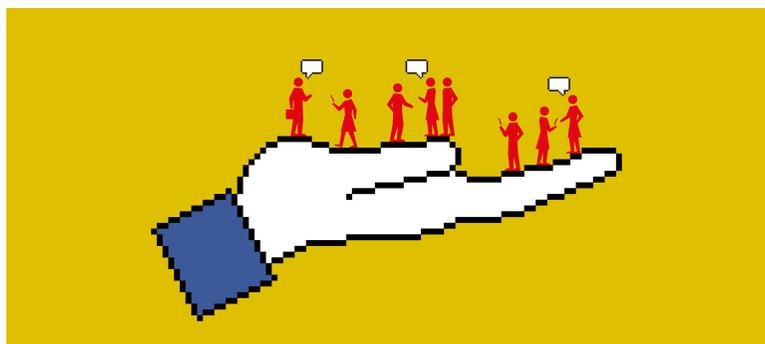

THE TECH GIANTS, MONOPOLY POWER, AND PUBLIC DISCOURSE



Social Media Regulation in the Public Interest: Some Lessons from History

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KNIGHT
FIRST AMENDMENT
INSTITUTE

at Columbia University

In November 2019, the Knight First Amendment Institute convened a major symposium at Columbia University, titled “The Tech Giants, Monopoly Power, and Public Discourse,” to address concerns arising from the dominance of a small number of technology companies over a wide range of economic and expressive activity. The essays in this series were originally presented and discussed at this two-day event. Written by scholars and experts in law, computer science, economics, information studies, journalism, political science, and other disciplines, the essays focus on two questions: how and to what extent the technology giants’ power is shaping public discourse, and whether anti-monopoly tools might usefully be deployed to expose or counter this power.

The symposium was conceptualized by Knight Institute staff, including Jameel Jaffer, Executive Director; Katy Glenn Bass, Research Director; Alex Abdo, Litigation Director; and Larry Siems, Chief of Staff. The essay series was edited by Glenn Bass with additional support from Lorraine Kenny, Communications Director; Sarah Guinee, Research Fellow; and Madeline Wood, Communications and Research Coordinator.

The full series is available at knightcolumbia.org/research/

INTRODUCTION

FOR TWO DECADES after the courts struck down the Communications Decency Act in 1997, direct government regulation of the internet was a political third rail. That era of digital salutary neglect arguably contributed to American dominance in consumer software applications; if software has eaten the world, to extend Marc Andreessen's metaphor, the all-you-can-eat buffet line started in the United States.¹ As a result, U.S. tech hubs have been the destination for global capital and skilled immigrants, mitigating the economic effects of the Great Stagnation as the manufacturing industry moved overseas.

Recently, however, there has been growing support for internet regulation. Remarkably for an era of heightened political polarization, representatives of both major U.S. parties have called for antitrust action against big tech companies. These critics argue that the companies' market dominance leads to excessive political influence and poor outcomes for consumers.² This paper does not address these antitrust issues.

Instead we examine another plausible regulatory response to market domination: public oversight of private companies according to a public

interest standard. The prospect of a new era of public interest oversight should not be dismissed out of hand. Multiple politicians from both parties have called for the federal government to take an active role in fighting various online social ills, including hate speech, gun-related content, political bias, and sexual trafficking. In theory, public interest regulation could address these ills while also dealing with market power. In practice, public interest regulation could very well fail to accomplish those goals while creating negative unintended consequences.

The first section of this essay explores the growing interest in cross-applying the public interest standard from broadcasting to the internet. The second section recounts the history of the standard and the problems it created for free speech. The third section considers the implications of our historical analysis for public and private policymaking going forward.

A REVIVED PUBLIC INTEREST STANDARD

PROPOSALS TO REGULATE social media and the internet are solutions in search of justifications. Simply put, there are few digital-era regulatory precedents for government oversight of the internet. Instead, advocates have turned to the history of broadcast and telecommunications regulation to find examples of regulatory mechanisms that might be applied to the internet. Contemporary techno-progressives are borrowing ideas from progressive broadcast reformers of the early to mid-20th century.³

Most of these proposals are ultimately rooted in the idea that the internet should be regulated according to the “public interest,” an echo of wording in the Radio Act of 1927, which established what was then an unprecedented level of federal government control over a communications medium. Of course, in the broadest possible sense any government action that involves the taking of property or the restriction of liberty needs to be justified by an appeal to the public interest or commonweal. That is not the sense of the term as it is used by communications scholars, for whom the “public interest” is a way of describing a body of administrative law that evolved from the regulation of broadcasting and telecommunications. To put it in simple terms, the public interest standard is used to describe a diverse set of media

and telecommunications policies—including cross-media ownership bans, station licensing, and the Fairness Doctrine—that would be constitutionally prohibited were they applied to other domains like print media.

But today there is an ongoing effort by media scholars and policy analysts to expand the reach of the public interest standard to include the internet. For example, a committee from the Stigler Center for the Study of the Economy and the State at the University of Chicago recently called for conditioning Section 230 of the Communications Decency Act of 1996—which is widely acknowledged as the crucial deregulatory legislation that helped bring about a wave of consumer internet innovation—on “compliance with various public interest requirements drawn from media and telecommunications policy traditions.”⁴ Prominent media scholar Philip M. Napoli recently wrote a book that advocated reviving the public interest criterion to guide new regulations of the internet.⁵ Other proposals may not use the precise phrase “public interest,” but their contents are similar in form to old public interest-based concepts, as with Senator Josh Hawley’s (R-MO) proposal to enforce “political neutrality” on internet platforms.⁶

These proposals are not necessarily futile *ab initio*. The U.S. Supreme Court validated government regulation of the content of broadcasting because of the scarcity of the airwaves, a decision that has not been overruled.⁷ (Although the scarcity rationale would not seem especially apt for the internet and social media, which are unconstrained by the electromagnetic spectrum.) However, Napoli identifies several other ways to justify internet regulation that have previously been accepted by the courts: Social media might be seen as a public resource, pervasive or ancillary to other regulated technologies.⁸ Each of these arguments could be used to justify media regulation in the public interest.⁹ The public interest standard may not ultimately be embodied in new legislation regulating the internet, but it has returned to the policy agenda at a time when regulations seem likely, so it is a contender worthy of public attention.¹⁰

