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Financing Free Speech

A Typology of Government Competition Policies in Information, Communication, and Media Markets

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Contents

Introduction: The American System of Financing Free Speech 2

Limits on Horizontal Integration 5

Limits on Vertical Integration 8

Limits on Conglomerate Integration 10

Prohibitions on Discrimination in Pricing and Other Terms of Service 13

Enforcement of 'Essential Facilities' Doctrines 17

Standardization 18

Subsidization 19

Nationalization 20

Restrictions on Tying and Bundling Arrangements 21

Authors and Acknowledgements 23

Endnotes 24

Index 34

Introduction: The American System of Financing Free Speech

Today's conventional understanding of the proper relationship between government and the news media focuses on the clear injunction that the First Amendment imposes against government censorship: "Congress shall make no law ... abridging the freedom of speech, or of the press."[1]

Less well appreciated is a closely related tradition that is gaining new urgency as the financing of quality, independent journalism becomes increasingly problematic. That tradition is America's long history of using government policy to foster freedom of speech and of the press by guiding and regulating the terms and structure of competition within various media, information, and communications marketplaces.

This tradition starts with a core belief dating back to the Enlightenment about how societies discover truth and root out error. America's founders did not universally believe in an unlimited right to free speech.[2] Many were more than willing to use government power to suppress "seditious" speech, for example.[3] But they generally believed that if all legitimate points of view were allowed to compete on equal terms, then false ideas would necessarily be defeated over time by true ones, thereby reducing the need for censorship. Thomas Jefferson evoked this idea during his first inaugural address: "Error of opinion may be tolerated where reason is left free to combat it."[4]

From this, it followed that the government had a strong role to play in keeping media markets open and competitive, and in removing any market factors that facilitated the growth and expansion of private monopolies over communications, information, and media markets, both at the local level and nationally. Accordingly, right from the beginning of the republic and continuing into the modern age, successive generations of Americans have used an extensive toolkit of policies to structure competition in different media sectors to promote these values.

These policies range from postal subsidies for newspaper and book publishers as far back as the 18th century, to a growing body of state and federal antitrust law in the 19th and 20th centuries that strictly limited concentrated combinations among owners of emerging media technologies, such as the

telegraph, radio, and television. They also included a broad range of laws that prohibited owners of media infrastructure, including newspapers and wire services, from discriminating against some customers and favoring others. Just as previous generations of Americans enacted laws and regulations to prohibit privately owned railroads from charging some shippers and passengers more than others for the same service, 20th-century public policy also preserved open and equal access to privately owned communication infrastructure such as the telegraph and telephone networks.

In the mid-20th century, government regulation of media markets extended to requiring privately owned television stations to offer public affairs programming and to provide balanced coverage of controversial issues of public importance in return for their free access to the publicly owned broadcast spectrum. Unlike in many other nations, American legislatures and courts at all levels of government generally resisted nationalization of media and communication infrastructure. Still, they enacted a broad range of policies designed to ensure that the private ownership and operation of media technologies did not privilege some people's speech while suppressing that of others. Indeed, by the mid-20th century, mainstream thinking about the meaning of the First Amendment had evolved to the point where many saw it as giving Americans a positive right of access to a broad diversity speech. From this, it followed that government had a constitutional obligation to regulate and structure media markets so as to insure a pluralism of voices.[5]

Coming into the 1970s, these policies resulted in a media sector that had many faults, to be sure. Dominant newspapers and television stations were widely criticized for their putatively liberal or conservative bias. Many critics complained about the exclusion or distortion of minority or unpopular points of view. Other critics pointed to the undue influence over editorial content by advertisers, particularly deep-pocketed corporations marketing products such as liquor, cigarettes, automobiles, and sugary children's cereals. But these faults notwithstanding, by the middle of the 20th century, government structuring of media markets did enable a sustainable business model for quality, professionalized journalism, including most notably newsgathering at the local level by locally owned newspapers and radio and television stations.

Beginning in the 1970s, however, policymakers reversed or rolled back many of the laws and regulations that previous generations had used to balance and distribute power in media markets. In part, this reflected the emergence of a broad consensus, embraced for different reasons by many conservatives and liberals of the era, that antitrust enforcement and other competition policies needed to be relaxed throughout the economy.[6] Also at work was the arrival of new media technologies. With cable television offering hundreds

of channels, and the internet seeming to allow every citizen a platform for unrestricted free speech on a global scale, government involvement in setting the terms of competition in media markets came to be widely seen as unnecessary.

Many of the assumptions behind this retreat from government involvement in structuring media markets have since proven to be untrue. Today's media environment is increasingly under the effective control of just a handful of monopolies in the media, information, and communications industries.[7] The domination of Google and Facebook over digital advertising dollars has, in turn, deeply weakened the financial sustainability of quality journalism, particularly newsgathering at the local level, while also leading to a proliferation of "fake news" and hate speech.[8] Meanwhile, ownership of radio and television has become highly concentrated, as has control of all underlying media, communications, and information infrastructure.[9]

These developments, along with the extreme levels of concentration present in our information, communications, and media markets, bring new relevance to the now mostly forgotten history of how previous generations of Americans used public policy to craft open and competitive markets.[10] In the pages that follow, the Open Market Institute lays the groundwork for reconstructing that history and applying its lessons to today, by offering a typology of the surfeit of laws and regulations that have historically been used to limit the market power of dominant media players and to prevent discrimination against weaker voices.

Limits on Horizontal Integration

Definition: Prohibitions on mergers and other forms of integration between direct competitors.[11]

GENERAL EXAMPLES

- The breakup of Standard Oil under the Sherman Act in 1911.[12]
- The breakup of American Tobacco under the Sherman Act in 1911.[13]

EXAMPLES IN MEDIA AND COMMUNICATIONS

NEWSPAPERS

- For many decades before the 1970s, the federal government actively pursued vigorous antitrust action against newspaper companies that sought to share critical publishing and distribution infrastructure. These actions were designed to prevent collusion and foster vibrant competition and diverse opinions in local newspaper markets.[14]
- In 1970, Congress enacted the Newspaper Preservation Act.[15] The act granted a narrow exemption from the antitrust laws for newspaper companies to share critical publishing infrastructure only if at least one of the newspaper companies was a "failing newspaper."[16] Additionally, the exemption could only be granted by the U.S. attorney general, and the decision must be reasonable.[17] The act was meant to ensure that the press was "editorially and reportorially independent and competitive in all parts of the United States."[18]

TELECOMMUNICATIONS

- The McReynolds Agreement,[19] a 1913 out-of-court agreement between AT&T and the United States government, prohibited the corporation from acquiring telephone exchanges and forced AT&T to open its long-distance lines to independent exchanges.[20]
- The Willis-Graham Act of 1921 gave the U.S. Interstate Commerce Commission (ICC) the authority to review and either approve or prohibit mergers among telegraph or telephone companies.[21] The ICC was

abolished by Congress in 1995, and the agency's various duties were transferred to other government agencies.[22]

- In 1984, the United States government broke up AT&T. Under the consent decree, known as the Modification of Final Judgment (MFJ), AT&T was separated into seven Regional Bell Operating Companies (RBOCs).[23] However, the federal government and the Federal Communications Commission (FCC), with the passage of the Telecommunications Act of 1996,[24] have subsequently allowed the telecommunications industry to reconsolidate.[25] The industry is now dominated by three companies: Verizon, AT&T, and T-Mobile/Sprint.[26]

- In 2011, the FCC blocked the merger of AT&T and T-Mobile.[27] This action prevented a merger that would have decreased the number of firms controlling the cellular phone sector from four to three.[28]

RADIO

- The Radio Act of 1912 required radio broadcasters to obtain a license from the secretary of commerce to prevent crowding of the limited radio spectrum.[29]

