The letter of the law: telecommunications and the corporate person

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Abstract

Purpose – *This paper provides a brief historical sketch of cable and telephone regulation in the USA, the purpose of which is to demonstrate the legacy that precedes contemporary debates over competing models of digital networks, and to question the justifications offered for regulating such networks as private property with no corresponding public service obligations.*

Design/methodology/approach – *The paper relies on historical research to examine the rationales that have been used for cable and telephone regulation, based on the use of legal documents (statutes, regulations, court rulings).*

Findings – *The historic justifications that have been used to protect telecommunications from competition amounts to what is known as ''corporate welfare''. Today's cable and telephone networks, and the accumulated wealth of the corporations that own them, would not have been possible without the willingness of regulators to favor particular firms and business models, and to protect these firms from competition under the rationale that these networks are ''natural monopolies''.*

Originality/value – *Today's digital networks have been built on the wealth and market dominance that was made possible by protection from competition and the guaranteed rates of return that regulation permitted. Consequently, the property rights that have been afforded to network owners should be accompanied by responsibilities, namely, in the form of public service obligations.*

Keywords *Telecommunications, Cable television, Regulation, United States of America*

Paper type *Research paper*

Introduction

Participants in today's debates over telecommunications system development in the USA can learn much from the evolution of the industry over the past 30 years. The history of cable and telephone regulation, although quite distinct in many ways during that period of time, is instructive insofar as being able to explain why the two industries have been treated differently, why some of the differences are only superficial (both have enjoyed monopoly positions through high barriers to entry that were government-induced), and how attempts are being made by both industries to eliminate their more significant differences, to the detriment of citizens and consumers. I attempt in this paper to show the value in grounding discussions about access to digital broadband infrastructures in knowledge of key concerns that emerged in the period immediately preceding and following the breakup of AT&T. Chief among the persistently relevant questions is under what conditions, if any, would it be appropriate to permit a rate-regulated common carrier to enter into the business of electronic publishing (of text, voice, data, and video)? Although the train of completely blurred boundaries between infrastructure ''carrier'' and content provider has already left the station, the dubious rationale and conditions for indulging this scenario is a subject about which the public unfortunately knows very little. At the same time that regulators and the courts were puzzling over this question, newly emerging cable television services were finding their feet in a regulatory context that favored a different model than what had been used to govern telephony. Instead of being treated as a ''common carrier'', like the telephone industry, cable system operators managed to establish their closer affinity to broadcasters. That historical difference between the regulation of two industries, cable and telephony, is in part what explains the recent Supreme Court victory of the cable companies in being able to refuse to carry any internet service provider (ISP) besides their own. But the telephone industry is also not interested in being a common carrier for all ISPs who wish to connect to their infrastructure. Instead, like the cable companies, the telephone companies are lobbying for an exclusive form of control over their infrastructure that many fear will not only make independent ISPs who do not own their own wires a thing of the past. Another fear is that broadband access to the telephone system by independent information providers – ones in which phone companies have no financial interest – will become prohibitively expensive. At this moment, commercial information providers like Amazon.com, MapQuest, Google and Yahoo have become strange bedfellows with public interest advocates, the latter of whom who fear that independent and community media will find no place in a new telecommunications marketplace in which access to bandwidth will be based on the principle of ''pay to play''. Resisting the move by telephone companies to develop costlier pricing models for high-bandwidth information providers to have access to their infrastructure, this coalition's arguments may buy some delays. But it seems likely that in the end the big players among information providers are going to part company with small-scale public service organizations needing to reach clientele for purposes of social, political and cultural association and exchange, but whose enterprises are not designed to draw a profit.

It seems unlikely that the telecommunications companies – the owners of the cable and telephone infrastructures on which the digital broadband migration is taking place – are going to want to make their systems so unattractive to information providers and consumers that both parties seek out other delivery alternatives. Instead, they are likely to search for pricing schemes that enable the big players to do business, and for consumers to be reasonably satisfied with the choices available. At the same time cable and telephone companies compete with one another, they also face competition from cities that are constructing their own wireless broadband infrastructures. ''Municipal WI-FI'' systems compete with cable and telephone systems by providing bandwidth for commercial information services (Oram, 2006; Preston, 2006). And it remains an open possibility that new and presently unforeseen delivery systems will be developed in the future, which could work against the possibility of a cable and telephone duopoly that practices discriminatory pricing and provides lower quality service for information service providers who compete with information services in which they themselves hold financial interests.

In considering the prospects for renewal and future success for ''public service media'' in a digital broadband environment, it seems that the providers who fall under this (admittedly nebulous) category face a presumption against communication policy as a means of ensuring social welfare. The argument against ''positive rights'' or ''positive liberty'' has been a powerful one in recent decades, as evidenced by the progressive and successful assault on the theory and practice of welfare states (Berlin, 1969). That being the case, the advocates for such rights should more closely examine what it means to enjoy positive rights. As I argue in this paper, the large telecommunications monopolists – the national cable and telephone companies – are among the greatest beneficiaries of positive rights in the twentieth century. Through a critique of the corporate welfare that led to the establishment and ownership concentration within the telecommunications industry of the USA, I attempt to justify the obligations that industry has to sustain public welfare in communication at this time.