We should bear in mind that public interest arguments reflect a tradition that sees the First Amendment as empowering the government to pursue public ends through public means rather than as defending individual rights against government abridgment. The idea for the former—“First Amendment collectivism,” as Napoli calls it—can be traced back to Alexander

Meiklejohn's famous remark that "what is essential is not that everyone shall speak, but that everything worth saying shall be said."¹¹ In this view, government should regulate speech to produce a "rich public debate," promoting favored speech rather than simply being satisfied with whatever follows from everyone being allowed to speak as an individual right.¹² The public end in view is called "democracy" or perhaps the "public interest" (the two concepts are often used interchangeably).¹³ Earlier First Amendment scholars of a collectivist bent recognized that these ends might require "limits on autonomy" and urged care in suppressing speech that did not enrich public debate.¹⁴ In contrast, Philip Napoli emphasizes the benefits of speech regulation rather than its risks.¹⁵ Inevitably, the public interest standard gives public officials leverage over political speech. Perhaps that leverage will be used to improve public debate, but traditional liberals are inclined to believe that such authority will more likely serve the narrow interests of elected officials and dominant interests.

Given that would-be regulators are explicitly borrowing public interest concepts from the history of broadcasting, it is worth examining how those precepts actually worked (or not, as the case may be). This essay examines four cases: Bob Shuler's battle in the early 1930s with the Federal Radio Commission, the Roosevelt administration's attempt to keep anti-New Deal newspapers out of radio, and two instances of bipartisan abuse of the Fairness Doctrine. These stories illustrate the gulf between the public interest as an abstract ideal and the public interest as it was actually applied by the government. This history should inform our policies going forward.

FOUR CASE STUDIES

Bob Shuler vs. the Federal Radio Commission

This study of the public interest standard begins a century ago with a surprising individual, the Reverend Robert P. Shuler, a Methodist minister and radio broadcaster from Los Angeles nicknamed "Fightin'" Bob Shuler for his cantankerous preaching. In the 1920s and early 30s, he clashed with the newly commissioned Federal Radio Commission, setting an important legal precedent for regulating the airwaves in the public interest. There are

lessons to be learned from the early days of radio regulation—which followed a decade of relative laissez-faire and rapid growth—for those who would apply similar standards to the internet today.

Los Angeles in the 1920s was a boomtown, filled with oil derricks and liquor smugglers. As the oil bubble burst in 1927, Shuler was a key player in exposing a major political scandal involving the Julian Petroleum Corporation. Julian executives defrauded local investors of \$100–\$200 million (nearly \$3 billion in 2019 dollars) with the help of local businessmen and politicians. Grand juries indicted several of those involved, but the slow pace of the prosecutions led the Supreme Court of California to dismiss the charges *en masse* for failure to provide a speedy trial.

Shuler blamed both the District Attorney of Los Angeles County, Asa Keyes, and Los Angeles City Prosecutor Lloyd Nix for the failure, implying on air that Keyes was in the pocket of the indicted businessmen and that Nix was negligent. Shuler’s broadcast attacks forced Keyes to resign; the disgraced former district attorney would indeed later be convicted of taking a bribe from a Julian executive. Nix, also forced to resign, would eventually extract a measure of revenge on Shuler, but not before the imbroglio peaked with the killing of one of the indicted businessmen by a defrauded investor who carried a printed copy of one of Shuler’s broadcasts in his pocket bearing the title “Julian Thieves in Politics.” Nix claimed during an interview on another radio station that Shuler had as good as pulled the trigger by inciting public outrage over the acquittals in the first place.

Shortly after the Julian scandal resignations, Shuler had created such a political backlash against Los Angeles Mayor George Cryer for his ties to organized crime that Cryer opted not to run for reelection in 1929. The new mayor, John C. Porter, was supported by Shuler, who had picked him for office after seeing him on the grand jury that had indicted District Attorney Keyes for bribery. In addition, eight out of nine Shuler-backed candidates won seats on the city council.¹⁶ But Shuler had won that influence by making enemies out of almost every major institution in the city, including the Chamber of Commerce, the Bar Association, and multiple judges he had antagonized by accusing them of being soft on organized crime. (Shuler would be convicted of two counts of contempt of court for criticizing a judge.) Shuler may have been the most influential person in the city in 1930, but he was also the most

disliked. It is hard to imagine Shuler's anti-corruption campaigns succeeding without the radio station KGEF. His enemies, perceiving this as well, used a new regulatory tool to make that thought a reality.

During the 1920s, the boom in Los Angeles had been matched only by the rapid expansion of radio broadcasting, expanding from a niche interest early in the decade to being an appliance in a majority of households in California by 1930.¹⁷ Congress passed the Radio Act of 1927, which authorized the new Federal Radio Commission (which would become the Federal Communications Commission in 1934) to impose order on the industry. The Act gave the Federal Radio Commission (FRC) authority to determine station frequency allotment, a decision freighted with consequence given that applicants were expected to have raised the capital necessary for equipment and operations prior to applying for a spot on the spectrum. Hundreds of thousands, even millions of dollars rode on any given licensing decision; regulatory capture was a natural outcome, with applicants pulling strings with commissioners and congressmen for preferential treatment. The system rewarded the well-connected and the well-financed.

Furthermore, the Radio Act of 1927 charged the FRC with the responsibility to regulate the airwaves in the "public interest, convenience, or necessity." Simultaneously, Section 29 of the Act prohibited censorship or any interference with "the right of free speech by means of radio communications."¹⁸ As we will see, there was an inherent tension between those two charges, for how could the FRC decide that one radio station licensee's broadcast speech was more in the "public interest" than another applicant's speech without it being an act of censorship? Even if the question of censorship were set aside, the very concept of a singular "public interest" was an open invitation to majoritarian suppression of minority voices.

