The Communications Act Policy Toward Competition: A Failure to Communicate

G. Hamilton Loeb

Program on Information Resources Policy

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I. INTRODUCTION

Beginning in the late 1960's with the Carterfone[1] and Microwave Communications, Inc.[2] decisions, the Federal Communications Commission launched what has been described as a reformulation of telecommunications regulation.[3] By mandating interconnection of independently produced peripheral equipment and by permitting specialized common carriers to compete with the AT & T long lines for intercity private line business, the Commission signalled a reorientation of the FCC's regulatory policy toward introducing new competition into the telecommunications market. It has been the FCC view in these and subsequent proceedings that the public interest would best be served by opening the door to new providers of communications services and, with some notable limitations,[4] it has pursued this policy since 1968, much to the dismay of some established actors in the telecommunications field.

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[1] In the Matter of Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C. 2d 420 (1968).

[2] In re Applications of Microwave Communications, Inc. (MCI), 18 F.C.C. 2d. 953 (1969), reconsideration denied, 21 F.C.C. 2d 190 (1970). The MCI decision was expanded by the Commission's recognition of a general category of "specialized common carriers" (SCCs) providing private line services and facilities. Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier-Services in the Domestic Public Point-to-Point Microwave Radio Service, 29 F.C.C. 2d 870, Aff'd sub nom. Washington Util. & Transp. Comm. v. FCC, 513 F. 2d 1142 (9th Cir.), Cert. denied 423 U.S. 836 (1976).

[3] See, e.g., Comment, FCC Regulation of Domestic Computer Communications: A Competitive Reformation, 22 Buff. L. Rev. 947, 962-984 (1973).

[4] See particularly MCI Telecommunications Corp. (Docket 20640), (FCC No. 76-622, June 30, 1976) (Execunet service).

This competitive reformulation has been in large part a response to the ferment taking place in the communications equipment market.[5] With the increasing prosperity and the explosion in telecommunications technology that have occurred since World War II, new and more sophisticated opportunities have arisen for accommodating the needs of the familiar mouth-to-ear forms of communication, and a new range of capacities in data processing and computer technology has multiplied the possibilities for machine-to-machine communication. New forms of communications services have grown around these technologies. In turn, these new services and technologies have begun to merge with dynamic technical and service developments in the broadcasting and computer arenas to produce an integrated galaxy of "compunications" functions,[6]

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[5]To the extent that the new policy toward competition grows from changes in the Commission's composition or from political influences, it is beyond the scope of this study. However, the FCC's course in this area has been fairly steady under both Democratic and Republican appointees and does not appear to be the product of one or another partisan philosphy.

[6]The term was coined by Anthony G. Oettinger in Compunications and the National Decision-Making Process, in COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 74-113 (M. Greenberger, ed., 1971). See also Berman and Oettinger, Changing Functions and Facilities: The Politics of Information Resources, 28 Fed. Com. B.J. 227, 247-48 (1976); Statement of Alfred Kahn, then Chairman of the New York Public Service Commission:

> The overwhelmingly significant consideration about the future organization of telecommunications, so far as I can see, is the fact that its evolving technology is thoroughly demolishing the validity of the boundary lines we have been drawing across the face of the industry...

Hearings Before the Subcomm. on Communications of the Senate Committee on Commerce, 95th Cong., 1st Sess. (March 21, 1977).

This merger of technologies has occurred in one form or another throughout the history of modern telecommunications; the computer-communications merger is only the latest manifestation. For example, even at the time the Communications Act of 1934 was passed, the process of technological merger was apparent, as can be seen in the remarks of Rep. Merritt on the House floor during debate on the Act:

> It developed as the hearings [on the legislation] went on by reason of improvements and inventions and the mechanical part of the service, telephone and telegraph and radio are becoming more and more interconnected, so that it is hardly possible to regulate one without regulating the other.

78 Cong. Rec. 10316 (1934).

and it has fallen to the FCC to develop regulatory policies to deal with this regrouping. Part of the Commission's response has been the opening of certain segments of the compunications market that fall within FCC jurisdiction to more competition.

The elaboration of this competitive policy has been built from the Commission's analysis of how best to structure the new options and consequences created by the post-World War II telecommunications ferment, and it has been for the most part the perennial political question of "who gets what, when"[7] which has informed this analysis. However, as with all regulatory actions by administrative agencies, this edifice of policy rests on a legal base. In the telecommunications area, that legal base is the Communications Act of 1934.[8] Although the Communications Act has historically presented few difficult questions of law constraining the range of policy options open to the Commission in structuring compunications markets,[9] parties attacking the procompetition decisions have drawn on that legal base by arguing that there are specific policy directives in the Communications Act barring the FCC from acting in a manner that promotes competition, at least in the peripheral

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[7] H. Laswell, POLITICS--WHO GETS WHAT, WHEN, HOW (1936).

[8] 47 U.S.C. §151 et. seq. (1970), Act of June 19, 1934, 48 Stat. 1064 c. 652.

[9] See, e.g., FCC v. RCA Communications, Inc., 346 U.S. 86, 93 (1953) (FCC's "broad and not niggardly" powers over communications not limited by federal pro-competition laws).

equipment and specialized common carrier fields.[10] The contention is that there are limits of law imposed on the policy discretion of the FCC.

It is these questions about the governing law of telecommunications and compunications which this study will examine.[11] Part II describes the development of telecommunications regulation from the invention of the telephone in 1876 through the enactment of the Communications Act of 1934, focusing on the evolution of the federal regulatory structure and the substantive law which it has applied. Beginning with this basic historical framework, Parts III and IV undertake to outline and then analyze the two principal competing views regarding the mandate of the Communications Act toward the telecommunications market structure. Part III discusses the prevailing view that the FCC is free to exercise an essentially boundless discretion in overseeing telecommunications developments, while Part IV explores a novel interpretation of the Act, advanced with increasing frequency by the established carriers

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[10] See text at notes 151-248 infra; Domestic Common Carrier Regulation: Hearings on H.R. 7047 before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce. 94th Cong., 1st Sess. (1975) [hereinafter Hearings on H.R. 7047] (statement of Eugene V. Rostow on behalf of AT&T); Brief for the National Association of Regulatory and Utility Commissioners (NARUC) at 29-41, Washington Util. & Transp. Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1976).

The attack on the procompetition policy is taking place in Congress as well as in the courts. Compare Consumer Communications Reform Act of 1977, H.R. 8, H.R. 513, 95th Cong., 1st Sess. (1977) (designed to undo the Carterfone-MCI line) with H. J. Res. 285, 95th Cong., 1st Sess. (1977) (expressing Congressional approval of the procompetition developments). See House Panel Considers Major Overhaul of 1934 Communications Act, 35 Cong. Q. 1113 (June 4, 1977).

[11] In dealing with the new competition doctrine, it is important to keep separate insofar as possible the distinction between law and policy. The question at issue here is not which choice among available policies might optimize the structure and performance of the communications industry, but what limits on the range of those choices are imposed on the FCC by the terms of the Communications Act itself.

and state regulators, which finds provisions in the statute that would bar the FCC from permitting competition which threatens duplication of, or economic or technical harm to, the services and facilities of the monopoly shared by AT&T and the independent telephone carriers. Part V then draws conclusions about these two alternatives, suggesting that the single reliable lesson to be learned from studying the Communications Act is that Congress has failed to provide any useful guidance to regulators and courts faced with the critical job of allocating opportunities in a fluid, rapidly evolving compunications environment.

II. THE LAW OF COMMUNICATIONS REGULATION: THE GENESIS OF THE COMMUNICATIONS ACT OF 1934

To assess the implications of the Communications Act toward monopoly and competition in the telecommunications area is not easy. The Act is remarkable for its non-specificity,[12] and although the regulatory scheme for wire communications is laid out in more detail than that for broadcasting, it still provides no immediate answers to the problem. It is only through the techniques of legislative history and statutory construction--techniques which in this instance, as will be apparent, frequently resemble those of the haruspex of ancient Rome, who garnered his information by reading animal entrails--that the national policy for telecommunications set forth by Congress in 1934 can be discerned. Uncertain as the result may be, this task is central to addressing the initial legal question of whether the FCC is authorized to act as it has in the policy-making sphere.

There are two principal ways of looking at the Communications Act for the purpose of discerning its meaning for this and other issues. The predominant view of the Act is that it was intended simply to centralize scattered regulatory authorities over portions of the communications industry in one body, the FCC, without significantly altering the substantive law or the established policies created under predecessor statutes.[13] Under this viewpoint, the Act was mostly form and not substance, and the legislative enactments prior to 1934 from which it was composed become critical for deciding what policy was to be carried forward by the new Commission when

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[12] See, e.g., IV B. Schwartz, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 2374 (1973); L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 49 (1965).

[13] See text accompanying notes 112-150 infra.

it assumed power in 1934. Sections A and B below focus on these enactments and the Communications Act itself and Part III sketches this overall view of the Communications Act as solely procedural in aim. The alternative view of the Communications Act is that, despite protestations to the contrary by key Congressional sponsors, the substance of the law was changed and a new, or at least expanded policy for telecommunications was included in its provisions. This view sees the Act as more than a shuffling of offices and perceives new policy directions in its passage in 1934. This is the focus of Part IV below.[14]

A. Federal Regulation Prior to 1934

For the first seventeen years following the invention of the telephone in 1976, the Bell company monopoly on telephone service was protected under the patent laws.[15] When these patents expired in 1893-94, a new group of independent competitors, now free to make use of telephone technology, gave birth to a period of intense competition in the provision of local telephone services, which resulted in a massive increase in the number of telephones in service and brought the independents within close range of the Bell companies in total connections.[16] Within a decade of the expiration of the patents, AT&T began to use its superior financial and geographic resources to acquire a large number of competitors and to make the going difficult for

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[14] See text accompanying notes 151-248 infra.

[15] For the fascinating history of the invention of the telephone and the complex patent litigation it engendered, see Note, The Law and the Telephone, 50 Am L. Rev. 425 (1916).

[16] Gabel, The Early Competitive Era in Telephone Communication, 1893-1920, 34 Law & Comtemp. Prob. 340, 344 (1969).

the rest by refusing to connect independents into its local and long-distance lines, which were becoming increasingly important as the availability of telephone service expanded. It was not until the Justice Department under President Wilson intervened in 1913 that this fierce competitive phase cooled,[17] and until the latest stages of the post-patent competitive period, communications service remained practically unregulated by federal authority.[18]

1. The Mann-Elkins Act

Communications services were first brought under federal regulatory supervision by the Mann-Elkins Act[19] of 1910, which placed jurisdiction over interstate rates charged by "telegraph, telephone, and cable companies" under the Interstate Commerce Commission.[20] The Act provided to parties aggrieved by rates charged for communications services the right to complain to the ICC, which then could investigate and, upon concluding the rates were

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[17] This cooling came as the result of an agreement entered between the Justice Department and AT&T known as the Kingsbury Commitment, discussed at notes 60-62 infra.

[18] One caveat is in order. It is not entirely true that the federal government played no early regulatory role, although this is clearly the view which dominates the commentary on the early competitive period of the telephone. See, e.g., Gabel, supra note 16. The federal courts in this era engaged in a roundabout form of regulation by using the fourteenth amendment protection of property aggressively to control state rate-setting bodies. See J. Sichter, SEPARATIONS PROCEDURES IN THE TELEPHONE INDUSTRY: THE HISTORICAL ORIGINS OF A PUBLIC POLICY 11-12 (Harv. Prog. on Information Resources Policy, Pub. No. P-77-2, 1977); J. Bauer, TRANSFORMING PUBLIC UTILITY REGULATION 64-69 (1950). The effect of this federal court intervention on early state regulation, says Sichter, was "devastating".

[19] Commerce Court (Mann-Elkins) Act, ch. 309 § 7, 36 Stat. 544 (1910), amending Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379 (1887).

[20] Id.

"unjust and "unreasonable", declare the charge unlawful.[21] This was accomplished by a sparsely explained legislative maneuver which lumped the emerging technologies of telecommunications with sleeping-car companies and other transportation carriers under the purview of the federal body created for and trained in regulation of transportation and which thereby set the tone for the regulation of communications services that lasted at least until the New Deal.

The process by which this came about seems from the record almost casual. The principal provisions of the Mann-Elkins Act, designed to redeem part of the Republican platform on which President Taft had been elected,[22] established a special Commerce Court for handling ICC appeals and expanded the power of the ICC over the railroads.[23] Neither the House Report[24] nor the Senate Report[25] that accompanied the respective versions of the bill to the floor in each chamber contained any reference at all to telephone or telegraph, and no proposal to consider telecommunications technology had been made during committee hearings.[26] The first mention in the record of regulation of telecommunications services did not occur until mid-way through the House debate on the railroad bill, when an amendment was

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[21] Id.

[22] H.R. Rep. No. 923, 61st Cong., 2d Sess. at 1 (1910).

[23] See the discussion of the Mann-Elkins Act in II B. Schwartz, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 1007-09 (1973).

[24] H.R. Rep. No. 923, 61st Cong., 2d Sess. (1910).

[25] Sen. Rep. No. 355, 61st Cong., 2d Sess. (1910).

[26] 45 Cong. Rec. 5534-35 (1910) (remarks of Rep. Townsend).

offered to include "telegraph and telephone companies" within the definition of the common carriers to be regulated by the Interstate Commerce Act.[27] Its sponsor argued only that "there is no reason why these great instrumentalities of commerce should not... be put within the provisions of the interstate commerce act"[28] and that "these necessary instrumentalities which the citizens have to use, which are monopolies in their particular lines of business, [should] be required to make reasonable charges;"[29] at no point were any specific abuses to be corrected cited in the House consideration of the amendment. Even Chairman Mann agreed that regulation of telephone and telegraph was "desirable",[30] although he argued strenuously against the amendment being grafted onto the railroad-oriented bill amending the Interstate Commerce Act.[31] Despite Mann's opposition, the amendment carried relatively easily after a short debate.[32]

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[27] 45 Cong. Rec. 5533 (1910) (remarks of Rep. Bartlett).

[28] Id.

[29] Id. Other supporters of the amendment were hardly more specific. See remarks of Rep. Underwood, id. at 5534 ("we cannot afford to turn our backs on [the amendment] and refuse to bring the great telegraph and telephone lines in this country within the terms of the interstate commerce act, so that they may be properly regulated in the interest of the great commercial life of the Nation. [Applause.]"); remarks of Rep. Fitzgerald, id. at 5536 ("There is a persistent, a strong, and a reasonable demand throughout the country for some proper supervision of telegraph and telephone companies"); remarks of Rep. Hobson, id. ("to leave them unregulated is to leave private corporations with the power to tax the people at will... The whole domain of the distributing system in a great organism like a nation should be brought under the control of the regulating system--the Government").

[30] Id. at 5533 (remarks of Rep. Mann).

[31] [H]ow ridiculous it is to stick into the [bill] something which has nothing to do with either passengers or property. It amounts to nothing. It is an advertisement only of our own incompetence, of our incapacity for legislation... .

Id.

[32] Id. at 5537. The final House vote was 109-76.

The same procedure was repeated, with a deceptive twist, during Senate consideration of the Mann-Elkins Act. Again after no consideration of telephone and telegraph issues by the committee that reported the bill, an amendment was offered to bring "telegraph, telephone, and cable companies" within the jurisdiction of the Interstate Commerce Commission.[33] Its sponsor, misinforming the Senate that a similar provision had been reported unanimously by the House Committee and that it had passed the House without a division vote, echoed the generalized reasoning used in support of the amendment in the House: "the interstate telegraph and telephone companies are about the only remaining public service corporations engaged in interstate commerce that are not under the control of the Interstate Commerce Commission."[34] Again, the committee chairman presiding over the bill argued against its adoption, saying that the problems of communications should be considered separately and at more length than

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[33] The original version of the amendment, sponsored by Senator Dixon, ran over nine pages, although it did nothing more than reenact § 1 of the Interstate Commerce Act and add telephone, telegraph, and cable companies to its purview. This caused some consternation among Senators who were being forced to vote on such a lengthy measure without having time to consider it, and a motion to table the Dixon amendment was made but defeated, 22-37. Senator LaFollette then offered a simple substitute adding telecommunications companies to ICC jurisdiction, which was adopted by voice vote. Id. at 6975-76.

[34] Id. at 6973 (remarks of Sen. Dixon). No other Senator spoke in support of the amendment, although Senator Lodge expressed "no objection" to regulation of telephone and telegraph companies. Id. at 6976.

There is one indication in the Senate debate of the source from which pressure for the amendment may have come. Senator Dixon inserted a letter from the National Independent Telephone Association accusing the Bell System of being an "unfair competitor" and using "outrageous methods of warfare" against the independents. The letter pointed particularly to discrimination in long-distance rates and below-cost pricing allegedly practiced by Bell to drive out competitors, and claimed that federal supervision would eliminate these wrongs. Id. at 6973-74.

the Dixon amendment provided.[35] And again, after a debate even shorter and less illuminating than the House debate a month before, the amendment passed by a substantial majority.[36]

When the conference report[37] returned to the Senate, no time was spent discussing the new proposal regulating communications services. Senator Elkins, in explaining the conference report, noted that "[i]t extends the principle of rate legislation which requires all rates to be just and reasonable and free from unjust discrimination to telephone and telegraph companies as well as to carriers",[38] but the subject was not brought up again and the conference measure passed without a roll call.