A free and democratic society depends on what Immanuel Kant once termed ''the principle of publicity'', by which he meant the opportunity for a flow of ideas that is unencumbered by domination and fear (Kant, 1991). Knowing well that control of publicity about important and even potentially harmful information can be vital to maintaining social order, Margaret Thatcher once quipped that airplane hijackers ought to be deprived of the ''oxygen of publicity'', as that was what they sought through their actions[1]. The analogy here is not that average citizens are potential terrorists, against whom governments and complicit media are waging or should wage deliberate informational warfare. Rather, the ‘‘oxygen of publicity’’ of which average citizens are deprived on a daily basis is the basic information and knowledge needed to make effective use of the political institutions that are their right to understand, question and transform. More mundane than restrictive measures to thwart political violence, government and a complicit media have demonstrated the capacity and the will to contribute to narrowing and shrinking the public’s political imagination (Calabrese, 2004, 2005). My underlying assumption in writing this paper has been that, in the service of the healthiest possible political imagination of a free and democratic society, the promotion of the oxygen of publicity of the widest sort is the highest, and necessary, calling of telecommunication services that have been granted the opportunity to serve the public interest.

1. The sanctity of private property

Classical liberal political economy historically supported the treatment of infrastructures (roads, harbors, canals, etc.) as ‘‘public goods,’’ designed to ‘‘facilitate commerce’’ (Gaus, 1983, pp. 192-93). Today, that sentiment seems, well, sentimental, especially in terms of telecommunications infrastructures. The sanctity of private property has been the pre-eminent value underlying broadcast and telecommunication policy in the USA since its inception. Although significant public interest standards have been applied along the way, such accommodations have been implemented through a pattern that does not significantly impede the central and defining feature of US media policy[2]. Notwithstanding brief periods of exception, the US telephone industry grew up as a system nurtured by the core belief that the system would run better – more efficiently and effectively – if it were privately owned and operated. Likewise, despite resistance, radio and television broadcasting emerged in the USA as a system designed to serve the public interest in such a way as to impose minimal interference upon the editorial control of the private owner/publisher/broadcaster.

Arguably, from the start, broadcasting and telephony in the USA had the relationship to government that would aptly illustrate the principles of the twentieth century welfare state within the means of communication. As two prominent theorists of the welfare state have observed, the primary historical role of the state in such regimes has not been to impede capital accumulation, but rather to facilitate its smooth flow while at the same time lending legitimacy to the process by extracting a modicum of concessions in the name (if not the fulfillment) of the public interest. According to Jürgen Habermas, one of the key imperatives for legitimating advanced capitalist institutions is through their depoliticization, which is accomplished by attempting to establish their ‘‘naturalness’’ (Habermas, 1975, p. 37). Likewise, Claus Offe (1975, p. 144) notes the necessity for the state to intervene on behalf of capital, while simultaneously needing to conceal and deny the fact that it is doing so. As Offe has observed, the welfare state historically has not only played a vital role in sustaining capital accumulation, but it depends for its legitimacy on the success of that function (Offe, 1975, 1984). More recently, as we shall see below, Habermas has noted the degree to which states have been migrating away from the ‘‘welfare state constellation’’ and toward a ‘‘postnational constellation,’’ in which states play markedly different roles in the fulfillment of accumulation imperatives.

An underlying assertion in this paper is that the financial strength and global dominance of the US media industries would not have been possible without the historic largesse of the American taxpayer, consumer and cable and telephone ratepayer who has involuntarily bankrolled the US media and telecommunications industries. To attribute the vast wealth of the US media industries to a historical process that did not involve myriad forms of government intervention at public expense would be absurd. The only ‘‘natural’’ feature of markets is that they are products of human construction. US media markets did not emerge spontaneously, but rather they generally have arisen through the heavy hand of a federal government that has made particular arrangements of property rights (intellectual and infrastructural) its foremost concern. In this sense, the US government has shown itself to be true to the first dictum of classical liberalism, as enunciated in 1690 by John Locke:

> The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting (Locke, 1924, p. 180).

Not even Locke would have claimed that there is something inherently ''natural'' about property ownership or the accumulation of wealth.

Indeed, there are many individuals and organizations who have forcefully asserted the correctness of applying Locke's wisdom in the arena of digital media policy, among them the visionaries who crafted a ''Magna Carta for the Knowledge Age,'' which states ''Defining property rights in cyberspace is perhaps the single most urgent and important task for government information policy'':

> Doing so will be a complex task, and each key area – the electromagnetic spectrum, intellectual property, cyberspace itself (including the right to privacy) – involves unique challenges. The important points here are:
>
> First, this is a ''central'' task of government. A Third Wave government will understand the importance and urgency of this undertaking and begin seriously to address it; to fail to do so is to perpetuate the politics and policy of the Second Wave.
>
> Secondly, the key principle of ownership by the people – private ownership – should govern every deliberation. Government does not own cyberspace, the people do.
>
> Thirdly, clarity is essential. Ambiguous property rights are an invitation to litigation, channeling energy into courtrooms that serve no customers and create no wealth. From patent and copyright systems for software, to challenges over the ownership and use of spectrum, the present system is failing in this simple regard (Dyson *et al.*, 1994).

