, Starr's intense focus on the telegraph and telephone may seem like a distraction from the more familiar issues related to newspapers, radio, and television. Indeed, the public fascination with the mass media may well explain why the high-stakes questions of whether to classify broadband as a common-carrier service eludes public scrutiny and awareness, whereas the FCC's initiative related to liberalizing the media ownership rules elicited more public comment than probably all common carrier–related debates combined. The difference in the level of public controversy may stem from, among other things, the connection that Americans make between media ownership rules and the editorial choices related to the content of the programming that they watch.

A. *The Origins and Current Controversies of Media Policy*

Unlike telephony, the newspaper, radio, and television industries have never faced a true common-carriage regime as it would undermine the very essence of editorial discretion. These media have, however, confronted regulations aimed at promoting diverse viewpoints and protecting political speech (p. 371). Traditionally, the FCC has promoted competition and diversity in the mass media by

48. *See* Weiser, *Next Generation*, *supra* note 47.

49. *See* Lawrence Lessig, *Coase's First Question*, REGULATION, Fall 2004, at 38, 40-41, *available at* http://www.cato.org/pubs/regulation/regv27n3/v27n3-4.pdf (analogizing Starr's recounting of the early years of newspaper delivery to the Internet and praising FCC Chairman Powell's concern about discriminatory conduct in the broadband environment). Notably, the term "discrimination" must be defined carefully, as certain forms of discrimination — using different tiered pricing options, preventing certain uses that might undermine the quality of service, or engaging in price discrimination (i.e., pricing consumers according to their willingness to pay) — can be procompetitive. *See* Weiser, *Next Generation*, *supra* note 47, at 84 n.187 (calling for an evaluation of the justifications for discriminatory treatment before such treatment is condemned).

imposing cross-ownership restrictions between different modes of communication (such as barring the ownership of a television station and a newspaper in a particular locality) or even within the same mode of communication (such as barring the ownership of two major network stations in a local market). In the case of media ownership restrictions, the promotion of different viewpoints — i.e., diversity[50] — provides an additional reason to the competition policy–based logic for barring common ownership of rival information platforms (such as the telegraph and the telephone networks). As Starr explains, the origins of modern broadcast policy date back to the early days of radio when the FCC promulgated the Chain Broadcasting Rules that ensured, among other things, that a single company could not own more than a single network, thereby requiring RCA, which owned NBC, to spin off what later became ABC (pp. 380-81). In essence, these rules "aimed to increase competition among networks and to give local stations some independence — in short, to deny NBC and CBS the nearly complete dominion over radio they had previously enjoyed" (p. 381).

In 2003, the FCC reexamined the basis of the current restrictions on radio and television ownership, and concluded that some of the restrictions should be repealed.[51] This latest rulemaking, which followed similar efforts to implement the 1996 Act's deregulatory instructions, ignited an uproar in Congress and gave rise to a series of judicial challenges.[52] Ultimately, the critics of the FCC's *2003 Media Ownership Decision* convinced both Congress and the Third Circuit to overturn important parts of the FCC's new rules, requiring the agency to revisit these issues.[53]

Part of the challenge for the FCC in revising these rules is that it must grapple with the reality that Americans often rail against media concentration in principle, but gravitate towards media conglomerates in practice. The so-called Big Five media companies, for example, raise the ire of many concerned citizens who suggest that the Big Five

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50. The use of the term "diversity" begs for a definition, as "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured." FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 796-97 (1978). For purposes of this Review, I use the term to represent different ideological viewpoints. Notably, however, the FCC has, at different times, also sought to promote diversity of different kinds as well (such as the sources of programming and the race of station owners).

51. *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*, 18 F.C.C.R. 13,620 (2003) (report and order) [hereinafter *2003 Media Ownership Decision*].

52. For a discussion of the reaction to the FCC's decision, see Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. U. L. REV. 645 (2004).

53. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004); Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

wield enormous control over what the public watches on television. In particular, some argue that the massive popularity of CBS/Viacom, NBC/Universal (owned by General Electric), ABC/Disney, Time Warner, and News Corp. (which owns Fox) jeopardize a healthy marketplace of ideas by crowding out other voices. Commissioner Copps focused on this concern in his dissent from the recent rules, explaining that these companies "control 70 percent of the prime time audience."[54] Even if one views this situation as problematic, it is important to recognize that these five firms only control about twenty-five percent of the total channel capacity, meaning that it is hardly the case that consumers have no choice other than to watch the programming produced by the Big Five.

