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ABSTRACT

The late 1980s' resurgent appeal to public interest standards entails a misunderstanding of the real meaning of "public interest" and, whatever the merits of the critique of the deficiencies during the recent regulatory period, the standard still contains within it the seeds of its own compromise, if not destruction. Even among its strongest proponents, confusion about its essential character and ultimate applications in applied communication technology exist. Well before the advent of broadcasting and the particular regulatory measures adopted for it, American public policy had established an accommodation between public and private interests that turned largely around the economic well-being of the industries and the assumption that public service benefits would derive most fully from that relationship. The evidence from the long prior experience of state and federal regulatory policy is that the public interest standard had been developing as a key doctrine in American economic and social policy for nearly a century. It was upon that platform that much of the political and industrial policy for the new broadcast law would be erected. Many of the implicit understandings about the public interest in the previous experience would now migrate into the new order, and in spite of continuing confusions about the matter, then and now, the underlying significance of the public interest standard would likewise be transferred into the new broadcast communications realm. (Thirty references are attached.) (RS)

THE MEANING OF "THE PUBLIC INTEREST" IN COMMUNICATIONS POLICY -- PART I: ITS ORIGINS IN STATE AND FEDERAL REGULATION

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Introduction

The public interest standard in American communications legislation has been under concerted assault during most of the past decade. For over a half-century, as the cornerstone of federal broadcasting and telecommunications policy, the public interest standard had always been subject to some debate. Questions had been regularly raised about its meaning and the extent of the authority it implied for regulation. But at least until about the mid-1970s its central standing had not been seriously challenged.

At that point, however, as deregulatory thinking swept across the federal policymaking landscape and as it came to be applied increasingly to broadcasting and telecommunications, the debate took a more serious turn. The new mood was rooted in traditional libertarian ideology, fired now by widespread dissatisfactions with applied regulatory activity and by the promise of new technological opportunity. Although regulation had always had certain advantages for various of the vested industries, the public interest standard had seemed to guarantee that public service benefits would flow from protected monopoly positions, especially in association with its corollary fiduciary principle, the notion that licensees had an obligation to operate as public trustees. This balance of beliefs had commanded mainstream regulatory policy for decades. But renewed mythologies of the marketplace became strong enough in the general regulatory policies of the Carter and Reagan administrations and the contemporary Congresses and administrative agencies themselves to challenge the previously most inviolate of statutory terms in many sectors. As applied to communications (Fowler and Brenner, 1982), the new policies stripped away enough of the regulatory superstructure to expose the underlying public interest doctrine to direct assault.

Since the outset of broadcasting, the public interest standard had seemed to rest on two principal assumptions about the spectrum -- that it was a scarce natural resource and that it therefore was to be publicly owned. As Secretary of Commerce, Herbert Hoover, put it in 1926 during the Fourth National Radio Conference, the last meeting of industry and government officials that laid out the principles that were to undergird the Radio Act of 1927:

> [Among] some of our major decisions of policy have been . . . the decision that the public, through the Government, must retain the ownership of the channels through the air . . ..We can no longer deal on the basis that there is room for everybody on the radio highways. There are more vehicles on the roads than can get by . . ..(U.S. Senate, 1926, pp. 50, 55)

Now, with the apparently imminent, widespread availability of advanced telecommunications distribution technologies (cable, fiberoptics, satellites, digital techniques), those assumptions were opened to question. Whatever the merits of the usual attacks on extensive public regulation, usually related to arguments about its conflicts with the First Amendment, the technological justification for its existence began to seem highly vulnerable (Pool, 1983).

This condition was so promising to many advocates of broadcasting deregulation that they were emboldened to strike for the jugular and challenge the entire complex of the public interest doctrine, in the hope of thoroughly revising the statutory base of communication policy. By the late 1970s the National Association of Broadcasters, with support from certain congressional and regulatory quarters, was arguing that the public ownership doctrine had never existed: "Under past or present legal authority the notion that the public or the government 'owns" the airways is without precedent" (Congressional Research Service, 1979). Typically portrayed as enhancing freedom of expression and access, the immediate practical implication of this revision would have been to place spectrum assignments explicitly and permanently in the private sector, to allow them to be traded even more freely than before, as any capital resource, and to remove from public authority all but the most essential technical oversight responsibilities. It was clear that the public interest standard was a substantial barrier to the implementation of such objectives, and its discrediting would become key to the full realization of the new public policy regime.