The new FRC immediately ran into trouble untangling the competing claims of applicants for the most desirable portions of the broadcast spectrum (a problem compounded by congressional pressure to divide the number of licenses equally among five geographic zones regardless of actual demand or relative population levels). Based on the legal fiction of spectrum scarcity, the FRC tended to favor well-capitalized station affiliates of the emerging major networks over independent outfits while working to reduce the total number of station licenses, preferring a smaller number of powerful

stations over a larger number of local stations.¹⁹

In addition, the FRC rewarded stations that promised to avoid political radicalism and to promote majoritarian values. For example, in 1933 stations WIBO and WPCC in Chicago had their licenses revoked; their spectrum was granted to station WJKS in Gary, Indiana, both for sake of geographical balance and because WJKS's programming was "well designed to meet the needs of the foreign population," by which the FRC meant programs "stress[ing] loyalty to the community and the Nation" and "instruct[ing] in citizenship and American ideals and responsibilities."²⁰ Meanwhile radical political groups with radio stations, such as WCFL (owned by the Chicago Federation of Labor) and WEVD (owned by the Socialist Party of America; the call sign referenced the recently deceased Eugene Victor Debs), struggled with heightened regulatory scrutiny after the FRC labeled them "propaganda" stations serving only a narrow interest and not the general public interest.²¹ However, in both cases the FRC's efforts at asserting its authority to regulate radio licensees based on whether their programming was in the "public interest" was at least partially thwarted—albeit not without difficulty—given the ability of each group to rally significant national pressure campaigns on their behalf, such as WEVD convincing New York Evening Post publisher Oswald Villard and educator John Dewey to speak out on the issue.²²

The FRC would find greater success going after radio stations owned by individuals with fewer elite connections. The most famous involved homeopathic practitioner John Brinkley, who used the station KFKB ("Kansas Folks Know Best") to peddle his patent medicines and surgical "cures" for infertility, which involved implanting goat glands in the testes. The outrageousness of Brinkley's medical fraud made him an easy target for public interest action; the case continues to attract significant scholarly attention today. When the FRC denied KFKB a license renewal, Brinkley took the case to the Court of Appeals of the District of Columbia complaining that the denial—which all involved agreed was predicated on the content of his programming—violated Section 29 of the Radio Act of 1927, prohibiting censorship. The court ruled that no censorship was involved because the FRC had based its decision on the basis of "past conduct" rather than exercising prior restraint.²³

It was a very narrow definition of censorship, one that applied only to radio and not to newspapers. Indeed, the U.S. Supreme Court would rule just four months later in the landmark case *Near v. Minnesota*²⁴ that newspapers could not be gagged by state laws even on the basis of their prior content. When Minnesota passed a law targeting a newspaper that had criticized the state government, it was a violation of the First Amendment, but when California passed a “radio slander bill” that was “admittedly aimed at the activities of [the] Rev. ‘Bob’ Shuler,” it was not.²⁵ Simply put, under the public interest standard free speech and press protections were significantly weaker for radio broadcasters than for newspaper publishers.

To return to the case of Bob Shuler and KGEF in Los Angeles, Shuler had neither the elite friends of WEVD, the institutional support of WCFL, nor the approved programming of WJKS. And the court to which he would appeal his own case, the D.C. Court of Appeals, had just issued a precedent in regard to Brinkley that would undermine Shuler’s ability to make an effective First Amendment plea. Shuler was in trouble, but that was not immediately obvious when the FRC first announced a special hearing into the license renewal of KGEF in the fall of 1930. After all, at the time KGEF ranked fourth (of 20) in a poll of the most popular stations in Los Angeles and it had a regular listening audience of some 600,000 people.²⁶ Little more than a year previously he had unseated the mayor, toppled the corrupt district attorney, and forced the city prosecutor to resign, moves praised even by many of Shuler’s critics as necessary reforms to the city government. But Shuler’s influence was predominantly built on the radio, not through newspapers. And radio stations needed government licensure through the FRC, a license granted, in part, based on whether past programming had fulfilled a vague notion of the “public interest” or, as the case may be, a very specific vision of the public interest. That was all the leverage that Shuler’s political enemies needed.

Earlier, shortly before the FRC hearing, ex-Mayor George Cryer had tried to punish Shuler via ordinary channels, suing him for defamation after Shuler accused Cryer of abusing the mayor’s office. However, the jury acquitted Shuler; headlines about the failed attempt at retribution must have heaped insult on injury. Cryer had another chance with the FRC hearing; he was one of several dozen former Shuler opponents who testified at the hearing.²⁷ But the most determined of those involved was Lloyd Nix, the former

city prosecutor that Shuler had pushed to resign over the Julian scandal.

Technically, Nix was not the instigator of the hearing—that honor went to a local restaurant supplier who averred to be simply a concerned citizen who wanted to stick up for his slandered friends—but Nix volunteered his time to serve as attorney for the complainant. Nix also convinced a distinguished East Coast communications attorney to travel to Los Angeles to serve as co-counsel and even paid his substantial hotel expenses out of pocket. Nix’s efforts were rewarded when the complaint over KGEF’s license renewal resulted in the FRC making two unprecedented decisions about the handling of the hearing. In every prior case, FRC hearings of this type had been held in Washington, D.C., but the FRC held this hearing in Los Angeles, which allowed Nix to call dozens of witnesses to testify in person. Even more surprising was the FRC’s decision to allow the complainants’ attorneys to conduct the proceedings. Typically, the FRC’s examiner would question witnesses and generally act like a prosecutor. But in this hearing, Nix would effectively prosecute Shuler while the FRC examiner acted as judge.²⁸

Throughout the FRC hearing and later court appeals, Shuler’s attorneys made the mistake of assuming that appeals to the First Amendment would find purchase. But both the hearing examiner and the D.C. Court of Appeals adopted the narrow definition of censorship as limited to prior restraint. According to that logic, since this was a license *renewal* and not an initial application, it would not be censorship to deny Shuler’s license on the basis of his controversial programming. Much of the hearing consisted of antipathetic witnesses recounting Shuler’s attacks on their character and policy. Neutral observers might have thought that they were watching a trial for defamation or libel, except that the man conducting the proceedings, Nix, had a clear conflict of interest and the burden of proof rested definitively on Shuler, who had to affirmatively prove that his statements advanced the public interest.

This he could not do, so everyone involved was surprised when the FRC examiner, Ellis Yost, held that Shuler should have his license renewed. However, his reason for doing so was revealing. Yost acknowledged that Shuler had been “extremely indiscreet” in his broadcasts by “reflecting upon the character of a citizen, based solely on rumors and unverified reports.”²⁹ However, Shuler’s broadcasts only accounted for three hours a week compared to

the other 20 hours a week the station gave mostly free of charge to groups like the Union Rescue Mission, the Boy Scouts of America, and the Los Angeles Conservatory of Music.³⁰ Yost was fine with censoring Shuler on the basis of his programming content; he simply thought it unfair that these other groups should be punished for Shuler's excesses.

