

Creation of the Media: A Review and Introspective

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Paul Starr's *Creation of the Media* provides a rich history of the social, political and legal infrastructure that shaped the American media from its earliest origin. Starr examines in incredible detail the political decisions made from approximately 1600 to 1941 regarding public discourse in most of its forms and analyzes how those contributed to the development of the media.¹ Starr analyzes the context of American decision-making through an elaborate comparative analysis of the British, European and Canadian experience in an effort to fully describe the options available to the American power structure at critical points in history. At times the sheer volume of the comparative detail threatens to overwhelm the casual reader, but anyone seeking a comprehensive understanding will embrace Starr's approach with gusto.² Starr's narrative includes numerous footnotes to extensive scholarly works and other useful source material. As a result, *Creation of the Media* represents an exceptional resource for the interested lay reader as well as the dedicated academic.

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1. See PAUL STARR, CREATION OF THE MEDIA (2004). Starr's coverage of the media includes newspapers, the telegraph, the telephone, radio, movies and television.

2. For example, Starr takes the reader on occasional tangents including the Latin origin of words. See STARR, *supra* note 1, at 97 ("The term 'census' comes from Latin, and in Rome it referred to a 'register of adult male citizens and their property for purposes of taxation, the distribution of military obligations and the determination of political status.'") and 135 (discussing the evolution of the term and concept of "editor"). Although interesting, such discussion could be reserved for the footnotes to lessen the distraction to the reader.

I. AN ANALYSIS OF CONSTITUTIVE MOMENTS

Starr's examination of American media history focuses on what he terms "constitutive moments" and choices that shaped the growth of the media. Starr posits "[t]echnology and economics cannot alone explain the system of communications we have inherited or the one we are creating."³ Instead Starr points to the influence exerted by politics, finance and power on the evolution of the media. "At times of decision—*constitutive moments*, if you will—ideas and culture come into play, as do constellations of power, preexisting institutional legacies, and models from other countries."⁴ Starr identifies many such constitutive moments and examines the *intent* of the action as well as the international context of the moment.

Starr breaks constitutive choices about communications into three categories:

First, the general legal and normative rules concerning such issues as free expression, access to information, privacy, and intellectual property; second, the specific design of communications media, structure of networks, and organization of industries; and third, institutions related to the creation of the intangible and human capital—that is, education, research, and innovation.⁵

Of particular interest to Starr is how these categories relate to the development and the evolution of the public sphere.⁶ Starr frequently returns to these themes and the importance of public discussion, public knowledge, and public opinion throughout the book. For example, in his analysis of the role of the Post Office in the development of the media, Starr points out that tying public representatives and their constituents together through improved communications created a larger "public" sphere.⁷ The development of the Post Office and the growing national discourse disseminated over its network, facilitated by cheap rates for newspapers and magazines, became an essential instrument for implementing the republican ideas upon which the country was founded.⁸ Ironically, and typically, the creators of the national Post Office failed to appreciate at the time the implications of that particular constitutive moment.

The Creation of the Media goes far beyond a simple recitation of

3. STARR, *supra* note 1, at 1.

4. STARR, *supra* note 1, at 1–2.

5. *Id.* at 5 (emphasis in original).

6. *Id.*

7. *Id.* at 94.

8. *Id.*

history, even though the history alone justifies significant treatment. By choosing to examine the constitutive moments in history, Starr provides a rich discussion encompassing both the development of the media and the evolution of the larger American society, including education, politics and civil liberties. Similar to his approach in his Pulitzer Prize winning book *The Social Transformation of American Medicine*, Starr fits the institution of media into a comparative context.⁹ The result is a multi-dimensional discussion that provokes the reader into contemplation of how more modern constitutive moments may be judged by history.

Starr's account reveals the cyclical nature of history. His discussion concludes, somewhat abruptly, with America's entry into World War II in December 1941. Starr fails to explain why he chose to conclude the book at this point in time. "Our story stops at a point—the entry of the United States into World War II in December 1941—when some changes in the media paused and a new political framework of communications emerged."¹⁰ Perhaps it is a tribute to the excellence of the book that the reader cannot help but be disappointed that Starr's examination of media history ends more than 60 years ago.

II. AN APPLICATION OF HISTORY

The Nation's current involvement in foreign war and what some term an environment of change provokes the question of what impacts current developments and decisions regarding technology, law and policy may shape the continued development of the media.¹¹ Starr does not attempt to draw any lessons or advise modern society how to apply the lessons of history provided in *The Creation of the Media*, but an educated reader cannot help but speculate.