This ''Magna Carta,'' with its emphasis on the private property of ''the people,'' is featured prominently among the ''Classic publications'' of the Progress and Freedom Foundation (PFF), a Washington, DC-based ''market-oriented think tank that studies the digital revolution and its implications for public policy''[3]. The PFF counts among its powerful ''supporters'' the leading media and entertainment conglomerates, telephone companies, digital equipment manufacturers, internet service providers, and industry lobbies of the USA, including Apple, Disney, AT&T, Clear Channel, Comcast, the National Cable and Telecommunications Association, Time Warner, Sprint, T-Mobile, Verizon, EMI Group, Sony Music Entertainment, NBC Universal, and News Corp. The PFF regularly supplies testimony to receptive Congressional committees and the Federal Communications Commission. Its understanding of who ''the people'' are is, not surprisingly, large corporations. By the force of its principles and the vast wealth of its clients, the rights-bearer who matters to the Progress and Freedom Foundation is the corporate person who, by some lights, is a legal fiction who only enjoys provisional status, but who, by a much wider consensus, is the only citizen who consistently matters in the world of US communication policy.

Tom Streeter aptly characterizes the history of the regulation of commercial broadcasting in the USA as a ritual through which market behavior is made to seem as though it were devoid of the artifices of government regulation that in fact make it possible:

> The problem with the claim that commercial broadcasting in the United States operates according to the dictates of the natural marketplace, then, is not that there is no marketplace but that the marketplaces that do exist are neither natural nor apolitical.

In essence, Streeter's analysis demonstrates how the property relations that define the profitable realities of commercial broadcasting in the USA are themselves the products of government intervention, not spontaneous and uncontrolled markets (Streeter, 1996, p. 203). Consistent with Offe's observations about the need for states to conceal and deny playing the role of being preoccupied with the health of capital, the federal government and the media must work closely together as co-authors of the fiction of media markets and property relations as constitutive elements of a natural environment. A more accurate term for the ''invisible hand'' that governs media markets in the USA would perhaps be the ''well-hidden hand''.

2. Two paths in US public interest reasoning: telephone and cable

Prior to the advent and wide diffusion of wireless telecommunications, the ''landline'' telephone system and cable television were the two primary infrastructures serving US residences. However, they historically were viewed quite distinctly according to the law. The telephone system was defined by the Federal Communications Act of 1934 as a ''common carrier'':

> The term ''common carrier'' or ''carrier'' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier. 47 U.S.C § 153(a)(10)

Among the principal defining characteristics that defined a telephone common carrier for many decades was that there was only one company operating in a given geographic area, and thus it held a monopoly for that area. Consumers had no option to decide among competing service providers. Second, in the era when AT&T was the dominant carrier nationwide, it controlled service from end to end. AT&T not only controlled transmission services, it also controlled equipment, so that not long before the break-up of the company (in 1982), AT&T could prevent any other equipment manufacturer from attaching its products to AT&T lines, and it long succeeded in preventing interconnection from companies wanting to sell long-distance service to its customers[4]. Third, as a monopoly that controlled most of the business and residential service in the country, AT&T was able to average its high and low costs of providing service (between business and residential customers, urban and rural customers, and local and long-distance service users). In other words, through a complex system of cross-subsidization, costs were averaged, and therefore rates were not necessarily accurate reflections of the cost of providing service to particular individuals or groups. Such were the advantages and disadvantages of doing business with a national monopoly.

Based on the Congressional definition of a common carrier, telephone companies were obligated to do business with any company or individual who was willing to pay for service. In principle, the phone company could not discriminate between customers on the basis of price or quality of service. As a monopoly, the primary protections for price and quality that were afforded consumers were provided through regulation. But over a period of many years, starting with the antitrust case filed against AT&T's equipment manufacturing subsidiary, Western Electric, the problem of distinguishing ''data processing'' and regulated telephone service became a central issue. In the case of *U.S.* v. *Western Electric* (N.J. Dist., 1956), AT&T was required to restrict its business operations to the regulated telephone business and prohibited from engaging in ''data processing.''

Predictably, over time, the 1956 distinction between data processing and telecommunications service became less sustainable, despite the FCC's 1972 attempt to clarify and reinforce it in a ''Computer Inquiry''[5]. As data processing became increasingly integral to the provision of even basic telecommunications services, the FCC was forced to reconsider its rules, and in 1980 it launched a second inquiry (''Computer II''), this time in response to AT&T's attempt to market computer communications equipment and service. Opponents argued that AT&T should sell the terminal through a separate, unregulated subsidiary, rather than through its regulated services. The chief concern was that AT&T had an unfair advantage over other competitors in computer communications, because AT&T would be able to use its revenue stream from its rate-regulated telephone service to cross-subsidize the computer communication venture. As a result, the FCC drew a distinction between ''basic'' and ''enhanced'' services, the former being defined as rate-regulated (tariffed) monopoly services that were the historical bread-and-butter of the telephone system, and the latter being unregulated, competitive services. To the extent that data processing services were essential for providing its ''basic'' transmission services under monopoly conditions, AT&T could use them. But ''enhanced'' services had to be ''unbundled,'' and marketed separately, the idea being that these services would be in competition with other companies who should not be unfairly disadvantaged by not having access to the ''deep pockets'' of a monopolist parent company. The hard-line divisions between basic and enhanced services were referred to as a ''structural safeguards'', aimed at ensuring that no illegal cross-subsidization would occur between monopoly services and competitive services[6].