For a number of reasons this agenda was not entirely successful, and by the late 1980s, the Communication Act of 1934 and the public interest standard remained on the books. A considerable amount of the resistance to the doctrine's elimination rested in doubt about the efficacy of the technological argument. The evidence of the promised cornucopia of universally available electronic signals and the concomitant provision of highly diverse, pluralistic voices remained subject to debate (Glasser, 1985). There were enough questions about the effects of such major deregulatory experiments as those in the airline and finance industries and in the specific communication realms of cable and telephone, that a certain hesitancy about the entire program of communications deregulation began to assert itself (Horwitz, 1989, pp. 267-284). Within that resistance there persisted a strong theme of recourse to the traditional values of the public interest standard. As typically articulated, in this case by Rep. John Dingell, Chairman of the House Commerce Committee, the defense appealed to the fiduciary principle:

> The airwaves are a public trust. It is well said by the judicial decisions that have gone into this matter, that they do belong to all the people, and that licensing which takes place for the broadcasters is for those broadcasters to use the airwaves, first of all, as a public trust, and to serve the public interest well; and second, to make a decent and a proper profit by reason of the use of those airwaves. (U. S. House, 1981)

By the late-1980s this view was resurgent enough to lead to proposals for legislation to improve children's television, to reinstate the fairness doctrine, and to reregulate the cable industry by reinserting certain terms of public authority oversight removed in the 1984 Cable Act. Underlying such proposals there persisted strong support for the "public good" or the "public service" meaning of the public interest standard and for returning post-deregulation policy to those values.

It is the argument of this paper, however, that that resurgent appeal to the public interest standard entails a misunderstanding of its real meaning and that, whatever the merits of the critique of the deficiencies during the recent deregulatory period, the public interest standard still contains within it the seeds of its own compromise, if not destruction. This position rests in a deeper reading of the history and conflicting meaning of the public interest standard and the confusion among even its strongest proponents about its essential character and ultimate implications in applied communication policy.

To develop this argument the paper proposes to revisit the history of the public interest standard, in Part I, by reexamining its origins and the debates attendant upon its emergence in state and federal administrative policy. and, in Part II, by reviewing its adoption in communications law and the practical, operational terms of its application over a half-century or more of federal regulation.

The approach here is not that of normal telecommunications legal and regulatory research. That is, the focus is not primarily on the formalistic legal analysis of the relevant laws, administrative agency decisions, and judicial rulings with an emphasis on questions of constitutionality, process or precedence. Rather, it rises out of critical and cultural studies in communication policy (Rowland, 1987), and, while taking cognizance of the appropriate statutes and cases, it treats them as social and political texts subject to quite different readings, as socially created documents subject to interpretation in much the same way as are literary and other cultural texts. The intent is to understand them for what they reveal about patterns of thought and power in the history of American life and how those conditions are related to the terms under which American communication media and policies have emerged. This particular analysis casts the policy documents against the backdrop of images about the public interest and the nature of government-industrial accommodations that were all well developed in American political culture long before the advent of broadcasting. As such, it frames the current policy debates about deregulation, competition and the marketplace in light of those conflicting ideas about public service and the purposes of governmental regulation that were embedded in the rise of administrative law during the nineteenth and early twentieth centuries.

The standard literature on the history of American broadcasting and regulation tends to imply that, as an official doctrine, the public interest standard was invented only in the desperate rush to pass a new radio law during the reaction to the explosion of broadcasting in the mid-1920s. In that creation, often construed as hasty or not particularly thoughtful, the doctrine is typically portrayed as vague, elusive or little understood (Head and Sterling, 1987, pp. 441-442; Kahn, 1984, pp. 40-41; Krasnow, et. al., 1982, pp. 16-19; Barnouw, 1966, pp. 195-198). Most sources agree that the doctrine was purposefully sought, that a "discretionary standard" was necessary to provide the regulatory authority some basis upon which to make decisions, as a corrective against the lack of any standard guiding previous Department of Commerce regulation under the Radio Act of 1912. But most of those accounts argue that the public interest was so poorly defined as to make it subject to widely differing interpretations. Typically the complaint is that the meaning and scope of the standard were never articulated in the legislative debate leading up to the Radio and Communication Acts of 1927 and 1934 and that it was therefore left up to, first, the Federal Radio Commission (FRC) and, later, the Federal Communications Commission (FCC) to provide the details. That condition is frequently portrayed as unacceptable, and at worst, dangerous, because of its association with the constitutional dilemma of broadcast licensing. How, it is posed, is it possible to have government licensing of a medium of communication in light of the First Amendment, when, spectrum scarcity arguments notwithstanding, the discretionary standard for that licensing is so vague? The critique has become even stronger in recent years when, as suggested above, the doctrine of spectrum scarcity has been challenged by the advent of advanced electronic technologies and spectrum management capacities.