- The Radio Act of 1927 created the Federal Radio Commission and granted the agency the authority to issue radio licenses.[30] The act served as a critical horizontal restraint on the number of radio stations operating in a given location, to prevent overcrowding of the limited radio spectrum.[31]

- The Communications Act of 1934 superseded the 1927 Radio Act and created the FCC.[32] The 1934 Act vested the FCC with the power to enforce the Clayton Antitrust Act such that the agency could block all mergers in the communications industry except those that "enhance and promote, rather than eliminate or retard, competition."[33]

- The FCC in 1941 released its landmark Report on Chain Broadcasting. The report enacted the FCC's Dual Network Rules, which prohibited mergers and common ownership among any of the major radio stations.[34] Due to NBC's anti-competitive practices, the enactment of the Dual Network Rules resulted in the divestiture of NBC's Blue Network, which subsequently became the American Broadcasting Company (ABC) in 1945.[35] The FCC weakened the Dual Network Rules in 2001[36] but has since retained substantial portions of them.[37]

- The FCC enacted its Local Radio Ownership Rules in 1970. The rules limited the ownership of both AM and FM radio stations by a single owner depending on the total number of commercial radio stations within a defined geographic area.[38]

TELEVISION

- In 1941, the FCC adopted the TV Duopoly Rule. The rule is also known as the Local Television Ownership Rule. The rule expressly prohibited the ownership of more than one television broadcast station that "substantially serve[d] the same [geographic] area."[39] In 2017, the FCC substantially weakened the TV Duopoly Rule.[40]

- In 1946, the FCC applied the Dual Network Rule, which was part of the agency's Report on Chain Broadcasting, to the television industry.[41] The FCC weakened the Dual Network Rules in 2001[42] but has retained substantial portions of them.[43]

- In 1953, the FCC issued the National Television Ownership Rules. The rules limited the total number of stations a single entity could own to five. The rules sought to limit the influence any one broadcaster could have over the citizens of the United States.[44] The Telecommunications Act of 1996 repealed the maximum number of stations allowed under common ownership.[45] In 2004, Congress passed the Consolidated Appropriations Act that limited the national market share of any one broadcast company to 39%.[46]

- Enacted in 1970, the FCC's Prime Time Access Rules prohibited network affiliates in the top 50 geographic markets from carrying more than three hours of network programming during nightly prime time. The rules had exceptions for news coverage, political broadcasts, documentaries, public affairs, news specials, and children's programs.[47] The Prime Time Access Rules were repealed in 1995.[48]

Limits on Vertical Integration

Definition: Prohibitions on mergers and other forms of integration between actual and potential customers and suppliers.[49]

GENERAL EXAMPLES

- In 1906, Congress amended the Interstate Commerce Act of 1887 to prohibit railroads from transporting commodities (such as oil or coal) that they mined or produced, except for those that were necessary for the operation of their business.[50]

- Against the backdrop of the Great Depression, the Glass-Steagall Act of 1933 prohibited investment banks from operating as commercial banks.[51]

- In 1972, the Supreme Court in *Ford Motor Co. v. United States* prohibited auto manufacturers from owning auto part makers and auto dealerships.[52]

EXAMPLES IN MEDIA AND COMMUNICATIONS

TELECOMMUNICATIONS

- The 1984 Modification of Final Judgment (MFJ) that broke up AT&T also prohibited the subsequent Regional Bell Operating Companies (RBOCs) – the remnants of the AT&T monopoly – from providing long-distance service, and it prohibited the manufacturing or providing of telecommunications equipment.[53] The restrictions imposed on AT&T and the subsequent RBOCs by the MFJ were substantially repealed by Congress with the passage of the Telecommunications Act of 1996.[54]

RADIO

- Following its 1941 Report on Chain Broadcasting, the FCC implemented several vertical restraints. First, radio networks[55] could not contractually bind a radio station[56] to exclusive affiliation or require clearance of scheduled programming time sold to competing networks.[57] Second, affiliation contracts, which bound a broadcasting station to a broadcast network, were limited to two years.[58] Third, radio licensees were allowed to have full discretion to reject unsatisfactory or unsuitable network commercial offers and to substitute local-interest programs.[59] Lastly, the notice required before an affiliated network could demand clearance for

its programs during critical programming times was increased from 28 to 56 days.[60] This policy was meant to decrease the bargaining leverage of broadcast networks and give greater control over aired content to broadcasting stations.

TELEVISION

- In 1970, the FCC enacted the Financial Interest and Syndication (Fin-Syn) Rules. The rules separated the largest television networks from the television studios and production houses that produced their content, as a means of limiting a network's control over the content delivered to the nation.[61] Specifically, the rules prohibited a network from syndicating (rebroadcasting the same program on multiple stations) its own programming on independent television stations, if the network retained a financial interest in the program.[62] In 1993, the FCC repealed the Fin-Syn Rules.[63]

- The FCC's 1970 Prime Time Access Rules prohibited the largest television stations from broadcasting more than three hours of their own content during prime-time evening hours, to foster the airing of diverse content during the most watched daily time slot.[64] The Prime Time Access Rules were repealed in 1995.[65]

MOVIE PRODUCTION AND DISTRIBUTION

- In *United States v. Paramount Pictures*, the Supreme Court ruled in 1946 that movie studios had to divest from movie theaters and were prohibited from future ownership.[66] The prohibition established a more open and competitive market for films and prohibited a variety of illegal trade practices, including discriminating against independent theaters and requiring theaters to purchase a set of movies from the studio. In 2019, the Department of Justice filed a motion in the Southern District of New York to terminate the settlement agreement that enforced the 1946 ruling.[67]

Limits on Conglomerate Integration

Definition: Prohibitions on mergers and acquisitions among corporations that are neither competitors nor potential or actual customers or suppliers of each other in the same product or geographic market.[68]

GENERAL EXAMPLES

- The Panama Canal Act of 1912 prohibited railroads and other common carriers from owning ocean carriers that utilized the Panama Canal.[69]

- A 1940 statutory amendment empowered the ICC to prohibit railroads from owning trucking firms.[70]

- In 1967, the Supreme Court in *FTC v. Procter & Gamble* blocked a conglomerate merger between Proctor & Gamble and Clorox Chemical Company.[71]

EXAMPLES IN MEDIA AND COMMUNICATIONS

TELECOMMUNICATIONS

- The 1913 McReynolds Agreement between the United States government and AT&T forced the corporation to sell off Western Union Telegraph Company, thereby separating ownership of telegraphy and telephony.[72]

- Section 314 of the 1934 Communications Act prohibited the joint operation, merger, or acquisition of radio and wired (i.e., telegraph and telephone) systems if the effect would "substantially lessen competition" or "unlawfully … create a monopoly."[73]

- In 1954, the FCC's National Ownership Rules explicitly limited common ownership of FM, AM, and TV broadcast stations to seven.[74] The Telecommunications Act of 1996 repealed the maximum number of stations allowed under common ownership.[75] Instead, the 2004 Consolidated Appropriations Act enacted a maximum national ownership percentage. The 2004 act limits the maximum national ownership allowed by one station to 39%.[76]

- In 1956, the United States Department of Justice settled a 1949 antitrust case against AT&T for monopolizing the manufacturing, distribution, sale,

and installation of telephones, telephone equipment, and supplies.[77] The settlement prohibited the corporation from entering the market for data processing and restricted the corporation to "common carrier communications services."[78]

- Fearing that companies would leverage their dominant position, the common ownership of cable television and telephone companies was prohibited in 1970 by the FCC.[79] This prohibition was repealed with the passage of the Telecommunications Act of 1996.[80]

- The FCC's 1971 Computer Inquiry I, which became a series of investigations to understand the interrelation between telephone systems and computer networking, blocked AT&T and other telephone common carriers from entering the new data processing industry unless the telephone company set up an entirely separate entity – including separate accounting books, officers, personnel, equipment, and facilities.[81] Additionally, the Computer Inquiry I investigation prevented a telephone company from utilizing its data processing infrastructure for non-data processing services, should the company enter the data processing industry.[82]

