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The FCC's Structural Barrier to Appropriate Television Rulemaking

Most Americans probably have not seen a TV with bunny ears for quite some time. Many may wonder where they went and why. Well, they died at the hands of the United States government. Since various different communication technologies have continuously been invented, the American government has taken it upon itself to regulate how content is produced, from and to where it is distributed, and who consumes it by means of the Federal Communications Commission. Americans don't have antennas on their TVs today because broadcasting over-the-air as a means of transmitting television programming has been reduced to meager remnants of bygone prosperity. The downfall of broadcast television is due to the Federal Communications Commission's mortal mistake of pushing the boundaries in which it was made. Without the guidance of law, the FCC mishandled the sound business that broadcasters had. The Commission attempted to facilitate the success of both broadcast and cable television in tandem, but its regulational doctrine impeded its purpose to promote healthy competition and resulted in the eradication of the broadcasting industry. The provider-based, rather than function-based, structure of the Communications Act created a rigid framework that became outdated almost as soon as it was passed, and the FCC's breach of its delegated privileges ultimately doomed broadcasting. The guardrails that were constructed to perpetuate broadcast ultimately undermined it, allowing the emerging cable business to annex broadcast viewership and usher in the second 'golden age' of entertainment.

The Communications Act of 1934 established the Federal Communications Commission to execute provisions included in the bill. It was a landmark piece of legislation for communications. Previous statutes appointed the Secretary of Labor with a miscellaneous duty to issue broadcast licenses to all who asked for one–there was not a policy doctrine related to the issuance of licenses and the Secretary was compelled to hand out licenses to whoever asked without running standardized tests or screening equipment. The passage of the Communications Act incorporated all communications industries under the authority of the federal government, sorted them into two types, and declared the spectrum public property to be maintained by the FCC. All members of the bureau would be presidentially appointed and were made responsible for making an annual report to Congress (United States, Congress), in which the members of the Commission documented the state of the FCC, future plans, and thoughts on recent activity in and outside of the agency. The Act sought to tie services like telephone, telegraph, and radio broadcasting together in a cohesive manner that would be conducive to their shared success and usage of the spectrum.

While being incredibly constructive to those industries, the Communications Act gave an inflexible arrangement to how the FCC came to interact with them. Amongst six titles are two that organize common carriers and radio providers (United States, Congress). This system is dubbed a “silo-based” structure, which means that once a commodity is sorted into a title, even if a very similar service is also offered, there will be entirely different standards for the two. John Blevins of the Florida State Law Review elaborates on the acts format, stating “under this framework, the appropriate regulation depends not on the function of the service, but on the label the FCC chooses to apply to the provider or to the network infrastructure over which service is provided. In fact, the FCC often regulates identical services differently if the providers or infrastructure have different ‘labels’ (e.g., wireline telephone voice service falls within Title II, while wireless voice service over radio spectrum falls within Title III)” (9). Broadcast television fell under Title III because it was wireless, which meant that all programming was subject to the ‘public-interest’ standard, things that are televised must be “consistent with the public interest, convenience, and necessity” (United States, Congress Section 301). This translates to the airing of programming that is educational, informational, or the like. Broadcast networks did produce programming with entertainment value, but the options for what could be aired were stringent: for example, restrictions on profanity and obscenity meant that R-rated movies can never be televised over-the-air. Services that utilized wires would be called ‘common carriers’ and were subject to different standards under Title II.

The legal grounds under which cablecasting emerged can be described as a gray area. Broadcast television firmly planted itself as a communications industry because of the fact that it seamlessly integrated into the realm of the FCC’s jurisdiction. In a series of hearings in 1940 involving the development of broadcast television, the Commission found “Upon consideration of the record of the January hearing, the Commission adopted rules governing television broadcast stations which provided for two classes of television stations – class I and class II stations indicating experimental research stations and experimental program stations, respectively” (*FCC Reports* 90). The Commission was aware of their natural jurisdiction over broadcasted television transmissions because of the understanding that anything which utilizes the airwaves is dictated by the Communications Act to be subject to FCC oversight. The Commission should have operated only to standardize communications as exemplified in these hearings. The original reason for the passage of the Communications Act was for the FCC to act as a more refined version of previous bills that awkwardly attempted to create a fixed legislative order for technologies that were ever changing. The tactical use of an agency benefitted Congress in that endeavor greatly due to the Commission's ability to execute provisions in creative ways that will most successfully advance the acts agenda.