Why the apparent consensus that telegraph and telephone companies should be regulated by the federal government had developed by 1910 is not clear from the record. There was some expression of populist sentiment,[39] some suggestion that rates had been set unfairly or even predatorily,[40] and some indication that the proregulatory view that emerged during the Progressive era and first bore fruit in the regulation of interstate railroads

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[35] Id. at 6975 (remarks of Sen. Elkins). However, after a division vote indicating substantial support for federal regulation, Senator Elkins agreed to accept the LaFollette substitute.

[36] See note 33 supra.

[37] Sen. Doc. No. 623, 61st Cong., 2d Sess. (1910), printed at 45 Cong. Rec. 8146-49 (1910).

[38] 45 Cong. Rec. 8240 (remarks of Sen. Elkins).

[39] See id. at 5536 (remarks of Reps. Hopson and Fitzgerald), and note 29 supra.

[40] See id. at 69, 73-74 (letter from National Independent Telephone Association); id. at 8240 (remarks of Sen. Elkins).

was thought to apply automatically to communications carriers as well.[41] Perhaps the fact that the communications company amendment to the Mann-Elkins Act produced no real regulation of telephone and telegraph services in the 25 years the ICC had jurisdiction over telephone and telegraph companies[42] indicates that, whatever the guiding reasons for extending federal authority to communications in 1910 may have been, no large wave of public sentiment demanded it. But why the ICC was to regulate the providers of interstate telephone and telegraph services is no more apparent from the Congressional consideration of the problem than is the policy that the Commission was to follow in exercising its supervisory jurisdiction. The most that can be said is that whatever Congress had previously established in 1887 as the regulatory policy for nineteenth century barge and rail traffic was after 1910 to apply to telephones and telegraphs as well, although this can only be inferred from the amendment of the Mann-Elkins Act and not found in any expression of the House or Senate as to what the regulatory scheme was to be.

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[41] See id. at 5533 (remarks of Rep. Bartlett) and text at note 28 supra. One of the larger mysteries surrounding the Mann-Elkins telephone and telegraph amendments is the role played by AT&T and its dynamic President, Theodore Vail. Not long before 1910, Vail began to defuse the Bell System's resistance to state regulation, suggesting that regulation could work to the benefit instead of the detriment of AT&T. See AT&T ANNUAL REPORT 23-33 (1907); note 180 infra. Although it may appear unlikely that historical proximity between the emergence of Vail's proregulatory view and the 1910 amendments is coincidental, the historical evidence is silent.

[42] See text at notes 84-86 infra.

2. The Transportation (Esch-Cummins) Act of 1920

The Mann-Elkins amendment to the Interstate Commerce Act remained the statutory authority for federal regulation of telecommunications for ten years.[43] In 1920, while developing legislation to return the railroads to private ownership from wartime government control, Congress revamped the Interstate Commerce Act to extend federal regulation of surface transportation even further through the Transportation (Esch-Cummins) Act of 1920.[44] As had been the Mann-Elkins Act, the Esch-Cummins Act was almost exclusively concerned with railroad issues; the statement of the policy of the act (which included the preservation of competition wherever

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[43] For twelve months in 1918-19, all wire communications facilities were taken over by the government as a war emergency measure. Although managerial control was placed in the Postmaster General and revenues were diverted to the Treasury, operation of the communications system remained effectively in the hands of the corporate executives of each company, and no new regulatory policy emerged. See Note, The Telegraph Industry: Monopoly or Competition, 51 Yale L.J. 629, 636 (1942) [hereinafter The Telegraph Industry]:

> The wartime operation of the communications system might well have been an important step towards a reasoned national communications policy. But, in fact, it was merely a brief, unrelated hiatus in the haphazard accumulation of ad hoc legislation made to substitute for policy. A few hours of cursory debate sufficed to hand over to the Executive all the country's facilities for rapid communication. Brief hearings followed by even less--as well as less relevant--debate marked the end of the experiment.

Upon return of the communications companies to private control, telephone and telegraph service reverted to the regime of the Mann-Elkins amendments. Act of July 11, 1919, Ch. 10, 41 Stat. 157 (1919) (withdrawing government control of communications companies).

[44] Transportation (Esch-Cummins) Act of 1920, Ch. 91, § 400, 41 Stat. 474, amending Mann-Elkins Act, Ch. 309, §7, 36 Stat. 544 (1910).

possible[45]) refers explicitly to rail and water transportation but makes no mention of communications.[46] However, at least one change--although it may have been only cosmetic--was made by the Esch-Cummins Act in the statutory language relating to communications services: the jurisdiction of the ICC over "telegraph, telephone, and cable companies" was restated to encompass "the transmission of intelligence by wire or wireless."[47]

There is no discussion in the official record of this specific change in the jurisdictional language. The Senate Report[48] and debate on the Esch-Cummins bill, in fact, made no mention of communications at all. The conference report[49] was likewise silent. Only in the House were the problems of communications carriers addressed at all. There the original version of the bill had subjected communications companies to the full panoply of regulatory requirements aimed primarily at railroad carriers, including the acquisition of a certificate of convenience and necessity for extensions, abandonments and the issuance of stocks and bonds.[50] That part of the proposed legislation drew almost uniform opposition in the

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[45] Esch-Cummins Act, Ch. 91, §407, 41 Stat. 482 (1920), amending Interstate Commerce Act §5(4). See text at note 191 infra.

[46] It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

Esch-Cummins Act, Ch. 91, §500, 41 Stat. 499 (1920).

[47] Id. §400.

[48] Sen. Rep. No. 304, 66th Cong., 1st Sess. (1919).

[49] H. R. Rep. No. 650, 66th Cong., 2d Sess. (1920).

[50] H. R. Rep. No. 456, 66th Cong., 1st Sess. at 11 (1919).

House hearings[51] and was subsequently dropped in the bill reported from the committee. The committee made it clear that no change in the regulatory scheme or the regulatory policy previously applied to communications was contemplated,[52] and this intent was reinforced by the exclusion of communications carriers from the broad statement of policy incorporated in the act.[53]

Given this fairly unambiguous intent not to alter existing ICC regulation, or non-regulation,[54] to read much more than cosmetic significance into the

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51 Return of the Railroads to Private Ownership: Hearings on H. R. 4378 before the House Committee on Interstate and Foreign Commerce, 66th Cong., 1st Sess. (1919). See statement of E. Clark on behalf of ICC, at 2912 ("I am not prepared to say that there is at this time any pressing public need for extending the proposed legislation to the telegraph and telephone companies in the same manner and to the same extent as it is proposed to be extended for the railroads and other carriers aside from the telegraph and telephone companies"); statement of F. Stevens on behalf of Independent Telephone Association, at 1813 ("The railroad industry needs federal regulation. The telephone industry does not... Such a statute is not needed at the present time for public protection. There has been no abuse..."). The telephone carriers did not oppose regulation generally but urged that communications carriers be given separate consideration and a separate statutory title. See statement of F. MacKinnon on behalf of Independent Telephone Association, at 1785 ("The telephone business... should be given that same earnest study, that same careful consideration, that this committee has been giving for the past weeks to the railroad problem. Our problem, we say, is not pressing"); statement of N. Kingsbury on behalf of AT&T, at 1788-93.

52 [T]he committee left the control of wire systems practically as it was under the interstate commerce act prior to Federal control. There was practically no demand for placing with added powers the wire systems under the commission... it was not thought wise at this time to complicate the solution of the railroad question with the peculiar problems connected with the regulation of wire systems.

H. R. Rep. No. 456, 66th Cong., 1st Sess. at 11 (1919).

53 See note 46 supra.

54 The House committee noted that by 1919 only "a half dozen cases" involving communications had been brought before the ICC. H. Rep. No. 456, 66th Cong., 1st Sess. 11 (1919). See also text at notes 84-86 infra.

restatement of ICC jurisdiction over the "transmission of intelligence by wire or wireless" would not be warranted. The most likely reason for the change was simply to conform the statute to the scope of federal authority over interstate communications as marked out by the Supreme Court in the 1877 decision in Pensacola Telephone Co. v. Western Union Telephone Co.[55] The Pensacola Telephone case had been alluded to briefly in the Mann-Elkins debates by proponents of the Dixon amendment to include telephone and telegraph within ICC jurisdiction,[56] although no attempt had been made then to reword the floor amendment to incorporate the language of the Court. The Esch-Cummins change therefore can most reasonably be read as an effort to match the legislative and judicial pronouncements in the communications area and to extend administrative authority over communications to the full

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[55] 96 U.S. 1 (1877). The Court's interpretation of the interstate commerce clause in light of the changes wrought by the telegraph on postal service is broad and worth quoting in full:

> The powers thus granted [by the commerce clause and by the post office clause] are not confined to the instrumentality of commerce or the post service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successfully brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that the intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

Id. at 9 (emphasis added).

[56] 45 Cong. Rec. 5537 (1910) (remarks of Rep. Cooper); id. at 6795 (remarks of Sen. Rayner).

reach of Congress' constitutional powers. By relating the statutory scheme for communications regulation to the expansive early definition of federal power over communications, the sixty-sixth Congress can be understood to have shown in the initial stages of federal communications regulation that the authority of regulatory agencies in the communications field was not to be confined narrowly to existing technologies or operations but was to reach as wide and deep as "progress" and "new developments"[57] carried it. In this respect, the Esch-Cummins Act was of seminal importance in the evolution of communications regulation, even though the practice established ten years earlier of legislating in communications areas with little or no consideration of the special aspects of the field was not disturbed.

3. The Willis-Graham Act

In 1921, Congress expanded federal authority over telecommunications by giving the ICC power to approve or disapprove consolidations and mergers of telephone and telegraph companies. At the same time, it exempted communications companies from the restraints of the antitrust acts once the ICC had determined that a proposed consolidation or merger would be "of advantage to the persons to whom service is to be rendered and in the public interest."[58] This reallocation of federal authority from the courts to the ICC, known as the Willis-Graham Act, was the first piece of legislation specifically targeted to the new and increasingly complex problems of telecommunications in the twentieth century and the first Congressional consideration in any detail of the communications industry.

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[57] 96 U.S. at 9; supra note 55.

[58] Willis-Graham Act, Ch. 20, §1, 42 Stat. 27 (1921), amending Esch-Cummins Act, Ch. 91, §407, 41 Stat. 482 (1920).

It therefore takes on special importance in the legislative history of communications regulation.

The Esch-Cummins Act had authorized the ICC to exempt railroads from the antimerger laws upon a showing that consolidation of competing rail lines would be in the public interest, but had withheld power to exempt acquisitions of communications companies as part of the overall reluctance to alter the scheme of regulation that had been established through the Mann-Elkins Act.[59] As of 1921, therefore, communications carriers remained statutorily subject to antitrust suits. The Justice Department had come close to bringing one such suit during the crest of the period of intense competition between AT&T and the independent telephone companies, the process ending in the formulation of an agreement between AT&T Vice-President Nathan Kingsbury and Attorney General MacReynolds which required Bell to divest control of Western Union,[60] to interconnect independent lines with its own long-distance lines,[61] and to refrain from purchasing or acquiring control of independent telephone companies operating in the same market as Bell system subsidiaries. Under the agreement, known as the Kingsbury Commitment,[62] AT&T remained free to purchase non-competing independent companies, and it did so in the period between

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[59] See notes 51-52 supra.

[60] Bell had acquired control of Western Union in 1909. See J. Brooks, TELEPHONE 133-34 (1975).

[61] During the early competitive era, Bell had used the leverage it gained from refusal to make long distance lines available to independents aggressively to force the competition out of business. The independents had attempted to establish a competitor long-distance system in 1899, but the financing for it failed. See Gabel, supra note 16, at 350, 353.

[62] Letter of N.C. Kingsbury, Vice-President of AT&T, to Attorney General J.C. Reynolds, reprinted at FCC, Report of the Investigation of the Telephone Industry in the United States, H.R. Doc. 340, 76th Cong. 1st Sess. 139-41 (1939).

the 1913 agreement and 1921, increasing its control from about 50 percent of telephones in service in 1910 to 62 percent in 1921.[63] However, as the decade of the 1910s evolved, independent companies competing with Bell subsidiaries or with other independents in the same market--that is, independents who could not sell out to AT&T because of the Kingsbury Commitment or to competitors because of antitrust prohibitions--suffered progressively worsening financial problems and began to seek relief from federal restrictions on consolidations. This effort culminated in the passage of the Willis-Graham Act, which provided an escape route from antitrust laws for pressed telephone companies[64] through the ICC.[65]

Unlike the Mann-Elkins and Esch-Cummins Acts, the Willis-Graham Act underwent some measure of deliberate congressional consideration.

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[63] J. Sichter, Supra note 18, at 25 and n. 42.

[64] But not telegraph companies. The two telegraph carriers established at the time of the Willis-Graham Act, Western Union and Postal Telegraph, were carefully excluded from the exemption provided for telephone carriers by the act. It was not until 1943 that congressional authorization for a telegraph merger was granted. Act of March 6, 1943, Ch. 10, 57 Stat. 5 (now 47 U.S.C. § 222 (1970)).

[65] As far as the official records are concerned, at least, it appears that the primary push for the Willis-Graham Act came from the independent telephone companies. See 61 Cong. Rec. 1983 (1921) (remarks of Rep. Winslow) ("The bill was brought to the attention of the committee by those representing a very large majority of the so-called independent telephone companies... Many of them are... skating on very thin ice..."); Consolidation of Competing Telephone Companies: Joint Hearings on S. 1313 before House and Senate Committees on Interstate Commerce, 67th Cong., 1st Sess. (1921) [hereinafter JOINT HEARINGS] at 9-11 (testimony of F. MacKinnon). AT&T maintained a studied neutrality on the bill. See JOINT HEARINGS at 21 (testimony of C. Cole on behalf of AT&T) ("We have no objection to the bill whatsoever. We are not proponents of the bill; we are not here advocating it"). Whether this reflected AT&T's off-the-record position is, of course, subject to some skepticism.

Joint hearings were held and the proposal received careful debate in the House.[66] It therefore contains the first indications of federal policy toward the communications market, and if Congress was not exactly clear on what the dimensions of that policy were, it is nevertheless true that the legislators expressed at least a "mood"[67] about what federal regulation of telecommunications was to involve. Since the provisions of the Willis-Graham Act were carried forward unchanged in the Communications Act of 1934 and remain in force today as 47 U.S.C. §221(a), it is particularly important to determine what that policy or "mood" was.

By 1921, the view was quite commonly expressed that the provision of telephone service fitted the definition of a natural monopoly and should be regulated and free from competition. The Senate Commerce Committee's flat declaration that "[t]elephoning is a natural monopoly"[68] was representative, as were frequent comments to that effect in the Willis-Graham debates.[69] That this view of the economic characteristics of telephone

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[66] See JOINT HEARINGS, supra note 65; 61 Cong. Rec. 1983-1994 (1921). However, the committee reports are only two and three pages long and there was no Senate debate at all. Sen. Rep. No. 75, 67th Cong., 1st Sess. (1921); H.R. Rep. No. 109, 67th Cong., 1st Sess. (1921); 61 Cong. Rec. 1999 (1921) (Senate voice vote).

[67] Cf. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) (Frankfurter, J.) ("It is fair to say that in all this Congress expressed a mood...As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application").

[68] Sen. Rep. No. 75, 67th Cong., 1st Sess. 1 (1921).

[69] See, e.g., remarks of Rep. Huddleston, 61 Cong. Rec. 1988 (1921) ("Any man of observation is bound to recognize that there are certain natural monopolies... There are monopolies which ought to exist in the interest of economy and good service in the public welfare... The telephone business is one of these"); remarks of Rep. Burton, id. at 1991 ("They are natural monopolies. It is desirable that one consolidated organization should occupy one field").

service was at the root of the policy enacted by the Willis-Graham Act is not subject to dispute. However, there are indications in the record of possible limits to the range of this policy, and these limits are central to establishing just how far the federal policy of natural monopoly reaches into the communications market.

The central practical problem facing the committees that drafted Willis-Graham was the existence of dual and competing telephone systems serving one local market. As the House committee explained,

> Wherever there are such dual systems engaged in local business patrons of these telephone systems are put to endless annoyance and increased expense. In order to reach all the people using telephones, the telephone patron finds he must install two telephones in his house and office. This entails additional expense and usually results in inferior service over both systems.[70]

Although the Committee found "[t]here is nothing to be gained by local competition in the telephone business," it noted that "in about 1000 out of the 21,000 exchange points in the United States there are two local exchanges."[71] The Senate committee reached a similar conclusion.[72] In the House debates, Representative Graham, the chief House proponent of the bill, elaborated:

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[70] H.R. Rep. No. 190, 67th Cong., 1st Sess. at 1 (1921).

[71] Id.

[72] To have two systems in any community simply means that no telephone user can have communication with all the telephone patrons unless he has two telephones in his office or his residence.

Sen. Rep. No. 75, 67th Cong., 1st Sess. at 1 (1921). For a contemporary echoing of this two-telephone dilemma as a paradigm of natural monopoly, see 2 A. Kahn, THE ECONOMICS OF REGULATION 123 (1970).