- The FCC's 1980 Computer Inquiry II required telecommunications common carriers, such as AT&T, to separate themselves from so-called "enhanced services" such as computer networking.[83] This policy allowed regulated telecommunications monopolies to take advantage of computer networking for the purposes of facilitating their current operations, but also restricted the corporations from entering the nascent data processing industry except through a separate and distinct entity. Within five years, the FCC eliminated this restriction.[84]

- In 1984, the Modification of Final Judgment against AT&T prohibited telephone companies from providing "information services," which in effect meant any telecommunications service that was not telephone services, such as broadcast services.[85] The Telecommunications Act of 1996 repealed many these restraints and subsequently fostered the consolidation of telecommunications, internet service providers, and media organizations such as Comcast to obtain significant market power.[86]

- In 1985, the FCC initiated its Computer Inquiry III investigation.[87] To limit the ability of telecommunications companies to engage in unfair competition or destroy enhanced service providers (i.e., providers of internet and other non-telephony computerized services, such as

cable television), the investigations implemented the FCC's Customer Proprietary Network Information (CPNI) rules. The CPNI rules set limits on how telecommunications companies can use data collected about their customers. Specifically, the FCC required that a user's information be available to the user upon the user's request, limited what information an enhanced service provider could obtain from the user's telecommunications company based on a customer's request, and required that users be notified annually of their CPNI rights by their telecommunications provider.[88] The 1996 Telecommunications Act expanded the CPNI rules.[89] In 2015, the FCC sought to strengthen the CPNI rules[90], but Congress and President Donald Trump enacted a resolution in 2017to block the FCC's efforts.[91]

RADIO

- In 1930, the government brought what is now known as the "Radio Trust Suit" against the Radio Corporation of America (RCA). The subsequent 1932 consent decree mandated that General Electric and Westinghouse Electric and Manufacturing Company divest their holdings in RCA, and required the cross-licensing of radio technology patents. Additionally, the corporations' radio technology patents could not be licensed on an exclusive basis by General Electric and Westinghouse.[92]

RADIO AND TELEVISION BROADCASTING

- In 1970, the FCC enacted the Radio/Television Cross-Ownership Rules (RTCO). The rules prohibited the common ownership of radio and television broadcast stations in the same geographic area.[93] The FCC repealed the RTCO rules in 2017.[94]

- In 1975, the FCC enacted the Newspaper/Broadcast Cross-Ownership Rules (NBCO). The rules prohibited the common ownership of broadcast stations and newspapers in the same geographic area, to promote competition and provide for diverse information sources.[95] The FCC repealed the NBCO rules in 2017.[96]

Prohibitions on Discrimination in Pricing and Other Terms of Service

Definition: Policies that require equal treatment of market participants, whether end users, distributors, or suppliers.[97]

GENERAL EXAMPLES

- "Common carriage" regulation requiring transparent and equal terms of service has a long history in transportation, including stagecoaches, ferries, rails, airlines, and the taxi industry.[98]

- The Motor Carrier Act of 1935 amended the Interstate Commerce Act of 1887 and prohibited buses and trucks from charging customers different rates for the same services.[99]

EXAMPLES IN MEDIA AND COMMUNICATIONS

TELECOMMUNICATIONS

- The Mann-Elkins Act of 1910 classified telegraph and telephone corporations as common carriers and placed them under the jurisdiction of the Interstate Commerce Commission.[100] The common carrier designation imposed several restraints aimed at prohibiting discrimination against customers based on price, distribution, or usage, and the designation required reasonable prices for telegraph services.[101]

- In 1956, AT&T agreed with the United States government on a consent decree, which stated that AT&T would only engage in telephone services as a common carrier[102], and required AT&T to license all its then-valid patents without royalties. Additionally, AT&T was also required to license its future patents at a reasonable and nondiscriminatory rate.[103]

- After AT&T attempted to prohibit the attachment of all external equipment to the telephone lines it controlled,[104] the FCC ruled in its 1968 Carterfone decision that AT&T must allow third-party devices to connect with its telephone network. Third-party devices were allowed to connect to the telephone network as long as the devices did not harm the network.[105] The case concerned a technology to connect two-way

radios via the telephone system.[106] This decision created an open access environment within America's telephone network that ultimately helped foster the creation of various telephone-dependent technologies such as fax machines, answering machines, and internet modems.[107] The principles of open access and nondiscrimination were later applied to the FCC's debates on net neutrality and the imposition of common carrier-like restraints on internet service providers (ISPs).[108]

RADIO AND TELEVISION BROADCASTING

- Section 18 of the 1927 Radio Act ordered broadcast stations to provide equal opportunities for airtime to political candidates.[109] This policy was the foundation for Section 315 of the Communications Act of 1934,[110] which also required equal broadcast opportunities for political candidates, the 1940 Mayflower Doctrine, and the Fairness Doctrine. The Fairness Doctrine was formally repealed by the FCC in 1985.[111]

- Section 29 of the 1927 Radio Act prohibited the broadcasting of obscene, indecent, or profane language.[112]

- Sections 307(b) and 310(d) of the Communications Act of 1934 required the FCC to distribute and allocate the broadcast spectrum in a "fair, efficient, and equitable" manner such that broadcast permits and licenses could only be transferred if "the public interest, convenience, and necessity will be served."[113] Congress reversed this policy in 1993 by granting the FCC the ability to conduct spectrum auctions. Spectrum would be allocated and distributed to corporations and other entities based on which paid the highest price, instead of which served the public interest.[114]

- The FCC's 1940 Mayflower Doctrine required American radio broadcasters to "provide full and equal opportunity for the presentation to the public all sides of public issues."[115] The Mayflower Doctrine also prevented broadcast station owners from editorializing.[116] The FCC justified its holding on the grounds that citizens should have the opportunity to hear diverse and conflicting viewpoints.[117] The FCC repealed the Mayflower Doctrine and replaced it with the Fairness Doctrine in 1949, which was in turn repealed in 1985.[118]

- Through its mandate in the 1934 Communications Act to distribute and manage the broadcast spectrum in the public interest, the FCC in 1946 attempted to define the meaning of the term "public interest" in its

Public Service Responsibility of Broadcast Licensees report – known as the Blue Book – but this was never enforced.[119] The FCC's interpretation of its public interest standard was codified to ensure equitable treatment in the enforcement of the FCC's regulations over the telecommunications industry.

TELEVISION

- The FCC enacted the Fairness Doctrine in 1949.[120] The Fairness Doctrine required that every television licensee "devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance." [12`] The Fairness Doctrine also required that television broadcasters "affirmatively endeavor to make ... facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented."[122] The Fairness Doctrine was repealed in 1985.[123]

- The FCC in 1970 instituted what became known as the Zapple Doctrine. The Zapple Doctrine mandated that broadcast time be offered to political candidates if their opponent or their opponent's supporters purchased broadcast time.[124] The Zapple Doctrine closed a loophole in the Fairness Doctrine that allowed a political candidate to use third-party organizations to purchase broadcast time and not appear in the advertisement. Such a situation did not constitute a use of broadcast time, thus allowing the broadcaster to avoid its Fairness Doctrine obligations.[125] The Zapple Doctrine was repealed by implication along with the repeal of the Fairness Doctrine by the FCC in 1985 and was explicitly repealed in 2014.[126]

- In 1992, Congress passed the Cable Television Consumer Protection and Competition Act.[127] Among other things, the act required cable systems to carry local broadcast television stations, to foster local and diverse programming.[128] These rules were formally known as the Must Carry Rules. The Supreme Court upheld the constitutionality of the Must Carry rules in 1997 and, to a large extent, they remain in effect today.[129]