In fact, however, it turns out that the public interest standard was neither vague nor undetermined in meaning or practice when introduced into broadcasting legislation.

To the contrary it was a well-rehearsed doctrine, with a rather widely understood practical meaning that had been emerging throughout the earlier stages of American industrial regulation. Unacknowledged in most accounts, the standard had been in public statutory use for nearly a century, and in the experience of its application it had demonstrated a remarkable capacity for subsuming seriously conflicting definitions. Its genius, and much of the reason for its ready assimilation in broadcasting and other legislation, was its ability to mask distinct differences of view about the obligations of the regulated industries and the authority of the administrative agency. The balance of this part of the paper is devoted to showing how the standard evolved in the pre-broadcast period and how in that process its practical meaning and significance emerged to establish the role it would come to play in communications law and regulation.

The Public Interest in State Regulation

As is generally understood by serious students of government regulation, the federal government did not invent administrative law and practice. There had been nearly a half-century of state-level experience with such activity before Congress passed the first federal interstate commerce legislation in 1887 (Cushman, 1972, pp. 19-34). At least as early as 1832 individual states were experimenting with the establishment of laws and regulatory commissions governing certain matters in transportation. Even then state and federal involvement in private enterprise was not new. The colonial and early republican periods had been marked by tariff and other measures that variously had brought public authority, willy-nilly, into commercial regulation. Such activity, however, had been handled directly by colonial and then state and federal legislatures. The departure in the 1830s and beyond was to begin to establish a new structure -- an administrative agency or commission system that was to operate somewhat independently of state legislatures or executive offices.

With the emergence of the industrial revolution and the expansion of state and national economies, various enterprises began to grow to the point that, as they pursued their own commercial ends, they raised questions about how well they were serving various public needs. Not yet anywhere near the size and impact of those enterprises that would become associated with the full extent of monopoly and concentration by the late-nineteenth century, there already were indications in the antebellum period that certain activities simply did not fit the eighteenth-century, Smithian notion of small enterprises freely competing in an open marketplace. Nowhere were such difficulties more quickly apparent than in the realm of transportation, particularly in that quintessentially industrial enterprise, the railroad.

The story of the railroad industry, its economic impact, and the struggle with it by public authorities has been often and well told (see, for instance, Haney, 1968, and Miller, 1971). It need not be repeated here. There are, however, a few observations about that experience that reveal much about the practical nature of industrial-governmental relationships in the American experience and the long-term implications of administrative agency practice and associated doctrines of public interest oversight.

To begin with, there is the special, quasi-public nature of the American railroads. Except for a brief period in a few states during its first two decades, the U.S. railroad industry was never widely perceived as an activity subject to public ownership, and it was generally left to private interests. However, the state was, in fact, an active investor in the enterprise. For, in most instances the states saw the railroad and other public arteries as keys to economic growth (Miller, 1971, pp. 42-44). As with the construction of shipping canals, roads and highways, the railroad industry was seen by public authorities as "a vital element in the broad program of public improvements which was to bind the country together and increase its prosperity" (Cushman, p. 20). Its potential to serve a broad public interest was such that state and federal governments found it appropriate to support private enterprise in railroads with charters and franchises for exclusive, monopoly rights-of-way, with lines of credit and preferential loans, and with outright grants of land. Seldom partners in the formal sense of holding stock, governments nonetheless lent considerable economic support to the railroads, and they did so under assumptions about the general public welfare to be served by this new industrial technology.