In the meantime, another major antitrust case against AT&T had been mounted, this time resulting in the divestiture of all of the regional Bell Operating Companies (BOCs), of which there were seven at the time, and AT&T kept its long-distance, manufacturing, and R&D companies[7]. Among the key restrictions of the decision (referred to as the ''Modified Final Judgment,'' or MFJ) that were applied to the BOCs was that they initially were prohibited from entering a variety of lines of business. Essentially, the federal District Court that decided the case applied the ''basic'' and ''enhanced'' distinction from Computer II, thereby requiring that the regional companies establish separate, unsubsidized subsidiaries if they wished to enter into competitive (unregulated) enhanced service markets. Under the terms of the MFJ, both AT&T and the BOCs were prohibited from engaging in ''electronic publishing,'' which it defined as ''the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in which he has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means''[8]. Although this definition does not refer to specific types of services, elsewhere the court indicated its intention to keep the phone companies from providing cable television service as well. Not surprisingly, newspaper lobbyists at the time were fearful that their local advertising revenues would be siphoned by online directory (''electronic yellow pages'') that could incorporate advertising. Anticipating the possible movement by phone companies into broadband markets, the cable industry lobbied against this as well.

While the breakup of AT&T was underway, the FCC continued to struggle with how to distinguish between regulated common carrier (''basic'') services and unregulated competitive (''enhanced'') services, and in 1986 announced its Third Computer Inquiry (Computer III). Computer III, like the MFJ, addressed many important issues, perhaps the most important of which were the claims made by AT&T and the BOCs that they could not effectively compete in enhanced service businesses because of the hard-line distinction (''structural safeguards'') they were forced to observe between basic and enhanced services. Sympathetic towards this complaint, the FCC decided to take a new approach by eliminating the separate subsidiary requirement and replacing it with ''nonstructural safeguards'', which meant that AT&T and the BOCs had to maintain public accounting records that made it clear that no cross-subsidization was taking place between basic and enhanced services. Along with this provision, the FCC also stated its support of ''open network architecture'', designed to enable and facilitate an ''ala carte'' concept of national telecommunications system development. The FCC also imposed on the common carriers that the offer ''comparably efficient interconnection'' to any competitor who wanted to offer enhanced services on the system, regardless of whether such services were in direct competition with enhanced service offerings from the phone company[9]. A clear concern raised by the Computer III decision was that, in the absence of structural separations ratepayers of regulated services would involuntarily be subsidizing BOC entry into competitive, enhanced service business ventures. Another concern was that, despite the language and expectations of ''comparably efficient interconnection'', the BOCs would discriminate against enhanced service competitors on their systems, providing them with a quality of service that would be inferior to what they would provide in delivering their own enhanced services. Not long afterwards, in 1991, the District Court judge who presided over the breakup of AT&T, Harold Greene, lifted the ban prohibiting BOCs from offering electronic information services. Soon after, a federal Appeals Court granted BOCs permission to offer information services, a decision that was later upheld by the Supreme Court. Since that time, BOCs have entered into new ventures involving partnerships with other information providers, including cable television service.

When Congress passed the Telecommunications Act of 1996, much of the patchwork of FCC and court decision making was streamlined and consolidated, with the aim of promoting competition in the provision of basic telephone service as well as a variety of ''enhanced'' information services, including cable television. Unlike basic telephone service, cable television service has not been regulated as a common carrier. From its humble origins as a means for re-transmitting broadcast signals, cable service has moved in a much different direction than telephony in regulatory terms. In a sense, cable became an unlikely stepchild of broadcasting, which was established when the Supreme Court declared that the FCC's jurisdiction over cable was justified as an extension of cable's relationship to broadcasting. In the 1968 case of *U.S.* v. *Southwestern Cable*[10], the Court reasoned that, because cable companies carry broadcast signals, the FCC's authority over cable was ''reasonably ancillary'' to its authority over broadcasting. Although it would be inaccurate to say that cable has been regulated as a broadcaster, the relationship between the two industries helps explain why the cable industry has succeeded in avoiding being regulated as a common carrier. To begin, it is helpful to note how ''broadcasting'' has been defined by statute. According the Federal Communications Act of 1934, as amended, ''broadcasting'' is defined as follows:

> The term ''broadcasting'' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations. 47 U.S.C § 153(a)(6)

And the term ''radio communication'' is defined in the 1934 Act as follows:

> The term ''radio communication'' or ''communication by radio'' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission. 47 U.S.C § 153(a)(33)

Although the television industry came later, this definition has been applied not only to radio, but also to television broadcasting.