INTERNET

- In 1996, Congress enacted the Communications Decency Act (CDA). The act was a subsection within the 1996 Telecommunications Act.[130] Section 230 has two provisions. First, Section 230(c)(1) of the CDA grants broad immunity to "interactive computer services" – such as internet platforms such as Facebook or Twitter – from lawsuits seeking to hold the service

liable for information published by "information content provider[s]," who are typically users of the computer service.[131] This provision shields internet companies from liability due to the harms resulting from the content – such as pictures, video, and text – that their platforms host and that are provided by someone else (such as another user of Facebook). Second, Section 230(c)(2) grants immunity to these services if they restrict the content they host, should the service take reasonable action to restrict and remove content deemed "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[132] The immunity granted by the CDA protects platforms from a range of litigation, including claims of breach of contract and defamation.[133]

- The FCC's 2015 Open Internet Order classified internet services providers as "common carriers" under Title II of the 1996 Telecommunications Act and applied common carrier-style net neutrality rules to ISPs.[134] The order also prohibited ISPs from unreasonably interfering with or disadvantaging both internet users' access to lawful online content and online content providers' access to internet users. In 2017, the FCC repealed the net neutrality rules.[135]

Enforcement of 'Essential Facilities' Doctrines

Definition: A concept in antitrust law that forbids a dominant company operating so-called "essential facilities" from blocking its rivals from using those facilities.[136] It is designed to prevent companies from controlling or leveraging control of bottlenecks in a market.

GENERAL EXAMPLES

- In 1912, the Supreme Court in United States v. Terminal Rail Road found that a group of railroads that controlled key railway bridges and switching yards in St. Louis and that prevented competing railroad services from utilizing these facilities was engaged in an illegal restraint of trade and an attempt to monopolize.[137]

- In Otter Tail Power Co. v. United States, the Supreme Court held in 1973 that a vertically integrated utility could not use its transmission monopoly to exclude retail rivals. The court ruled that a utility that refused to transmit power over its lines from generators to municipal utilities was liable for monopolization.[138]

EXAMPLES IN MEDIA AND COMMUNICATIONS

NEWSPAPERS AND NEWS ORGANIZATIONS

- In 1945, the Supreme Court in Associated Press v. United States ruled that The Associated Press (AP) violated the Sherman Act by limiting membership in the organization and thereby limiting access to AP's essential news reports.[139]

- In 1951, the Supreme Court in Lorain Journal v. United States considered whether the newspaper in question, which was the only one in Lorain, had violated the Sherman Act by refusing to accept advertisements from businesses that advertised with a rival local radio station.[140] The Supreme Court ordered the paper to accept such advertisements.

Standardization

Definition: Laws and regulations used to ensure that different networks and products are able to work and communicate with each other, which is essential for the maintenance of competition in complex, networked industries.

GENERAL EXAMPLES

- The Pacific Railroad Act of 1863 empowered the president to standardize the width of the railroad tracks for the transcontinental railroad line.[141]

- The 1990 Clean Air Act Amendments required car manufacturers to install a standardized onboard diagnostics system so that mechanics could diagnose maintenance issues.[142]

EXAMPLES IN MEDIA AND COMMUNICATIONS

TELECOMMUNICATIONS

- The McReynolds Agreement in 1913 between AT&T and the United States government forced AT&T to ensure interconnection between the Bell Telephone System and noncompeting, independent telephone providers.[143]

COMPUTERS AND INTERNET PROTOCOLS

- The Federal Information Security Management Act of 2002 required the implementation of standards and guidelines for information security.[144]

- In 1985, the FCC initiated its Computer Inquiry III investigation.[145] The investigation required AT&T and the Regional Bell Operating Companies to develop Open Network Architecture (ONA) standards – standards that allowed all to connect to the basic parts of network functions on an equal basis. The investigation imposed other limitations, such as prohibitions on cross-subsidization of data processing.[146] Federal courts and the Telecommunication Act of 1996 eliminated some of these restrictions.[147]

Subsidization

Definition: Incentivizing the use of a service or good through funds supplied directly or through tax and/or regulatory provisions.

GENERAL EXAMPLES

- The Pacific Railroad Acts of 1862 promoted the construction of a transcontinental railroad through the issuance of government bonds and grants of land to private railroad companies.[148]

- The Rural Electrification Act of 1936 provided subsidized loans to rural communities to expand the distribution of electrical power.[149]

EXAMPLES IN MEDIA AND COMMUNICATIONS

POSTAL MAIL AND NEWSPAPERS

- The Postal Clause of the Constitution expressly granted Congress the ability to subsidize and grant the construction of "post roads."[150] This authority ensured the equitable growth of the postal system for several decades after the signing of the Constitution.[151]

- The Post Office Act of 1792 provided newspapers and, in 1794, magazines with a lower postal rate than that of personal correspondence.[152] Printers were allowed to exchange newspapers for free, and, beginning in 1845, the post office would deliver newspapers for free to any person within 30 miles of the newspaper's office.[153]

TELEVISION

- The Public Broadcasting Act of 1967 provided funding to establish a public broadcasting station for educational programming.[154]

GENERAL

- Many media outlets, such as *ProPublica*, and broadcasters, such as National Public Radio, enjoy the tax advantages of being classified as nonprofit corporations under 501(c)(3) of the internal revenue code.[155]

Nationalization

Definition: The public ownership of specific firms or entire industries for different purposes, spanning correcting market failures and providing subsidized services to regions or classes, to offering competition with the public sector through the provision of a public option.

GENERAL EXAMPLES

- The United States government nationalized the railroads during World War I.[156]

- The United States government nationalized penicillin production during World War II.[157]

EXAMPLES IN MEDIA AND COMMUNICATIONS

POST OFFICE

- With the passage of the 1792 Postal Act, the right to deliver first-class mail was restricted exclusively to the federal government.[158]

TELECOMMUNICATIONS

- Enacted in 1866, the National Telegraph Act authorized Congress to buy out any telegraph company after 1871. [159]

- Congress nationalized both the telegraph lines and the telephone lines during World War I.[160]

RADIO

- The United States government maintains and supports the Voice of America, Radio Free Europe, and Radio Televisión Martí, which are government-operated companies designed to provide access to information both domestically and internationally.

Restrictions on Tying and Bundling Arrangements

Definition: Prohibitions against the practice of requiring consumers to pay for an unrelated product or service together with the desired one.[161]

GENERAL EXAMPLES

- In *United Shoe Machinery Corporation v. United States*,[162] the Supreme Court in 1922 condemned a tying arrangement that prohibited lessees of United Shoe's shoe manufacturing machines from using the machines with other shoe manufacturing machines not provided by United Shoe.[163]

- In IBM v. United States,[164] the Supreme Court in 1936 condemned IBM's tying arrangement that required the lessees of IBM tabulating machines to purchase only from IBM the tabulating cards that were necessary to operate the machines.[165]

EXAMPLES IN MEDIA AND COMMUNICATIONS

TELECOMMUNICATIONS

- Section 251(c)(3) of the 1996 Telecommunications Act required the unbundling (i.e., the offering of separately priced services) of customer premises equipment, including telephone sets, answering machines, internet modems, and other equipment used to route or transmit telecommunications services,[166] by local telephone service providers, in order "to eliminate the monopolies" of any incumbent local telephone company.[167] The 1996 Act also required the rates for these unbundled services be "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[168] Later in National Cable & Telecommunications Association v. Brand X Internet Services, the Supreme Court would uphold the FCC's decision not to apply unbundling services to cable modem services.[169] After extensive litigation the D.C. Circuit Court of Appeals in 2006 upheld the implementation of the FCC interpretation of the rules and imposed specific requirements on telecommunications carriers.[170]

MOVIE PRODUCTION AND DISTRIBUTION

- In 1962, the Supreme Court in United States v. Loew's held that movie distributors violated Section 1 of the Sherman Act by forcing television stations to purchase bundles of low-demand movies in order to obtain high-demand movies.[171]

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Endnotes

[1] U.S. Const. amend I.