That might have been that, but Nix and the complainant appealed the examiner's ruling to the full Federal Radio Commission, which overruled Yost and denied KGEF its license renewal. Shuler then appealed the FRC's decision to the D.C. Circuit Court of Appeals, which echoed the FRC's reasoning in its ruling. The FRC and the circuit court believed that Shuler's offenses were so onerous that allowing them to compose even a small fraction of KGEF's programming violated the public interest. Specifically, the commission pointed to Shuler's obstruction of "the administration of justice" (his contempt of court charges), "offend[ing] the religious susceptibilities of thousands" (he criticized the Catholic Church), inspiring "political distrust and civic discord" (toppling the Cryer administration), and "offend[ing] youth and innocence by the free use of words suggestive of sexual immorality" (Shuler once said the word "pimp" on the air). Ultimately, Shuler was condemned because he had used the airwaves as "a theater for the display of individual passions and the collision of personal interests."³¹ In other words, Shuler had treated KGEF as an outlet for advancing his own beliefs and had failed to prove to the commission or the court that doing so represented the public interest. As a result, he would be denied access to the airwaves.

Shuler's hearing was fundamentally political in nature. No matter how crude his conduct, Shuler had used KGEF to intervene in local politics and lost his station as a result. If this had happened in any other medium—print or newspaper—it would have been protected speech. His accusers would have been required to prove their complaints of defamation and claim compensation for a tort in an actual court of law. The managing director of the National Association of Broadcasters—the primary industry association—proposed filing an amicus brief if the Supreme Court decided to hear Shuler's appeal (which it did not), calling the case "a discrimination against broadcasting in favor of newspapers" and citing *Near v. Minnesota*. The American Civil Liberties Union did file an amicus brief for KGEF, as it did in the cases of WCFL and WEVD, though it made no difference in the final result.³²

Shuler’s case also serves as a reminder that the conceit of a singular “public interest” is exactly that. Was it in the public interest of the citizens of Los Angeles to have one of the 18 stations in the town owned by a muckraking, albeit reform-minded, broadcaster? Shuler’s popularity with a weekly listening audience of 600,000 suggested a certain kind of vote by radio dial democracy. Lloyd Nix, George Cryer, Asa Keyes, and their friends clearly disagreed. Would the calculus have been different if Shuler had spoken for only two hours a week on the air rather than three, or if he had forced the resignations of only one official instead of half a dozen? No firm answer could have been given to any of these questions since the FRC had no firm guidelines. And, of course, if KGEF had been a newspaper, these questions would never have needed to be asked in the first place. The FRC had been given an impossible mandate: It was the overseer of a system of government-issued radio licenses to be distributed in artificially limited numbers according to the vague-by-design public interest standard and enforced via an opaque and arbitrary process that was supposed to simultaneously avoid censorship while still making decisions based on broadcast content.

In other cases, the FRC would rule that advertisements for contraceptives, betting lines, and mildly provocative innuendo from starlet Mae West were quite obviously not in the public interest. In 1939, the FRC considered formal guidelines prohibiting “favorable references to hard liquor,” “excessive suspense on children’s programs,” and “excessive playing of recorded music to fill air-time”;³³ the FRC would not officially adopt the guidelines—though there are many cases at the time of individual stations penalized for violating these preferences³⁴—but they served as a reminder that the public interest standard was defined by majoritarian cultural values. In the FRC’s view, license-holders should advance Victorian mores and moral self-improvement, not frivolity, consumption, and sexual license. The Commission also kicked off decades of conflict between religious groups for a shrinking share of free sustaining airtime.³⁵

The New Dealers vs the Newspapermen

In terms of the politics of the public interest, political right and left alike complained about the FRC enforcing a species of consensus liberalism. For example, the FRC praised stations that promoted “the national preparedness

movement” by liaising with the American Legion; meanwhile pacifistic programming was labeled propaganda. And the problem would only worsen as the decade advanced. After the start of President Franklin Delano Roosevelt’s New Deal reforms, a commissioner at the newly renamed Federal Communications Commission (FCC) sent a letter to stations telling them that it was “their patriotic, if not bounden and legal duty” to reject any advertisers “disposed to defy, ignore, or modify the codes established by the N.R.A. [National Recovery Administration].” After all, station licenses were not the actual property of the licensee. Given that they were “using valuable facilities loaned to them temporarily by the government,” they had an obligation to support rather than undermine federal policy.³⁶

That episode of unsubtle, pro-New Deal pressure is also a reminder that the urge to use the public interest standard to advance political interests would be as great a temptation on the national level as on the local. The Roosevelt administration had credited the president’s landslide election victory in 1936 to his effective use of radio. Jim Farley, then the chairman of the Democratic National Committee (DNC), believed that radio was necessary to do “the work of overcoming the false impression created by the tons of written propaganda put out by foes of the New Deal,” an impression that was “washed away as soon as the reassuring voice of the President of the United States started coming through the ether into the family living room.”³⁷ As a new mass medium, radio allowed politicians like FDR to bypass preexisting media power structures—in this case print journalism—and appeal directly to voters. It was a presidential “fake news” defense but set in the 1930s.

Despite his dominant election victory in 1936, Roosevelt was worried by the growing number of newspapers buying radio stations (a third of the total by 1939) given that the percent of newspapers declaring support for his candidacy dropped from 41 percent in 1932 to 37 percent in 1936 and down to only 25 percent in 1940.³⁸ Conservative-owned newspapers were running editorials criticizing New Deal programs and accusing FDR of creeping authoritarianism. FDR’s response did little to persuade his critics otherwise. During the ‘36 election, the administration had gone through back channels to urge the FCC to deny or delay radio station licenses to several newspapers that supported his political opponents. Still frustrated with critical newspaper coverage in 1938, the administration leaked that

Roosevelt was contemplating firing the entire slate of FCC commissioners for their inaction.³⁹

Roosevelt did not carry out that threat, but the next year he appointed a new FCC Chairman, ardent New Dealer James “Larry” Fly. In December 1940, frustrated once again by sinking newspaper support for his candidacy, FDR asked Fly if he would “let me know when you propose to have a hearing on newspaper ownership of radio stations.”⁴⁰ Fly’s successor as chairman, Paul Porter, would later say, “This was a fetish of [Roosevelt’s] ... and he was constantly putting the blow torch on Larry.”⁴¹ The president’s request put Fly in an awkward position. He was committed to the New Deal and loyal to the president, but he was also an ardent civil libertarian who would lose his job several years later partly because he opposed the FBI’s request for warrantless wiretapping authority. Roosevelt also made it clear that if Fly “got in trouble” on the radio ownership issue, the proposal would be disavowed by the administration. And Fly had other priorities as commissioner that he lavished more political capital and attention on, particularly the push for regulation of chain broadcasting. But in March of 1941 Fly did accede to the president’s request and announced FCC hearings into newspaper ownership of radio stations.⁴²

