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SI 507: Information Policy Analysis and Design

Wk 2: Telecommunications Policy (Pt 1)

Outline of the talk

- Histories and theories of regulation
- 3 regulatory traditions – print, broadcast, common carriage
- Telecommunications reform and the AT&T divestiture
- Spectrum management

Trends in U.S. regulatory practice

THREE GENERATIONS:

Progressive (1900-1920s) (management of continental and technological economy) – e.g., Federal Reserve Board, Interstate Commerce Commission, Federal Trade Commission)

New Deal (1930s-1940s) (rationalization and support for key industries) – e.g., FCC, Civil Aeronautics Board, Securities and Exchange Commission)

Great Society (1960s-1970s) (consumer protection / social regulation) – e.g. Environmental Protection Agency, Occupational Safety and Health Administration)

THREE TRENDS:

1. the *rise* of regulation / administrative law as specialized bodies of government;
2. the social *extension* of regulation;
3. gradual decline in judicial deference to regulating agencies (e.g., grant of standing).

"The irony of regulatory reform" (Robert Horwitz)

Theories of regulation: public interest, capture, conspiracy, neo-Marxian

First Amendment: 2 traditions

- literal interpretation – "Congress shall make no laws abridging the freedom of the press"; a "marketplace of ideas" will flourish in the absence of government regulation / censorship (liberal / individualistic)
- (narrowly) interventionist interpretation – limited government action to ensure the structures / conditions for a free and fair "public sphere" to exist (collective / communitarian)

3 regulatory traditions: print

- WWI protest cases
- Robust and open "marketplace of ideas" as best means of surfacing truth and achieving self-governance
- Particular protection against "prior restraint"
- Some limited exceptions: criminal incitement, libel, obscenity, "fighting words"
- First Amendment protection: strong

3 regulatory traditions: common carriers (telegraph, telephone)

- Often infrastructural in nature (i.e., foundational to other forms of commerce or social exchange)
- Often characterized as "natural monopoly" (via natural economies of scale, network effects, etc.)
- Grant of legal monopoly in exchange for public interest obligations (nondiscrimination, subject to regulatory oversight of rates, e.g. "rate of return" regulation, universal service obligations)
- Separation of content from conduit.
- "dual jurisdiction"

Telecommunications regulation

- Kingsbury Commitment (1913) – under threat of public takeover, AT&T divests Western Union (telegraph monopoly), allows interconnection of independents, sets up internal cross-subsidy system; in exchange, receives protection against competitive entry, rate of return regulation ("continuing surveillance"). Problems: severe information assymetries allow AT&T control of the regulatory process; "gold plating"
- 1927 Radio Act – stabilizes the airwaves, manages problems of interference
- 1934 Communications Act – transfers management of wire communication (i.e. telephone) to newly formed FCC

Ongoing efforts to limit the extension of AT&T power into subsequent fields (radio, computing (1956 Consent Decree grants companies reciprocal access to AT&T equipment patents, especially transistor).

Efforts to chip away at the AT&T monopoly, starting post-50s. Social movement activism plus corporate entities in the non-communication sector plus neo-classical economics.

Above 890 systems; the entry of value-added carriers (MCI, GTE); equipment liberalization (Hush-a-phone, Carterphone)

3 regulatory traditions: broadcast

Two distinctive characteristics of broadcasting:

- Uniquely pervasive; (FCC v. Pacifica, "Seven Dirty Words");
- **Technological scarcity**

Regulatory restrictions:

Licensing system and the "trustee model";
Structural rules (e.g. ownership concentration);
Content rules (e.g. Fairness Doctrine)
"Time and manner" restrictions (FCC v. Pacifica, "Seven Dirty Words")

Striking a balance between individual and collective First Amendment rights.

"Regulation by raised eyebrow."

Two cases:

Red Lion v. FCC (1969)

Tests – and *upholds* – the FCC's "personal attack" rule (mandatory right of reply).

Cites technological scarcity and widespread failure in the marketplace of ideas; vindicates the FCC's Fairness Doctrine; weighs collective 1st Am rights above those of the station owner.

Emboldens access advocates (in part by pointing to limitations of the Fairness Doctrine).

Miami Herald v. Tornillo (1974)

Tests – and *rejects* – a mandatory "right of reply" Florida statute.

Acknowledges but disregards claims of *economic* scarcity in the newspaper industry; rejects right of reply as an unconstitutional abrogation of the editorial perogatives of newspaper owners (enforced speech as obverse of prior restraint).

1) Marks the regulatory distinction between broadcasting and print;

2) Marks a turn from collectivist to literal interpretations in First Amendment law, and from regulatory "activism" to "forbearance".

Summary: 3 regulatory traditions

Medium	Distinctive features	Regulatory model or paradigm.	First Amendment Protection
PRINT	Well distributed in society (?); explicitly identified in 1st Am.	Weak / non-existent (w marginal exceptions)	Strong
TELEPHONE / TELEGRAPH	Natural monopoly.	Common carriage (non-discrimination, universal access, etc.)	Weak
BROADCASTING	Technologically scarce; uniquely pervasive	Trustee model (balanced programming).	Intermediate

Plus, content-based hierarchy of speech: political > artistic > commercial / entertainment.