The disconnect between the principle of an equally distributed media market and the public's propensity to watch programs produced by the major firms leads some to suggest that government should police concentration not based on opportunity for diverse information, but based on actual consumer practice. This is in line with conventional antitrust policy, but the FCC often seeks to restrict mergers above and beyond what antitrust law would allow in order to protect noneconomic (i.e., diversity) concerns. In terms of whether a multiplicity of voices can thrive and attract attention, the results in the Internet context are not encouraging. Current surveys, for example, suggest that the websites controlled by Time Warner, Microsoft, and Yahoo! each pull in twice the traffic of their closest rivals, even though other websites are just a click away.[55] Perhaps even more telling is the situation with weblogs, which would appear to be an ideal medium of making everyone a publisher and providing for an atomistic marketplace of ideas. On one account, however, interest in weblogs varies a thousandfold between the most popular ones and the average ones.[56]

The best explanation for the imbalance of popular viewing habits may well not be manipulation or the susceptibility of the public to advertising (although they may well play a part), but the phenomenon of network effects. As discussed in Part I, network effects refer to the fact that the more individuals use a product, the more valuable it is. In network markets, including television programming (e.g., ABC, NBC,

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54. *2003 Media Ownership Decision*, *supra* note 51, 18 F.C.C.R. at 13,953 (Copps, Comm'r, dissenting).

55. Declan McCullagh, *FCC debate: Is the Net enough?*, CNET NEWS.COM, May 31, 2003, *at* http://news.com.com/2100-1028_3-1011850.html?tag=ni_print.

56. Clay Shirky, *The FCC, Weblogs, and Inequality*, Clay Shirky's Writings About the Internet, *at* http://www.shirky.com/writings/fcc_inequality.html (first published June 3, 2003); *Services: Top 100 Technorati*, Technorati, *at* http://www.technorati.com/cosmos/top100.html (last updated Jan. 18, 2005) [hereinafter *Technorati*].

CBS, and Fox), websites (e.g., Yahoo!, MSN, and AOL), and weblogs (e.g., Lawrence Lessig's Blog), size matters because the more people talk about a phenomenon, the more people want to take part in such discussions. In the case of the major networks, for example, consider the success of reality shows like *American Idol* or *Survivor*, which depend on "buzz" that generates conversations about them and leads to increased viewership. Similarly, the Volokh Conspiracy weblog (ranked 35 by the number of links to it[57]) generates lots of discussion about legal issues because that is where lots of people discuss them. Quite fittingly, the leading Internet search engine, Google, both reflects and reinforces the already-strong network-effect position of popular websites or blogs by arranging the order of search requests by how many other users have linked to the site that falls within the scope of the request.[58]

Before leaving the point about why the most popular sources for news and information are durably popular, one theory related to network effects warrants consideration. This theory, which one author has dubbed the "paradox of choice," suggests that even where people claim they want choice, the large number of choices available to them actually cause consternation and confusion.[59] One response to this dilemma is to rely on information-saving shortcuts (rather than suffer information overload), leading viewers, for example, to watch those same popular programs that their friends are watching, particularly when lots of other choices are available.[60] In short, the difficulties of choosing among a large number of possibilities — i.e., almost a third of American consumers complain about the volume of media choices available to them[61] — can be another reinforcing dynamic behind the power of network effects in the mass media. Or, as Nobel Laureate Herbert Simon predicted in 1970, "when information is plentiful, attention will be scarce."[62]

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57. *Technorati*, *supra* note 56.

58. Some have cited this feature as a dangerous force for centralization of information on the Web. *See* Mathew Hindman & Kenneth Neil Cukier, *More Is Not Necessarily Better*, N.Y. TIMES, Aug. 23, 2004, at A19, *available at* http://www.nytimes.com/2004/08/23/opinion/23hindman.html.

59. BARRY SCHWARTZ, THE PARADOX OF CHOICE (2004).

60. Another technologically driven response is to rely on the shortcuts suggested through algorithms used by Tivo and NetFlix, which make suggestions for a viewer based on what he liked previously and what others with the same interests enjoyed. Whether or not this search cost-savings device will be less likely to drive viewers to as narrow a set of options as the network-effects phenomenon remains to be seen.

61. Joe Mandese, *Study: Media Overload On The Rise*, TELEVISION WK., May 17, 2004, at 21, *available at* http://www.tvweek.com/planning/051704study.html (last visited Dec. 18, 2004).