Importantly, despite efforts in the early days of radio to make broadcasting a common carrier service ''for hire,'' this did not happen. Instead, the broadcaster was treated as a publisher, and not just a carrier. In comparing the two models – common carriers and commercial broadcasters – the former historically has had no control over the content it delivers, whereas the latter has had nearly complete control, notwithstanding some minor public service obligations. The last truly significant attempt to extract common carrier obligations from a broadcaster came in 1973, when the Supreme Court stated unequivocally that no group has the right to demand access to airtime[11]. By most accounts, the high-water mark of public service obligations receded at the time in which the Reagan FCC reviewed its ''Fairness Doctrine'' rules and determined that they were not only unnecessary (because of the emergence of new means of communication, e.g. cable and direct broadcast satellites), but that they had a ''chilling effect'' on the speech of broadcasters[12].

As these decisions have illustrated, the model of broadcasting in the USA has treated station operators not simply as carriers of the messages of others, but as publisher/author/speakers in their own right. Curiously, cable system operators have managed to enjoy a similar sort of treatment. In US cable history, attempts were also made to impose public service obligations that tested where cable stood with respect to the boundaries between broadcasters and common carriers. In 1972, a case was decided by the Supreme Court expanded FCC jurisdiction over cable by enabling it to require cable system operators to originate local programming, consistent with local programming obligations imposed on broadcasters[13]. Then, in 1979, the FCC pushed further towards common carriage by creating rules requiring cable companies to carry channels for public, educational, governmental (PEG) and leased commercial access[14]. With respect to this requirement, the Supreme Court determined that the FCC was now trying to regulate cable as a common carrier, and that it was violating the statutory distinction between broadcasters (to which cable was seen as somehow joined) and common carriers. Although the Court did not allow the FCC to impose these access requirements, in 1984 Congress passed legislation that, while not imposing such requirements, did authorize cities to extract such obligations of cable companies in fulfillment of their municipal franchise agreements[15].

This obligation remains a matter of agreement between cable companies and municipalities. But a new twist has come about in recent years, as the cable industry has moved into the business of providing Internet service. Once again, the waters have been tested to see if cable companies should be required to act as a common carrier and provide access to their wires by third-party internet service providers (ISPs). In the case of *National Cable & Telecommunications Association* v. *Brand X*, the Supreme Court upheld the FCC determination that it is the right of a cable company to not provide broadband cable modem connections for third parties. The reasoning of the Court was that ISPs are offering ''information service'', which is not subject to common carrier regulations, unlike ''telecommunications services''[16].

Since Brand X did not own its own infrastructure (''telecommunications service''), and since cable companies had already established their free speech rights to determine what content is purveyed on their systems, Brand X was not seen as having any justified claim to access on the cable operator's infrastructure. Cable's history of being ''reasonably ancillary'' to broadcasting came in handy once again, as the industry has established that cable operators can be the exclusive providers of Internet service on their own wires[17]. This case followed on the heels of a declaratory ruling by the FCC, stating that cable modem service is an ''information service'', not a ''telecommunications service''[18]. To be a provider of the former, one acts in essence as a broadcaster does, the role of content provider being of the foremost significance, whereas to be a provider simply of the latter, one acts in essence as a common carrier. Never wanting to be cast as the latter, despite being the operator of an infrastructure bearing some resemblance to a telephone system (wires to residences, relying on the use of a city's ''rights of way'', etc.), the cable industry association successfully tipped the emphasis on the importance of ''information'' in its cable modem service.

The case was a watershed, and one that has been seen as having dealt a serious blow to public interest groups wanting to secure internet access to the nation's telecommunications infrastructure. Writing an Amicus Brief when the case was before the Appeals Court, the American Civil Liberties Union argued:

> Without regulations treating cable modem service as a common carrier telecommunications service, cable companies can leverage ownership of the physical infrastructure into control of citizens' access to and use of the Internet . . . . This threatens free speech and privacy. A cable company that has complete control over its customers' access to the Internet could censor their ability to speak, block their access to disfavored information services, monitor their online activity, and subtly manipulate the information services they rely on. Customers may have no choice but to submit to this surveillance[19].

This is the essence of concern today about what role the local telecommunications monopolies – cable and telephone – are able to play with respect to citizens and the conditions under which the latter are able to participate in the public sphere. Because cable companies are private entities, their ability to censor is not a matter of First Amendment concern. And if telephone companies manage to secure a comparable degree of control over the use of the Internet over their wires, they would appear poised to enjoy similar powers of ''market censorship''. Furthermore, given their concentrated power, telecommunications companies can serve as convenient ''one-stop-shopping'' outlets for the National Security Agency's fishing expeditions in surveillance of US citizens (Cauley and Diamond, 2006). While these two problems – market censorship and surveillance – are not directly connected, both stem from the concentration of market power that telecommunications companies have been granted by the federal government. The illusion that both the government and the telecommunications companies aim to perpetuate is that this concentration of power is somehow the result of the vicissitudes of a healthy marketplace, rather than one of corporate welfare.