> it is believed to be better policy to have one telephone system in a community that serves all the people... There is nothing more exasperating, nothing that annoys the ordinary businessman or the ordinary person more than to have two competing local telephone systems, so that he must have in his house and in his office two telephones...[73]

From these references in the record it appears most likely that the sixty-seventh Congress had in mind to create an explicit, promonopoly federal policy toward basic telephone service insofar as individual local communications markets were concerned. By clearing away the barriers to consolidation of competing systems, Willis-Graham announced a recognition that the provision of telephone service facilities within a single exchange area was a natural monopoly which should be protected from the deleterious effects of competition.[74] The principal policy underlying the Act was this: that there should be available in each community one system through which all telephone users in that community can communicate. This is not automatically to that where such universal and unified facilities are available, competition with reg to every conceivable telecommunications service cannot coexist compatibly with th

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[73] 61 Cong. Rec. 1983 (1921) [emphasis added]. See text at note 179 infra.

[74] On its face, the policy of Willis-Graham did not necessarily go so far. In the first place, the act merely removed federal antitrust prohibitions to consolidations, and state public utility commissions were left with full authority to decide whether proposed consolidations were desirable. As a practical matter, though, it is apparent that state regulators were eager to consolidate if freed from antitrust restrictions. See testimony of J. Benton for NARUC, JOINT HEARINGS, supra note 65, at 32. Moreover, the ICC was allowed some measure of discretion in deciding which consolidations were deserving of exemptions. Although the language was changed by the committee from a simple authorization of a discretionary ICC grant to a mandatory certification of exemption once the "advantage to users" and "public interest" showings were made, see 61 Cong. Rec. 1938 (1921) (committee amendments), the leeway inherent in those standards indicate that some possibility of dual systems remained where consolidation would not meet the "advantage" and "public interest" tests.

local monopoly. But it is to say that what is familiarly thought of as local telephone service--the provision of facilities to route calls within an exchange area through lines radiating from switching stations--is to be preserved from competition.

That the local service monopoly should be at the focus of the policy recognized by Congress in 1921 is of course no surprise. Telephone service at the time consisted almost exclusively of local exchanges and AT&T's switched long-distance voice lines, interconnecting to the independent local exchanges after the Kingsbury Commitment, and it was the problem of unprofitable duplicative local services which drove the independents to seek refuge from the laws mandating competition. It is also not surprising, therefore, that long-distance service is hardly mentioned in the Willis-Graham record,[75] since no independent long-distance lines had ever competed successfully with AT&T's long lines.[76] Operating under a common and widely-held view of what "telephone" was, and without reason to anticipate the explosive technological developments that would develop from the basic telephone apparatus, Congress was under no sort of compulsion to elaborate on what the perimeters of the federal policy regarding the local telephone service was to be. Those perimeters were, no doubt, readily apparent to all in 1921.

Nevertheless, it is impossible to conclude with assurance that the Willis-Graham telecommunications policy was limited solely to local

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[75]The House Report refers to long distance only once in passing. See text at note 78 infra.

[76]See note 61 supra.

competition in the provision of telephone facilities. The language of the Act itself contains no such limitation;[77] and there is passing reference in the House report to the problem as one of "dual and competing telephone systems, doing both local and long-distance business."[78] Moreover, within a year after its passage the Act was applied by the ICC to permit consolidation of long-distance competitors, apparently without objections from the opponents of the consolidation,[79] reinforcing the applicability of the Act's antitrust immunities beyond mergers of local competitors. Thus, while it is apparent that Willis-Graham enunciated a monopoly-oriented tilt where local duplication of facilities were involved, the Act's more general policy implications remain too indistinct to provide meaningful guidance in cases involving potentially duplicative private service systems or in which alternate suppliers compete for the responsibility of providing individual components of the unified service facility.

B. The Communications Act of 1934

1. Development of the Communications Act

As demonstrated above, the Mann-Elkins, Esch-Cummins, and Willis-Graham Acts--the essential substance of federal telecommunications regulation during the first half-century of telephone service in the United

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[77] See note 58 supra.

[78] H.R. Rep. No. 109, 67th Cong., 1st Sess. at 1 (1921).

[79] Acquisition of Control of Northwestern Long Distance Telephone Co., 71 I.C.C. 530 (1922).

States--painted a national policy toward the market structure and regulation of telecommunications that consisted at most of a broad brush stroke laid over, in part, by the single, more carefully labored application of attention in 1921. By Mann-Elkins and Esch-Cummins, Congress poured communications into the mold that had developed from, and continued to be concerned primarily with, transportation services. When faced with the problems of duplicative local exchanges, Congress turned special attention to communications carriers for the first time, although the resulting Willis-Graham antitrust exemption again reflected existing transportation regulation by taking the same shape as the exemption that previously had been allowed for railroads. The sum of these acts was a federal communications policy which went little further than the generalized assertion that telephone and telegraph carriers should be regulated and that geographically competing providers of basic mouth-to-ear telephone service should be free to consolidate. How the regulatory authority established was to operate was left to be analogized from railroad regulation, without congressional guidance as to its goals.

The post-1921 statutory scheme for communication common carriage regulation lacked not only an articulation of the aims which were to animate the regulators. To a large degree, it lacked the basics of regulatory authority as well. In the first place, their usual railroad responsibilities kept the Interstate Commerce Commissioners overworked during this period, and the Esch-Cummins additions of new powers over railroads and water transportation service compounded the workload.

But more importantly, even had the ICC had the time and personnel to devote to communications matters, the authority granted it over telephone and telegraph was, for the most part, illusory. The ICC was not empowered to initiate actions against telephone and telegraph companies on its own; a complaint from a disgruntled competitor or consumer of communications services was required before proceeding, and--while complaints were easily generated by the large amounts involved in challenges to railroad rates or practices, which brought shippers to the Commission frequently--in the communications area few users had interests substantial enough to justify pursuing formal complaint proceedings.[80] The Commission could not require communications carriers to file rate schedules, as it was authorized to require of railroad carriers.[81] It had no power to prescribe new rate schedules to replace rates found unjust or unreasonable, and no authority to require a certificate before expansion of communications facilities. In fact, the authority of the Commission to regulate any type of practice or classification beyond simple rates was in doubt.[82] What the legislation of 1910, 1920, and 1921 granted the ICC over communications was "largely a paper authority".[83]

With no real policy to guide it, and no real powers to act through, the ICC exercised its jurisdiction over telephone and telegraph with no

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[80] The Telegraph Industry, supra note 43, at 632; Wheat, The Regulation of Interstate Telephone Rates, 51 Harv. L. Rev. 846, 847 (1938).

[81] During this period, the ICC "repeatedly urged the modification of the statute so as to require the wire carriers to file rate schedules." The Telegraph Industry, supra note 43, at 632 n. 26.

[82] See 60 Cong. Rec. 8528 (1920) (colloquy between Reps. Esch and White during debate on Esch-Cummins bill).

[83] The Telegraph Industry, supra note 43, at 632.

frequency or enthusiasm. Only fourteen formal rate investigations were begun[84] and, with the exception of the introduction of a uniform accounting practice in the industry,[85] ICC regulation between 1910 and 1934 had no lasting impact at all on communications services, except insofar as it permitted unregulated private market forces to act without restraint. As one review of the period put it, "[t]he net result of regulation under the ICC may well have been to relieve the wire carriers of any effective governmental control in the public interest."[86]

Awareness of this regulatory deficiency was first reflected on Capitol Hill in 1929, when legislation was introduced to consolidate federal authority over communications in one agency. Communications jurisdiction was spread between the ICC's telephone and telegraph authority, the authority of the Federal Radio Commission over the newer technology of broadcasting,[87] and long-standing powers of the Postmaster General, primarily over telegraph operations,[88] and hearings were held in the Senate to investigate

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[84] Eight of the cases involved telegraph rates; four, telephone; and two, cable rates. J. Herring and G. Cross, TELECOMMUNICATIONS 220 (1936). The ICC undertook some consideration of telephone depreciation charges and valuation of Western Union properties, but both investigations failed to reach a final stage before jurisdiction passed to the FCC in 1934. See The Telegraph Industry, supra note 43, at 632-33.

[85] Interstate Commerce Commission, ANNUAL REPORT (1913). The rules, revised and upheld by the Supreme Court in 1936, AT&T v. United States, 299 U.S. 232 (1936), remain in effect today. See 47 U.S.C. §220(a).

[86] The Telegraph Industry, supra note 43, at 633.

[87] Authority over radio had originally been vested in the Department of Commerce in 1912, and was later relocated under the Federal Radio Commission, created by the Radio Act of 1927, 44 Stat. 1162, Ch. 169.

[88] See, e.g., Act of July 24, 1866, Ch. 230, 14 Stat. 221 (fostering construction of telegraph lines by providing rights-of-way over public lands).

the relocation of these split jurisdictions under one authority.[89] However, no final action was taken on the bill.

During the first year of the Roosevelt administration, the idea of a unified communications agency was rejuvenated as part of studies of national communications policy by both the administration[90] and Congress.[91] In February 1934, President Roosevelt proposed the creation of a Federal Communications Commission in which the existing authority of the Federal Radio Commission, the ICC, and the Postmaster General would be consolidated,[92] and this recommendation was echoed by the conclusions of the massive congressional study of the communications industry headed

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[89] Hearing on S. 6 before the Senate Committee on Interstate Commerce, 71st Cong., 1st Sess. (1929) (Couzens bill).

[90] Study of Communications by an Interdepartmental Committee, Sen. Comm. Print, 73rd Cong., 2d Sess. (1934) [hereinafter The Roper Report].

[91] Preliminary Report on Communications Companies, H.R. Rep. No. 1273, 73d Cong., 2d Sess. (1934) [hereinafter Splawn Report].

[92] The text of Roosevelt's message to Congress read in part:

> I have long felt that for the sake of clarity and effectiveness the relationship of the Federal Government to certain services knows as "utilities" should be divided into three fields: Transportation, power, and communications...
>
> In the field of communications...there is today no single Government agency charged with broad authority...
>
> I recommend that Congress create a new agency to be known as the "Federal Communications Commission", such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission...

Message to Congress, February 26, 1934, reprinted in H.R. Rep. No. 1850, 73d Cong., 2d Sess. at 1-2 (1934).

by Dr. William Splawn.[93] The day after Roosevelt's message, legislation designed to achieve the goal of consolidation was introduced,[94] and the drafting of what became the Communications Act of 1934 began.

As was the case with many of the early initiatives of the first Roosevelt administration, that evolution was not a slow one. Senate hearings were underway within three weeks,[95] the House hearing a month later;[96] both reports were out by June 1[97] and debate completed by the next day; the work of the conference committee was then done and approved in a week.[98] The whole process took just over 100 days. The speed with which the bill was enacted has given some commentators alarm; for a measure which was to have such a fundamental impact on an industry as the Communications Act has had, brief committee reports and brief floor

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[93] Splawn Report, supra note 91, at xxix.

[94] S. 2910, H.R. 8301, 73d Cong., 2d Sess. (both introduced February 27, 1934).

[95] Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. (1934) [hereinafter SENATE HEARINGS].

[96] Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) [Hereinafter HOUSE HEARINGS].

[97] Sen. Rep. No. 781, 73d Cong., 2d Sess (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. (1934).

[98] H.R. Rep. No. 1918, 73d Cong., 2d Sess. (1934) (Conference Report), reprinted in 78 Cong. Rec. 10986 (1934).

debates do not seem appropriate.[99] This concern is reinforced with special seriousness in regard to telecommunications, since the debate on the Act centered on broadcasting and almost neglected wire carriers altogether.[100] Nevertheless, the period from February 27 to June 9, 1934, represents the first and the last time that Congress as a body has turned its attention to the full range of issues associated with regulation of the

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[99] "The Dill bill [the original version of the Communications Act] was debated only briefly in the Senate, the entire debate taking place on May 15, 1934... The bill then was approved without a roll call.

In the House, the debate was even briefer, being limited to only two hours on June 2, 1934. The shortness of the debate in both Houses is striking, bearing in mind the importance of the bill, which worked a complete transformation of the regulation of communications."

IV B. Schwartz, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 2375-76 (1973). The committee reports were nine and eleven pages, most of which were given over to a simple recounting of the bill's provisions. The debates were not only short, but highly partisan, with Republican allegations that the Roosevelt administration--already making political use of radio through the fireside chats--would use the FCC for partisan ends. See 78 Cong. Rec. 10317 (remarks of Rep. Fish). Almost no debate took place on the common carrier provisions of the new law.

[100] It would be useful, however, to compare the extent of congressional consideration given the Communications Act with comparable early New Deal legislation such as the National Industrial Recovery Act of 1933, the Securities Act of 1933, the Securities Exchange Act of 1934, and others. It may be that Congress gave no less attention to rewriting the communications law than to other major federal regulatory statutes.

Note also that the short attention given to the Communications Act may be due to some degree to a contemplation that more legislation on the subject would be enacted as a result of the studies commissioned by the Act. See the discussion of § 215 at notes 204-209 infra. The studies produced no major revisions or expansions of the Act.

telecommunications industry.[101] It is, therefore, the one source of the law and policy which must govern federal administrative regulation[102] of telecommunications. Whatever sub-Constitutional legal restraints exist on FCC policy making, and especially its policies regarding competition in the modern compunications markets, are to be found within the text of the Act and the legislative record that accompanied its passage and may expand on its meaning.

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[101] That this was the first full consideration is evident from the cursory or partial attention given telecommunications in the Mann-Elkins, Esch-Cummins, and Willis-Graham Acts. That this was the last full consideration is indicated by the fact that no major revisions of the Communications Act have been accomplished since 1934. The principal amendments to the wire communications authority of the act have been the addition of § 222, permitting the Western Union-Postal Telegraph merger, see note 64 supra, and the requirement that carriers obtain a certificate of convenience and necessity for abandonment of facilities as well as expansion, 57 Stat. 11, Ch. 10 (1943), amending 47 U.S.C. § 214(a). Other amendments have been of a specialized or housekeeping sort, or concerned with specialized areas of carriage by satellite. See Communications Satellite Act of 1962, Pub. L. 87-624, 76 Stat. 419, codified as 47 U.S.C. §§ 701-744 (1970) (illustrating the way modern compunications technologies raise problems which reflect into the Title II common carrier scheme).

Congress may be in the process of undertaking a complete review of telecommunications regulation in considering the "Consumer Communications Reform Act" and legislative countermeasures. See note 10 supra.

[102] It is worth remembering, of course, that telecommunications is also subject to federal regulation under the antitrust laws. See United States v. AT&T, Civil No. 74-1698 (D.D.C.), probable jurisdiction noted November 24, 1976, appeal filed January 6, 1977.

2. The Telecommunications Provisions of the Act

The Act itself drew heavily on its predecessors, reflecting its origins in the amalgamation of the separate existing federal authorities over portions of the communications markets. Title II of the Act incorporated the provisions of the Interstate Commerce Act that had governed telephone and telegraph since 1910. Title III adopted the substance of the Radio Act of 1927 governing broadcasting. Titles IV-VI set forth general administrative procedures used in much of the federal regulation in operation at the time. Only Title I, which announced the creation of the FCC and stated broadly the purposes of the Act, was more the product of the Communications Act's drafters than of the statutes which previously governed communications regulation.

While it is true that the wire communications provisions of Title II were carried over basically intact from the Interstate Commerce Act, some new powers over common carriers were granted to the FCC that had not been available to the ICC in regulating telecommunications. Section 201(a) empowered the FCC to require carriers to interconnect with other carriers and to establish through-routes.[103] Section 201(b) resolved ambiguities over whether ICC jurisdiction had extended beyond regulation of rates and charges by granting the FCC clear authority to review not

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[103] 47 U.S.C. §201(a) (1970). This was adapted from § 1(4) of the Interstate Commerce Act, which had applied only to transportation carriers. See SENATE HEARINGS at 200. AT&T had been under a non-statutory duty to interconnect other carriers in most circumstances as a result of the Kingsbury Commitment. See text at notes 60-61 supra.

only carriers' charges, but their "practices, classifications, and regulations" as well, to determine whether they were just and reasonable.[104] Section 203 made filing of rate schedules with the FCC mandatory for communications carriers, a duty which had not been imposed under the Interstate Commerce Act.[105] Section 204 empowered the FCC to make use of these filings to investigate proposed changes in rates not only after a user presented a complaint but "upon its own initiative without complaint", and to suspend the proposed rate schedule pending the investigation.[106] Section 211 gave the FCC authority to require the submission of contracts made by any carrier. Section 214 made it a condition for the expansion or construction of new interstate telecommunications lines that the carrier obtain a certificate of public convenience and necessity from the Commission.[107] And Section 218 instructed the FCC to keep abreast of technological developments in telecommunications "to the end that the benefits of new inventions and developments may be made available to the people of the United States."[108] The sum effect of these new provisions was to locate in the newly-established

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[104] 47 U.S.C. §201(b) (1970). This was adapted from §1(6) of the Interstate Commerce Act, which gave the ICC authority over practices, classifications, and regulation of transportation carriers only.

[105] 47 U.S.C. §203 (1970). Compare §6 of the Interstate Commerce Act (filing required for transportation carriers only).