62. Philip Meyer, *Journalism Must Evolve — and Quickly*, USA TODAY, Sept. 23, 2004, at A21, *available at* http://www.usatoday.com/printedition/news/20040923/oplede23.art.htm.

B. *The Future of Media Policy and Revisiting Past Constitutive Choices*

What can we learn from reflecting on network effects and the power of major networks? First off, the effort to maintain and regulate artificial scarcity — a tempting thought for victims of information overload or those who regard the Golden Age of television as the 1960s when TV programs were better and the news was more elevated — denies technological reality and would be legally unsustainable. Second, it is important to appreciate that we now have more diversity than ever in that the ability of a single TV show or newscast to garner forty-five percent of the audience has been relegated to history. Rather, with the prime-time audience for cable television networks now surpassing those watching all of the major broadcast networks and the Internet competing with television for attention "in the market for eyeballs," citizens face a multiplicity of choices. Indeed, part of the challenge of the emerging telecommunications marketplace — in the cases of telephone service, Internet offerings, and video programs — is that people are forced to make choices where they previously lived, often comfortably, in a world of regulated scarcity.

In terms of its policy implications, the changing marketplace does not mean that there is no role for a public interest compass in media policy. Or, to use Cass Sunstein's formulation, it is indeed true that "[t]here is a large difference between the public interest and what interests the public" and that the media should be used to "promote the American aspiration to deliberative democracy."[63] The problem with the legacy model of media policy is that it expects that commercial broadcasters can be effectively regulated to, for example, cover political news in a thoughtful and robust fashion or to develop and air educational programming for children. Like the universal service policy based on the use of cross-subsidies, the promotion of public interest programming in return for the use of free spectrum licenses is a form of "taxation by regulation." A key difference between the universal service regime and the public interest obligations imposed on television broadcasters is that, in the mid-1990s, policymakers upped the ante in the television context by awarding a second set of licenses to broadcasters to use while they transition their customers (only about fifteen percent of the viewing public) to digital television.

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63. Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 501 (2000); *see also* Mark Cooper, *Open Communications Platforms: The Physical Infrastructure As The Bedrock of Innovation and Democratic Discourse in the Internet Age*, 2 J. TELECOMM. & HIGH TECH. L. 177, 193 (2003) (arguing that speech is not just "an economic commodity").

Like the universal service regime borne in a world of regulated scarcity, the current system of broadcast regulation is under great strain in a new marketplace environment. First, this model, particularly with the second set of licenses used by the broadcasters during the digital transition, is a major cause of the United States' economically inefficient use of spectrum.[64] Second, this model, like other taxation by regulation regimes, invites and encourages heavy investments in lobbying and political gamesmanship that often mean that the public interest goals supposedly served by it are highly unlikely to be achieved in a robust fashion.[65] Finally, this model both relies on and encourages the continuation of the increasingly shaky "scarcity" rationale that explains why broadcasters cannot invoke the First Amendment to challenge public interest regulations that could not, for example, be imposed on their newspaper brethren under the same amendment.[66]

Just in time for the current model of broadcast regulation to begin collapsing under its own weight, Starr's *The Creation of the Media* reminds us that there is a better model for ensuring public interest goals. In particular, Starr reports that policymakers faced a critical constitutive choice during the radio industry's formative years when noncommercial and commercial radio stations alike were clamoring for spectrum to air programming. Perhaps reflecting the zeitgeist of the 1920s, the Federal Radio Commission — which was established in 1927 before being folded into the FCC in 1934 — began its control

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64. *See* NUECHTERLEIN & WEISER, *supra* note 24, at ch. 7; Thomas Hazlett & Gregory Rosston, *Why the Airwaves Should Be Deregulated*, CNET NEWS.COM, Feb. 11, 2004, *at* http://news.com.com/2102-1039_3-5156846.html (explaining that EU countries have about twice as much spectrum available to cellular carriers as the US).

65. As James Surowiecki recently reported:

> Commendable as [the public interest system of broadcast regulation] may seem, it has very little to do with the business of broadcast television. Today, most Americans — ninety per cent or so — have cable or satellite TV. The airwaves are used less and less. Nor is there any evidence that the public interest is better served by broadcasters than by cable channels. That the major networks showed just an hour of coverage per night of the national political conventions suggests that it is not. (And it's unclear who is to blame, exactly, for the fact that two out of five Americans think Saddam Hussein was behind the September 11th attacks.) If people would rather watch an episode of "Survivor" than a speech by Al Gore, the network will air "Survivor." This is a sound business decision. But taxpayers shouldn't be footing the bill for it.