3. Corporate welfare and the corporate legal person

At the federal level, little momentum has ever been sustained around the idea of government ownership, or even of substantial direct government financing, of the means of electronic communication. That is not to deny the substantial indirect forms of government financing, which exist to this day, and which today are properly understood as ''corporate welfare''. Most notable in recent years was the spectrum giveaway to broadcasters that resulted from the Telecommunications Act of 1996, which had an estimated value of $70 billion (see Nader, 2000, pp. 17-18; Aufderheide, 1999, pp. 63-64). Ironically, the idea and reality of the welfare state has been anathema to the post-depression values of government that prevailed in the USA since the era of the Johnson administration's ''Great Society'' programs. Perhaps more accurately, it would be Richard Nixon, a Republican who called himself a Keynesian in 1971 when he introduced wage and price controls and a budget of deficit spending aimed at ''full employment'', who presided over ''the last liberal administration'' (Yergin and Stanislaw, 2002, pp. 42-46). But it was William Jefferson Clinton who presided over the first fully-fledged neo-liberal administration, and it was Clinton who most effectively led the charge to ''end welfare as we know it'', demonstrating just how reversible welfare rights were[20], by introducing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, a policy that make good on the rhetorical assault Ronald Reagan launched on ''welfare queens'', the stereotyped black urban women on welfare driving around town in a pink Cadillac. The Welfare Reform Act of 1996, as it more commonly is known, had as its highest profile symbolic target the dismantling of program called ''Aid to Families with Dependent Children (AFDC)''. AFDC's undoing was a moral victory for those who adhere to the ''welfare-as-semen theory'', as Barbara Ehrenreich refers to the belief that making public money available for single mothers encourages unmarried women to have children. But more significantly, Ehrenreich detailed how the efforts to end ''welfare as we know it'' produced a new clientele on the dole: corporate welfare scam artists who became the targets of federal spending for privatized social services (Ehrenreich, 1997; Brodkin, 1995). The era of Clinton's assault on welfare was a significant one, as it was a phase in the ''creative destruction'' of an old economy – the welfare state – which was followed by initiatives to foster a new one: the information society (Calabrese, 1997).

For a brief time after Clinton's welfare legislation was passed, corporate welfare became the focus of public outrage, and even dominant media outlets found the topic difficult to ignore. In 1998, Time magazine did a cover story on the topic, following an 18-month investigation that revealed ''how hundreds of companies get on the dole – and why it costs every working American the equivalent of two weeks' pay every year'' (Barlett and Steele, 1998). The Cato Institute, the Washington, DC-based libertarian think-tank, is a harsh critic of federal corporate welfare programs. According to the 2005 edition of the *Cato Handbook for Congress*, in 2002, ''the federal government spent about $93 billion on programs that subsidize businesses'' (Crane and Boaz, 2005, p. 337). The *Cato Handbook* defines ''corporate welfare'' as: ''government programs that provide unique benefits or advantages to specific companies or industries'' (Crane and Boaz, 2005, p. 338). In Ralph Nader's treatment of the subject, corporate welfare comes in many forms, including giveaways, as in the case of the 1996 spectrum bonanza for broadcasters, research and development, bailouts, tax expenditures (''special exclusions, exemptions, deductions, credits, deferrals, or tax rates''), government-sponsored enterprises, and export and overseas marketing assistance (Nader, 2000). Cato adds to these:

> Many corporate welfare programs provide useful services to private industry, such as insurance, statistics, research, loans, and marketing support. Those are all functions that many industries in the private sector do for themselves. If the commercial activities of government are useful and efficient, then private markets should be able to support them without subsidies.
>
> In addition to spending programs, corporate welfare includes barriers to trade that attempt to protect U.S. industries from foreign competition at the expense of U.S. consumers and U.S. companies that use foreign products. Corporate welfare also includes domestic legal barriers that favor particular companies with monopoly power over free-market competitors. Corporate welfare sometimes supports companies that are already highly profitable. Such companies clearly do not need any extra help from taxpayers. In other situations, corporate welfare programs prop up businesses that are failing in the marketplace. Such companies should be allowed to fail because they weigh down the economy and reduce overall U.S. income levels (Crane and Boaz, 2005).

In the case of the US telecommunications industry, the means through which corporate welfare has been enjoyed have been myriad, not least of which has been through the historical cultivation of the status of ''natural monopoly''. Telephone and cable companies have had a strong incentive to appeal to governments to grant them ''natural monopoly'' franchises, as success in gaining such status provides legitimacy in the face of what would otherwise be considered anti-competitive behavior. Thomas DiLorenzo (1996, p. 50) cites a study that ''found no significant differences in prices and profits of utilities with and without regulatory commissions from 1917 to 1932'', and notes how in that case ''rate regulators did not benefit the consumer, but were rather 'captured' by the industry, as happened in so many other industries, from trucking to airlines to cable television''. DiLorenzo also notes that when AT&T's initial patents expired in 1893, many new independent phone companies sprouted up. In 1894, independents had 5 percent of market share, but by 1907, ''AT&T's competitors had captured 51 percent of the telephone market.'' The competition helped to significantly drive down prices. ''Moreover, there was no evidence of economies of scale, and entry barriers were obviously almost nonexistent, contrary to the standard account of the theory of natural monopoly as applied to the telephone industry'' (DiLorenzo, 1996, p. 56, 57). In looking more specifically at the cable industry, Thomas Hazlett (1990, p. 66) has argued that the federally authorized local franchising process is not justified on the basis of cable service being a ''natural monopoly''. Instead, potential competitive entrants have been disadvantaged by cozy relationships established by incumbents who pay monopoly rents to municipal officials in exchange for what in essence is protection from competition, creating market conditions that ''prove hostile to competition and to consumer interests''.