The paradigmatic shifts in competition policy in the telephone industry Starr describes in the latter half of the book provides a classic example of a current constitutive moment begging for an application of history. Starr describes the early telephone market as a rich, competitive market for both patents and customers.¹² In the years following the

9. PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1982).

10. STARR, *supra* note 1, at 402.

11. The ongoing war on terrorism and broad deployment of American troops complicates the constitutive decisions facing Congress. In his discussion of World War I, Starr notes that war often functions as a "generative crisis," which brings with it additional political, social and legal pressures to constitutive decisions. STARR, *supra* note 1, at 274–75. During World War I, Starr points out that "[p]rogressive groups overwhelmingly accepted the premise that the war required a temporary suspension of rights in the greater interest of protecting the nation and making the world, as Wilson said, 'safe for democracy.'" *Id.* at 281.

12. *Id.* at 195–98.

expiration of the Bell patents on telephone technology, “the market broke open with a surge of independent commercial and nonprofit cooperative telephone enterprises.”¹³ As the Bell System grew in political power and technological superiority, it purchased, coerced and manipulated the competitive Independent Telephone Companies to come within its monopoly umbrella. Bell created its long distance subsidiary, AT&T, in 1884 with its first line carrying traffic from New York to Boston.¹⁴ The Bell Companies transferred their assets to the long distance affiliate, AT&T, for financial reasons in 1899.¹⁵ Over the next century, the combined company created one of the most pervasive monopolies in American history.¹⁶

Starr’s close examination of the telephone concludes before AT&T’s monopoly came to a staggering halt. In an effort to settle a landmark antitrust suit in 1984, AT&T and the Justice Department entered into a Consent Decree, commonly known as a Modification of the Final Judgment (“MFJ”).¹⁷ The MFJ stipulated that the 22 Bell Operating Companies providing local telephone service be organized into seven Regional BOCs independent from the AT&T parent company offering long distance service.¹⁸ The breakup of the AT&T monopoly signified a shift in public policy as much as a settlement of the dispute: the American public lost patience with the lack of competition in the long distance and local telephone market.¹⁹ The resulting state and federal antitrust litigation created a momentum for change that AT&T could not ignore.

Twelve years passed before the next constitutive moment in the

13. *Id.* at 193.

14. *Id.* at 197.

15. *Id.* at 198.

16. Starr describes the monopoly of the Bell System during this period as established “under new forms of regulatory and antitrust policy that encouraged Bell to maintain its position through technological leadership rather than simply reverting to its earlier strategy of exploiting the richest markets.” STARR, *supra* note 1, at 193.

17. Starr’s history stops well before the MFJ. Several excellent articles discuss the MFJ in illuminative detail. *See generally* Warren G. Lavey & Dennis W. Carlton, *Economic Goals and Remedies of the AT&T Modified Final Judgment*, 71 GEO. L.J. 1497 (1983); Steven Semeraro, *The Antitrust-Telecom Connection*, 40 SAN DIEGO L. REV. 555, 561–62 (2003); *see also* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 455–56 (2003) (discussing the placement of the MFJ in the broader landscape of antitrust law).

18. Shannon M. Heim, *Signaling System Seven: A Case Study of Local Telephone Competition*, 13 COMMLAW CONSPECTUS 51, 61–62 (2004). Consolidation has whittled the original seven RBOCs down to four, but further consolidation is expected.

19. Semeraro *supra* note 17, at 561. “That decree sought to stimulate competition in long distance telephone service by stripping AT&T of its local service monopolies and forcing it to compete on a more level playing field with MCI and other competitive entrants into the long distance telephone service market.” *Id.*

evolution of the telephone. In 1996, Congress took aggressive action to further erode the Bell monopoly in local telephone service by mandating avenues of competitive entry previously unavailable to new companies.²⁰ The Telecommunications Act of 1996 ("1996 Act") enticed the Bell Operating Companies to facilitate competitive entry by permitting them to petition the FCC for authority to enter the lucrative long distance market once certain competitive benchmarks were met.²¹

Competition in the local telephone market flourished and floundered in turn over the decade following the 1996 Act. The introduction of new communications technology brought significant uncertainty and change to the market. The ability to make a telephone call over the Internet and the increased penetration of wireless technology suddenly allowed a customer to completely bypass the local telephone company.²² The resulting scramble led, perhaps predictably, to further consolidation in the industry. Ironically, one of the strongest remaining Bell Companies, SBC, purchased its former parent, AT&T.²³ The acquisition prompted rampant speculation that the old Ma Bell was being reassembled.²⁴ Before the dust settled over that acquisition, the new AT&T, in turn proposed to buy another of the Bell Companies, BellSouth.²⁵

Congress, the FCC and the industry stand at a cross roads, a constitutive moment if ever there was one.²⁶ The FCC must approve the

20. The avenues of competitive entry included resale of the incumbent's service, access to the unbundled network elements of the incumbent's network and service over the entrant's own facilities. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, paras. 1-5 (1996).