[106] 47 U.S.C. §204 (1970). This reflected powers the ICC had over railroads through §15(7) of the Interstate Commerce Act. See text at note 81 supra.

[107] 47 U.S.C. §214 (1970). This was based on §§1(18)-(24) of the Interstate Commerce Act, requiring such certificates for expansion of rail carrier lines.

[108] 47 U.S.C. §218 (1970). No such duty had been imposed on the ICC during its tenure over telephone and telegraph.

federal agency regulating communications carriers the same repertoire of tools and powers used by the ICC in regulating transportation carriers but not included in the communications regulation authority vested in the ICC between 1910 and 1934.

In at least one respect, however, the Communications Act went well beyond its precursor amendments to the Interstate Commerce Act. The text of the Act began in Title I with a sweeping statement of the overarching goal to which the Title II powers, together with the Title III authority over broadcasting, were to be directed:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges, for the purpose of national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication...[109]

This statement of purpose was not derived from, or even foreshadowed by, the 1910, 1920, or 1921 communications amendments to the Commerce Act or the overall railroad regulation scheme to which the amendments were appended. It is original to the Communications Act. As such it may play an important role in determining what the seventy-third Congress intended national policy toward telecommunications to be; the established carriers have made recourse to it as a building block in the argument that FCC discretion to permit telecommunications competition is circumscribed by

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[109] Communications Act of 1934, § 1, codified at 47 U.S.C. § 151 (1970). See text at notes 166-203 infra.

Congressional endorsement of a monopolistic market structure.[110] This novel view of the Act is explored in Part IV below. But for the most part, this statement of purposes has been ignored by courts and regulators who, in the process of discerning statutory policy toward telecommunications competition, have read the Act to grant the FCC an almost plenary authority over the structure of American telecommunications.[111] It is to this more orthodox view of Communications Act policy to which we turn in Part III.

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[110] See text at notes 151-248 infra.

[111] See text at notes 112-150 infra.

III. THE ORTHODOX VIEW: CREATION OF A NEW REGULATOR

From the record, it is quite clear that one central thrust of the passage of the Communications Act of 1934 by the seventy-third Congress was to centralize authority over telecommunications in one federal regulatory body. The period of ICC regulation of telephone and telegraph had resulted in effectively no regulation at all, while the burgeoning radio industry had been subject first to the jurisdiction of the Secretary of Commerce, then of the Radio Commission. By 1934, an awareness that the separate technologies of telephone, telegraph, and radio played complementary roles in the larger net of what had come to be called the "communications industry" was surfacing, and along with it grew the idea that a unified, coordinated system of regulation for communications was needed. President Roosevelt's message to Congress accompanying the administration proposal for the Communications Act stressed the need for "a single Government agency charged with broad authority."[112] The point was repeated by almost every witness at the hearings on the Act and in both committee reports. That the establishment of this "single agency" was foremost in the minds of the Communications Act's authors and proponents is abundantly clear.

The difficult question is what, if anything, Congress meant in passing the Communications Act beyond the accomplishment of this goal of centralization. Was the entire purpose of the Act to relocate the disparate authorities of the ICC, the Radio Commission, and the Postmaster General in a single body, while not alterning the law which that

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[112] Message to Congress, supra note 92.

body was to apply or the policy by which it was to be guided? Or did the Act work not only a restructuring of the regulatory process for telecommunications and other communications areas but also a new or expanded law and policy relating to telecommunications technologies? Did the Act intend to achieve only a change in the name and address of the regulator, or were deeper currents present in the new law?

There is strong support in the legislative history for the former view. In the first place, the two studies which led up to the drafting of the Communications Act recommended only restructuring of the regulatory jurisdictions. The Roper Report,[113] the Roosevelt administration's first report on communications problems, suggested only a centralization of authority; the President's message to Congress proposing the Communications Act followed this view by emphasizing the organizational problems of communications regulation and urging only the "transferring [of] the present authority" without altering it.[114] The Splawn Report on communications holding companies prepared for the Commerce Committees--the report which provided the factual bases on which the 73rd Congress acted--proposed a bill which

> would accomplish three purposes: (a) A codification of existing Federal legislation regulating communications; (b) a transfer of jurisdictions from several departments, boards, and commissions to a new communications commission; and (c) a postponement for future action after further study and observation of some of the more difficult and controversial subjects.[115]

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113 The Roper Report, supra note 90.

114 Message to Congress, supra note 92, at 2.

115 Splawn Report, supra note 91, at xxix.

In both reports, no change in the substance of regulation was thought necessary.

Both congressional committees reporting the Communications Act indicated the same view. The House Commerce Committee explained that

> it is the primary purpose of this bill [the Communications Act] to create such a commission [with comprehensive jurisdiction] armed with adequate statutory authority to regulate all forms of communication... The bill is largely based upon existing legislation and except for the change of administrative authority, does not very greatly change or add to existing law...[116]

and committee chairman (and later Speaker) Rayburn told his colleagues during debate that

> the bill as a whole does not change existing law, not only with reference to radio but with reference to telegraph, telephone, and cable, except in the transfer of the jurisdiction and such minor amendments as to make that transfer effective.[117]

The Committee emphasized that the "minor amendments" to which Chairman Rayburn referred, meaning the addition of the several regulatory powers which had been unavailable to the ICC under the Mann-Elkins and Esch-Cummins Acts,[118] were not intended to signal any new direction in communications policy; rather, they were designed to provide the FCC with statutory powers comparable to those familiarly employed in transportation regulation. As the committee report explained:

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[116] H. R. Rep. No. 1850, 73d Cong., 2d Sess. at 3 (1934).

[117] 78 Cong. Rec. 10313 (1934) (remarks of Rep. Rayburn). See colloquy between Reps. Rayburn and Snell, id. at 10315:

> Mr. SNELL: No change in the present law?
> Mr. RAYBURN: We transfer the jurisdiction to the new commission, and the only amendment as to the telegraph and telephone companies is to make effective their transfer.

[118] See text at notes 103-108 supra.

> the [Commerce] act never has been perfected to encompass adequate regulation of communications, but has really been an adaptation of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the terms of the act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of court and commission interpretation of that act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications common carriers.[119]

The Title II communications common carrier provisions, the House committee continued, "[f]or the most part... [follow] provisions of the Interstate Commerce Act now applicable to communications or [adapt] some provisions of that act now applicable only to transportation."[120] Thus, the House expressed a firm intent to maintain the continuity of the fundamental substantive law of communications regulation, embryonic as the substantive law may have been, and described the expanded authority under Title II as an attempt to make the existing regulatory scheme effective under the new regulators by correcting omissions and oversights that found their way into the law during the hasty and incomplete consideration given the 1910 and 1920 legislation bringing communications under federal regulation.

The Senate Commerce Committee's conception of the bill paralleled that of the House. Noting that much of the language of the legislation was copied verbatim from the Commerce Act, the Committee explained that where the provisions varied from the text of the Commerce Act it was

> for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective.[121]

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[119] H. R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934).

[120] Id. at 5.

[121] Sen. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934).

Title II, in the Senate Committee's view, "follow[ed] provisions of the Interstate Commerce Act now applicable to communication or adapt[ed] some provisions of that act now applicable only to transportation."[122] On the Senate floor, Chairman Dill called attention to the fact that nearly three-quarters of the bill "comprise[d] a rewriting of existing radio law and its amendments and of the Interstate Commerce Act and its amendments", while the remainder provided

> for certain additional powers which the committee thought were necessary for the newly created commission to have for effective regulation.[123]

These new powers were not thought, as the committee report made clear, to express any new policy other than that regulation of communications--and particularly of telecommunications, the regulation of which had been "practically nil"[124] theretofore--was to become more effective than had been the case to date.[125]

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[122] Id. at 3.

[123] 78 Cong. Rec. 8822 (1934) (remarks of Sen. Dill). Cf. remarks of Senator Dill on introducing S. 3285, 78 Cong. Rec. 4139 (1934) ("The purpose of the proposed legislation is to make effective the power now written into the Interstate Commerce Act to control the telephone and telegraph business in this country").

[124] Sen. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934).

[125] When the conference report returned to the House and Senate there was little discussion. Representative Mayes, one of the House conferees, emphasized the continuity of the substantive communications law, remarking that the bill "left existing law intact, but established a new communications commission," 78 Cong. Rec. 10990 (1934). Some members objected to the speed with which the bill was moved through Congress, concluding that no time had been provided for mature reflection on it. See 78 Cong. Rec. 10988, 10989 (1934) (remarks of Reps. Bland and Lehlbach).

The view that Congress intended no major substantive change in the law governing telecommunications is reinforced by the actions Congress did take in 1934 regarding possible changes in the federal policy toward the communications industry. As noted earlier, President Roosevelt in his message proposing the Communications Act requested only a reorganization of regulatory jurisdictions. Rather than ask for reorientation of communications policy, Roosevelt suggested that the new FCC be given "full power to investigate and study the business of existing [communications] companies and make recommendations to the Congress for additional legislation..." [126] The Splawn report had urged the same course. [127] Congress followed these suggestions by requiring the new FCC to "consider needed additional legislation" in critical problem areas; the House Committee stated that existing law was not greatly changed by the new act and that "most controversial questions [were] held in abeyance for a report by the new commission recommending legislation for their solution." [128] This postponement, embodied in Section 215 of the Act, [129]

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[126] Message to Congress, supra note 92, at 2.

[127] See Splawn Report, supra note 91 ("postponement for future action after further study and observation of some of the more difficult and controversial subjects").

[128] H. R. Rep. No. 1850, 73d Cong., 2d Sess. at 3 (1934).

[129] 47 U.S.C. § 215 (1970). Congress directed the FCC to investigate and submit legislation if necessary on intercompany transactions and relationships between holding companies and operating subsidiaries (i.e., AT&T), on the provision of telegraph service by telephone companies and vice-versa, and on exclusive contracts prohibiting patrons of a carrier from doing business with other carriers. See Rep. Rayburn's explanation of § 215 at 78 Cong. Rec. 10314 (1934). On Bell's brief venture into the telegraph business through its purchase of the Teletype Corporation, see Trebing, Common Carrier Regulation: The Silent Crisis, 34 Law & Contemp. Probl. 299, 306 (1969).

explicitly shifted primary responsibility for a large part of the development of federal common carrier telecommunications policy to the new agency: it was to be the FCC's task, not Congress', to take the first step in suggesting how the law governing telecommunications should be changed or expanded. Ultimate authority, of course, was to remain with the legislators; the Commission was to study and then suggest new legislation, on which Congress would have to act before the federal policy and law could take on new shape. However, with respect to the meaning of the Communications Act itself, leaving the formulation of new legislation to deal with telecommunications to the FCC in the first instance serves to undergird the conclusion that Congress did not intend to do more than streamline the regulatory system as inherited from Mann-Elkins and Esch-Cummins. New law and new policy were left for a later date.[130]

In light of Congress' apparent intention to alter only the form of regulation in place in 1934, and thus to carry forward intact in the Communications Act the regulatory policy established by its predecessor statutes, it becomes particularly important to formulate as best possible what the substantive law of Mann-Elkins, Esch-Cummins, and Willis-Graham and the Communications Act was. The answer is not obvious. As Paul Berman has written, attempting in another context to glean the

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[130] The contemporary commentary on the Communications Act also reinforces this conclusion. One commentator complained that

> it appears on analysis that the administration has no program or policy at all, except to consolidate communications control, and that it has not and apparently will not come to grips with the really vital questions which must all be solved before the country has a sound communications policy.

Webster, Notes on the Policy of the Administration with Reference to the Control of Communications, 5 Air Law Rev. 107, 109 (1934). See also Seidman, The Communications Act of 1934, 5 Air Law Rev. 299 (1934).

meaning of the Act for modern compunications problems, "examination of the legislative history of telephone and telegraph regulation yields no clear indication of just [what]...was in the mind of Congress."[131] Given the paucity in the record of similar indications in the context of telecommunications competition, a similar conclusion would be wholeheartedly justified. Yet, while it is impossible to measure with any certainty the cumulative effect on this area of the attention Congress turned briefly on the communications industry in 1910, 1920, 1921, and 1934, it is possible to suggest some of the dimensions of telecommunications policy toward monopoly and competition embedded within the statute.

Some evidence of the roots of Communications Act policy is visible in the legislative consideration of the Act itself. There is no doubt, for example, that the legislators in 1934 recognized AT&T's telephone monopoly,[132] as they had in 1921.[133] But, again as in 1921, at no point during the congressional debates or in the brief committee reports is the scope of that monopoly discussed. None of the legislators responsible for the Communications Act so much as indicated a view on whether "monopoly" in this instance encompassed only operation of basic trunk and switching centers in local, geographically compact areas or

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[131] Berman, Computer or Communications? Allocation of Functions and the Role of the Federal Communications Commission, 27 Fed. Com. B. J. 161, 215 (1974) (examining whether so-called packet communications fit the Communications Act definition of "common carrier" and "wire carrier").

[132] See Sen. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("This vast monopoly which so immediately serves the needs of the people in their daily and social lives must be effectively regulated"); 78 Cong. Rec. 10315 (1934) (remarks of Rep. Rayburn).

[133] See text at notes 68-69 supra.

extended to all methods of voice communication by wire, or included manufacture and sale as well as maintenance of the equipment through which that communication was accomplished.

Of course, to this observation it is usual to respond that Congress was not more articulate because everyone knew in 1934 what was meant when "the telephone monopoly" was mentioned. Since no one needed an explanation, no explanation was given. To an extent, this response is accurate; there was apparently a consensus about certain aspects of "the telephone monopoly."[134] But there was also clear disagreement about how far the scope of the monopoly should reach, and conversely, about how great a role competition should play. The hearings on the Communications Act illustrate this disagreement lucidly. At one extreme, David Sarnoff, influential through his control of the NBC radio network at the time, advocated the complete abandonment of competition in communications.[135] AT&T emphasized the widespread recognition by state regulators that "telephone is a monopoly and competition against the public interest."[136] On the other hand, the independent telephone companies vigorously denied that all forms of competition in telecommunications were wasteful;[137] in

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[134] See text at notes 70-74 supra and notes 139-140 infra.

[135] Address by David Sarnoff, printed at 78 Cong. Rec. 5209 (1934).

[136] Testimony of W. Gifford on behalf of AT&T, HOUSE HEARINGS at 200.

[137] To these people [who advocated the Bell argument for monopoly] the wastes of competition seem as obvious as the flatness of the earth. You need only look at it to see that it is flat.

Statement of D. Friday on behalf of the USITA, HOUSE HEARINGS at 267.

fact, they insisted, telephone service improved only under the mutual prodding of competitors. Since it would be safe to say that neither AT&T nor the independents were without clout in Congress at the time,[138] it cannot be assumed that either pole of the debate illustrated in the hearings dominated the views of the period. To the contrary, it should be clear that the bromidic assertion that "telephone is a monopoly" meant different things to different interests: everybody did not "know" intuitively what national policy over telecommunication monopoly and competition was.

Neither was it clear, for that matter, what types of "competition" were envisioned. The independents' witnesses advocated the benefits of two competitive practices: the yardstick for measuring the comparative performances provided by the limited competition between adjacent but not overlapping local service monopolies not engaged in direct competition for revenues, and the technological innovations that resulted from competitive manufacture and procurement. But other potential sources of telephone competition went unmentioned during the congressional consideration of the Act.

Although the historical evidence points away from a general contemporary "sense" of a telecommunications market structure envisioned by the Communications Act, there was one area where a broad contemporary agreement favoring monopoly did exist in the period in which the Act was passed. Plain local telephone service--the routing and switching of calls within a geographic area--was conceded by all to require monopoly. Even

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[138] There were over 6000 independents, serving 14,000 communities, at the time of the passage of the Act. Testimony of W. Gifford, HOUSE HEARINGS at 200. It may be inferred from this that the independents' voice was not ignored in Congress.

the independents, who had local basic-service monopolies of their own, found competition in this area indefensible.[139] This in 1934 was little more than a continuation of the basic concern which had first surfaced in the Willis-Graham Act, and it remained the only limit on telecommunications market structure with firm support in the enacting record, as it had been in 1921.[140]

Beyond this local service monopoly, it can be argued convincingly that Congress in the formulation of telecommunications regulation between 1910 and 1934 agreed on no substantive policy. But this does not imply that in the 1910-1934 period there was no telecommunications policy at all. Although Congress did not endorse any particular shape for the telecommunications market beyond the local geographic monopoly, it did make clear that whatever the market structure was to be was left not to private but to public decision. Although procedural rather than substantive in emphasis, this is no less a policy than a flat promonopoly or procompetition policy would have been. The unifying theme throughout the congressional considerations of telephone and telegraph from Mann-Elkins to the Communications Act is that the allocation of decision-making authority over the interstate telecommunications market should reside finally in a public regulatory body. It was largely in response to the failure of the Mann-Elkins, Esch-Cummins, and Willis-Graham enactments to realize this goal that the Communications Act

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139 One kind of competition was, indeed, eliminated [in the period prior to 1934]. The experience of recent years had shown that two telephone systems in the same community are neither economical nor convenient.

Statement of D. Friday on behalf of USITA, HOUSE HEARINGS at 269 Cf. testimony of W. Gifford on behalf of AT&T, SENATE HEARINGS at 100 ("They [telephone companies] are a monopoly in the particular place they are in").