[2] *See generally* Jud Campbell, *The Invention of First Amendment Federalism*, 97 Tex. L. Rev. 517, 537–38 (2019) (stating "Nor does the language of the First Amendment suggest a lack of federal power over expression….however, a ban on passing laws that abridge a certain right in no way suggests a lack of power to pass laws that do not abridge that right. If anything, the appropriate inference at the Founding was precisely the opposite, thus supporting an inference that federal authority included at least some room for regulating expression."); David Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699, 1709 (1991) (stating that per Federalist number 10, Madison, the primary author of the First Amendment, feared that "one faction would capture the central government and use its control of the governmental machinery to wipe out and oppress its rivals." Madison's solution was to "'extend the sphere' of governance--to bring the full play of contending societal forces into a forum where the factions would cancel each other out.") (quoting Federalist 10); *see generally* Cass R. Sunstein, *Government Control of Information*, 74 Cal. L. Rev. 889, 893 (1986) (stating "Public and private power inevitably weakens the autonomy of deliberative processes; open discussion, while formally egalitarian, gives some factions an opportunity to dominate the process.").

[3] *See generally* Yassky, *supra* note 2, at 1707 (stating "[T]he Founders did not conceive of liberty as requiring that all points of view have access to public debate. Large categories of immoderate public speech were, in their view, properly subject to censure."); *see also* Norman L. Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel 100 (1986) (stating "[P]olitical leaders of Jefferson's generation constitutional guarantees did not require toleration of everything published in the press about the conduct of the best men. Rather, political leaders from both major factions endorsed a quite different proposition: government, if not at the national then at the state level, had a positive responsibility to monitor--and, when necessary, to step in and moderate--political communication.").

[4] Thomas Jefferson, First Inaugural Address, *in* Thomas Jefferson: Writings 492–93 (Merrill D. Peterson 1984).

[5] *See* Victor Pickard, America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform 103 (2014).

[6] *See generally* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 717–36 (2017).

[7] Tiernan Ray, *Google, Facebook Approaching 'Saturation' of Ad Budgets, Says Pivotal*, Barrons (Dec. 20, 2017 5:10 PM), https://www.barrons.com/articles/google-facebook-approaching-saturation-of-ad-budgets-says-pivotal-1513804634.

[8] *Starving the News: Surveillance Advertising and the Eroding Economic Foundations of a Free Press*, Open Markets Inst. (forthcoming 2020); eMarketer Editors, *US Digital Ad Spending Will Surpass Traditional in 2019*, eMarketer (Feb. 19, 2019), https://www.emarketer.com/content/us-digital-ad-spending-will-surpass-traditional-in-2019 [hereinafter Digital Ad Spending].

[9] Sriya Pradhan, *Television Broadcasting in the US*, IBIS World 8 (Apr. 2020); Jeremy Moses, *Wireless Telecommunications Carriers in the US*, IBIS World 8 (May 2020); Jeremy Moses, *Wired Telecommunications Carriers in the US*, IBIS World 8 (Feb. 2020); Devin McGinley, *Cable Providers in the US*, IBIS World 7 (Dec. 2019); Jeremy Moses, Internet Service Providers in the US, IBIS World 8 (Apr. 2020); *see also Top Broadband Providers Surpass 100 Million Subscribers*, Leichtman Res. Group (Nov. 12, 2019), https://www.leichtmanresearch.com/top-broadband-providers-surpass-100-million-subscribers/; Arnez Rodriguez, *Cable Networks in the US*, IBIS World 8 (Mar. 2020); Devin McGinley, Radio Broadcasting in the US, IBIS World 8 (Nov. 2019); *see also* Eli Noam, *Media Concentration in the*

United States, *in* Who Owns the World's Media: Media Concentration and Ownership Around the World 512–13 (Eli M. Noam et al. eds., 2016); Anthony Gambardella, *Newswire Services*, IBIS World 7 (Dec. 2019); Devin McGinley, *News Syndicates in the US*, IBIS World 8 (Feb. 2020); Jeremy Moses, *Satellite Telecommunications Providers in the US*, IBIS World 8 (May 2020); Griffin Holcomb, *Search Engines in the US*, IBIS World 8 (Dec. 2019); Evan Hoffman, *Social Networking Sites*, IBIS World 8 (Dec. 2018); eMarketer Editors, *US Digital Ad Spending Will Surpass Traditional in 2019*, eMarketer (Feb. 19, 2019), https://www.emarketer.com/content/us-digital-ad-spending-will-surpass-traditional-in-2019 [hereinafter Digital Ad Spending]; Jeremy Moses, *Satellite TV Providers in the US*, IBIS World 8 (Mar. 2020).

[10] *See generally* Richard R. John, Network Nation: Inventing American Telecommunications (2010) [hereinafter Network Nation]; Richard R. John, Spreading the News: The American Postal System from Franklin to Morse (1998) [hereinafter Spreading the News].

[11] Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 542 (4th ed. 2011) (stating a horizontal merger is "when one firm acquires another firm that manufacturers the same product or a close substitute, and both firms operate in the same geographic market.").

[12] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[13] United States v. Am. Tobacco Co., 221 U.S. 106 (1911).

[14] United States v. Times Mirror Co., 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968). *See also* United States v. Citizen Pub. Co., 280 F. Supp. 978 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969).

[15] 15 U.S.C. §§ 1801–04.

[16] 15 U.S.C. § 1802. *See also* Comm. for an Independent P-I v. Hearst Corp., 704 F.2d 467 (9th Cir. 1983).

[17] 15 U.S.C. § 1803 (stating "It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.");10 Joseph P. Bauer et al., Federal Antitrust Law § 75.2 (2019) (citing 868 F.2d 1300 (D.C. Cir.), *aff'd by an equally divided Court*, 493 U.S. 38, 110 S. Ct. 398, 107 L. Ed. 2d 277 (1989)). *See also* Comm. for an Independent P-I v. Hearst Corp., 704 F.2d 467, 473 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983) (stating deference to the Attorney General's views to approve a joint operating agreement should be approved "only so far as it is reasonable … and consistent with the intent of Congress in adopting the statute.").

[18] H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S.C.C.A.N. 3547.

[19] Letter from Nathan C. Kingsbury to Attorney General J. C. McReynolds (Dec. 19, 1913) [hereinafter McReynolds Agreement].This agreement is more commonly known as the Kingsbury Commitment. However, historians also use the alternative phrasing. *See* Network Nation, *supra* note 10, at 359.

[20] Milton L. Mueller, Universal Service: Competition, Interconnectionand Monopoly in the Making of the American Telephone System 128 (2013), https://surface.syr.edu/cgi/viewcontent.cgi?article=1017&context=books.

[21] Willis-Graham Act, ch. 20, 42 Stat. 27 (1921) (codified as amended at 47 U.S.C. § 221(a)) repealed by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(2), 110 Stat. 56 (codified at 47 U.S.C. § 151).

[22] ICC Termination Act of 1995, 109 Stat. 803.

[23] United States v. Am. Tel. & Tel. Co. (*AT&T*), 552 F. Supp. 131, 139 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983), *and amended sub nom.* United States v. W. Elec. Co., 714 F. Supp. 1 (D.D.C. 1988), *aff'd in part, rev'd in part sub nom.* United States v. W. Elec. Co., 900 F.2d 283 (D.C. Cir. 1990), *and modified sub nom.* United States v. W. Elec. Co., 890 F. Supp. 1 (D.D.C. 1995), *vacated*, 84 F.3d 1452 (D.C. Cir. 1996).

[24] Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56.

[25] Thomas Gryta et al., *AT&T Reaches Deal to Buy Time Warner for $85.4 Billion*, Wall St. J. (Oct. 22, 2016, 11:06 PM), https://www.wsj.com/articles/at-t-reaches-deal-to-buy-time-warner-for-more-than-80-billion-1477157084.