The hearings were meant to determine whether the “joint association of newspapers and broadcast stations tends ... to prejudice the free and fair presentation of public issues ... cause editorial bias ... or to inject editorial policy or attitude into the public service rendered.” The predetermined answer was, of course, yes to all of the above, but Fly simply did not have the political capital to fight the newspaper industry. Instead, after 17 days of hearings the FCC stopped the proceedings. Even if the hearings did not lead to a formal newspaper ownership ban, at the start of the hearings Fly had placed a temporary ban on the issuance of powerful FM licenses to newspapers, limiting them to the weaker AM frequencies. And when the hearings ended, Fly did not remove the ban, leaving newspaper FM applications in regulatory limbo for the next two and a half years until Fly’s successor officially declared an end to the investigation under congressional pressure.⁴³

All of the parties involved in this fight—Fly, Roosevelt, and the newspapermen—claimed that they were the actual defenders of the public interest and that it was the other parties who were subverting the will of the people.⁴⁴

In private, however, they could be more blatant about the pragmatic considerations involved. For example, when the president accused Chairman Fly once again of dawdling on the newspaper ownership question, Fly responded that he needed to orchestrate the hearings so as to avoid the appearance of being motivated by “punitive political considerations towards the press.”⁴⁵ That was, of course, the actual motivation, but the president had learned a lesson about the importance of keeping up democratic appearances after the embarrassing failure of his Supreme Court packing scheme a few years earlier.

In the case of both Roosevelt’s newspaper ban and Bob Shuler’s KGEF fight a decade earlier, the FRC/FCC offered a new arena for the politically well-connected to circumvent judicial or legislative due process in order to gain political advantage. On two occasions in the late 1930s, pro-New Deal congressmen sponsored bills that would have ordered the FCC to enact the newspaper ownership ban, but the administration lacked the necessary political support for the measure.⁴⁶ Pressuring the FCC—an administrative agency headed by a presidential appointee—was a cleaner, simpler way of getting the president what he wanted. Whether or not that was in the public interest, it was certainly in FDR’s own best interests.

The Fairness Doctrine vs the Radio Right

The death of FDR in 1945 and Republican control of Congress after the 1946 midterm elections led to a decade and a half of salutary neglect towards broadcasting on the part of the FCC. Attempts at further public interest-based regulation were generally honored in the breach. Concerns over network domination of radio broadcasting faded as the networks shifted their attention to television. The percentage of radio stations controlled by network affiliates dropped precipitously as most new licenses went to small-scale, independent station owners. It was, in a sense, a return to the radio landscape of the late 1920s and, like then, it entailed a resurgence of political radicalism from both the left and right on the airwaves. Cash-strapped independent station owners were willing to air programs from a new wave of conservative broadcasters.⁴⁷ Indeed, by the early 1960s there were a dozen right-wing broadcasters airing on a hundred or more stations nation-wide, forming a kind of ad hoc syndicated network of stations airing conservative shows.⁴⁸

Meanwhile, a new generation of public interest advocates—young,

idealistic lawyers fueled by New Frontier zeal—had been nominated to the FCC by President John F. Kennedy. Commissioners like Newton Minow, William Henry, and Kenneth Cox believed that broadcasters had forgotten their obligation to educate and uplift the public. Of course, their definition of what counted as educational and uplifting did not include conservative ideas or advocacy, or at least not in the proportion that they were currently being communicated over the airwaves. Furthermore, the Kennedy administration had its own complaints about the constant attacks on its legislative agenda by conservative radio hosts. Surely it was not in the public interest to allow the “Radio Right” to undermine trust in the administration? This alliance between well-intentioned public interest advocates and administration officials using public interest rhetoric to advance narrowly partisan interests would lead to the most successful episode of U.S. government censorship of the past half century. They singled out conservative broadcasters for targeted audits by the Internal Revenue Service and created front organizations that would launder administration talking points and generate complaints about stations for the FCC. Ultimately, they pressured hundreds of radio stations into dropping conservative programming altogether.⁴⁹

But the details of the Kennedy administration’s censorship campaign most pertinent to our discussion of the public interest standard revolve around the partisan deployment of a newly enhanced set of regulations known as the Fairness Doctrine. A detailed examination of the evolution of the Fairness Doctrine would require a much longer treatment, but suffice it to say that the rule was rooted in the public interest standard. As already discussed, in the 1920s and 1930s the FRC defined stations that broadcast only one point of view—whether socialist, religious, or conservative—as “propaganda” stations, unlike stations that promoted broadly acceptable politics.

That general suspicion of stations controlled by political advocates had crystallized into the FCC’s Mayflower ruling during Fly’s chairmanship. Station WAAB in Massachusetts was owned by the Yankee Network, a second-tier regional network that frequently aired critiques of the New Deal and Roosevelt administration.⁵⁰ When WAAB was up for license renewal in 1939, the Mayflower Broadcasting Corp., owned by a disgruntled former Yankee employee, filed a competing claim for the license. The FCC threatened to award the license to Mayflower until Yankee promised to drop its offensive

editorializing habits. As Fly wrote, “A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.” It was awfully convenient, of course, for the Roosevelt administration that the Mayflower ruling punished a station supporting the political opposition, coming as it did in 1941, the same year that the Commission launched its investigation of newspaper ownership of radio. By the end of the decade, however, the FCC realized that the Mayflower decision was having a chilling effect on radical political speech. Radio station owners were avoiding editorializing in general in order to avoid the semblance of advocacy. This was not the outcome that sincere public interest reformers had hoped for, so in 1949 the FCC released a clarification of the Mayflower rule that allowed airing “the licensee’s personal viewpoint” as long as it was “part of the more general presentation of views or comments” on issues of public importance.⁵¹