Despite their generosity -- or perhaps because it was too readily secured -- the states were often "rewarded . . . bv callous disregard, if not outright exploitation of the public interest" by the railroad companies (Cushman, p. 20). Corruption, rate discrimination, few or no safety standards, and general charter violations led various states, particularly in New England, to begin to institute legislation more strictly governing railroad practices. Initially such laws attempted to provide direct supervision of the railroads by the legislatures with enforcement by the courts. But against the rapidly changing characteristics of the industry the attempt to legislate all preventative measures in advance proved cumbersome, and by the 1850s some states had begun to edge toward creation of a number of ad hoc railroad commissions to oversee various aspects of the state railroad charters and to report to the legislature on further necessary statutory measures. After the Civil War, as the importance and power of the railroads grew ever more rapidly, the states began to establish more permanent commissions, some still with only relatively weak, advisory authority; others, especially in the Midwest, with somewhat stronger powers involving setting rates and services and enforcing their own orders.

Yet even the strongest of such commissions were of limited impact. Although they had become relatively widely accepted as regular parts of the public apparatus, and although a public interest standard had come to undergird their status, certain basic constraints existed on both the institution and the standard. Most importantly, the regulatory commission concept was not based on any simple direct constitutional provision. In the U.S. Constitution the short interstate commerce clause is typically cited as the authority for administrative law, but its structural implications were initially unclear. Focusing on the balance-of-power principle and never imagining that American industrial and economic enterprise would become anything as large and powerful as it had by the end of the nineteenth century, the federal and state constitutions had assumed commercial regulation to be possible through existing government structures and had made no provisions for agencies of government outside the tripartite structure of legislative, executive and judicial branches. Regulatory agencies were therefore invented by state governments in an effort to grapple with aspects of the new, rapidly expanding industrial economy of the mid-nineteenth century, but their lack of clear constitutional provision made them an odd, and in many ways, suspect, statist creature.

Nonetheless, such assertions of state regulatory authority were upheld by state and federal courts and the rationale for such support was quickly couched in public interest terms. As early as 1837 Justice Roger B. Taney confirmed state regulatory power, and in the process he was able to articulate a distinction between general private property rights and certain broader public interests. In one of the earliest cases involving transportation and public authority, in this instance with regard to public construction and operation of a bridge in Massachusetts, Taney argued that while property rights are to be "sacredly guarded . . . the interest of the public must always be regarded as the main object" (*Charles River Bridge* v. *Warren Bridge*, 1837). On the surface this would seem to have been a strong endorsement of a public right that in various enterprises would be superior to private interests. This doctrine grew in acceptance among the states and then was echoed forty years later in a major Supreme Court decision upholding the constitutionality of a series of Granger laws and the state government regulations they had authorized:

> When . . . one devotes his property to a use in which the public has an interest he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created (*Munn* v. *Illinois*, 1877).

In finding in favor of state regulations governing railroads and grain elevators the Court seemed to be leaving little doubt about state authority relative to private property. Indeed, it appeared that *Munn* moved the public interest doctrine beyond those instances of pure monopoly conditions, permitting state regulation in locations where competing franchises might have been granted (Kohlmeier, 1969, p. 22).

Yet even with this sort of endorsement one must be careful not to misinterpret the meaning of the state regulatory commissions and of judicial statements of the public interest. There is a strong critical school of thought that argues that *Munn* was more significant for actually limiting the reach of public control by "placing a broad class of private rights beyond the reach of the state legislatures" (Miller, p. 191). It is arguable whether in upholding the Granger laws the Court was at this point also supporting the concessions to the industries that had been built into them (Horwitz, pp. 58-59). Miller (p. 192) sees *Munn* as unsympathetic to "the needs of venture capital" and an expression of justices who "looked upon the demands of industrial capitalism with suspicion." Nonetheless, he concludes that in another twenty years the Court was responding "more favorably to the needs of the new industrial order," as reflected in the interests of the railroad companies (p. 193).

Meanwhile, the fact remained that the commission device was initially an ad hoc, reactive arrangement. It was an experimental response to a rapidly changing economic and social order, one never envisioned by the founding fathers -- not even by the most adamant Hamiltonians. It therefore had no *a priori* authority, it was based on no pre-existing consensus about its necessity, and even with court endorsement, it carried with it certain ideological doubts about its legitimacy. As a result its practical authority was limited. The state administrative agency could only respond to conditions already established by the industries it regulated. Based on a fundamentally libertarian model, in which there was a strong presumption that the best social good would emerge in the most unfettered commercial environment, the initial experiments in state regulatory practice could provide for little or no prior establishment of standards or service.