140 See text at notes 70-74 infra.

was written: the ICC's inability or unwillingness to carry out its responsibilities resulted in the creation of a public decisionmaker with clear and unified authority over communications.[141] Moreover, in overseeing the telecommunications market structure the new regulator was to have teeth, as the grant of expanded regulatory tools in the Communications Act testifies,[142] and was to operate under the broadest charter imaginable, a standard of public interest, public convenience, and public necessity. Its powers reached apparently to the full grasp permitted the federal government under the Commerce Clause.[143] It was to view the market open-endedly, with an eye out to new developments.[144] And above all, it was to insure that telecommunications "be effectively regulated":[145] whatever that mandate implied for the structure of the market, the determination was to rest with the Commission and not with the private players.

The adoption of an essentially procedural policy of this sort in 1934 should not be startling. As is frequently said, the legislators did not anticipate the development of sophisticated microwave or dataprocessing technologies or of specialized communications needs calling for a multiplicity of services and equipment. But as the debate[146] and the Act itself[147]

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[141] See text at notes 84-86 supra.

[142] See text at notes 103-108 supra.

[143] See text at notes 55-57 supra.

[144] Communications Act of 1934, § 218, codified at 47 U.S.C. §218 (1970), discussed at text at note 108 supra.

[145] Sen. Rep. No. 781, 73d Cong., 2d Sess. at 2 (1934). See also 78 Cong. Rec. 10313-15 (1934) (remarks of Rep. Rayburn).

[146] See remarks of Rep. Merritt, quoted at note 6 supra. See also text at notes 56-57 supra, discussing the Pensacola Telephone case and the Esch-Cummins Act.

[147] See note 144 supra.

indicate, Congress was aware that the communications market was in a process of evolution. Although there is little doubt given the historical period in which Congress acted that the creative force behind this evolution was to come from private actors, the task of directing that evolution was made a public one.[148] It was the establishment of a regulatory process capable of this task of public regulation to which the Communications Act and its predecessors were addressed.[149] The result of this policy is to commit the structure of the telecommunications market to political interaction before the Commission, subject to rather cursory substantive

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[148]The contemporary commentary--what little of it there was--recognized this as a central outcome of the Communications Act. See Note, The Communications Act of 1934, 21 Va. L. Rev. 318, 324-25 (1934):

> The added powers vested in the Commission should prove of benefit to the public in possible rate reductions and closer regulation of the carrier's activities for the public good. The Act, however, should be equally helpful to the carriers. Though at present there seems little chance of any true competition in the field, the same was thought true in the field of transportation thirty years ago. With unified control, the interests of the carriers may be better preserved should such competition arise in the future.

[149]What Justice Holmes said of the Constitution can also be said of the Communications Act:

> we must realize that they have called into a life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or hope they had created an organism...

Missouri v. Holland, 252 U.S. 416, 433 (1920).

judicial review: the distribution of opportunities in the evolution of telecommunications is left to a political resolution without significant legislative limits on the outcome.[150]

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[150] See K. Borchardt, STRUCTURE AND PERFORMANCE OF THE U.S. COMMUNICATIONS INDUSTRY, 125-26 (1970):

> The distribution of opportunities deals with the question "who gets what and how...". [C]onflicts over opportunity distributions remain essentially political conflicts even though resolutions of such conflicts are delegated to executive departments or independent regulatory commissions to be decided in accordance with such general standards as "the public interest".

See also, Fuchs, The New Administrative State: Judicial Sanction for Agency Self-Determination in the Regulation of Industry, 69 Colum. L. Rev. 219 (1969).

IV. "TRUE FAITH" AND THE 1934 MILIEU

A. The New Model

Like most reformations, the FCC's procompetition policy has produced a counterreformation[151] led by those whose positions have been most jeopardized by the new policy--the established carriers, whose revenues are at stake, and the state regulatory agencies whose traditional jurisdiction has been partially usurped by federal authorization of competitive entry and interconnection. And as might be expected of a counterreformation, a sizeable part of the assault on the FCC competition decisions has been devoted to the articulation of a new model of the policy and theory underlying the chief document in question--in this case the telecommunications provisions of the Communications Act.[152]

At the core of this new model is a vision its advocates describe as the "true faith"[153] of the Act. The vision is a complex one, but its essential features may be briefly summarized. In its most elementary form, the new model suggests that the Communications Act provided not only for centralization of the regulation, as the orthodox interpretation would have it, but for the centralization of provision of telecommunications services and facilities as well. The Act, it is claimed, recognizes a "national public

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[151] See Comment, supra note 3.

[152] The assault has a second major front as well: the attempt to secure the replacement or revision by Congress of the Act itself, rather than mere reinterpretation of it in the courts. See note 10 supra (discussing the Consumer Communications Reform Act). This study is primarily concerned with the effort via litigation to invest the 1934 Act with a new, more monopoly-oriented character, not with legislative reforms. However, the outcome of the effort to interpret the existing statute has significant ramifications for the current legislative debate. See text at notes 249-250 infra.

[153] Rostow, The Great Telephone Debate, 192 TELEPHONY 64, 64 &65 (June 6, 1977) [hereinafter The Great Telephone Debate].

utility franchise...managed as a unified system by AT&T and its affiliates in partnership with some 1600 Independent Telephone Companies" for the purpose of "assur[ing] the maintainence and development of the telephone network."[153A] The telecommunications industry under this new model would be structured as an expansive, integrated monopoly network under a single management pervasively regulated by the FCC, and free of deleterious competition. It would become the business of the FCC in this scheme to do more than simply to regulate efficiently; the Commissioners would be charged with the affirmative duty to shape its regulation toward an ultimate goal of insuring that the monopoly network not be jeopardized by potential telecommunications competitors.[154]

For the purposes of the debate over the recent FCC procompetitive decisions, the consequence of this new model of the law of telecommunications regulation, according to its proponents, is the emergence of four subprinciples designed to implement the overarching goal of protecting the franchised monopoly network. Briefly noted, these principles would appear to dicatate that:

153A See The Great Telephone Debate, supra note 153, at 64. The Rostow article represents one of the most comprehensive statements of the new model.

154 See The Great Telephone Debate, supra note 153, at 65:

> [T]he basic contention...[is] that the 1934 Act, and common sense in any event, require the FCC to preserve, maintain, and use the resources of the integrated telephone network where it is economic to do so, as an immensely valuable national asset and the heart of our communications system.

This model, it should be pointed out, is a fairly precise echo of the "one system, one policy, 'universal service'" slogan used by the Bell system since Theodore Vail first advocated a heavily regulated telephone monopoly in the early decades of this century. See notes 41 supra and 180 infra.

(1) The FCC may not permit the entry into the industry of telecommunications services or facilities that operate outside the network itself and that duplicate existing services without providing users more than what is available from the unified, franchised network. (The "no duplicative competition" principle).[155]

(2) The FCC may not permit the offering of communications services or facilities from outside the network which carry a risk of being technologically incompatible with the network offerings (The "technical harm" principle).[156]

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[155]This focus on duplication of services is evident in AT&T's criticism of the Specialized Common Carrier decisions, Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service, 29 F.C.C. 2d 870, aff'd Washington Util. and Transp. Comm. v. FCC, 513 F. 2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1976); Bell Telephone Co. of Pa. v. FCC, 503 F. 2d 1250 (3rd Cir. 1974), cert. denied 422 U.S. 1026 (1975). AT&T considers the services provided by the specialized common carriers to be duplicative of basic long-distance service and insists specialized common carriers are no more than "other" common carriers which have no place in the scheme established by the Communications Act. See AT&T v. FCC, 539 F. 2d 767 (D.C. Cir. 1976); testimony of E. Rostow, Hearings on H.R. 7047, supra note 10.

[156]The "technical harm" threat has been advanced primarily by AT&T's challenge to the interconnection decisions following Carterfone. Problems of technical interface and design may expose the network to deterioration and increased maintainence costs. See testimony of E. Rostow, Hearings on H.R. 7047, supra note 10. The arguments regarding technical harm to network integrity are ably discussed in Report of the Panel on Common Carrier/User Interconnections, Computer Science and Engineering Board, National Academy of Sciences, A Technical Analysis of the Common Carrier/User Interconnections Area (report to Common Carrier Bureau, FCC, June, 1970). See also Note, Competition in the Telephone Equipment Industry: Beyond Telerent, 86 Yale L. J. 538, 546 & n. 33 (1977) (concluding that AT&T's argument is "overstated"). Cf. Baker, Competition and Regulation: Charles River Bridge Recrossed, 60 Cornell L. Rev. 159 (1975).

The spectre of technical harm is also potentially relevant to specialized common carrier competition, although less forcefully than to terminal equipment interconnection competition, since AT&T is required to interconnect the services provided by SCC's. See 47 U.S.C. §201(a) (1970).

(3) The FCC may not permit providers from outside the network to offer alternative communications services or facilities which, because they may be used interchangeably with network-originated offerings, threaten to impair the revenues and thereby the economic health and stability, of the network providers (The "economic harm" or "cream-skimming" principle.)[157]

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[157] The "economic harm" principle has been invoked in both the interconnection and the specialized common carrier challenges. With regard to interconnection, competitive manufacture and installation of terminal equipment may reduce AT&T revenues and thereby result in increased prices for basic residential and business service. The claim regarding SCC's is that, whether they are truly specialized or merely duplicative, their operations threaten to "skim the cream" off AT&T long-distance revenues, which AT&T claims subsidize local service, again meaning increased basic telephone rates. See testimony of E. Rostow, Hearings on H.R. 7047, supra note 10, Cf. Baker, supra note 156.

The fact that AT&T has relied on the "technical harm" and "economic harm" prongs of the protected-monopoly arguments in attacking the interconnection and terminal equipment decisions, while resting more heavily on the "duplicative competition" prong in attacking the SCC cases, may be a semi-conscious reflection of the difference between the "core" of the system and its peripheral elements. Although the independent production of terminal equipment is strongly duplicative of the functions performed in the Bell system by Western Electric, Western Electric may not be close enough to the system core to be protected by a prohibition on duplication. On the other hand, long-distance communications facilitated by the specialized carriers closely resemble those carried out by AT&T's long lines, which must be at the core of any statutorily franchised monopoly. For core services, the "duplication" attack is strong, and resort to the technological and economic claims used to defend peripheral services--claims which, although arguable on social and economic grounds, are difficult to find in the law itself--is not required.

(4) The FCC may not prohibit the network from providing any new telecommunications-related service or facility, whether within or beyond the scope of conventional network offerings, particularly where providers outside the network have begun or are planning to make that service of facility available (The "unrestricted entry" principle).[158]

It is these four principles that constitute the operative rules of the new model of the Communications Act. Taken as a whole, these principles suggest that a fundamental purpose of federal regulation of telecommunications under the Communications Act has been and remains to insure the presence of a single, expansive, unified communication network operating as a monopoly and protected from competition which either duplicates existing network services or threatens to do technical or economic harm to the network. In operation, they would constrict the range of policy choices open to the FCC and would compel the specific conclusion that the FCC procompetition rules contravene the basic tenets of the federal regulatory scheme and should be retracted.

Whether these principles are the most logical deductions from the vision of a "natural public utility franchise," and whether their implications for the recent FCC policies are as their proponents contend, remain open

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[158] See, e.g., The Great Telephone Debate, supra note 153, at 65, 68. ("The network should be developed and used...for all the services within its dynamic reach", and SCCs would then survive only where they provide "genuinely novel and innovative services beyond the reach or imagination of the classical telephone companies..."). AT&T has been especially bitter about what it calls the "protective umbrella" given the SCCs by restrictions on AT&T participation in new forms of private line and data processing services. See, e.g., id. at 68.

Note that it is not only voice communications--the traditional service provided by AT&T and the independent telephone companies--which this vision of franchised monopoly encompasses. Record communications may be included as well. See id. at 68("As technology abolished the older distinctions between voice and record sciences, and...as it would inevitably abolish the distinction between data transmission and data processing, the scope of the network should be adjusted accordingly.").

to debate. But before these questions become relevant, it must first be determined whether or not these principles, and the vision they embody, possess recognizable legal roots in the 1934 Act. It is this threshold inquiry to which attention must initially be turned.

B. The Legal Basis for the New Model

The legal foundation supporting the franchised monopoly model has been plagued until recently by an all but impenetrable ambiguity, and it remains somewhat unfocused even as of this writing. From its earliest formulations, the legal assault on the Carterfone and Specialized Common Carrier decisions and their progeny has rested on an amorphous combination of the legislative history of the Act, interpretation of its specific provisions and its broader scheme, and extrapolations from the overall social and legislative environment in which the seventy-third Congress acted.[159] Only with the increased attention currently being given the debate over the structure of the telecommunications market--largely precipitated by suggestions in 1976 that the Communications Act be overhauled[160] --have positions on the legal front of the competition battle been refined in sufficient detail to join the issue.

In support of the new model, the proponents of the franchised-monopoly reading of the Act have woven together four principal sources of law: the

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[159] See testimoney of E. Rostow, Hearings on H.R. 7047, supra note 10; brief of NARUC, supra note 10, at 30 (inquiry into FCC competition policy begins with "consideration of the social milieu which precipitated congressional action, the legislative history, the language of the Communications Act, and the scheme established by the Act.").

[160] See note 10 supra (discussing the Consumer Communications Reform Act and countermeasures).

statement of purposes of federal communications regulation found in the sweeping language of the Act;[161] the implications of specific provisions of Title II, most notably Section 215,[162] toward the question of where authority to decree fundamental changes in the telecommunications market structure should lie; references in the legislative history by the drafters of the Act to the existence of monopolistic industry structure;[163] and a general sense of the milieu surrounding the passage of the Act--including the cumulative experience and practice of federal regulation from 1910 to 1934 and the universal expectations about the telecommunications business that had arisen at that time--which points toward the existence of a semi-articulated concept built into the Act about the proper industry structure.[164]

While the analysis of the legal issues by all sides has remained only moderately sophisticated at best,[165] it does appear that the contention that FCC discretion to condone or to effect changes in the structure of the telecommunications industry is limited by the existing regulatory statute has come to rest on these four legal pillars.

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[161] Communications Act of 1934, §1, codified at 47 U.S.C. §151 (1970). See text at notes 166-203 infra.

[162] Communications Act of 1934, § 215, codified at 47 U.S.C. § 215 (1970). See text at notes 204-209 infra.

[163] See text at notes 210-226 infra.

[164] See text at notes 227-248 infra.

[165] Compare letter of Donald I. Baker, Assistant Attorney General to Representative Timothy R. Wirth, regarding the legislative history of the Communications Act, printed at 123 Cong. Rec. E409-E411 (daily ed., January 27, 1977) [hereinafter Baker letter] with AT&T, Memorandum with Respect to Department of Justice Analysis of Legislative History as Set Forth in a Letter from Assistant Attorney General Donald I. Baker to the Hon. Timothy E. Wirth, dated (March 1, 1977), printed at 123 Cong. Rec. E1356-E1357 (daily ed., March 9, 1977) [hereinafter AT&T Memorandum] and Petition for Writ of Certiorari at 80-83, AT&T v. United States (D.C. Cir., filed January 6, 1977).

1. Section 1: The Service-To-All Clause

Perhaps the most interesting facet of the argument in favor of a statutarily franchised telecommunications monopoly is the effort to invest the Act's comprehensive opening statement of purposes with significant substantive content which at the same time both embraces the monopoly model and limits FCC discretion in regulating it.[166] Prior to the competition debate Section 1 lay dormant, seldom used by the courts and the Commission for more than a hortatory function.[167] As a general practice, regulatory decisions have been made and reviewed primarily with reference to the "public convenience and necessity" or "public interest, convenience and necessity" standards of Titles II and III, respectively;[168] the specific

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[166]The full text of Section 1, as currently enacted, reads:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Communications Act of 1934, §1, codified at 47 U.S.C. § 151 (1970). The service-to-all clause is emphasized.

[167]See, e.g., United States v. Southwest Cable Co., 392 U.S. 157, 167 (1968); National Broadcasting Co. v. United States, 319 US 190, 214 (1943); Washington Util. & Transp. Comm. v. FCC, 513 F. 2d 1142, 1157 (9th Cir. 1975), cert. denied 423 U.S. 836 (1976).

[168]See 47 U.S.C. §§ 214(a), 303 (1970).

substantive policy goals ennumerated by Section 1--adequate service to all at reasonable charges, national defense, and safety--have only rarely played even secondary roles in the explanation of regulatory actions, and more frequently have been ignored altogether. But with the attempt to fashion limits on the discretion of the FCC to do what it otherwise concludes is in the public interest standards of Titles II and III, the language of Section 1, particularly its service-to-all clause, has been imbued with new importance.

The service-to-all clause has yet to be explored in depth. Even those who have begun to breathe life into it in order to reinforce the franchised monopoly model have done little more than to cite Section 1 without explication in support of conclusory generalizations about the policy of the Act.[169] More recently, however, the role Section 1 should play in constructing the franchised monopoly model has begun to take shape around the argument that, by describing certain service, safety, and defense goals as the aim of all communications regulation, Section 1 substantively constrains the types of industry structure the FCC can find to be with the public interest standards of Title II.[170] The claim is that through the

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[169] See The Great Telephone Debate, supra note 153, at 64 and note 170 infra; AT&T Memorandum, supra note 165 at E1357:

> The [service-to-all clause] in particular makes it plain that Congress envisioned a system optimized in accordance with modern engineering networking concepts in which each company participating in the provision of service becomes an integral part of a coordinated nationwide network.