The Mayflower doctrine would be revised again in 1959 to include an equal time requirement for political candidates, one that would be given the imprimatur of Congress, which was worried about bipartisan balance in television coverage during the upcoming 1960 election. The FCC also added a requirement to notify people when they’d been attacked on the air and the rules were renamed the “Fairness Doctrine.” However, it was not until 1963 that any attempt at enforcing the Fairness Doctrine would be made. That year, in the middle of a fight with conservative broadcasters over the Nuclear Test Ban Treaty, President Kennedy appointed a new FCC chairman, E. William Henry, and told him, “It is important that stations be kept fair.”⁵² Two months later, Henry would announce a “clarification” of the Fairness Doctrine reiterating that stations were not licensed “exclusively for the private interest” of their owners but to air programs that dealt with “issues of interest to his community, and in doing so ... be fair.”⁵³

The clarification signaled the FCC’s intent to take Fairness Doctrine complaints from listeners into account when renewing station licenses. Shortly thereafter, the White House would secretly organize the Citizens Committee for a Nuclear Test Ban to combat criticism of the treaty by demanding response time from stations under the threat of lodging a Fairness Doctrine complaint with the FCC.⁵⁴ And when a small station in Cullman, Alabama, offered a response time slot to the Committee—but only if they paid for the

airtime—the FCC that fall issued an update known as the Cullman Doctrine that obligated stations to provide response time gratis if the respondent said they could not pay.⁵⁵ In the 1960s, the enhanced Fairness Doctrine rules were without exception enforced against stations airing conservative programs. After JFK’s assassination and during the election of 1964, the Democratic National Committee used Fairness Doctrine complaints to intimidate radio stations into dropping broadcasters who supported Republican presidential nominee Barry Goldwater and to secure free airtime for the Lyndon Johnson campaign, some 1,700 free broadcasts in the final weeks before the election.⁵⁶

Nixon and CBS News

Although the Kennedy administration was the first to use the Fairness Doctrine to advance their political interests, the temptation to do so was a bipartisan impulse. Not long after the election of 1968, members of the Nixon administration began scheming about how they might use the Fairness Doctrine to intimidate television networks that portrayed administration policies in a negative light, particularly in their coverage of the Vietnam War.

For example, during the intense antiwar demonstrations of October 1969, President Richard M. Nixon told his staff to take “specific action relating to what could be considered unfair network news coverage,” saying it not once but 21 times. This scattershot response to displeasing coverage was not very effective, so Jeb Magruder, one of Nixon’s operatives working for the Committee to Re-Elect the President (CRP, later mockingly nicknamed “CREEP” by the media), argued for replacing Nixon’s “shot-gun” method with a more targeted, “rifle”-like approach. Magruder’s inspiration was the Kennedy administration, which, in his words, “had no qualms about using the power available to them to achieve their objectives.”⁵⁷ Magruder’s plan involved, among other measures, monitoring broadcasts in order to “make official complaints” via the FCC, which was then chaired by recent Nixon appointee and former Republican National Committee chairman Dean Burch.⁵⁸

The first test for Magruder’s plan came when recently retired NBC News anchor Chet Huntley said of Nixon in an interview, “The shallowness of the man overwhelms me; the fact that he is President frightens me.”⁵⁹ Nixon was furious at the slight, so Magruder promptly released a “plan on press

objectivity,” the ultimate goal of which was to “tear down the institution” of the press and “generate a public re-examination of the role of the media in American life.”⁶⁰ The networks, worried about the effect on public relations, forced Huntley to apologize, but the Nixon administration had bigger plans. They wanted to “plant a column” with a sympathetic outlet calling for “a blue-ribbon media ‘watchdog’ committee to report to the public on cases of biased reporting.”⁶¹ They would then have a Republican senator write a public letter to the FCC proposing that newsmen should be licensed since “the airwaves belong to the public,” which “should be protected from the misuse of these airwaves by individual newsmen.”⁶² The Nixon administration wanted to fully weaponize the public interest standard to spare the president public embarrassment and to undermine opposition to its legislative agenda.

However, Magruder and the rest of the CRP team found that the mere threat of regulatory scrutiny was often enough to compel compliance. After the Huntley controversy and various regulatory tweaks by Dean Burch, CRP operative Chuck Colson found that the network television heads were “accommodating, cordial and almost apologetic” in private meetings.⁶³ CBS told Colson that every administration had asked for more favorable coverage since “every Administration had felt the same way”; Nixon’s operatives had actually “been slower in coming to them to complain” than their predecessors had been.⁶⁴ By September 1970, the Nixon administration had bullied the networks into a submissive state that lasted another year or so. Broadcast television resistance had mostly been neutered; it would be print media—with its stronger legal protections and lack of a public interest standard—that would take the lead in challenging the administration over the next several years.

After the 1972 election, the White House renewed its efforts to control network coverage, which had taken a negative turn in keeping with the crumbling situation in Vietnam. Clay T. Whitehead, the head of the White House Office of Telecommunications Policy, proposed changes to the Communications Act of 1934. When station licenses were up for renewal, according to a speech Whitehead delivered that winter, their owners would be required to demonstrate that they were “substantially attuned to the needs and interests of the community” and that they had offered a reasonable opportunity for the “presentation of conflicting views on controversial issues.”⁶⁵ Local station

managers and network officials would be held responsible for “all programming, including programs that come from the network.” Those that did not correct imbalances or bias in network political coverage would be “held fully accountable by the broadcaster’s community at license renewal time.”⁶⁶ This policy would have had some bite. If a station could not demonstrate meaningful service to all elements of the community, the license would be denied renewal by the FCC. That stick was proffered along with two carrots: The license period for stations would be extended, and challenges to license renewal would become harder to sustain.⁶⁷

Earlier in American history, it had been the political left that had raised concerns about a private monopoly over the airwaves. Now, from the political right, Whitehead traced the problems in media bias to “excessive concentration of control over broadcasting,” presumably by the networks.⁶⁸ Such control, he argued, was as bad when it came from network headquarters in New York City as it was when exercised by the government from Washington, D.C. Whitehead had taken up the anti-monopoly cause and ended up with something like the “right to hear” interpretation of the First Amendment by the Supreme Court in *Red Lion Broadcasting Co. v. FCC* in 1969; rather than thinking of the First Amendment as a negative restriction against constraints on speech, the Court viewed the First Amendment as a positive means to promote underrepresented speech, even if doing so meant legal favor for certain kinds of speech over others. This would be done by preventing monopoly control over information; from the perspective of the Nixon administration, that meant breaking apart a perceived monopoly of outlets and journalists whose politics favored the political left. Nixon’s team wanted to force broadcasters to present points of view favorable to the administration: “The Fairness Doctrine became the Holy Writ; and the ‘King Richard version’ called for local stations to enforce it on pain of being put out of business if they did not.”⁶⁹

This time the news media outlets were not as quick to capitulate as before. A Washington Post editorial captured the spirit of the harsh response that met Whitehead’s speech: “[T]he administration is endangering not simply the independence of network news organizations, but the fundamental liberties of the citizens of this country as well.”⁷⁰ NBC president Julian Goodman joined in, writing, “Some federal government officials are waging

a continuing campaign aimed at intimidating and discrediting the news media, and the public has expressed very little concern.”⁷¹ And Robert G. Fichtenberg, chairman of the freedom of information committee of the American Society of Newspaper Editors, called the proposed licensing standards “one of the most ominous attacks yet on the people’s right to a free flow of information and views.”⁷² The Nixon administration’s 1972 proposals were not included in subsequent legislation nor were they publicly mentioned again by officials.