By 1869 two types of permanent state commissions had begun to appear. Cushman (p. 23) calls these the "weak" and "strong." The weak agencies, largely in New England and the eastern states, were clearly restricted to giving advice to their state legislatures; they had no independent disciplinary authority. By contrast the "strong" agencies, principally in the Midwest, were somewhat more empowered, with authority to set terms of rates and service. In time this was the model toward which most state regulatory and utility commissions moved. But the restrictions inherent in them remained significant. Many of the rates and service terms were largely predetermined by the conditions of technological development and finance dictated by the industries themselves. Meanwhile, many of those industries were becoming parts of increasingly large, complex national enterprises that were often well beyond the capacity and authority of the state agencies. In this light, then, even the strongest commissions were still relatively weak.

As part of the later development of the state commissions there began to appear provisions for issuing certificates of "convenience and necessity" as, in effect, the licensing device for railroads and utilities of various kinds. The "convenience and necessity" language became closely associated with "the public interest" in state statutes "as a standard for the exercise of administrative decision" (Caldwell, 1930, p. 300), but its specific association was to the certificate granting or licensing function.

It was not as if all state regulation was thoroughly resisted by the regulated industries. The "strong" commissions had come into existence in the wake of heavy overbuilding by the railroads, and many of them were in danger of failing. While it is typically understood that it was the resulting chaos of cutthroat competition and kickbacks in some regions and the compensatory practices of exorbitant rate setting in others that led to the creation of the permanent commissions, presumably to protect farmers and agricultural traders, the commissions may have al[illegible]d the effect of saving the railroads from their own excesses, thereby preserving rather than threatening their existence in private hands. The public interest would best be served by protecting the economic well being of the railroads as private corporations.

That conclusion casts an important light on the major theme of political compromise that had come to be reflected in the state administrative agencies, and therein the deeper meaning of the public interest. For all the concerns about the unwarranted extension of government power they posed, such instruments were eminently preferable in the eyes of the industries to the specter of another alternative. By the late nineteenth century other industrial democracies were considering proposals to take monopoly transportation and utilities out of the private sector and to reorganize them in various forms of public ownership. To avoid any serious concerted efforts to move in similar directions -- a seemingly distinct possibility in at least the post-bellum populist Midwest -- it appeared wise to strike an accommodation with state governments that would fall well short of such measures and that would prove to be much less objectionable than often portrayed. The spirit of compromise thus infused the politics of state regulation; the administrative agency was politically acceptable only to the extent it did not overstep its restricted bounds, and the terms of public interest upon which it was established were understood to be defined largely by the private interests submitting to the process.

The Federal Statutory Adoption of the Standard

That the state regulatory commissions and the public interest rationale behind them were of only limited strength could be no better demonstrated than by the appearance in the late nineteenth century of federal agencies. The national economy had grown so rapidly following the Civil War that, for all the experimentation with state commissions, it was clear they were only marginally effective, especially against the concentrated interstate powers of the emerging national railroad, banking and oil trusts. Particularly as a result of the continuing abuses in land speculation, and anti-competitive rate fixing and kickbacks by the railroads, the rural Granger and Populist reform movements had begun to press Congress for action that would reach beyond the authority of the individual states. Finally in 1887 after twenty years of debate over some 150 bills, Congress passed the Interstate Commerce Act, establishing the first federal regulatory agency, the Interstate Commerce Commission, and shortly thereafter, in 1890, it passed the Sherman Anti-Trust Act.