The benefits of corporate welfare have been the foundation of the market power of the corporate persons/cable monopolies. The legal convention of the corporate person was invented in order to re-interpret and extend to private corporations the rights that previously had been available only to individuals. The paradox of this entity is, on the one hand, the great importance that is attached to the enjoyment of citizenship rights by corporations, while on the other hand, the degree to which powerful corporations are adamant and effective in resisting the elaboration of formal codes of civic obligation. In other words, and not surprisingly, corporations have been effective in claiming the rights, while avoiding the responsibilities, of citizenship. Not at all in keeping with the spirit of civic republicanism that today's communitarians are so quick to ask of the weakest citizens of society. As legal scholar Samuel Walker notes of communitarians, ''Even to mention some restrictions on big business would expose them to attacks as 'radicals' and frighten off much of their present membership'' (Walker, 1998, p. 168). Moreover, he notes ''Communitarian spokespersons have a bad tendency to avoid any direct challenge to powerful economic interests and instead attack the far less powerful groups'' (Walker, 1998, p. 178).

As we can see in the case of global trade and investment policy, although efforts have been underway for decades to establish a dialogue about, if not the realization of, corporate obligations, these have been effectively avoided. But the vigor, speed, precision, and effectiveness with which transnational corporate rights have been formally articulated and legally enforced has been uncanny. Adding further complexity and contradiction to this situation are the substantial and ongoing government expenditures that go not only into the processes of articulating and enforcing corporate rights of property and contract, but also into direct and indirect financial subsidies of corporate activity. More commonly known as ''corporate welfare'', such subsidies are where neo-liberal and communitarian forces show similarly conspicuous blindness. While, for different sets of reasons – mainly economic and moral – neoliberals and communitarians argue that citizenship should not be a pork barrel project, both groups tend to be silent when corporate citizens belly up to the public trough. This is no novelty in American telecommunications policy.

The corporate person has individual rights of free expression. But as Holmes and Sunstein (1999) demonstrate, no rights are free, and it is at citizens' expense that corporate free speech is protected. If government largesse provides the economic basis on which a corporation speaks, is not the resulting expression a form of state action? This view accurately punctures a vital foundation on which liberal speech rights rest. Given the amount of taxpayer expense that is dedicated to keeping corporate free speech rights afloat, it makes perfect sense to place obligations on those corporations. A favorite quip of communitarians is ''No rights without responsibilities'' (Etzioni). The implications of formalizing corporate free speech rights, especially are that there are associated corporate responsibilities. It was not always the case that the rights of the corporate person prevailed in American jurisprudence. Rather, it was an invention whose origins date back to the late nineteenth century, when the Supreme Court determined that, under the Fourteenth Amendment, corporate property could not be taxed differently than the property of individuals[21]. Today, as one legal theorist has noted, ''The protests of modern legists notwithstanding, the business corporation has become the quintessential economic man'' (Mark, 1987, p. 19). That being the case, and having assigned ''economic man'' the role of ''person'' and, indeed, of ''citizen'', it stands to reason that the standards of good citizenship must be defined and sustained. As another writes, ''Corporate persons, like natural persons who fail to live up to society's expectations, might be coerced into doing the right thing'' (Millon, 2001, p. 51).

Conclusion

In 1923, in a moment of frustration about being pushed out of radio broadcasting, an AT&T executive made the following prescient statement:

> We have been very careful, up to the present time [1923], not to state to the public in any way, through the press or in any of our talks, the idea that the Bell System desires to monopolize broadcasting; but the fact remains that it is a telephone job, that we are telephone people, that we can do it better than anybody else, and it seems to me that the clear, logical conclusion that must be reached is that, sooner or later, in one form or another, we have got to do the job (quoted in Danielian, 1939).

Out of the ashes, the Phoenix of AT&T, and the entire telephone industry, stands poised to alter the terrain of mass communication in the USA in unprecedented ways, and perhaps, by its model and by its market power, in much of the rest of the world. It is commonplace to celebrate or lament the dislodging of corporations from the moorings of the nation state, especially in discourses about global communication (Calabrese, 1999). But lest they stand nakedly accused of escaping the accountability to the states and citizens from whom they profit, global corporations have taken on the mantle of the ''global corporate citizen'' (Sklair, 2001). In the case of telecommunications, transnational operations date back to the late nineteenth century telegraph cables that connected countries across borders and oceans. In the 1990s, following the breakup of AT&T, there was rapid acceleration of foreign direct investments by US telecommunications companies, particularly in wireless telephony and cable television service (Calabrese, 1995). Today, with more relaxed ownership policies than ever, privatized national firms have joined forces with US companies to create behemoths of global telecommunications infrastructures.