By the end of that year, Nixon and CRP were too busy trying to handle the fallout from the Watergate scandal to lean on the networks over coverage of the Vietnam War. Still, their early efforts to control the networks in 1969 and 1970 had, as Charles Colson privately reported to H.R. Haldeman, intimidated the network heads: “They are very much afraid of us and are trying hard to prove they are ‘good guys.’”⁷³ The effects of the Whitehead plan are more difficult to assess. Even though it was later withdrawn, the proposals may have affected the judgment and actions of network news executives in much the same fashion as the earlier campaign clearly had. Nonetheless, the Nixon administration’s use of the Fairness Doctrine was, in its own way, nearly as successful as the Kennedy administration’s efforts a decade earlier, though Kennedy targeted small, independent radio stations while Nixon went after the major television networks. Both were designed to control criticism of the government without falling afoul of the Constitution’s ban on direct censorship.

The final rotten fruit of Nixon’s use of FCC regulations to cripple his political opponents was a ban on newspapers owning more than a single television station in any major media market. Katharine Graham, the owner of the Washington Post—which had played a vital role in exposing the Watergate scandal—believed that the rule was meant to intimidate her into silence by threatening her ownership of two television stations in Florida. She would later write that “of all the threats to the company during Watergate ... [this was] the most effective.”⁷⁴ Graham sold off one of the stations in order to avoid the threat of heightened regulatory scrutiny, but Nixon’s tactic might have worked on a less stalwart or less wealthy person, potentially stifling the coverage that ultimately led to his downfall.

Nixon’s cross-media ownership rule fulfilled the promise of Roosevelt’s

cross-ownership proposal 30 years earlier. Roosevelt wanted to punish conservative newspaper owners by barring them from owning too many radio stations. Nixon wanted to punish liberal newspaper owners by barring them from owning too many television stations. Both Roosevelt and Nixon used the public interest regulatory apparatus in order to censor speech they found inconvenient. Bear in mind that the text of the cross-media ownership rule said nothing about regulating broadcast content. It is an important reminder that even regulations that purport to be “content-neutral” can be used to mask censorial purpose.

Summary

There is a line of jurisprudential reasoning running through all four episodes, but there are other fundamental themes that connect them as well. Each case reveals the insoluble tension between an obligation to regulate broadcasting in the public interest while simultaneously avoiding censorship. Each case reveals just how foolhardy the pursuit of a singular public interest is, as if there exists some Platonic ideal of a unitary, homogenous public for technocratic regulators to identify and altruistically serve. Each case is a reminder of just how easily public interest mechanisms can be used to advance partisan or private interests; indeed, it is when well-intentioned public interest reformers have had the most influence that the risk of regulatory capture by baser political operatives has been most acute. It is not at all obvious that the public interest standard in broadcasting has served the public interest.

When the Fairness Doctrine was finally taken to the Supreme Court in *Red Lion Broadcasting Co. v. FCC* (1969)—a case secretly manufactured by an operative working for the Democratic National Committee—the Court upheld the Fairness Doctrine on public interest grounds, citing Shuler’s case, *Trinity Methodist Church, South v. FRC*, and the Mayflower decision among the precedents.⁷⁵ It is interesting, however, that the Court was much more concerned about the possibility of censorship than the courts had been in those prior cases, when they had simply stipulated that the FRC/FCC could not be guilty of censorship so long as they avoided prior restraint and adhered to the public interest standard. By contrast, Justice Byron White wrote that evidence of “self-censorship” by stations avoiding Fairness Doctrine complaints would “indeed be a serious matter.” White’s concerns over censorship were

assuaged when the FCC's attorneys told the Court that "the fairness doctrine in the past has had no such overall effect" and that self-censorship was "at best speculative."⁷⁶ If the Court had known that the explicit purpose of the enhanced Fairness Doctrine rules was to encourage stations to self-censor and to drop conservative programming for the benefit of the Kennedy and Johnson administrations, they might not have been so blasé, but that was information the Court was not privy to.

As noted earlier, the *Red Lion* decision remains an active precedent.⁷⁷ The Fairness Doctrine was overturned via the political process, not through the courts. Which means that if reformers can successfully assert that the internet falls under the public interest standard, *Red Lion* could be used to defend expansive internet speech regulations. So far proponents have been unable to make the public interest standard stick. The last attempt to apply the standards to internet content providers was the Communications Decency Act of 1996, which the Supreme Court struck down in *Reno v. ACLU* in 1997.⁷⁸ The Court explicitly rejected *Red Lion* because "the special factors recognized in some of the Court's cases as justifying regulation of the broadcast media"—namely, the scarcity rationale—were "not present in cyberspace." Without the scarcity principle, broadcast public interest standards could not be applied to internet regulation. That seemed final at the time, but when the courts close a door, sometimes they leave open a window.

As noted earlier, media scholar Philip Napoli argues that there is an alternative to the scarcity rationale that would justify the extension of the public interest standard to the internet. Napoli believes that the broadcast spectrum, like the air or the water, is a public resource "owned by the people." As such, it is "public property subject to complete regulation by the federal government."⁷⁹ And so Napoli proposes that aggregated internet user data be defined as a public resource, which would provide "a grounding for the imposition of content-related public interest obligations in a manner similar to the way that the public resource character of the broadcast spectrum justifies a range of content-related public interest obligations."⁸⁰ Napoli's novel public resource approach has yet to be tested in court, but it serves as a reminder that the jury is still out on whether public interest standards could be applied to the internet.