The cable conundrum: indeterminate / contradictory assignment of cable vis-à-vis these regulatory traditions. NOT a broadcaster, NOT a common carrier. Assertion of FCC 'ancillary jurisdiction'…

Traditional telephone regulation

- Government ownership (PTO) vs. regulated monopoly
- Dual jurisdiction (FCC and states)
- Monopoly leveraging concerns: local exchange, long distance services, equipment manufacturing
- 'Rate-of-return' v. 'price cap' regulation ("gold-plating")
- MCI – competition on the margins (business, urban, value-added services – "cream skimming")
- 1984 divestiture: the 'old' AT&T (vertically integrated) becomes: 7 RBOCS (local service) + AT&T (long distance)

  Assets: $149 billion → $34 billion;

  Employees: 1,000,000+ → 373,000

Telephone regulation, 1984-1996

- Fear: Bell companies would leverage their monopoly in local exchange services ('the last mile') to dominate the LD market and/or equipment markets
- Piecemeal steps toward competition
- Parallel activities in the data market (e.g. Computer Inquiry II)

Telephony in the 1996 TCA ('Title 1')

For local telephone companies (ILECs, the 'baby Bells')

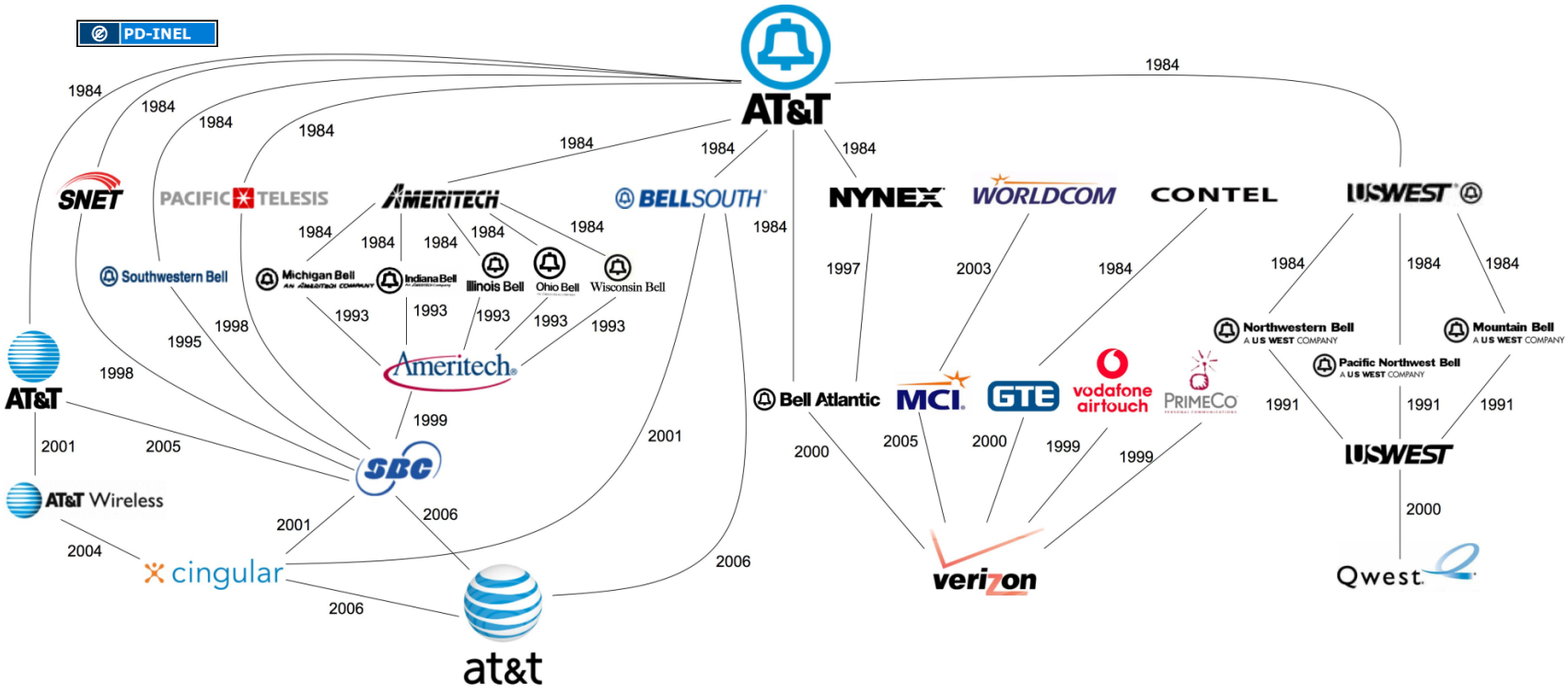
- Unbundling / 'wholesaling' requirements (resale competition)
- Number portability
- Dialing parity
- 'competitive checklist' in response for reentry into long distance markets (outside of the home service area), equipment manufacturing
- Limiting local cross-ownership of cable and telephone
- Explicit support for universal service in 'basic services'

Intercarrier compensation / interconnection policies

- Access charges (paid by LD to local exchange carriers)
- International settlement fees (paid by originating system to terminating system)
- Peering relations (Internet backbone providers)

AT&T, 1984-2006

(from Free Press, http://www.freepress.net/content/atthistory)



Who were the key stakeholders in the debates leading up the 1996 TCA, and what key interests and objectives were they pursuing? How were these varying positions (eventually) accommodated within the law? Does Aufderheide identify, or can you identify, clear winners and losers in the process?

How have notions of "public interest" shifted over the course of telecommunications policy making in the twentieth century? ***What are the appropriate criteria or considerations by which public interest in telecommunications policy making ought to be assessed (price, access, efficiency, fairness, innovation, competition, etc.). How should these and other possible guiding principles be weighed against each other?***