The Interstate Commerce Act was the first of a series of laws establishing what by the late 1970s were eventually to number over fifty "independent" federal regulatory agencies. Many of these laws were not passed until the 1930s, when during the New Deal period a number of major regulatory commissions were established, as, for instance, with the Federal Power Commission (1931), the Securities and Exchange Commission (1934), the National Labor Relations Board (1935) and the Civil Aeronautics Board (1938), and during the Great Society period of the 1960s and 1970s, when twenty more commissions came into being. Previously Congress had created only a half-dozen agencies, chief among which were the ICC, the Federal Reserve Board (1912), the Federal Trade Commission (1914), and the old Federal Radio Commission (1927), subsequently to be replaced in 1934 by the FCC. For most of the period leading up to the formal passage of radio and communication legislation the principal federal agencies were the ICC, FRB and the FTC, and it was to their enabling legislation that Congress turned for much of the approach it developed in the communication laws. The principal piece of legislation remained the original Interstate Commerce Act (1887), but prior to the emergence of the radio law, the ICA was amended in various ways by subsequent statutes, principally the Hepburn Act (1906), the Mann-Elkins Act (1910), and the Transportation Act (1920).

In general the struggles faced by Congress were those the states had confronted, and in many ways the policy rationales and attitudes were similar. No less than the state legislatures, Congress had found itself without the resources to deal with the rapidly changing industrial and economic conditions of the late-nineteenth and early twentieth centuries, and likewise it sought to establish a mechanism, and a rationale for it, for providing day-to-day administrative oversight that would have a certain degree of authority to promulgate and enforce rules and regulations to an extent impossible by Congress itself.

The term "independent" emerged to suggest that such agencies would be established in such a way as not to be too beholden to the executive branch. Cabinet agencies were themselves increasingly involved in regulatory activity, they were being tempted into considerably more, and Congress itself occasionally authorized such extensions. Attempting to resist that tendency and to create a certain amount of distance from the executive for most of the new regulatory bodies, Congress sought to locate them in a terrain between the two branches of government. It also invested them with a quasi-judicial authority, giving them, in effect, attributes of all three branches. What "independent" masked, however, was the extent of dependence the agencies came to have upon the regulated industries themselves and the broader ideology of a progressive era, neo-libertarian capitalism.

Beyond these structural terms the new federal commissions were also situated in a rhetoric of purpose and justification similar to those of the state agencies. Having become an integral part of the state regulatory philosophy and having been sustained in the courts, the public interest standard readily migrated into the new federal policy, though at the outset its appearance in statutory terms was somewhat oblique. That is, the actual language of the later broadcast legislation, "the public interest, convenience and necessity," did not appear directly in the initial federal regulatory laws. It tended to be incorporated more in the committee reports and Congressional debates leading up to them. Thus, for instance, in the 1886 Cullom Report, the authoritative analysis of the railroad problem and the justification for federal regulation that lead to the Interstate Commerce Act, the issues were put in various public interest terms. The report stated that the railroads were part of the broader question "of controlling the steady growth and extending influence of corporate power and of regulating its relations to the public" (Schwartz, I, p. 33); they "necessarily rest under the same obligations [as the state] to deal fairly and equitably with all its citizens, without favoritism or discrimination (p. 44); and

> National legislation is necessary to remedy the evils complained of because the operation of the transportation system is, for the most part, beyond the jurisdiction of the States, and until Congress acts, not subject to any governmental control in the public interest (p. 59).

In its employment in the legislative history of the Commerce Act, the public interest spirit served largely the same function for the federal administrative laws as it had for the states. It appealed to a public purpose in apparent opposition to the private interests of the regulated industries, and it seemed to offer the regulatory agency, in this case the ICC, a justification for its existence and basis upon which to issue its rules and take action. Yet, while the act charged the ICC with preventing excessive freight charges and discrimination, and gave it certain investigatory authority, the legislation denied the Commission any enforcement powers. The only way in which the ICC could enforce its rules was through the courts with the cooperation of the Justice Department, a highly cumbersome and ineffective process (Schwartz, I, pp. 19-20).

The principal purpose of the Hepburn Act (1906) was to rectify that situation by authorizing the ICC to prescribe maximum rates and to adopt orders that would be immediately effective (Schwartz, I, pp. 594-595). To a certain extent the public interest in interstate commerce was being defined around a more authoritative regulatory body with somewhat more rate-setting power. But there remained serious problems in the ICC's enforcement powers and conflicts with the courts. The Mann-Elkins Act (1910) sought to deal with these and other issues, but at the same time that it seemed to be endorsing more ICC power over rate-setting and, by establishing the short-lived U.S. Commerce Court, to be creating a more sophisticated, expert system of judicial review (Schwartz, II, pp. 1383-1386), the reality of the administrative agency's compromise position persisted. As with the prior experience of the state commissions, the ICC was highly dependent upon the regulated industries for a considerable amount of information about their structures, revenues, costs and service prospects. As the ICC grew and became more established, its interpenetration with the railroad industry increased with the exchange of personnel and with them of outlook. Throughout that process of mutual accommodation there emerged an increasing understanding that the economic health, technological capacity and general growth of the industry were foremost considerations of the regulatory process.