[26] New York v. Deutsche Telekom AG, No. 19 CIV. 5434 (VM), 2020 WL 635499 (S.D.N.Y. Feb. 11, 2020); *see also* United States v. Deutsche Telekom AG, No. CV 19-2232 (TJK), 2020 WL 1873555 (D.D.C. Apr. 14, 2020).

[27] *See* AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of License and Authorizations, Staff Analysis and Findings, WT Docket No. 11-65, ¶ 5 (stating the merger between AT&T and T-Mobile "would likely lead to a substantial lessening of competition in violation of the Clayton Act."), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A2.pdf.

[28] The U.S. Department of Justice eventually supported the merger of T-Mobile and Sprint. *See Deutsche Telekom*, 2020 WL 1873555.

[29] Christopher Sterling, Stay Tuned: A History of American Broadcasting 43 (3rd ed. 2002).

[30] Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

[31] *Id.*

[32] The Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1103, https://www.govinfo.gov/content/pkg/USCODE-2011-title47/html/USCODE-2011-title47.htm.

[33] 47 U.S.C. § 309(e) (stating "The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant"); Nynex Corp., Transferor, - & - Bell Atl. Corp., Transferee, 12 FCC Rcd. 19985 ¶ 3 (1997) (emphasis added). Section 7 of the Clayton Act also states that mergers are prohibited if they "substantially ... lessen competition ... [or] ... tend to create a monopoly[.]" *See* 15 U.S.C. § 18.

[34] Fed. Commc'ns Comm'n, Report on Chain Broadcasting 70–73 (1941).

[35] Sterling, *supra* note 29, at 231–32.

[36] Amendment of Section 73.658(g) of Comm'n's Rules-Dual Network Rule, 16 FCC Rcd. 11114 (2001) [hereinafter Dual Network Rule].

[37] 2014 Quadrennial Regulatory Review F Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 31 FCC Rcd. 9864, 9952–60 (2016) [hereinafter 2014 Quadrennial Review Second Report and Order].

[38] Amendment of Sections 73.35, 73.240 & 73.636 of the Comm'n Rules Relating to Multiple Ownership of Standard, FM & Television Broad. Stations., 22 F.C.C.2d 306 (1970) [hereinafter 1970 FCC Ownership Rules]; 2014 Quadrennial Regulatory Review F Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, 32 FCC Rcd. 9802, 9841–45 (2017) [hereinafter 2017 Quadrennial Review].

[39] Part 4—Broadcast Services Other Than Standard Broadcast, 6 Fed. Reg. 2282, 2284–85 (May 6, 1941).

[40] The FCC repealed what was known as the Eight-Voices Test. The Eight-Voice test required "at least eight independently owned television stations must remain in the market after combining ownership of two stations in a market[.]" *See* 2017 Quadrennial Review, 32 FCC Rcd. at 9831–40.

[41] Part 3—Rules Governing Standard and High-Frequency Broadcast Station, 11 Fed. Reg. 33 (Jan. 1, 1946).

[42] Specifically, the FCC allowed one of the major four broadcast networks, which included ABC, CBS, Fox and NBC, to purchase another broadcast network. *See* Dual Network Rule, 16 FCC Rcd. 11114, 11114–18 (2001).

[43] 2014 Quadrennial Review Second Report and Order, 31 FCC Rcd. at 9952–60 (2016).

[44] Amendment of Sections 3.35, 3.240 & 3.636 of the Rules & Regulations Relating to Multiple Ownership of AM, FM & Television Broad. Stations, 18 F.C.C. 288 (1953) [hereinafter National Television Ownership Rules].

[45] See Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56.

[46] Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3.

[47] Respect to Competition and Responsibility in Network Television Broad., 23 F.C.C.2d 382 (1970 Consideration of the Operation of, & Possible Changes in, the "Prime Time Access Rule', Section 73.658(k), of the Comm'n's Rules Petitions of Nat'l Broad. Co., Inc. (NBC) Midland Television Corp. (KMTC, Springfield, Mo.) Kingstip Commc'ns, Inc. (KHFI-TV, Austin, Tex.) (for Deletion of the Rule) MCA, Inc. (to Permit Use of "Off-Network' Material Plus 25% New Material), 44 F.C.C.2d 1081 (1974).

[48] Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, 11 FCC Rcd. 546 (1995) [hereinafter PTAR Repeal].

[49] Smith-Victor Corp. v. Sylvania Elec. Prod., Inc., 242 F. Supp. 315, 317 (N.D. Ill. 1965) ("Vertical combinations … join complementary facilities by integrating different stages in the production or distribution process").

[50] Pub. L. No. 59-337, 34 Stat. 584, 59 Cong. Ch. 3591 (stating "[i]t shall be Railroads not to carry products in unlawful for any railroad company to transport … any article or commodity…manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."), https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/34/STATUTE-34-Pg584.pdf.

[51] Banking Act of 1933, ch. 89, 48 Stat. 162. The Glass-Steagall Act is four sections of the Banking Act of 1933. §§ 16, 20, 21, and 32, 12 U.S.C. §§ 24, 378 (2012). Repealed by the Gramm-Leach-Bliley Act, see Pub. L. No. 106-102, 113 Stat. 1338 (1999).

[52] Ford Motor Co. v. United States, 405 U.S. 562 (1972).

[53] *AT&T*, 552 F. Supp. at 139.

[54] Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 Hastings L.J. 1395, 1457–58 (1999). *See also* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[55] A network is a collection of radio or television stations that air programming from the same unified source. See Glenn Halbrooks, *Broadcasting Networks Define the TV and Radio Business*, Balance Careers (Mar. 10, 2019), https://www.thebalancecareers.com/broadcasting-network-tv-business-2315175.

[56] A station is an entity equipped to engage in radio communication or radio transmission of energy. *See* Erik Barnouw, The Golden Web: A History of Broadcasting in the United States 1933–1953, at 313 (1968).

[57] *The Impact of the FCC's Chain Broadcasting Rules*, 60 Yale L.J. 78, 86 (1951).

[58] *Id.*

[59] *Id.*

[60] *Id.* at 85.

[61] Christopher J. Pepe, *The Rise and Fall of the FCC's Financial Interest and Syndication Rules*, 1 Vill. Sports & Ent. L.F. 67, 68 (1994).

[62] Evaluation of the Syndication & Fin. Interest Rules, 7 FCC Rcd. 345 ¶ 2 (1991).

[63] Evaluation of the Syndication & Fin. Interest Rules, 8 FCC Rcd. 3282 (1993).

[64] Thomas G. Krattenmaker & A. Richard Metzger, Jr., *FCC Regulatory Authority over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 NW. U. L. REV. 403, 491 (1982); Sydney W. Head, Broadcasting in America: A Survey of Television and Radio 216 (3rd ed. 1976).

[65] PTAR Repeal, 11 FCC Rcd. 546.

[66] United States v. Paramount Pictures, 66 F. Supp. 323 (S.D.N.Y. 1946), *aff'd in part, rev'd in part*, 334 U.S. 131 (1948).

[67] *Department of Justice Files Motion to Terminate Paramount Consent Decrees* (Nov. 22, 2019), https://www.justice.gov/opa/pr/department-justice-files-motion-terminate-paramount-consent-decrees (last visited Feb 3, 2020).

[68] *See* United States v. General Dynamics Corp., 258 F. Supp. 36, 56 (S.D.N.Y. 1966); *see also* John T. Miller Jr., 44 St. John's L. Rev. 613, 620–24 (1970).

[69] Panama Canal Act of 1912, Pub. L. No. 62-337, § 11, 37 Stat. 560, https://en.wikisource.org/wiki/Panama_Canal_Act (last visited Jan. 27, 2020).

[70] Unless that the ownership of the trucking company was "auxiliary and supplemental" to the operation of the railroad. *See* United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951).

[71] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[72] McReynolds Agreement, *supra* note 19.