[170] See, e.g., The Great Telephone Debate, supra note 64:

> While Congress gave the Commission broad discretion in interpreting the statutory standard of the public interest, there were limits... inherent in the policies of Section 1 of the Act which directed the FCC to encourage universal service on the cheapest and most efficient basis. The supporters of [the new model] believe that this direction requires the FCC to allow the network, as a regulated natural monopoly, to provide all the communications services within its capabilities.

enunciation of an overriding regulatory goal, the service-to-all clause serves to define the public interest standard which is to guide the Commission's decisions and against which those decisions are to be judged on judicial review.

As an initial matter, it is important to note that the use of a statutory statement of policy such as Section 1 to modify or define the standards in the operative titles of the Act is well within the canons of statutory interpretation.[171] But conceeding its relevance to the assessment of the pro-competitive decisions only raises the more perplexing question of what Section 1, and particularly the service-to-all clause, means. As will become apparent from examining it, there are sizeable difficulties in the construction and interpretation of the clause that drastically limit its usefulness as a guide in reaching the appropriate mix of monopoly and competition in the telecommunications market, and it is therefore not surprising that its role in the creation of the legal model of franchised monopoly has been unspecific and essentially rhetorical.

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[171] See A. Sutherland, STATUTES AND STATUTORY CONSTRUCTION § 20. 12, at 63-63 (4th ed., Sands, ed. 1972). There is a crucial distinction between statements of policy which, like § 1, follow the enacting clause of the legislation and become part of the statute, and statutory preambles, which precede the enacting clause (usually as a litany of "whereas" clauses) and are not part of the statutory law. Policy statements, as a rule, are available to clarify amgibuous substantive provisions of the statute, but cannot be used to create ambiguities. There are, however, scattered examples of much more aggressive use of policy statements, including some by the Supreme Court. See Dayton-Goose Creek R. Co. v. United States, 263 U.S. 456 (1924); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (but largely discredited case). See also Note, Legal Effect of Preambles--Statutes, 41 Corn. L.Q. 134 (1955).

Thus, in order for § 1 to be relevant under the usual rules of statutory interpretation, there must be some ambiguity in the remainder of Title I or in the provisions of Title II and III, to the clarification of which § 1 can contribute. Very little about the Communications Act is not ambiguous enough to authorize recourse to § 1 as interpretive aid, particularly areas like interconnection, specialized carriage, and data transmission.

(a) The Background of the Service-to-All Clause

Almost all of the language of the Communications Act of 1934 was brought directly forward without substantial change from the Interstate Commerce Act, as amended by the Mann-Elkins, Esch-Cummins, and Willis-Graham Acts. The committees responsible for the drafting and passage of the Act assured their colleagues that the legislation contained little that did not appear in the transportation laws.[172] Yet, although it slipped through without comment, there was one original and unique addition: the far reaching statement in Section 1 of the purpose of federal communications regulation to "make available... to all... a rapid, efficient, Nationwide... communication service." Nowhere in the amendments made to the Commerce Act in 1910, 1920, or 1921 had any declaration of policy been spelled out; in fact, communications had been specifically excluded from the comparable statement of policy in the law governing communications which the 1934 Act eventually displaced, the Esch-Cummins Act.[173] Nothing in the preamble to the Radio Act swept as broadly.[174] In writing

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[172] See text at notes 116-125 supra.

[173] See text and note 46 supra.

[174] [T]his Act is intended to regulate all forms of interstate and foreign radio transmission and communications in the United States...; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority...

Radio Act of 1927, Ch. 169, §1, 44 Stat. 1162. This statement of purposes was carried forward essentially unchanged as §301 of Communications Act.

this set of purposes into the statute books, the drafters of the Communications Act put on record, for the first (and as it turned out, the only) time, what the national legislature meant the overarching goal of communications regulations to be.

Surprisingly, however, this potentially important new provision has next to no legislative history at all. The original versions of what was to become the Communications Act, introduced the day after President Roosevelt's message (and drafted principally by the administration [175]) as S. 2910 and H.R. 8301, opened with this dual statement of purpose:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United State a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created [the FCC]. [176]

A third goal, "for the purpose of the national defense," was added in committee. [177] The official documents of the House did not mention the existence of the purposes section other than to parrot it in passing. The Senate report noted that Section 1 "declares the policy of Congress, assuring

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[175] 78 Cong. Rec. 8822 (1934) (remarks of Sen. Dill).

[176] S. 2910, H. R. 8301, 73d Cong., 2d Sess. (1934) (emphasis added).

[177] S. 3285, 73d Cong., 2d Sess. (1934) (committee bill). The fourth goal of act as it currently stands, "for the purpose of promoting safety of life and property through the use of wire and radio communication," was added by amendment in 1937. Act of May 20, 1937, Ch. 229, §1, 50 Stat. 189.

an adequate communications system for this country,"[178] but said no more, and the Senate debate and the conference committee were completely silent on this provision. No indication was made at any point in the official documents or record of what the language means, how far it reaches, or from where it was derived.

It is still possible, of course, to speculate about likely sources of this "service to all" concept and language. During the debate on the last major legislative action in the telecommunications area prior to 1934, the 1921 Willis-Graham Act, Representative Graham chose an almost identical way of articulating the federal interest in telecommunications:

> I think I am stating the opinion of most men who have carefully considered the matter, that it is believed to be better policy to have one telephone system in a community that serves all the people...than it is to have two competing telephone systems.[179]

It might be that Section 1 was designed to refer specifically to this statement, carrying the national aim of communications regulation as expressed on the floor of the House into the statutes. Or it may have been that the specific concept advanced by AT&T since first enunciated by Theodore Vail in 1907[180] of a unified, singly-managed telephone system

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[178] Sen. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934).

[179] 61 Cong. Rec. 1983 (1921) (remarks of Rep. Graham) (emphasis added).

[180] AT&T, ANNUAL REPORT 23-33 (1907); Vail, Public Utilities and Public Policy, 3 Atlantic Monthly 307 (March 1913). See Gabel, supra note 16, at 356. An accessible early explication of the Bell viewpoint of this era can be found in an article by Arthur Stedman Hills, a Bell lawyer, The Telephone as a Public Utility, 21 Case and Comment 881 (1915). This concept was summarized in the Bell slogan, "one system, one policy, universal service". FCC, Investigation of the Telephone Industry in the United States, H. R. Doc. No. 340, 76th Cong., 1st Sess. at 145-46 (1939).

providing universal telephone service under government regulation found its way into the preamble of the Act by either tacit or unconscious adoption. The concept certainly was pushed by Bell officials at the hearings on the 1934 legislation.[181] Or it may have been simply that the "service to all" language represented a highly generalized and diffuse shared sense of the fundamental aim of communications providers and regulators without any specific content as to the way that service was to be provided. That the central goal of regulating communications was to make service available to all was something everyone could agree on in 1934 without giving up disagreements about the best way to accomplish that goal.[182] Or the "service to all" language may have been in reality nothing more than New Deal boilerplate, intended to provide the FCC with something that would pass for an "intelligible principle" to guide its regulation and thereby satisfy the courts' requirement that policy-making powers not be delegated by Congress without providing some standard for their use by administrative agencies.[183] The

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[181] Testimony of W. Gifford on behalf of AT&T, HOUSE HEARINGS at 200-201.

[182] Compare AT&T President Gifford's testimony, supra note 136, with testimony of Dr. David Friday for the independent telephone companies, supra note 137.

[183] In 1934 the "intelligible principle" rule of the Hampton case was still the leading authority on delegation of legislative and quasi-legislative powers by Congress, and no statute had yet been struck down for unconstitutional delegation. See J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928), requiring Congress to lay down an "intelligible principle to which the [agency]. . . is directed to conform." The confusion that arose in the delegation doctrine with the Schecter and Panama Refining cases was still to come. A. L. A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act of 1933); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (same).

question of which, if any, of these speculative explanations is the correct one is not clearly addressed or resolved by the record.

(b) Exploring the Meaning of "Service-to-All"

Nevertheless, it can be argued that at some point in attempting to understand modern statutes recourse to legislative history must yield to a close reading of the language and construction of the statute itself. As one court expressed it, "an explanatory tale should not wag a statutory dog."[184] Particularly with congressional documents as unilluminating as these, what the Act may be read to say on its face becomes doubly important. And a close reading of the service-to-all clause can unearth an alternative reading of the Act which is at odds with the more traditional view that nothing more was accomplished in 1934 than the creation of a unified regulatory mechanism for communications.

In the first place, the construction of Section 1 may in some measure belie the traditional argument that more effective regulation was the Act's primary goal. As now embodied as 47 U.S.C. § 151, the statement of purposes for the Act has four separate clauses: the first announcing the "service-to-all" concept, followed by the "national defense" and "safety of life and property" clauses, and finally the "more effective execution" clause. Only the first and the last were part of the original drafts of the Communications Act introduced on February 27, 1934; the "national

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184 Chief Judge Jones in A. P. Green Export Co. v. United States, 284 F. 2d 383, 386 (Ct. Cl. 1960). See generally R. Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES, Ch. 10 at 164-75 (1975).

defense" clause was added after the committee hearings.[185] As originally conceived, then, the Act can be read to have had a dominant aim of achieving insofar as possible "service-to-all" and a subordinate aim of "securing a more effective execution of this policy" by centralizing and expanding on the existing federal authority over communications. As currently written, the Act adds two complementary goals to the initial dominant theme of "service-to-all" and makes all three the cumulative policy which the final "more effective execution" clause is to serve. Regardless then of what Congress said about desiring only to legislate the more effective regulation of which both Chairman Rayburn and Chairman Dill spoke during the debates,[186] the terms of Section 1 place the goal of effective regulation within the larger context of the broad "service-to-all" policy and its complements.

This may be to say no more than that Congress for the first time in 1934 articulated what had in fact been the national communications policy at least since 1921 (and possibly since 1910), that at the heart of that policy had been "service-to-all", and that Section 1 therefore did not change the existing law any more than did the provisions that follow it, in accordance with the general suggestion in the legislative record that no such change was intended. But whether the "service-to-all" concept was something new or just a verbalization of what had been implied before, the fact that it precedes the statement of the goal of better regulation and announces the considerations that are to inform the exercise of that regulation indicates that more than a simple restructuring and streamlining of the regulatory

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[185] See text at note 177 supra; address of David Sarnoff, supra, note 135.

[186] See text at notes 117, 123 supra.

process was achieved by the Act. The regulatory process was given a set of substantive aims--service, safety, and defense--and arguably those aims placed substantive limits on what directions the regulatory process could take. Assuming for the moment that it can be shown that economic or technical harm to the statutory network from any specific form of competition has the effect of retarding the achievement of these service, safety, or defense aims, it could then be argued that the structure of Section 1 precludes the FCC from permitting that competitive offering.

Furthermore, beyond the construction of Section 1, the actual language of the "service-to-all" clause may serve to amplify the importance of Section 1 in the Communications Act scheme. As the Supreme Court has noted in a classic passage on statutory interpretation, the "words by which the legislature undertook to give expression to its wishes... [o]ften... are sufficient in and of themselves to determine the purpose of the legislation."[187] Within the words of the service-to-all clause, it can be argued, there is an "expression of wishes" which speaks over the cacaphony of the legislative history. To reiterate, the clause states the purpose of the Act as

> regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.[188]

The important point to note about this clause is that it contemplates not "communication service" in the broad, generic sense but rather "a communication service." It is not service provided by whoever has the

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[187] United States v. Am. Trucking Ass'n, 310 U.S. 534, 543 (1940).

[188] Communications Act of 1934, §1, 47 U.S.C. §151 (1970) (emphasis added).

wherewithal to enter the communications business and in whatever form the market forces may eventually dictate that this phrase can be read to comprehend, it might be said; it is instead service as provided by a single, unified, national communications concern, with strong monopolistic characteristics that the phrase envisions. A service for all, not service to all, is the statutory goal. By way of sharp contrast, the declaration of purposes for the Esch-Cummins Act--from which communications was clearly excluded, it should be remembered[189]--calls on the executing agency only to "promote, encourage, and develop water transportation service and facilities,"[190] suggesting only the diffusion of maritime transportation services through a multiplicity of providers[191] rather than centralized provision through "a" service. In the communications area, on the other hand, the presence in Section 1 of the "a... communications service" language can be taken to direct federal policy in the opposite direction, toward the maintenance of a communications monopoly. The fact that this service was to be "rapid, efficient, Nationwide, and world-wide," all factors which are frequently invoked to defend monopoly market structures, serves to reinforce this thrust toward a centralized and exclusive provision of the communications capacities which were to be available to all.

To make the statutory policy toward the structure of the telecommunications industry turn on the drafters' choice to express the

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[189] See note 46 supra.

[190] Transportation (Esch-Cummins) Act of 1920, Ch. 91, §500, 36 Stat. 544 (emphasis added).

[191] It should also be remembered that the Esch-Cummins Act instructed that railroad "competition shall be preserved as fully as possible" as well. Id., § 401. See text at note 45 supra.

service-to-all policy in a singular rather than a plural mode, as this reading of the clause suggests, would be extreme. If the drafters deliberately intended to convey a significant shift from the policy of multiple providers implicit in the language of the Transportation Act by omitting to qualify the "service" aim with the singular article "a", they would surely have said so at some point in the legislative process. More likely, the language was the fortuitous product of a simple literary choice.

Beyond this linguistic concern, there are several deeper difficulties with the interpretation of the service-to-all clause as channeling the regulatory powers of the FCC toward maintaince of a franchised monopoly. First, as already noted, the lack of legislative history giving any type of signal in this direction is forbidding. The entire purposes provision of the Act received less than cursory mention in the committee reports and debates.[192] Even admitting that resort to the legislative history is not always dispositive,[193] the overwhelming lack of attention paid to the language of Section 1 by Congress should give pause to this kind of elaborate interpretation of unexplained statutory text.

Second, even granting that the definition of the goal of communications policy as service to all through "a communications service" indicates some deliberate congressional choice to authorize a statutory telecommunications monopoly, the full language of the service-to-all clause brings this argument toward the point of dissolving in ambiguity. This is so for two reasons. In the first place, the statutory aim is "a...communication service with adequate facilities at reasonable charges." This leaves some range for

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[192] See text at notes 176-178 supra.

[193] See note 184 supra.

the existence of alternative communications providers. The technical and economic insulation provided by Section 1 would not reach all competitive impacts; only those impacts which are serious enough to threaten that the facilities of the statutory network will be rendered inadequate or that the network's prices will be pushed to unreasonable levels would be prohibited. Up to the limits of "adequacy" and "reasonableness", there is statutory space for competitive entry.[194]

More importantly, the determination of what array of facilities is "adequate" and what level of pricing is "unreasonable" leaves the FCC with broadly sweeping powers to say what the shape and extent of the statutory network is to be. The elasticity of the terms "adequate" and "reasonable", like that of the phrases "in the public interest",[195] "just and reasonable",[196] and "public convenience and necessity"[197] in Title II of the act, is practically boundless.[198] "Adequate facilities" may conceivably by those which are absolutely protected under the "technical harm" principle from technological decay or disruption from competitors' facilities, but that term may also mean something much less expansive. Charges may conceivably

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[194] This limited form of competition differs from the traditional model of competitive services, to be sure, and those entering under this type of statutory authorization would be subject to double risks: not only would they in all likelihood fall prey to the superior size and range of competitive tactics open to the statutory network, but they would also be dependent on the consistency of the FCC determination of where the limits of "adequate facilities" and "reasonable charges" should be set.

[195] 47 U.S.C. § 201(a) (1970).

[196] 47 U.S.C. § 201(b) (1970).

[197] 47 U.S.C. § 214(c) (1970).

[198] See IV B. Schwartz, supra note 12.

become unreasonable under the "economic harm" principle by virtue of any increase caused by economic impacts of competition on historic separations and rate schedules, but it remains clear that the statute did not mandate the lowest prices possible, just "reasonable" ones. As a result, the FCC is left with a wide degree of discretion in giving content to the terms of the service-to-all clause. Deciding that the clause envisions the maintenance of a statutory communication network does not say much at all about how far the "adequate facilities" of the network are to extend or what considerations will be legitimate in developing a "reasonable" set of charges for communications services.

Moreover, again reading the service-to-all clause to grant a statutory monopoly, the full language of the clause leaves large doubt over the scope of the "communication service" envisioned. The clause gives no clue as to what types of service or facilities are at the core of the statutory network, what types are on its perimeters, and what types (if any) are beyond it. It is certainly unarguable that even this reading of Section 1 will fail to answer whether data communications is a core or peripheral part of the communications network, or no part of the network at all.[199] But on reflection, it is no clearer from the clause whether simple terminal equipment or

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[199] This is evident from the FCC's lengthy and as yet unresolved computer inquiry. See Notice of Inquiry, Regulatory Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 7 F.C.C. 2d 11 (1966); Tentative Decision, 28 F.C.C. 2d 291 (1970); Final Decision and Order, 28 F.C.C. 2d 267 (1971), aff'd in part, rev'd in part, sub nom. GTE Service Corp. v. FCC, 474 F. 2d 724 (2nd Cir. 1973); Berman, supra note 131, at 172-82.