In this sense the public interest notion proved to be an intimate part and principal symbol of the Progressive period. It incorporated the image of reform and the appeal to public service and welfare, yet it shared with much of the Progressive experience that extensive set of social and legal compromises that has been widely acknowledged by historians of the period (Wiebe, 1967; Quandt, 1971). In serving as the rhetorical basis for the establishment of the new federal regulatory commissions it helped give them legitimacy, while nonetheless masking their implicit accommodations with the regulated industries. As one recent account observes:

> Though popular clamor against corporations did indeed galvanize the effort to create regulatory agencies during the Progressive Era, the "public interest" interpretation of reform as the unambiguous victory of the people over the trust cannot truly be sustained. . . . Notwithstanding some anti-corporate rhetoric, Progressive Era reforms defined the public interest within the context of a rationally functioning capitalist system. Consumer welfare was considered enhanced through expanded, rational competition (Horwitz, pp. 68-69.)

The habit of limiting government action to the establishment of market rules on behalf of the producers was fostered during World War I when the government only nominally assumed operational authority over the railroads. Throughout this episode the primacy of minimal regulation and maximum profitability remained. Yet, despite the reality of the terms of government supervision during the war, the popular image of its nature, as being antithetical to the interests of the railroad companies and therefore to the interests of the public, was so strong that Congress passed the Transportation Act (1920) to return to a prewar form of regulatory oversight.

By the time of the Transportation Act the public interest language, now embellished by the "convenience and necessity" term borrowed from the state utility laws, was now appearing directly in the statutes. The Commission's powers to act in various specific and general ways, as in issuing certificates, authorizing route changes, or approving acquisitions, were all now couched directly in terms of its authority to consider whether such action was reasonably required in the interest of public "convenience and necessity" and to find "it to be in the public interest." Language such as this runs repeatedly throughout the Act. However, in keeping with the previous trends, the 1920 law also formally endorsed the principle that the ICC should be concerned primarily with the economic health of the industry. The Commission was charged with the positive responsibility for seeing to it "that an efficient, economically viable transportation system should prevail." What had previously been only implicit was now explicit -- the ICC had an affirmative duty to build up the railroad system and ensure a fair profit to its owners. The ICC "became a superboard of directors concerned principally with the industry's problems" (Schwartz, II, p.1393). In effect the public interest in transportation had become almost completely identified with the interests of the railroad industry.

This interpretation of the public interest was likewise coming to apply in the communications industries. Since 1910, under Mann-Elkins, the ICC had had responsibility for regulating the interstate aspects of the telegraph, telephone and international cable companies. The policies it developed for the railroad industries were thenceforth adopted in these realms of wired communications, and if anything, they were less restrictive.

By the end of the war that domain had extended in part to wireless telegraphy and telephony. The ICC's authority over "transmission" in telecommunication had been interpreted as applying to message delivery services via electromagnetic radiation. At that time wireless remained principally point-to-point transmission of discrete messages in the telegraph and telephone models. It was not yet widely being thought of nor used as broadcasting. As that application emerged, a regulatory crisis would develop over the extent of the authority of the ICC and the Department of Commerce to regulate the new use. But the extent to which the ICC's authority had already been interpreted as entailing a strong commitment to the economic well being of the regulated industry, transportation or communication, would be crucial to the prospects for any new regulatory scheme.

Meanwhile, the telephone industry had been highly successful in establishing for itself a remarkably favorable regulatory regime. As has been well documented (Danielian, 1939; Goulden, 1970; Brooks, 1975), AT&T managed in the early 1900s to achieve a balance of state and federal regulation that, while appearing to give government agencies a great deal of power in its affairs, so split their authorities as to restrict the Bell Company only minimally, while also preventing it from having to endure any serious competition or to be absorbed into the Post Office or any other government agency, as in the European model. As with the railroads, the telecommunication industries were operated by government agencies during the war, but the terms of that supervision by the Post Office were also highly favorable to the communication firms. When they were returned to entirely private hands, they were actually in a far stronger fiscal position than at the outset of the war.