The FCC began its relationship with CATV by holding that the legislation under which it was made specifically intended that the agency only have jurisdiction over the airwaves and wires separately, meaning that radio and broadcast television were subject to entirely different standards than wired services. CATV utilized both antennas and cables, meaning that it would be sorted into both Title II and Title III. This immediately created questions on how the service would be regulated on a legal basis. At first, the FCC questioned whether to apply Title II at all, “The Commission is presently studying the question of whether persons engaged in furnishing this service are engaged as common carriers … and, therefore, subject to the common carrier provisions of the Communications Act” (*Nineteenth Annual Report* 42). When they appeared, cable systems were confusing to the FCC, they did not use the spectrum that the FCC was responsible for, but they were still related to broadcast television by retransmitting what had already been broadcasted along with the mere fact that it could be classified as a communications project. The Commission dissented, in its *Twentieth Annual Report*, it was stated that “Commission authorization is not required for the installation and operation of a community antenna TV system or for any other closed-circuit TV system which is operated solely over wires” (92). CATV was not required to be licensed by the Commission because they were agreed to be excluded from the regulatory jurisdiction of the FCC set forth by the Communications Act. This lack of licensure was imperative for the early development of CATV systems; networks were able to prioritize attracting customers and refining operations. Early cable systems were small, usually serving under 5,000 homes and the use of cable television was not to substitute or replace broadcast television, but to supplement it. Small towns outside of the major city in a given area would still want to receive news from those stations. Some towns did not have a local broadcast station or had to rely on one from another community.

Before placing restrictions on cable television systems, the FCC failed to deeply investigate the presumed effects of cable television on different kinds of markets. In a study of the probable impact of cable on over-the-air broadcasting by Rolla Edward Park of the RAND corporation, it was determined that "Generally, stations in smaller markets are harder hit than those in larger markets. Those in large (top 50) markets lose, on the average, 15 percent of their without-cable revenue; those in small (fourth 50) markets lose 56 percent, on the average" (71). The FCC's overarching method of regulating cable was to prevent its entrance into the top 100 markets and allowing for it to operate unrestricted in the smaller markets. This completely undid local broadcasting as CATV was enormously competitive in these areas by its definition. Once it began to pursue regulatory oversight, the FCC chose to employ tactics to bar cable systems from the top 100 markets (big cities) and allow for unrestricted growth in small markets (rural towns).

The problem with this was that the effect of cable TV on a market was to fragment broadcast viewership and potentially draw away revenues (Park 69). This was a dire problem for small broadcast stations where viewership is imperative to their operations. Those in the top markets already had pristine reception–cable TV was unnecessary and therefore would not have attracted those consumers who attained the same network channels without a fee. Rural communities propelled the growth of cable networks in the future, consumers were eager to pay the price for flawless television programming.

Following these claims, the Commission officially put community antenna systems under its umbrella. In a document from 1966, the FCC plainly asserts that they now possess "jurisdiction over all community antenna television (CATV) systems" (*FCC Reports* 725). Licenses were the tool that the FCC employed to rigorously enforce rules to the detriment of cable systems. Pre-existing statutes dictated that operating without a license issued by the Commission is unlawful and risks the termination of a station and extensive fines. To attain a license, stations must pass tests and fulfill standards for equipment, and to keep a license, stations must apply themselves to all rules properly. The idea behind this is clearly outlined in the FCC report–the FCC described cable as something that needed to be regulated, implying that cable was a threat to broadcast. The plan of action described was to move CATV systems away from the larger markets so that they would not infiltrate and destroy broadcast viewership there.

The statement and subsequent application of control was a broad overreach of the responsibilities outlined in the Communications Act. The titles specifically separate "communication by wire or radio" (United States, Congress, Section 1089), and not communications from function-to-function like previously described. If the Communications Act had been constructed around a function-to-function structure, then broadcast and cable television would have rules tailored to the needs of their industries. The simple fact was that there was no provision in the Communications Act that the FCC could apply to cable television systems. The Commission acknowledged arguments that "the commission itself has repeatedly denied jurisdiction over CATV systems… and that principles of statutory construction foreclose the commission from now claiming jurisdiction" (*FCC Reports* 729), but attempted to justify the overstep by saying "there is no provision in the Communications Act which specifically excludes CATV systems from the commission's jurisdiction," and "We are not persuaded that these sections demonstrate a statutory denial of jurisdiction over CATV systems" (*FCC Reports* 731). Essentially, the FCC stepped into a legal gray area to justify itself. In a 1966 Supreme Court case entitled *United States v Southwestern Cable Co.,* the Supreme Court entertained the idea of Ancillary jurisdiction. One of the FCC's arguments was that since cable TV is directly related to broadcast TV, the Commission is granted ancillary authority over cable systems. The court reasoned the FCC should be in charge of regulating nascent communications technologies as they evolved (United States, Supreme Court). The impact of the ruling essentially said that the agency of the Federal Communications Commission surpasses the confines of the Communications Act. *Southwestern* affirmed the FCC from a judicial end, but this jurisdiction had yet to have legislational backing, which Congress refused to draft until the 1980's. Without a document outlining specific duties for the Commission–which already had been done in the original Communications Act–the FCC had nothing dictating to it what is within their right, and most importantly, what is within the rights of others. The Supreme Court ruling certified whether or not regulation is constitutionally possible, which was uncontested, of course the FCC has the possibility to regulate cable systems. The argument that the FCC dodged was that without a legislative basis in the Communications Act, regulation could not be justified and grounded in the same principle of 'public interest' that it applied to all else that was actually written within the act. Further, the Commission would not even have to apply the same standards, by stepping out of the Communications Act–its limiting document–it became unlimited, and cable suffered for this.