AT&T argues that data communications services, if not part of the monopoly franchise itself, should at least be part of the broad range of services which the statutory monopoly is permitted to offer. See note 158 supra.

telephone handsets belong to the core or at the perimeter. The answers must remain to be defined by the FCC, and answering them would carry the Commission beyond the issues of adequacy and reasonableness of network facilities and charges to the fundamental determination of what is inside and what is outside the network. The text and history of Section 1 are too meager to give it much useful guidance in this task, and the end result does not differ much from the result of the more orthodox view of the Act: in the end the Commission is left with something close to a plenary power to define the scope of the statutory network. That it were to do so in the course of constructing the specific terms of the service-to-all clause rather than under the broader charter of the orthodox interpretation would be of little real consequence.[200]

Beyond these niceties of the construction and interpretation of the service-to-all clause, there is an even more compelling reason to reject the "statutory monopoly" view of Section 1 when taken in light of the substantive provisions of the Act. Section 1 and the service-to-all clause apply not just to telecommunications but to broadcasting as well; the service

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[200] This is particularly true in the American system of administrative law, in which courts reviewing administrative actions usually defer to agency judgments about the meaning of ambiguities in the statutes they interpret. See, e.g., Skidmore v. Swift and Co., 323 U.S. 134 (1944). Although a reviewing court might say the FCC interpretation of whether a certain type of service is inside or outside the statutory network is more readily challenged when the agency is interpreting the meaning of statutory language than when it is exercising judgment regarding technical or economic matters, since courts are better trained in interpreting statutes than in reviewing discretionary judgments, in matters as complex as those involved in interconnection, specialized carriage, and data transmission a court is likely to yield to the agency's view of the Act. See Washington Util. & Transp. Comm. v. FCC, 513 F. 2d 1142, 1157 (9th Cir. 1975); cf. International Harvester Co. v. Ruckelshaus, 478 F. 2d 615 (D.C. Cir. 1973) (comments by Judges Leventhal and Bazelon on the difficulty of judicial review of complex issues of technology, in this case vehicle emissions standards under the Clean Air Act).

called for by the clause includes both "wire and radio communication." What the interpretation of Section 1 now under consideration would require would be that a single, unified monopoly was mandated by the Act to supply both telecommunications and radio service, since whatever the service-to-all clause means for telecommunications, it must mean equally for radio communications. The language of the clause permits no other reading. Yet the provisions of Title III and the history of radio regulation before and after the Act make it absolutely clear that no radio monopoly was to exist. The fundamental national policy toward radio communications was in 1934 and has always been to maintain a multiplicity of broadcast operators.[201] Reading Section 1 in the way suggested here would fly in the fact of that policy.[202]

On examination, then, it should be apparent that there are formidable difficulties in assessing to the service-to-all clause of Section 1 a wide-ranging substantive role in the law of telecommunications. To suggest the "monopoly franchise" understanding of the clause has the force of law requires a concentrated extrapolation from the record and text. While it is true that the opening statement of purposes may be used to clarify statutory ambiguities,[203] in the case of the Communications Act the statement of

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[201] FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1960) ("the act recognizes that the field of broadcasting is one of free competition").

[202] But there may be an interesting parallel to be noted between the local geographi monopoly policy indicated by the Willis-Graham Act, see notes 70-74 supra, and the effective local wavelength monopoly granted to broadcast licensees. To the extent that both reflect a policy of local monopoly over basic telecommunications and broadcasting services, it is not inconsistent that wire and radio communications are joined in Section 1's statement of purposes while treated separately elsewhere in the Act.

[203] See note 171 supra.

statutory purposes is in many ways even more ambiguous than the regulatory standards which it allegedly helps to define. Its ability to contribute to the analysis of the legal limits on FCC competitive policy is therefore marginal, and its place in the regulatory process is more likely to remain primarily hortatory.

2. Fundamental Structural Change Under Section 215

As a second ground of support for the new model, its proponents interpret several of the specific terms of Title II to lead to the conclusion that fundamental changes in the structure of the telecommunications industry were reserved for Congressional (and not administrative) action. The most heavy reliance in this line of argument falls on Section 215 of the Act.

Under Section 215, three of the more controversial problems regarding the 1934 structure of the telephone and telegraph industries were reserved for later Congressional consideration--the internal corporate structure of the AT&T system, with AT&T as the parent holding company for operating subsidiaries; cross-industry competition that arose originally from Bell's venture into the provision of telegraph services; and the practice of some carriers of requiring users to agree not to do business with other carriers.[204] In adopting the section, the congressional sponsors indicated that its purpose was to postpone these structural issues until the new FCC could investigate and "recommend...legislation for their solution."[205] The advocates of the franchised monopoly view read Section 215 to indicate that by postponing

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[204] See note 129 supra.

[205] See text at note 128 supra.

consideration of these problems and by indicating that their solution was to come in the form of new legislation, the seventy-third Congress declared its intent to retain authority over basic structural change in telecommunications. As a result, the argument concludes, the power to reshape the industry was not delegated to the FCC but was reserved by Congress, and the FCC's recent decisions opening the way for competitive offerings therefore go beyond the range of administrative actions authorized by the statute.[206]

As a threshold matter, there may be reason to discount the assertion that the services authorized by the Carterfone or Specialized Common Carrier decisions threaten to produce anything that could qualify as a "fundamental structural change" to be accorded Congress-only treatment under this view of Section 215.[207] But assuming for the moment that such a showing could be made, it appears that the Section 215 reservations fall short of supporting the franchised monopoly view.

In the first place, Section 215 does not explicitly deprive the FCC of authority to take actions which have the effect of basic restructuring, provided those actions are found to satisfy the overriding public interest

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[206] See The Great Telephone Debate, supra note 153, at 64 ("Section 215 represents one limit [on FCC discretion] in its reservation to the Congress of jurisdiction over problems of fundamental structural change.") This passage overstates the argument somewhat, since Congress always retains its jurisdiction; the issue is whether Congress declined to share that jurisdiction with the administrative agency. See the discussion in the text immediately following.

[207] This is a question of characterization which is dependent on economic fact and analysis, and is beyond the scope of this study. See generally FCC, Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures (Docket 20003), First Report, 61 F.C.C. 2d 766 (1976).

standards of Title II. Nothing in the terms or legislative history of Section 215 definitively precludes the interpretation that the Commission was to share with Congress concurrent jurisdiction over fundamental change. The fact that the section envisions the possibility of further legislation on the reserved problem areas need not mean that FCC activity in those areas was foreclosed; the section may have had a more modest aim of satisfying critics and defenders of the 1934 industry structure by the familiar compromise tactic of authorizing a thorough study of the problem by a newly-created expert agency. Given the legislators' explicit concern with creating a more effective regulatory body[208] and their failure to indicate directly an intent to limit that body's powers by Section 215, the interpretation that best harmonizes the terms of that section with those of the entire Act would hold that after 1934 the power of fundamental restructuring was possessed by both Congress and the FCC.

Second, under the traditions of statutory interpretation the reservations of authority in Section 215 should be read to apply only to the three structural issues explicitly referred to in the express provisions of the section. In the development of federal telecommunications regulation, the strong indication is that Congress delegated first to the ICC and then to the FCC the full extent of Congressional authority over interstate commerce in telecommunications.[209] The understanding most consistent with this plenary delegation is that the Communications Act clothed the FCC with full authority to act as the agent of the legislature in accomplishing the public interest, subject only to the explicit reservations carved out of the

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[208] See text at notes 116-125 supra.

[209] See text at notes 55-57, 143 supra.

delegation in Section 215 and elsewhere. The argument made by proponents of the franchised monopoly model would therefore prove too little: in light of the broad grant of authority to the FCC, the reservation of Congressional concern over a set of specific problems cannot appropriately be generalized to declare an across-the-board Congressional reservation of authority over fundamental structural change, to the exclusion of the agency charged with telecommunications regulation. The more convincing reading of Section 215 cuts against the grain of the argument for the new model.

3. The Legislative History

In the legislative histories of the Communications Act and of its sister Public Utility Holding Company Act of 1935,[210] the argument for the franchised monopoly model finds a third basis of support. Focusing on floor remarks by the committee chairmen responsible for the 1934 Act and on comments at Congressional hearings by one of the leading contemporary authorities on industry regulation, proponents of this view read the legislative history to show that Congress undertook a careful reexamination of the telecommunications industry structure, including the expanding Bell monopoly, and concluded that the structure should not be changed.[211]

Only a portion of the support claimed in the legislative history can be gleaned from the general remarks made during the consideration of the

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[210] 49 Stat. 838, ch. 687, codified at 15 U.S.C. § 79 (1970).

[211] See, e.g., AT&T Memorandum, supra note 165. Moreover, as the AT&T Memorandum notes, id., the fact that Congress instructed the FCC to investigate provision of telegraph service by telephone companies in § 215(b) of the Act may be understood to show that Congress not only preserved the telephone monopoly, but indicated concern over the most visible form of service competition then present--the competition between telephone and telegraph companies for record communications business.

Communications Act indicating Congress' recognition of the effective monopoly possessed by AT&T in 1934. Most prominent was the comment of Senator Gill:

> I think it is generally well known by those who know anything about the set-up of the telephone monopoly, that under the present arrangement, the parent telephone company, the American Telephone & Telegraph, not only owns the operating companies in the principal cities in the United States... but it owns the manufacturing company, the Western Electric, which supplies the operating companies with the equipment of the telephone business, and there is no competitive bidding on the part of those who would sell equipment to the operating companies.[212]

Similar remarks were made by Congressman Rayburn.[213] The point is unarguable: Congress understood that the industry structure which had developed and which was to be subjected to FCC regulation was monopolistic, without significant competition. But it is equally obvious that none of the Congressional statements in themselves indicate particular enthusiasm for this monopoly structure; they are recognitions of the fact that little competition existed, not a policy directed toward that result. Standing alone, the comments of the Act's sponsors tell little about the role envisioned for competitive services or facilities in the regulatory scheme.

The more forceful legislative historical argument relies not on materials related to the Communications Act, but on the Public Utility Holding Company Act of 1935, by which Congress inter alia effected a restructing of the power industry by breaking up the holding companies which had come to dominate the generation and delivery of electric and

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[212] 78 Cong. Rec. 8824 (1934).

[213] Id. at 10314 (1934) ("The competition in the industry will run about as follows: Telephone: American Telephone and Telegraph 95 percent of the business; 100 independent companies 5 percent of the business. In telephone service the American Telephone and Telegraph is practically a monopoly.")

gas services.[214] During Hearings on the 1935 Utility Act, the author of the extensive investigative report which lay the groundwork for the Communications Act, Dr. William Splawn, reappeared before both Commerce Committees to explain the recommendation that utility holding companies be abolished.[215]. In the House hearings, Splawn explained that organization of the power business on a national scale was unnecessary because "[t]he power business is not like the telephone business..."[216] He expanded on this conclusion six weeks later at the Senate hearings:

> Someone seems to have had a dream that the electric power business could be organized corporately and conducted very much as the telephone business is. Now there's quite a difference in the physical operation of the two. The telephone, in order to be most useful must be connected through switchboards with every other switchboard in the entire country.[217]

From the distinctions drawn in the Splawn testimony and in the treatment of industry structure by the 1934 and 1935 Acts,[218] the proponents of the

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[214] See generally Public Utility Holding Companies Hearings on H.R. 5423 before the House Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935) [hereinafter 1935 House Hearings]; Public Utility Holding Company Act of 1935, Hearings on S. 1725 before the Senate Comm. on Commerce, 74th Cong., 1st Sess. (1935) [hereinafter 1935 Senate Hearings]; Bonbright and Means, THE HOLDING COMPANY 90 et seq. (1932).

[215] On the 1934 Splawn Report on Communications Companies, see notes 91,93 supra. Splawn was appointed pursuant to a 1932 resolution to investigate the holding company structure of the railroad, oil pipelining communications, and power industries. By the time of the 1935 hearings he had been named an Interstate Commerce Commissioner, but the bulk of the utility investigation had been carried out before Splawn left his position as counsel to the House committee. See 1935 House Hearings at 55.

[216] 1935 House Hearings at 180 (February 26, 1935), quoted in Petetion for Writ of Certiorari, supra note 165 at 80. But see text at note 220 infra.

[217] 1935 Senate Hearings at 75 (April 16, 1935).

[218] While the 1934 Communications Act left the structure of telecommunications unchanged--with AT&T operating long-distance lines and holding control of its operating subsidiaries--the 1935 Public Utility Act ordered divestiture by the utility holding companies of manufacturing and operating subsidiaries. See 15 U.S.C. § 79k (1970).

franchised monopoly reading of the Communications Act conclude that Congress decided to freeze the monopolistic market structure, subjecting it to purvasive regulation, rather than to change it in the dramatic way by which the breakup of the electric and gas utility holding companies was accomplished.

The Splawn remarks do lend credence to this claim, particularly given Splawn's central role in the development of industrial regulatory legislation in the New Deal era. But looked at in their entirety, both the Splawn comments and the holding company divestiture requirements of the 1935 Act are considerably less than compelling evidence that the Communications Act was aimed at foreclosing telecommunications competition.

In the first place, the dichotomy drawn by Splawn was not, as the incomplete quotation of his remarks suggests, simply between the power and the telephone industries. In its full context, the sentence partially quoted above[218A] reads:

> The power business is not like the telephone business or the railroad business, transcontinental and essentially an interstate proposition.[219]

This linking of the telephone and railroad industries belies an interpretation of the Splawn testimony as supporting the franchised monopoly view. Because railroad regulation did not treat new competition as inimical, at least prior to the decline of the rails brought about by the advent of air transportation, the contrast drawn by Splawn between the power, telephone and railroad industries can hardly constitute prima facie proof that the divergent legislative approaches taken by Congress in 1934 and 1935 express adoption of the new model's "true faith".

[218A] See text at note 216 supra.

[219] 1935 House Hearings at 180 (emphasis added).

Indeed, the full context of the Splawn testimony shows that a welter of factors went into the congressional judgment that electric and gas utility holding companies served no useful end. Starting with the sentence just discussed, Splawn told the House Committee:

> The power business is not like the telephone business or the railroad business, transcontinental or essentially an interstate proposition. Its operations are at the most regional. Many of the soundest operations are altogether intrastate and may be designated as local... This is an industry which is essentially local and which should be managed locally and therefore regulated locally...
>
> ...[earlier testimony] has shown you the abuses that have grown out of these interregional holding-company activities...to reach all of these abuses, you will have about 32 different bills or different sorts of approach...
>
> ...when you try to reach out and regulate them [rather than breaking up the holding companies]..., [y]ou would not be regulating public utilities. They are often not operating anything, but merely hold securities.[220]

[220] Id. at 180-181.

At the Senate hearings, Splawn continued in the passage partially quoted in the penultimate paragraph above[221] to describe, in addition to technical interconnection differences, differences in the corporate operations of the telephone and power industries that called for different legislative treatment:

> Now, there is quite a difference in the physical operation of the two. The telephone, in order to be most useful, must be connected through switchboards with every other switchboard in the entire country. And you find in that industry a holding-operating company, rather close to the operations which you are undertaking to regulate through your agency, the Federal Communications Commission.
>
> But in the power field there is no such situation or transcontinental transmission of power.... The physical set-up in this operation is local and, at most, regional. There is nothing Nation-wide about this set-up except the corporate structure, the intangible thing superposed upon these local physical operations.[222]

Thus, Splawn distinguished the differing needs for structural change in the telephone and power businesses on at least four grounds. First, there were technological differences dictating nationwide interconnection of telecommunications services and facilities which were not present for the still-embryonic electric power system. Second, there was an underlying current, much like a federalism concern, that an industry which was truly local in every way but its ownership should be regulated by states or municipalities; rather than intervene to regulate the industry because it was held in interstate conglomerations, the federal government should dismantle the industry's unproductive interstate characteristics. Third, in the power industry there was a record of abuses by the electric and gas utility holding companies which aroused the ire of the congressional committees but which had no apparent counterpart in the telecommunications

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[221] See text at note 217 supra.

[222] 1935 Senate Hearings at 75 (emphasis added).

industry.[223] And fourth, there were important differences in Splawn's comparison of the corporate arrangements of AT&T and the utility holding companies: while the latter "merely h[e]ld securities" while "not operating anything,"[224] the AT&T holding company was not only "rather close to the operations"[225] of the subsidiaries whose securities it held, but also actively engaged in operating the AT&T long distance lines. It was not a "mere paper company"[226] which transformed local into regional activity purely for the sake of enlarging its economic holdings and control.

Given their lack of technical or service functions and the abusive conduct of the utility holding companies, it is understandable why Splawn and the 1935 Congress chose to reshape the power industry radically, only a year after following a more conservative course in the Communications Act. The two industries were not similarly situated, for reasons that were more complex and more immediate than the economic explanation that the telephone business inclines toward a centralized, nationwide monopoly

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[223]The power industry abuses are noted throughout the 1935 Hearings. That there were few comparable contemporary abuses by telecommunications holding companies--i.e., AT&T--is indicated by the relative lack of allegations of abuse in the Communication Act hearings and debates. See notes 34 and 40 and Part III supra.