The US model of telecommunications policy is one of powerful corporations who accumulated their massive wealth not through competition but through cozy deals as protected (read: regulated) monopolies, whose profits were assured and whose exposure to competition was kept to a minimum. Protection of an industry is not an intrinsic evil, especially in exchange for public service obligations. But now, the deep pockets of telephone and cable monopolies are being deployed increasingly to control the flow of news and entertainment, working as they are to define their rights to purvey content on infrastructures that was unwittingly financed by the public. Cable and telephone monopolies gained their wealth the old-fashioned way: through deals that had more to do with seeking protection from competition than with embracing it. Although the history of telecommunications infrastructure development is indelibly marked by corporate welfare, the sleight-of-hand rhetoric of bootstrap entrepreneurship that has gotten the telephone and cable companies to their present positions of market dominance should not become the cause of policy neglect toward their future public service obligations. Those obligations should include shouldering the financial burdens of sustaining a healthy public service communication environment.

It is too soon to tell what direction the winds will blow with respect to the future relationship between telecommunications services and information services, as we are in the midst of a major re-examination and re-definition of this arena. However, among the basic principles that should be most dear to sustaining the spirit of public service obligation are that networks not be permitted to prevent access to any legal content, that they not be permitted to favor their own services over those of competitors (either in terms of price or quality of service offered), and that they share significantly in bearing the cost of the re-invention of public service media for the digital age, whether it be through universal service funding, co-financing of municipal broadband services, or other means as yet unforeseen[22]. The bottom line should be a sustained resolve by policy makers to not forget that the success and concentrated market power of the US telecommunications industry was extracted from the hide of the American public, courtesy of the US government, and that the public is owned much in return.

Notes

1. The full statement, made by Thatcher in a London speech at a 1985 meeting of the American Bar Association, was, ''[Democratic nations] must try to find ways to starve the terrorist and the hijacker of the oxygen of publicity on which they depend.'' Available at: www.bartleby.com/63/41/8341.html
2. For the sake of convenience, I use the term ''media'' in this paper to refer to all technological forms of mediated communication, both in terms of ''content'' and ''structure''. I am referring to the print media of newspapers and magazines, radio and television broadcasting, cable television, satellite communication, telephony, and internet communication. I realize that the term media does not always get used in this expansive way, so I beg the reader's forbearance regarding my choice of a convenient umbrella term.
3. Progress and Freedom Foundation, ''Who We Are'', Available at: www.pff.org/about/whoweare.html
4. The policies for loosening end-to-end control began decades earlier, beginning with a federal court decision to allow there to be ''foreign attachments'' (hardware not manufactured by AT&T) to the Bell system. *Hush-a-Phone Corp.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956). Also, in 1971, the FCC decided to allow ''specialized common carriers'' to market telecommunication services requiring interconnection to the AT&T system. 29 FCC 2d 870 (1971), recon. denied, 31 FCC 2d 1106 (1971). Nevertheless, it was not until the 1982 break-up of AT&T that such piecemeal decisions were consolidated into a more coherent policy.
5. Computer Inquiry 1 (FCC, 1972).
6. Second Computer Inquiry, 77 F.C.C. 2d (1980, 1981).
7. *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. *Maryland* v. *United States*, 460 4.2. 1001 (1983).
8. 552 F. Supp. 131, 181 (D.D.C. 1982).
9. Third Computer Inquiry (Computer III), 104 F.C.C. 2d 958 (1986).
10. U.S. v. Southwestern Cable Co. (U.S. 1968).
11. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 105 (1973)
12. *Meredith Corp.* v. *FCC* (D.C. Cir, 1987): re: Syracuse Peace Council, Memorandum Opinion and Order (2 FCC Rcd. 5042, August 6, 1987): The circuit court mandated that the Commission consider the constitutionality of the Fairness Doctrine. The court found that the FCC, based on the evidence in the case, properly recognized that the television station, WTVH-Syracuse, had failed to meet its fairness requirement. However, the court sent the case back to the FCC (remanded it) because it wanted the FCC to consider the constitutionality of the Fairness Doctrine. The FCC drew the conclusion that the Fairness Doctrine unduly restrained the free speech rights of broadcasters.
13. *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).
14. *F.C.C.* v. *Midwest Video Corp.*, 440 U.S. 689 (1979).
15. The Cable Communications Act of 1984. Public Law 98-549 - October 30, 1984 (98 STAT.2780).
16. According to the United States Code, ''The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively

available directly to the public, regardless of the facilities used''. 47 U.S.C. Sec. 153(46). Also, according to the U.S. Code, ''The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.'' U.S.C. Sec. 153(20).

17. *National Cable & Telecommunications Association* v. *Brand X Internet Services*, 125 S. Ct. 2688 (2005).
18. Declaratory Ruling and Notice of Proposed Rulemaking Concerning High-Speed Access on the Internet Over Cable and Other Facilities (FCC 02-77), March 14, 2002.
19. Brief Amicus Curiae of the American Civil Liberties Union and the Brennan Center for Justice at NYU School of Law in Support of Respondents in the case of *National Cable & Telecommunications Association et al.*, v. *Brand X Internet Services et al.* On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, p. 4.
20. As Bryan Turner (1992, p. 37) aptly notes, ''welfare-state rights are clearly reversible and [should] not be taken for granted.''
21. *Santa Clara* v. *Southern Pacific Railway*, 118 U.S. 394 (1886). See also Millon (2001)
22. Some of this thinking is inspired in part by Representative Rick Boucher (2006) (D-VA).

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