[73] The Communications Act of 1934 § 314, Pub. L. No. 73-416, 48 Stat. 1103, https://www.govinfo.gov/content/pkg/USCODE-2011-title47/html/USCODE-2011-title47.htm.

[74] Amendment of Section 3.636 of the Comm'ns Rules & Regulations Relating to Multiple Ownership of Television Broad. Stations, 43 F.C.C. 2797 (1954). A year earlier it was five stations. See National Television Ownership Rules, 18 F.C.C. 288.

[75] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56.

[76] Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3.

[77] *AT&T*, 552 F. Supp. at 135 (discussing United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956).

[78] *See generally* Consent Decree, United States v. Western Electric Co., Civil Action No. 17-49 (D. N.J. 1956) [hereinafter 1956 AT&T Consent Decree].

[79] 1970 FCC Ownership Rules, 22 F.C.C.2d at 309. *See also* Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Cmty. Antenna Television Systems, Final Report and Order, 21 F.C.C.2d 307 (Section 214 Certificates), *recon.*, 22 F.C.C.2d 746 (1970), *aff'd*, General Tel. Co. of S.W. v. U.S., 449 F.2d 846 (5th Cir. 1971).

[80] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[81] Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 Fed. Comm. L. J. 167, 178 (2003).

[82] *Id.*

[83] *Id.* at 181-98.

[84] See *AT&T,* 552 F. Supp. 131; Cannon, *supra* note 81, at 199.

[85] Kearney, *supra* note 54, at 1413–14.

[86] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56. *See* notes 12–15.

[87] Cannon, *supra* note 81, at 199.

[88] Amendment of Sections 64.702 of the Comm'n's Rules & Regulations (Third Computer Inquiry); & Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Thereof Commc'ns Protocols Under Section 64.702 of the Comm'n's Rules & Regulations, 104 F.C.C.2d 958, 1090 (1986); *see also* Bell Operating Companies Joint Petition for Waiver of Computer II Rules, 10 FCC Rcd. 13758 ¶ 46 (1995).

[89] Telecommunications Act of 1996, Pub. L. No. 104-104, § 702, 110 Stat. 56. The 1996 Telecommunications Act stated that unless the customer approved otherwise, a telecommunications company could not use the information gathered from its customers to provides enhanced services and could only be to provide telecommunications services.

[90] Protecting the Privacy of Customers of Broadband & Other Telecomm. Servs., 31 FCC Rcd. 13911 (2016).

[91] S.J.Res. 34, 115th Cong. (2017).

[92] Robert Sobel, RCA 97 (1986).

[93] 1970 FCC Ownership Rules, 22 F.C.C.2d 306.

[94] Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9875 (2017) [hereinafter 2017 Repeal].

[95] Amendment of Sections 73.34, 73.240, & 73.636 of the Comm'n's Rules Relating to Multiple Ownership of Standard, FM, & Television Broad. Stations, 50 F.C.C.2d 1046, 1074 (1975), *recon.*, 53 FCC 2d 589 (1975), *aff'd in part and rev'd in part sub nom.* National Citizens Committee For Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978).

[96] 2017 Repeal, 32 FCC Rcd. at 9806.

[97] Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (stating "the primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking to

carry for all people indifferently. . .") (citations omitted) (internal quotations omitted).

[98] Riebana Sachs, *The Common Carrier Barrier: An Analysis of Standard of Care Requirements, Insurance Policies, and Liability Regulations for Ride-Sharing Companies*, 65 DePaul L. Rev. 873, 881 (2016) (stating "taxi drivers, as well as taxi companies, have historically been defined as public common carriers, thus subjecting them to a higher standard of care regarding liability) (citations omitted).

[99] Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543, ch. 498.

[100] Mann-Elkins Act, Pub. L. No. 61-309, 36 Stat. 539 (1910).

[101] Fred H. Cate, *Telephone Companies, The First Amendment, and Technological Convergence*, 45 DePaul L. Rev. 1035, 1036 (1996) (citations omitted). *See also* Missouri Pac. R. Co. v. Larabee Flour Mills Co., 211 U.S. 612, 619 (1909) (stating that telegraph companies cannot price discriminate against customers).

[102] Pickard, *supra* note 5, at 53.

[103] *See* 1956 AT&T Consent Decree.

[104] AT&T's rules are also known as tariffs.

[105] Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C.2d 420 (1968).

[106] John Brooks, Telephone: The First Hundred Years 299 (1976).

[107] Jonathan Coopersmith, Faxed: The Rise and Fall of the Fax Machine 106 (2015); *see also* Tim Wu, *Wireless Carterfone*, 1 Int'l J. Comm. 379 (2007), https://www.eff.org/sites/default/files/wu07wireless-carterfone.pdf.

[108] *See generally* FCC Releases Open Internet R&O, Declaratory Ruling, & Order, 30 FCC Rcd. 5601 (F.C.C. March 12, 2015) [hereinafter Net Neutrality Order]. http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

[109] Radio Act of 1927, Pub. L. No. 69-632, § 18, 44 Stat. 1162.

[110] The Communications Act of 1934, Pub. L. No. 73-416, § 315, 48 Stat. 1103.

[111] General Fairness Doctrine Obligations of Broadcast Licensees, Report, 50 Fed. Reg. 35418 (1985) [hereinafter Fairness Doctrine Repeal].

[112] Radio Act of 1927, Pub. L. No. 69-632, § 29, 44 Stat. 1162.

[113] The Communications Act of 1934, Pub. L. No. 73-416, § 307(b), § 310(d), 48 Stat. 1103, https://www.govinfo.gov/content/pkg/USCODE-2011-title47/html/USCODE-2011-title47.htm.

[114] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 388-92.

[115] Mayflower Broad. Corp., Mass., 8 F.C.C. 333 (1940).

[116] Pickard, *supra* note 5, at 103.

[117] *The Mayflower Doctrine Scuttled*, 59 Yale L. J. 759 (1950).

[118] Fairness Doctrine Repeal, 50 Fed. Reg. 35418.

[119] *See generally* Pickard, *supra* note 5, at 62.

[120] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964).

[121] *Id.*

[122] *Id.*

[123] Fairness Doctrine Repeal Report, 50 Fed. Reg. 35418.

[124] Fed. Commc'ns Comm'n, The Law of Political Broadcasting and Cablecasting: A Political Primer 88 (1980), https://americanradiohistory.com/Archive-FCC/Law-of-Political-Broadcasting-FCC-1980.pdf.

[125] Charles D. Ferris & L. Gregory Ballard, *Independent Political Action Groups: New Life for the Fairness Doctrine*, 36 Vand. L. Rev. 929, 937–38 (1983) (stating "Without [the] Zapple [Doctrine] a political candidate would have no right to equal opportunities unless his opponent's political advertisement constituted a 'use' of broadcast facilities. The FCC defines a 'use' as an identifiable appearance of a candidate by voice or picture, regardless whether the candidate has sponsored the advertisement or the appearance pertains to the campaign. Under a traditional interpretation of section 315(a) [of the Communications Act], the airing of political advertisements in which the candidate does not appear is not a 'use' by that candidate and, consequently, does not trigger his opponent's right to equal opportunities. The Zapple Doctrine prevents a candidate from rendering the section 315(a) equal opportunities provision inapplicable by deliberately failing to appear on ads that his supporters purchase; Zapple thus extends equal opportunities to political broadcasting in which no 'use' occurs.").

[126] Fairness Doctrine Repeal, 50 Fed. Reg. 35418; Richard J. Bodorff, Esq. Sue Wilson, 29 FCC Rcd. 5010 (2014).

[127] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[128] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 645–47 (1994) (*Turner I*).

[129] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (*Turner II*); see Cable Carriage of Broadcast Stations, Federal Communications Commission (Dec. 9, 2015), https://www.fcc.gov/media/cable-carriage-broadcast-stations.

[130] 47 U.S.C. § 230. Section 230 is actually Section 509 of the Telecommunications Act of 1996, which amended Section 230 of the Communications Act of 1934.