[224]See text at note 219 supra.

[225]See text at note 221 supra.

[226]1935 House Hearings at 180.

while the electric and gas utility service requires only local and independent monopoly providers.

This is not at all to say that the divergent concepts of optimum industry structures present in the Splawn testimony and in the 1934 and 1935 Acts have no significance. But it is important to place the genesis of those differing concepts in full context. Doing so illustrates that from the standpoint of legislative history, the fact that Congress ordered the amputation of centralized ownership in the electric and gas industries while leaving the 1934 structure of the telecommunications industry intact cannot be explained entirely, or even primarily, by the view that Congress endorsed the franchised monopoly model in the Communications Act but did not do so in the Public Utility Holding Company Act of 1935. While the floor remarks on the Communications Act and the contrast between the treatment of telecommunications and power industry structures may help to illuminate the general environment in which the Act was passed, neither is so strongly indicative of the franchised monopoly model as its advocates suggest.

4. The Expression of the 1934 Milieu: The "Common Carrier Concept"

While the foregoing arguments regarding the service-to-all clause, Section 215, and the legislative history are important cornerstones of the

franchised monopoly model, the core of the vision of the "true faith" lies elsewhere, in an organizing concept which assertedly has governed the development of telecommunications regulation from its earliest stages and which found expression in the general plan of Title II.[227] By providing the broadest and most accurate reflection of the universal understandings and expectations of the period in which the 1934 Act was formulated, it is argued, this concept announces a theory of industry structure which is incompatible with the basic premises of competitive theory and which leads to the conclusion that Title II is "inconsistent with the notion that Congress intended that reliance would be placed upon competition to govern the provision of telecommunications service."[228]

In its briefest form, the "common carrier concept" holds that "the theory of competition cannot rationally be applied to products or services, the provision of which has been made subject to pervasive regulation."[229] As with the application of most core concepts, the consequences of this common carrier ideal for substantive regulatory rules occassionally became diffuse and difficult to penetrate. But, as articulated by its proponents, the concept is as blunt and simple as it sounds: the congressional decision to engage in regulation of telecommunications carriers, once beyond the threshold of pervasiveness, inevitably precludes competition in the regulated field.

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[227] See generally AT&T Memorandum, supra note 165, at E1357; The Great Telephone Debate, supra note 153, at 65; Petition for Writ of Certiorari, supra note 165, at 70-83; Brief of NARUC, supra note 10.

[228] AT&T Memorandum, supra note 165, at E1357.

[229] Petition for Writ of Certiorari, supra note 165, at 74, 83. A slightly less all-encompassing version of the concept is offered in The Great Telephone Debate. See the discussion at note 207 supra. Cf Hawaiian Telephone Co. v. FCC, 498 F. 2d 771, 777 (D.C. Cir. 1974):

> The whole theory of licensing and regulation by government agencies is based on the belief that competition cannot be trusted to do the job of regulation in that particular industry which competition does in other sections of the economy.

Thus, the choice to open the telecommunications field to competitive entry by new providers would be outside the principles of the "common carrier concept" and beyond FCC authority.[230]

The source of this concept is found in a panoramic view of the development of the telecommunications industry structure prior to 1934.[231] Quickly told, the story of this development was this: from the pattern in the early decades of this century of increasing industry consolidation and state regulation and decreasing competition,[232] AT&T had forged a centrally planned and operated partnership with the independent companies which provided nationwide telephone service. Throughout this period, Congress was aware of--and had even encouraged[233]--this monopolistic course. In 1934, via the Splawn investigations, Congress assessed this development and, by electing to retain the monopoly structure and subject it to comprehensive regulation, embraced the no-competition principle of the common carrier

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[230] Similarly, carriers would be immunized from competitive scrutiny under the antitrust laws. See United States v. AT&T, Memorandum and Order (D.D.C. November 24, 1976) (Communications Act regulation does not grant antitrust immunity).

[231] It has been suggested that taking this panoramic view moves the discussion to a "deeper and more jurisprudential" level. The Great Telephone Debate, supra note 153, at 65. There is a sense in which the effort to bring into focus the context in which Congress acted has something of a more "jurisprudential" character than the rather close attention to the language of the statute and to supporting legislative documents. But it is important to remember two things. First, care must be taken not to confuse deep jurisprudence with stratospheric musings. And second, while there is an important need for recourse to the temper of the times in which legislation was enacted, the more reliable mode of ascertaining legislative intent remains the examination of the contemporary official records and materials. Calling an approach "more jurisprudential" does not automatically make it the preferred technique of legal analysis.

[232] See text at note 16 supra.

[233] See text at notes 61-64 supra (discussing Willis-Graham Act merger authorization).

concept. Thus, the trajectory of telecommunications regulation leading up to and through the 1934 deliberations must have carried irresitibly toward the monopoly franchise model:

> If one looks at the statute in its full context of practice and habit over a period of 35 years as an integral part of the process of making decisions of communications policy... it is obvious that Congress could have had no other goal in mind, because a unified telephone network had existed for a long time before the Act; it existed at the time the Act was passed; and its legitimacy was not challenged until 1968. The unified network was the universal expectation reflected in the Act.[234]

There is strong appeal to this "totality of the circumstances" type of approach, not the least part of which comes from the intuitive sense that had the Congress intended in 1934 to alter this monopolistic course, it would have done so. But there are flaws in the argument that raise doubts about the intensity with which it supports the principles of the franchised monopoly model.

Most importantly, the argument is overstated. In suggesting that pervasive regulation necessarily carries with it the intent to freeze out competitive entry into monopolistic market structures, the argument goes a step further than the fact of regulation alone will propel it. The primary meaning of the legislative choice to engage in comprehensive regulation is that the final locus of authority over decisions affecting the price, availability, and delivery of the regulated services should reside in a public body, not in private hands. Nothing in the fact of extensive regulation automatically leads past this concern for public decision making to the conclusion that a

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[234] The Great Telephone Debate, supra note 153, at 65.

specific industry structure is mandated. Pervasive regulation is no more than just that: the commitment of the development of the regulated field to the comprehensive oversight of the public agency. It need not mean that the only proper subjects for regulation are monopoly providers.

This is not to say that the "common carrier concept" has no substantive content with regard to the roles of monopoly and competition in the regulatory process. The undertaking of pervasive regulation of an industry in which monopolies are already in place and in which the elements of natural monopoly are strong does indicate that the practice of relying on competitive forces to guide industry development has been judged insufficient alone to promote the public interest. The existence of monopoly structures is therefore to be expected. But the most that can be deduced reliably from the adoption of a sweeping regulatory scheme is that the usual presumption against monopolistic economic structures has been foregone by the legislature. The deduction cannot be stretched to the point that competition in the regulated field is conclusively outlawed. Even were it the case that pervasive regulation fully reverses the usual presumptions, making monopoly favored and disfavoring competition--and it is not clear that the initiation of pervasive regulation requires even this severe an alteration of the balance--the choice to follow a competitive course would still be open to the public regulatory authority, provided it concluded that those presumptions were overcome. Once even this limited form of agency discretion to create competitive markets

or sub-markets is conceded, the claim that the common carrier concept precludes competitive entry falters.[235]

Furthermore, reading the Communications Act to incorporate the expansive substantive view of the "common carrier concept" would require a questionable implication of statutory immunity from competition initiated under regulatory supervision. In the record there is nothing more than ambiguous support for this reading. Although the 1910, 1931, 1934 deliberations conclude frequent recognitions of the monopolistic character of telephone service then,[236] the substantive contours of that statement were seldom elaborated upon. The Willis-Graham policy of favoring local geographic monopolies in the provision of basic telephone services and facilities,[237] while displaying at least a narrow substantive tilt toward monopoly, does not itself reach so far or in as many directions into the industry structure as the franchised monopoly model would suggest. And while the 1934 Congress made no significant changes in industry structure,

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[235]This understanding of the consequences of extensive regulation is illustrated by the leading Supreme Court case on telecommunications competition, FCC v. RCA Communications, Inc., 346 U.S. 86 (1953). In a passage from which advocates of the franchised monopoly model frequently take comfort, see, e.g., Petition for Writ of Certiovari supra note 165, at 83; AT&T Memorandum, supra note 165, at E1357, the Court noted that

> The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifi favors competition in communications.

346 U.S. at 93. This language falls well short of disapproving of the us of competition as a tool for regulating telecommunications. It explicitly goes no further than to dismantle the presumption that monopoly structu are unlawful; it does not cast competition into disfavor, much less fore close its use entirely.

[236]See text at notes 28-29, 67-68, and 132 supra.

[237]See text at notes 70-79 supra.

neither did it embrace the existence structure with enthusiasm.[238] As is clear from the manner in which it has been advanced,[239] the expansive "true faith" form of the common carrier concept can be discovered only by implication from the overall course of telecommunications regulation.

In light of the overall federal policy favoring competition, such implications should rarely be given the force of law. As the Supreme Court has held where comprehensive regulation has been argued as a defense to antitrust complaints, implied repeal of federal procompetition policies by regulatory statute should be "strongly disfavored" and should "only [be] found in cases of plain repugnancy between the [competitive] provisions and the regulatory provisions."[240] The policies underlying this rule in the antitrust area are even more visible where the issue is implied restriction of agency discretion to use competition as a regulatory tool, rather than repeal of judicial jurisdiction over activity which is subject to simultaneous administrative regulation.[241] While there is great potential for institutional conflict and inconsistent policy direction when both regulators and courts exercise simultaneous authority over private activity, no such threat is posed by permitting the agency to consider the degree of competition in the industry in determining what regulatory actions to take. Any inconsistencies between the dictates of competitive and monopolistic

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[238] See text at notes 212-213 supra.

[239] See, e.g., The Great Telephone Debate, text at note 153 supra; Petition for Writ of Certiorari, supra note 165.

[240] Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1974).

[241] The former forms the centerpiece of the challenge to the FCC pro-competition decisions. The latter is the centerpiece of the defense in the current antitrust action brought by the Justice Department against AT&T. See note 102 supra.

policies may be mediated by the agency through application of its broad public interest standard; a finding that certain activities would have anti-competitive effects may nevertheless be consistent with the regulators' view of the public interest and therefore need not control the agency's actions.[242] Thus, although a colorable argument can be made that regulated entities should be immune from antitrust suits based on actions in which regulatory agencies have approved or acquiesced, no similar immunity from agency-supervised competition can be implied from the fact of regulation. Indeed, if the regulated entity obtains immunity from judicial regulation of market structure under the antitrust laws, agency authority to regulate market structure becomes doubly important in a system which is leery of unregulated telecommunications markets and its discretion to employ competition in that task should remain unfettered unless the legislature clearly indicates otherwise.

The "common carrier concept" of the "true faith" would curtail that discretion, not on the basis of the express intent of the Act, but by implication from its overall scheme. Using the "plain repugnancy" test of the antitrust cases,[243] the implication is without merit. Even if the presumptions against monopoly are withdrawn by pervasive regulation, there can be nothing plainly repugnant to the Communications Act's task of public interest regulation for the FCC to regulate with the aim of introducing increased competition to the telecommunications industry. Without stronger roots for doing so in the express terms of the Act,[244] authorization of competition cannot be ousted from the Commission's regulatory repertoire by the simple regulation-means-monopoly formula of the "true faith" common carrier concept.

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[242] Indeed, the Supreme Court has ruled that such a finding alone cannot control the administrative decision. See the discussion of FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), at note 235 supra.

[243] See text at note 240 supra.

[244] ... it should be noted that legislation to provide such express roots (discussing

There is a final problem with this concept. In a large measure, its strong intuitive appeal rests on the view that in the "social milieu which precipitated congressional action"[245] in 1934, the milieu which permitted members of Congress to remark casually and without elaboration that "telephoning is a natural monopoly",[246] it was self-evident that most forms of competition were inappropriate. As an empirical matter, there is enough evidence of contrariety in the record to raise doubts about whether this self-evident notion extended very far at all.[247] But to focus on the empirical validity of this view largely misses the point of asking what the Communications Act means in relation to monopoly and competition.

In today's communications environment what was self-evident in 1934 is no longer self-evident at all. The scope of information resources to which the Communications Act must apply has been transformed by the modern explosion of technologies and the merger of modes of communications exemplified by compunications, cable broadcasting, and microwave systems. How national goals of making available "adequate facilities at reasonable charges", "national defense", and "promoting safety of life and property" will be advanced in this new environment--assuming that those remain the central requirements of present and future communications services--cannot be answered with any meaning by reference to whatever underlying sense of things existed in 1934, regardless of whether that sense tilted toward monopoly or toward competition. The risks of ossification are already large enough in a system where communications regulation is

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[245] Brief of NARUC, supra note 10 at 30.

[246] See note 132 supra.

[247] See notes 132-140 supra.

controlled by legal concepts designed for the problems of nineteenth century barge and rail traffic.[248] If it is the case that an abstract "common carrier concept" made the self-evident understandings of the early era of communications technology dispositive with regard to the telecommunications industry structure, the regulatory process established by the Communications Act would be exposed to even greater incapacity to deal with dramatic new developments within its jurisdiction.

There is no good reason to think the Communications Act was intended to reach this result. The much more reasonable view of the Act is that its aim was to create a durable mechanism for shaping the development of the evolving telecommunications industry to ends determined in the final analysis by public rather than private interests. Tying that mechanism to the structure of the industry that existed when it was created--by virtue of a "common carrier concept" or otherwise--would run counter to the fundamental purposes of public regulation. If there is any "more jurisprudential" way to think about the Communications Act,[249] that should be it.

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[248] See text at note 42 supra; Berman, supra note 131, at 165. See also Washington Util. & Transp. Co. v. FCC, 513 F. 2d 1142, 1157 (9th Cir. 1975) ("Regulatory practices and policies that will serve the 'public interest' today may be quite different from those that were adequate to that purpose in 1910, 1927, or 1934, or that may further the public interest in the future.")

[249] See note 231 supra.

V. CONCLUSION: COMMUNICATIONS LAW AND POLICY

To the uninitiated, the debate over the original intent of the Communications Act may seem arcane and antiquated.[250] But it is a debate that matters. It matters to courts charged with the unenviable task of divining the policy in the existing communications laws to deal with problems that go to the heart of industry structure. It matters to legislators who are being asked to "reaffirm" the basic policy of the Act by sides which offer diametrically opposite views of what that basic policy was. And it matters to the regulatory agencies: to the FCC, whose job it is to apply statutory communications policy in the first instance, and to state regulators, whose range of authority in the imprecise balance between state and federal control of communications developments is at stake in important ways. Until the Communications Act is revamped or replaced, or until the Supreme Court chooses to speak, the search for the original intent will remain the central preoccupation in the challenge to the FCC competition decisions.

There are two conclusions to draw from the search. First, to the extent that a judgment is permissible, the more convincing view of the Act is that it contains no per se prohibitions on FCC discretion to follow a policy of introducing competition in telecommunications. From a purely legal point of view, there are no persuasive reasons to find that the broad FCC discretion found in the traditional view of the Act distorts the "true faith" heretically.

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[250] Or worse. As one exponent of the "true faith" puts it, "[a]rguments about the 'original intent' are usually pedantic and rather unconvincing at best." The Great Telephone Debate, supra note 153, at 65. See also Baker letter, supra note 165, at 9. ("The legislative history of broad, general statutes enacted nearly a half a century before is unlikely to be dispositive of many present day questions.").

The second conclusion is that there can be no great reservoir of confidence in the first. The search for the Act's original intent, like the attempt to describe the sound of one hand clapping, is without much promise of discovery. Neither the statute nor its legislative history provide much useful guidance. In fact, the single most obvious feature of the debate is that the arguments of law reflect close to the surface the underlying beliefs of policy for which they are made; they barely escape dissolving into substantive judgments about which course the law is to take in the distribution of telecommuncations opportunities. The relevant law is more to be fashioned than found.

At this point, the search for the law of telecommunications underlying the FCC's procompetitive line of decisions comes full circle: the elucidation of what the terms of the Communications Act mean for this area of policy formulation ultimately comes to rest on questions which have more to do with policy and political judgments than on legal sources and methods. Some of the questions--like who is to make the decisions on market structure--involve structural issues about the regulatory process. Some--like what is the correct policy to follow--involve substantive issues that draw on extra-legal factors for resolution. But all of them reflect a balancing of options and consequences that is fundamentally political and for which the Communications Act as presently written can only provide a backdrop.[251]

Both the FCC and the players it regulates--as well as the courts which review the outcome--deserve better from Congress. In the 100 years since Alexander Graham Bell launched the telecommunications revolution, Congress

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[251] Cf. Oettinger & Berman, supra note 6, at 265 ("But there is no truth to disguise. There are only the complex questions of who gets what, when, how... and by whose say so").

has never once given even superficial attention to the unique set of problems and potentials presented by the telephone and its descendents. Whether or not it takes the brute force of the established carriers or the development of a crisis to spur a thorough legislative consideration of this aspect of information resources policy, the first order of responsibility for policy-oriented judgments of the type underlying the Carterfone and Specialized Common Carrier decisions remains with Congress. If the Communications Act and its predecessors teach any enduring lesson, it is that this responsibility has yet to be discharged.