James Surowiecki, *Free Air*, NEW YORKER, Oct. 18, 2004, at 60, *available at* http://www.newyorker.com/printable/?talk?/041018ta_talk_surowiecki (last visited Dec. 18, 2004).

66. *Compare* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (upholding the right of reply regulations imposed on television broadcasters), *with* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating the right of reply regulations imposed on newspapers). For a critique of this line of doctrine, see Phil Weiser, *Promoting Informed Deliberation and a First Amendment Doctrine for a Digital Age: Towards a New Regulatory Regime for Broadcast Regulation*, *in* DELIBERATION, DEMOCRACY, AND THE MEDIA 11, 12-13 (Simone Chambers & Anne Costain eds., 2000); Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 944 (1997).

over the airwaves by preferring commercial stations greatly over their noncommercial counterparts, resulting in a two-thirds drop in the number of nonprofit stations from 1927 to 1930 alone (p. 352). The Radio Commission disdained the nonprofit stations because it viewed them as (1) "propaganda" stations that could not be trusted to serve the public interest and (2) incapable of delivering powerful signals that could be transmitted far and wide (pp. 351-52). In 1932, when asked by the Senate to explain its reluctance to support nonprofit stations, the Commission explained that "educational programs can be safely left to the voluntary gift of the use of facilities by commercial stations" (p. 358). This perspective, although not conceived of in these precise terms, laid the groundwork for a regulatory regime that would mandate and oversee such "gifts" by commercial providers.

Like the case of the unregulated monopoly possessed by Western Union, the development of America's system of radio broadcasting failed to ensure the best possible use of the medium. In particular, other countries that made the formative decisions related to radio slightly after the United States did (i.e., in the 1930s as opposed to the 1920s), made very different decisions about how to foster the growth of radio broadcasting. In particular, Australia and Canada both took a more hybrid path than the United States, supporting both profit and nonprofit stations. In Canada, the government supported a system of public broadcasting in the 1930s, enabling the Canadian Broadcasting Corporation to develop a national network of stations and a national identity separate from the type of programs that CBS and NBC would offer (pp. 361-62). In Australia, the government not only assigned spectrum licenses to nonprofit providers, but also used the fees paid on radio receivers to support public radio stations (p. 362). In evaluating the path the United States took vis-à-vis Canada and Australia, Starr does not hide his wistfulness for the path not taken. Moreover, Starr underscores both the potential viability of this alternative path as well as the difficulty of reversing course once the broadcasters gained significant political power (that limited, for example, Roosevelt's willingness to change course) and became embedded in the public consciousness as the providers of broadcast programming.[67]

Despite its history, the United States can still correct its missed opportunity to promote public broadcasting and a stronger commitment to community stations. On the public broadcasting front, the United States finally did create the framework for such a system in the 1960s, with a Corporation for Public Broadcasting, a National

67. For another argument along these lines, see ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 226-40 (1999) (arguing that commercial interests undermined the opportunities for public media).

Public Radio network, and a Public Broadcasting System. In so doing, it laid the groundwork for a better system of ensuring true public interest programming, particularly by providing a noncommercial alternative that would not respond to the marketplace pressures that are, in the opinion of many, compromising the quality of news and leading the major networks to avoid coverage of political events.[68] Moreover, with the transition to digital television underway and a second license in the hands of each broadcaster, the U.S. government faces an opportunity to develop a revenue source for public broadcasting and to facilitate more efficient uses of spectrum in one stroke: enable the public broadcasters to return their licenses for auction ahead of their private brethren and use the added revenue to endow public broadcasting.[69]

In terms of supporting local stations, changes in technology now make it possible to grant additional "low power" licenses to stations operated by community organizations. Unfortunately, the FCC's effort to promote such stations several years back ran into the lobbying might of the commercial broadcasters and was reversed in Congress. But the claims of interference raised by the broadcasters, which were dubious at the time, were rejected entirely by an independent study, and some in Congress are pushing for a reversal of course on the matter.[70] Moreover, the Internet's ability to serve as an open medium for delivering information via weblogs, websites, and listserves is only beginning to be utilized. Ultimately, the Internet may well prove vital in expanding the marketplace of ideas. Notably, unlike traditional media, the Internet provides extraordinarily low entry barriers and is highly interactive, with over forty percent of all Internet users sharing information with others online.[71] Indeed, the

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68. Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 362-66 (1998); Norris Dickard, *Powell Muses: Maybe Public Broadcasting Can Help!*, CURRENT, Sept. 22, 2003, *available at* http://www.benton.org/publibrary/issuesinfocus/pubcasting.html; *see also* Ellen Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389 (2005).