The FCC interpreted its own responsibility significantly more from this. The case led to an expansion of rules intended to suppress cable; the concurrence of the Supreme Court and support of broadcasters motivated the FCC in its onslaught of administration to limit cable–the FCC made sure that CATV systems would be inoperable in big cities. The sheer amount of oversight is notable in recounting the regulatory lifecycle of cable, and the way the Commission governed cable actually was the undoing of broadcast in the long term. Cable systems were moderated only in larger markets and would be required to fulfill certain standards to enter the markets. These standards were construed so that CATV would not be able to establish and sustain itself in big cities. The Commission also furthered the redundancy of a cable subscription in big cities with a ban on carrying unique signals into a bigger market, meaning the special channels that rural communities enjoyed were not allowed to be brought into the city. CATV was developing what it could offer and conquering rural markets during this transitory period of oppressive rule.

The most impactful requirement set upon cable systems was the 'origination requirement.' This resolution spawned in the 70's as a part of the influx of rules meant to vanquish cable emergence. In the same report where the Commission seized regulatory jurisdiction, a few new edicts were set in motion. Requirements that cable systems with over 3,500 subscribers originate programming were crushing, especially paired with limits on advertising. To originate programming is to produce content that is exclusive to one cable system. Not only were the standards near-impossible, they changed many times. Concerning advertising on original programming, "while [the Commission] stated that it saw no need to place limits on originated programs supported by direct subscriber payments, in the following year it did just that" (Besen 93). The ideology became that of holding cable systems up to the same standards as broadcasting. Network TV stations even requested "that origination be banned entirely because it would divert audience from 'free' television" (Besen 92). In truth, this origination requirement did inevitably make cable networks seem much more appealing due to the unsurprising lack of thorough content rules.

To rewrite the wrongs of the FCC, the Cable Communications Policy Act was written and enacted in 1984. It was the summit of long debate on behalf of those enforcing rules and those who were being regulated to amend the archaic Communications Act which had suppressed the cable market unjustly for so long. Michael Meyerson of the University of Baltimore's School of Law said "it is, above all else, a compromise" (Meyerson, 545). The act officially nestled CATV neatly under a new Title VI in the Communications Act and codified some of the rules that the FCC established after the *Southwestern* ruling. In what Meyerson calls a balancing act, "the drafters of the Act wanted to 'minimize unnecessary regulation' that might impose an 'undue economic burden' on cable systems" (Meyerson, 546). Within the "Purposes" section of the bill, Congress acknowledged that the FCC's methods were suffocating cable and a better way must be established within the original Communications Act. Through a concrete legislative foundation, the FCC was handed a revised playbook that enforced justice.

With the acquisition of a distinct place within the realm of governance, cable networks truly set sail. The revised Communications Act commanded the FCC to renew its attitude towards cable TV–when these networks were given a chance to expand by the CCPA, they did so at an extraordinary pace. The FCC was to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public" (United States, Congress Section 601(4)). The possibilities of cable were attractive to many niches and cable could cater to all of them with 1st Amendment protections that broadcast did not have. This protection allowed for cable's unique ability to transmit content that would not have passed the strict content standards for broadcasting over-the-air and gave way to the blossoming of beloved cable networks like HBO and MTV. The legal standards for regulating cable systems finally became conducive to the industry itself and other industries bound to emerge, like the internet.

Since its inception, the FCC has been tasked with overseeing the sphere of consumer television in the public interest, which it has faltered in doing over its history. Initially, the FCC wanted to support the emergent broadcast business and was within their right to do so as outlined in the Communications Act of 1934, but fell out of line once cable emerged. Before attaining a legislative directive and guide for regulating cable television, the FCC assumed responsibility and mishandled both industries in the process. As its market was being suppressed, cable was developing its capabilities and offerings to demanding consumers; once cable systems were allowed a space to breathe with the passage of the CCPA, extraordinary growth ensued. The abounding colorfulness of content supplied the 80's and beyond with a fresh way to consume content, composting broadcasting quickly. If the growth of community antenna systems were appropriately regulated in conjunction with that of broadcasting, a natural balance between the two would flourish. If the Federal Communications Commission did not assume supremacy over consumer markets above its enumerated powers by congress, Americans would have more bunny ears on their TVs.

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