21. See 47 U.S.C. § 271.

22. See Christopher Stern, *So Long to Long-Distance?*, WASH. POST, Aug. 5, 2004, at E1.

23. See *FCC Approves SBC/AT&T and Verizon/MCI Mergers*, FCC News Release (Oct. 31, 2005). The FCC concluded that the merger "will create [a] stable, reliable U.S.-owned" company and will increase the incentive "to engage in basic research and development." *Id.*

24. See *Hanging Up on the new Ma Bell*, CNNMONEY.COM (Dec. 1, 2005) ("Given its prospects, the new Ma Bell looks an awful lot like the old Ma Bell. And that's not a good thing."); *Does Ma Bell want a DISH?*, CNNMONEY.COM (Dec. 29, 2005) (speculating that AT&T may bid on EchoStar to facilitate entry into the video programming market).

25. See *AT&T, BellSouth to Merge*, AT&T Press Release <http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22140&phase=check> (March 5, 2006) ("The new company will be better able to speed the convergence of new and improved services for consumers and businesses, and embrace the industry's shift to Internet Protocol network-based technologies.").

26. Commissioner Kathleen Q. Abernathy, *Overview of the Road to Convergence: New Realities Collide with Old Rules*, 12 COMM.LAW CONSPECTUS 133, 133 (2004) ("In a world where different platforms are used to provide functionally equivalent services, regulators must harmonize distinct regulatory frameworks. The challenge is formidable, however,

pending application of AT&T to purchase BellSouth, but commentators generally expect that approval to be granted.²⁷ Congress is debating several new pieces of legislation intended to provide guidance on new communications technology ought to be regulated, if at all, and how regulation of current technologies ought to change in face of the new realities of the marketplace.²⁸ Development of technology, consumer application and the direction of the industry depend on the outcome of these decisions.

The current state of upheaval in the industry begs the question of how Starr would analyze the choices to be made and how a historic perspective might guide those decisions. Starr suggests that “[a]t moments of change, a typical question is how, if at all, the state will translate the rules and policies for an old medium into rules and policies for a new one.”²⁹ Both Congress and the FCC appear inclined to take a cautious approach to current developments. For example, draft legislation appears to preserve the status quo regarding telephone regulation, with the possible exception of protecting rural markets more explicitly than done in 1996.³⁰ The minimal regulation of the internet appears to likely to continue, although industry players who own and control the physical infrastructure of the internet seek “network neutrality” legislation that would require companies whose products depend on access to the network, like Google, to contribute to its development and maintenance. Although the FCC may approve AT&T acquisition of BellSouth, other opportunities exist to shape the evolution, some would say revolution, of the telephone, particularly Internet telephony.³¹ Where these decisions may take American society

because the statutory framework that guides the FCC was written before this technological explosion.”).

27. Robert W. Crandall and Clifford Winston, *The AT&T/BellSouth Merger: The Breakdown of 'Breakup'*, Wall Street J. (Mar. 9, 2006) (“[T]he antitrust authorities will find it very difficult to derail this merger because it poses no threat whatsoever to the vitality of competition in the communications sector.”).

28. See, e.g., Broadband Investment and Consumer Choice Act, S. 1504, 109th Cong. (2005). Senator Ensign’s bill seeks “to establish a market driven telecommunications marketplace, to eliminate government managed competition of existing communication service, and to provide parity between functionally equivalent services.” *Id.*

29. STARR, *supra* note 1, at 6.

30. See, e.g., Internet and Universal Service Act of 2006, S.2256, 109th Cong. (2006). Senator Burns’ bill proposes to amend the Communications Act of 1934 to strengthen and streamline the Universal Service funding mechanisms available to provide advances telecommunications and broadband services in high cost areas. *Id.*

31. See *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 F.C.C.R. 7457 (2004). AT&T sought a ruling that its phone-to-phone IP telephony services are exempt from access charges. The FCC found that “the service that AT&T describes is a telecommunications service upon which interstate access charges may be assessed.” See generally *IP-Enabled Services*,

will be judged by history, but certainly asking the right questions at critical moments can only enhance the likelihood that the most advantageous decision is reached. To appreciate what may be at stake, consider Starr's analysis of the decision not to follow the international trend to nationalize the telegraph: "For better or worse, once the twig was bent, the tree started to grow in a particular direction—private interests accumulated, ideological defenses developed, and what was once an open question became a hardened institutional reality."³²

III. CONCLUSION

The primary achievement of Starr's historical analysis of the media lies in the fresh approach it gives decision makers and scholars to the topic. Identifying a constitutive moment in the making may continue to challenge legislators, regulators and industry, but *The Creation of the Media* certainly underscores the importance of the effort.

Starr concludes his introduction: "The question is no longer whether a post-industrial, information society is coming; it has come. But what kind of society it proves to be will ultimately be a political choice. If only because the future will hinge on decisions yet to be made, the political origins of modern communications ought to command our attention."³³ Indeed, Starr's analysis provides us the essential tools with which to begin our analysis.

Notice of Proposed Rulemaking, 19 F.C.C.R. 4863 (Mar. 10, 2004).

32. STARR, *supra* note 1, at 165.

33. *Id.* at 19.