In the deeper understanding of the compromises built into the structure of interstate commerce law at the outset, the accommodations between business and government embodied in the 1920 law should not have been surprising. Even at the height of the Progressive period, when the "public" seemed to be clearly opposed to the "private", the evidence of the underlying reality of mutual interpenetration was already compelling. The shift in the immediate post-progressive rhetoric, as reflected in the provisions of and debates over the newer administrative laws, was to try to rationalize the accommodation. With the advent of "management science" and professional business education in the universities, following the rise of comparable formal training in law, medicine and engineering, it was argued that a new, enlightened, socially responsible American corporate leader would emerge. His interests and those of the public would be synonymous, though now in the afterglow of the progressive period, in a positive social sense. From this leadership, in partnership with likewise professionally trained, enlightened government officialdom, would flow the general health and welfare benefits of a scientifically managed and more systematically expanding commercial economy.

As early as 1914 in his special message to Congress calling for the establishment of what was shortly to become the Federal Trade Commission, President Woodrow Wilson appealed directly to this new order:

> What we are proposing to do, therefore, is, happily, not to hamper or interfere with business as enlightened business men prefer to do it, or in any sense to put it under the bar. The antagonism oetween business and government is over. We are now to give expression to the best business judgment of America, to what we know to be the business conscience and honor of the land. The Government and business men are ready to meet each other halfway in a common effort to square business methods with both public opinion and the law (Schwartz, III, p. 1731).

Under such a mythology, and after the intervention of World War I when highly complex administrative problems of industrial, civic and military mobilization had been addressed, apparently with great success, it was entirely possible to imagine conditions of closer explicit accommodation between business and government. If the new Transportation Act encouraged the ICC to promote consolidation in the railway industry and to discourage those aspects of competition throughout the transportation and even telecommunications industries that had previously been considered sacred, the faith in the new postwar economic order was strong enough to overcome much of any residual doubt.

<u>Conclusion</u>

In various ways, then, by the early 1920s the applied terms of the public interest standard had proven to be closely identified with the needs of regulated transportation and communication industries. Well before the advent of broadcasting and the particular regulatory measures adopted for it, American public policy had established an accommodation between public and private interests that turned largely around the economic well being of the industries and the assumption that public service benefits would derive most fully from that relationship. The notion of any responsibility for defining an extensive set of public service terms *a priori* was largely alien in the American policy environment. At the most, the existing state and federal regulatory agencies could prescribe general terms, e.g., universal service in the telephone industry, or exercise certain rate controls. But such restrictions were closely associated with protections of monopoly positions, and were understood as the minimal concessions necessary to avoid more direct forms of state control or ownership. Moreover, the ideology of the post-progressive period was one that strongly favored the image of enlightened, scientific corporate leadership. Business and government, which had always been less at odds than had been apparent, would now explicitly overcome their differences, and the private would henceforth be infused with a responsible public purpose.

In this light the claims about the novelty and vagueness of the public interest standard as adopted in broadcast legislation must be reexamined. The evidence from the long prior experience of state and federal regulatory policy is that the public interest standard had been developing as a key doctrine in American economic and social policy for nearly a century. It was upon that platform that much of the political and industrial policy for the new broadcast law would be erected. Many of the implicit understandings about the public interest in the previous experience would now migrate into the new order, and in spite of continuing confusions about the matter, then and now, the underlying significance of the public interest standard would likewise be transferred into the new broadcast communications realm.

The task of Part II of this paper will be to describe and explain that transference into the new law and beyond. The analysis there will examine two principal domains of policy texts -- first, the collection of hearings, reports and debates leading up to the Radio Act of 1927 and, then, the subsequent principal regulatory rulings and judicial opinions in which the puolic interest standard figured centrally. The argument will be that throughout that long history of communication policy debate about the public interest standard, its underlying, practical meaning has been much clearer than most critics have realized and that that interpretation has deep and telling ties to the state and federal policy experience with the concept prior to its incorporation in radio and communications law.

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