69. Indeed, the Association of Public Television Stations has made just this argument. *See, e.g.*, *Completing the Digital Television Transition: Hearing on S.R. 253 Before the Senate Comm. on Commerce, Sci., & Transp.*, 108th Cong. (June 9, 2004) (statement of John M. Lawson, President and CEO, Association of Public Television Stations), *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=1220&wit_id=3514. For a scholarly explanation of this point, see Goodman, *supra* note 68, at 1467-71. *See also* Geller, *supra* note 68, at 362-66 (proposing a trust fund approach).

70. *See* NUECHTERLEIN & WEISER, *supra* note 24, at 241.

71. *See* Kevin Kelly, *The Web Runs on Love, Not Greed*, WALL ST. J., Jan. 3, 2002, at A8 (noting that seventy percent of the then-three million web sites were built by individuals' desire to share ideas, not to make money); Amanda Lenhart et al., Pew Internet & American Life Project, *Content Creation Online* (February 29, 2004), *available at* http://www.pewinternet.org/reports/pdfs/PIP_Content_Creation_Report.pdf.

Internet is already facilitating an increasing array of civic-minded, locally oriented publications that are providing "a sense of civic involvement for people who have felt shut out of their own local politics and media."[72]

CONCLUSION

Paul Starr's *The Creation of the Media* is an important reminder of the role that public policy plays in shaping the development of communication technologies and the structure of the information industries. His careful historical documentation, thoughtful analysis, and effective comparative case studies all underscore that policymakers confront the opportunity to make constitutive choices. Taken together, these choices — often not viewed together as part of a coherent strategy because of their separate legal pedigrees — account for a generally successful American information policy, which spurred substantially higher literacy rates, earlier adoption of telephone service, and a greater tradition of localism in media than its European counterparts. For policymakers and general readers alike, Starr's narrative is not only compelling, but an important counterbalance to the unfortunate reality that telecommunications policy is often, as Nicholas Lemann put it, "an insider's game, less because the players are secretive than because the public and the press — encouraged by the players, who speak in jargon — can't get themselves interested."[73] The eloquence of Starr's prose and lucidity of his analysis underscore why information policy is a subject that should be of interest to all Americans, and that Americans have a proud tradition to live up to in confronting future policy challenges.

Looking forward, policymakers are well advised to be careful about what lessons to draw from looking in the rear-view mirror. In a one-wire world, as telephony was for most of the 1900s, the common-carrier model of regulation and the concomitant use of cross-subsidies to achieve universal service goals constituted a reasonably effective public policy. The broadband world, however, will feature at least two wires and quite possibly more. Moreover, broadband will not be subject to rate regulation, meaning that the incentive for a regulated monopolist to extract its monopoly profits from adjacent markets will not motivate monopoly leveraging–type conduct. Consequently, policymakers should be hesitant to presume before the fact that such behavior will occur and restrict vertical relations on that ground.

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72. Mark Glaser, *The New Voices: Hyperlocal Citizen Media Sites Want You (to Write)!*, USC ANNENBERG ONLINE JOURNALISM REV., Oct. 26, 2004, *at* http://www.ojr.org/ojr/stories/041026glaser.

73. Nicholas Lemann, *The Chairman*, NEW YORKER, Oct. 7, 2002, at 48.

As to media policy, *The Creation of the Media* underscores that policymakers can reevaluate the constitutive choice made during radio's formative years and consider a new path appropriate for today's technological environment. In particular, rather than attempt to force the major broadcasters to take their public interest obligations more seriously (say, through a reimposition of the long abandoned Fairness Doctrine), policymakers would do well to promote and protect public broadcasting, low-power radio, and Internet weblogs, all of which are far more vibrant media for true localism and diversity than the major networks ever will be. Ironically, as public choice theory would predict, many policymakers and regulated titans will resist this path, as it would bring an end to the public interest benefits and regulatory controls that policymakers can claim credit for under the current system. Moreover, many regulated companies will also resist change (say, to spectrum policy) insofar as the proposed reforms may well stimulate new forms of competition, such as low-power radio. But, as Starr reminds us, the current model of media policy (and uses of spectrum) is by no means preordained and thus can be reconsidered. Consequently, when Congress reconsiders some of the regulatory policies embedded in today's industry structure as part of its reevaluation of the Telecommunications Act of 1996, it would do well to heed Starr's reminder and take the opportunity to devise a sound information policy for the Internet age.