[131] *Id.* § 230(c)(1).

[132] *Id.* § 230(c)(2).

[133] Langdon v. Google, Inc., 474 F. Supp. 2d 622, 626 (D. Del. 2007); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009).

[134] Net Neutrality Order, 30 FCC Rcd. 5601 (March 12, 2015).

[135] In re Restoring Internet Freedom , 33 FCC Rcd. 311 (F.C.C. January 4, 2018).

[136] *See generally* MCI Commc'ns Corp. v. American Tel. and Tel. Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983).

[137] United States v. Terminal R. R. Ass'n of St. Louis, 224 U.S. 383 (1912).

[138] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

[139] Associated Press v. United States, 326 U.S. 1 (1945).

[140] Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[141] Pacific Railroad Act of 1863, 12 Stat. 807, 37 Cong. Ch. 112, http://www.cprr.org/Museum/Pacific_Railroad_Acts.html#1863.

[142] *See* Pub.L. No. 101-549, 104 Stat. 2399 (1990). Susan Armstrong et. al., *Recent Developments in Environmental Law*, 14 Tul. Envtl. L.J. 245, 257 (2000) (stating "OBD systems are designed to monitor, control and record all emissions released by the vehicles' engines. Pursuant to the 1990 amendments to the CAA, EPA regulations require the installation of OBD systems on all new motor vehicles, including all light duty vehicles and trucks for model year 1994 and later.").

[143] McReynolds Agreement, *supra* note 19.

[144] Clean Air Act Amendments of 1989, Pub. L. No. 101-549, 104 Stat. 2399 (codified at 44 U.S.C. §§ 3541–49 (2006)).

[145] Cannon, *supra* note 81, at 199.

[146] *Id.* at 200–03; Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 F.C.C.2d 958, 1063–66 ¶¶ 210–17 (1986).

[147] For example, the RBOCs were prohibited to cross-subsidize certain forms of "electronic publishing." See Telecommunications Act of 1996 § 151(a), adding 47 U.S.C. § 274(h). One more of cross-subsidization what was that RBOCs could not cross-subsidize alarm services from their telephone exchange operations. Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 Conn. L. Rev. 123, 141 (1996). See also California v. FCC, 39 F.3d 919, 925–30 (9th Cir. 1994); California v. FCC, 905 F.2d 1217, 1230–39 (9th Cir. 1990).

[148] Pacific Railroad Act of 1863, 12 Stat. 807, 37 Cong. Ch. 112, http://www.cprr.org/Museum/Pacific_Railroad_Acts.html#1863.

[149] Rural Electrification Act of 1936, ch. 432, § 4(a), 49 Stat. 1363, 1365 (codified as amended at 7 U.S.C. § 904 (2012)).

[150] U.S. Const. art. I, § 8, cl. 7.

[151] Spreading the News, *supra* note 10, at 47–49.

[152] Post Office Act of 1792, § 14, 1 Stat. 232, 236, https://njpostalhistory.org/media/pdf/postact1792.pdf; Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 Hastings L.J. 671, 690 (2007); An Act to establish the Post-office and Post-roads within the United States, 3 Cong. Ch. 23, May 8, 1794, 1 Stat. 354.

[153] Postal Act of 1845, 5 Stat. 732, 28 Cong. Ch. 43.

[154] Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C. §§ 390–99b).

[155] 26 U.S.C. § 501(c)(3).

[156] United States Railway Administration Act of 1918, Pub. L. No. 65-107, 40 Stat. 451.

[157] Robert Gaynes, *The Discovery of Penicillin—New Insights After More Than 75 Years of Clinical Use*, 23 Emerging Infectious Diseases 5 (2017), https://wwwnc.cdc.gov/eid/article/23/5/16-1556_article.

[158] *See generally* George L. Priest, *The History of the Postal Monopoly in the United States*, J. L. & Econ. 33, 55 (1975).

[159] Network Nation, *supra* note 10, at 116; Post Roads Act of 1866, ch. 230, 14 Stat. 221, repealed by Act of July 16, 1947, ch. 256, 61 Stat. 327.

[160] *Id.* at 138.

[161] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958).

[162] United Shoe Mach. Corp. v. United States, 258 U.S. 451, 459 (1922).

[163] United States v. United Shoe Mach. Co., 264 F. 138, 142–44, 146 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1922).

[164] Int'l Bus. Mach. Corp. v. United States, 298 U.S. 131 (1936).

[165] *Id.* at 136.

[166] *See* United States v. American Tel. and Tel. Co. (AT&T), 552 F. Supp. 131, 228 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[167] Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 489–89 (2002).The D.C. Circuit Court of Appeals used the following example to explain the unbundling rules:

> The basics of unbundling are relatively simple. Suppose a CLEC (such as Covad) wants to serve customers in Washington, D.C. One way of doing so is for Covad to purchase its own switches, trunks, and loops, which it can then use to offer service to its new customers. However, given that the local ILEC (e.g., Verizon) has already deployed switches, trunks, and loops to serve the market, it might be economically impossible for Covad to duplicate competitively Verizon's infrastructure. Through regulatory unbundling, however, Covad might be able to lease Verizon's switches, trunks, and loops as UNEs. Covad could then use combinations of UNEs to cobble together a network and compete against Verizon in Washington.

[168] 47 U.S.C. § 251(c)(3).

[169] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

[170] See George S. Ford & Lawrence J. Spiwak, *Lessons Learned from the U.S. Unbundling Experience*, 68 Fed. Comm. L.J. 95, 120 (2016).

[171] United States v. Loew's, Inc., 371 U.S. 38 (1962), abrogated by Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

Index

AT&T 6, 7, 12, 14, 18
- Consent Decree (1956) 6, 11, 12, 14
- McReynolds Agreement (1913) 6, 11, 18
- Modification of Final Judgment (1984) .6, 9, 12

Cable Television Consumer Protection and
- Competition Act of 1992 16

Cases
- *Associated Press v. U.S.* (1945) 17
- *Lorain Journal v. U.S.* (1951) 17
- *Nat'l Cable & Telecommunications*
  - *Association v. Brand X Internet Services*
  - (2005) 21
- *U.S. v. Loew's* (1962) 21
- *U.S. v. Paramount Pictures* (1946) 10

Communications Act of 1934 ..... 7, 11, 15
Communications Decency Act (1996) 16
Constitution 19
- Postal Clause 19

Cross-Ownership Prohibitions
- National Ownership Rules (Radio & TV) .....
  - (1954) 11
- Newspaper-Broadcast (1975) 13
- Radio-Television (1970) 13

FCC
- Carterfone case (1968) 14
- Chain Broadcasting Report (1941) 7, 9
- Computer Inquiry I (1971) 12
- Computer Inquiry II (1980) 12
- Computer Inquiry III (1985) 12, 18
- Customer Proprietary Network Information .
  - (CPNI) Rules 12
- Dual Network Rules (1941) 7
- Fairness Doctrine (1949) 15
- Financial Interest and Syndication Rules
  - (1970) 10
- Local Radio Ownership Rules (1970) 7
- Mayflower Doctrine (1940) 15
- National Television Ownership Rules
  - (1953) 7
- Open Internet Order (2015) 16
- Prime Time Access Rules (1970) 8, 10
- Public Service Responsibility of Broadcast
  - Licensees Report 15
- TV Duopoly Rule (1941) 7
- Zapple Doctrine (1970) 15

Federal Information Security Management Act
- of 2002 18

Mann-Elkins Act of 1910 14

National Telegraph Act (1866) 20
Newspaper Preservation Act (1970) 6

Post Office Act of 1792 ..... 19, 20
Public Broadcasting Act of 1967 19
Radio Act
- of 1912 7
- of 1927 ..... 7, 15

Telecommunications Act of 1996 6, 8, 9, 11, 12,
- 16, 21

Willis Graham Act of 1921 6