The Carter and Reagan administrations abandoned the doctrine as part

of their general efforts to deregulate the economy. Yet the interpretation of the public interest as fairness in speech might have been revived in later administrations and, under *Red Lion*, might have passed constitutional muster. But for that to happen, the doctrine had to offer a net benefit to a political interest. The Kennedy and Nixon episodes discussed earlier suggested that neither of the major political parties could expect net benefits from a renewed broadcasting standard. Of course, broadcasters had paid the costs of the old doctrine and had little reason to expect a different outcome under a new version. Political calculation, not the courts, brought the Fairness Doctrine to an end.

POLICY IMPLICATIONS

TO REVIVE THE PUBLIC INTEREST STANDARD and apply it to the internet, policymakers first need to deal with the basic flaw of those rules, namely the way in which they can be manipulated to advance private or partisan interests at a cost to freedom of speech. It is not obvious that they have fully grappled with that flaw. In June 2019, Senator Josh Hawley introduced the Ending Support for Internet Censorship Act.⁸¹ Operating from the mistaken belief that Section 230 of the Communications Decency Act of 1996 requires that tech companies provide “a forum free of political censorship” in order to enjoy an exemption from publisher liability, Hawley proposed giving the Federal Trade Commission (FTC) certification authority over content moderation by large internet platforms.⁸² Under Hawley’s plan, every two years tech companies of a certain size would have to prove to the satisfaction of at least four of the five members of the FTC that their content moderation had been politically neutral. The bill further specifies that “information content providers” (websites) should “submit complaints or evidence that they have been subject to politically biased content moderation” and testify to that effect at certification hearings. If platforms fail to prove their neutrality, they would lose Section 230 liability protection and face a wave of lawsuits. Most tech companies would be much less valuable without Section 230 protections, giving government regulators tasked with serving the public interest immense leverage over internet companies, not

unlike how prior administrations exercised leverage over broadcast networks through the FCC and its licensing process.

How might that leverage work? The bill states that a certification of neutrality must be approved by “at least 1 more than a majority of the [five] Commissioners.”⁸³ To be precise, at least one member of both parties would have to approve the certification. This requirement might seem to serve the cause of free speech. After all, if a tech company sought to suppress online speech by a Democrat or Republican, the FTC could deny it a certification of neutrality through the vote of at least one Democratic or Republican member. Unlike the Fairness Doctrine, both parties could be assured that the neutrality standard would not be used against their partisans because leaders of both parties would have an effective veto over actions by the companies.

However, this supermajority rule—although an effort to mitigate majoritarian suppression of online speech—is paired with a problematic affirmative obligation. Online platforms are by default unprotected by Section 230 until the FTC certifies them as neutral and thus protected. This would make the entire review process particularly susceptible to filibustering. Given that four of five votes would be needed to certify, the two minority party commissioners, voting in unison, could block certification. It is not hard to imagine the political possibilities that could be reaped from this system. Any two commissioners could exercise enormous political and financial leverage over online platforms.

Consider the following scenario. In May 2019, the Trump administration invited conservatives who felt that they had been censored by social media platforms to submit complaints to a White House website. Three months later those complaints were then used to justify drafting an executive order titled “Protecting Americans from Online Censorship,” which proposed doing via executive power what Hawley had proposed doing via legislation, that is, removing Section 230 protection from biased internet platforms.⁸⁴ The executive order was never issued, but if, in some alternate universe, Hawley’s bill had been enacted earlier that summer, the president would then have had a powerful tool for advancing his partisan interests under the guise of advancing the public interest. He could have encouraged his ardent supporters to submit a wave of complaints to the FTC. If just two of the three Republican commissioners could be suborned, the administration would

have been able to deny certification to any online platform, using neutrality as a pretext for dampening criticism of Trump during a crucial period in his presidency. That did not happen, of course, but it is not hard to imagine how the FTC's neutrality authority could be abused for partisan gain.

But the question is not just whether the companies might suppress speech under partisan or ideological pressure from the FTC. Under Hawley's bill the companies would be fundamentally dependent on an agency of the federal government to operate (assuming that the protections against liability afforded by Section 230 are essential to the firms). These private companies are, at present, not covered by the First Amendment. Partisans could demand *sub silentio* that content moderators suppress disfavored speech in return for a neutrality certification. Hence, the leverage the agency would have over the company might well translate into censorship with no recourse to the courts. Furthermore, non-mainstream political speech might find it difficult to secure enthusiastic defenders from representatives of either party. Neutrality violations that hurt these radical speakers might very well be compatible with certification. Indeed, private content moderators, left to guess whether they should suppress speakers disliked by both parties, might do so in order to safely obtain a certificate of neutrality rather than out of any particular partisan affiliation.

The historical episodes we have discussed demonstrate the problem of mainstream apathy towards the suppression of radical speech. Bob Shuler, although a Republican, had alienated both the Republican and Democratic parties on the local level, leaving him with few political allies to speak for him when the FRC revoked his radio station license. Socialist radio station owners fought similar pressures from both Republican and Democratic FRC commissioners in the 1930s. Right-wing broadcasters in the 1960s, targeted by the Kennedy administration and the DNC with the Fairness Doctrine, quickly found that Richard Nixon had no interest in helping radical conservatives who had attacked his China policy.

Hawley's Ending Support for Internet Censorship Act is likely a stillborn effort to regulate content online. And perhaps other proposals will avoid these free speech issues, but history suggests otherwise. If the government is empowered to advance the public interest online, it will necessarily affect the moderation decisions of private companies. Given our current polarized

politics, a handful of newly empowered public officials are likely to view Facebook similarly to how Richard Nixon saw CBS News: as an opportunity to extract political rents.

That comparison is more relevant than you might think. Both CBS News (in the past) and Facebook (in the present) engage in content discrimination; there are no constitutional grounds to protest their actions. While elected officials have a natural interest in controlling what is said about them, they cannot effectively punish their online critics. Regulations that do not impose content discrimination, either explicitly or implicitly, fall outside our analysis, but we wonder whether such regulations are likely. Given the history of partisan abuse of the public interest standard in broadcasting, the burden of proof should rest with those advocating for a public interest standard for the internet to show that their rules would not impose new restrictions on free speech.

We believe that the implications of this history reach beyond public policy. Social media companies have responded to criticism by moderating content on their platforms, but they have also legitimized speech suppression through quasi-judicial institutions.⁸⁵ For example, Facebook is about to launch an independent oversight board to hear user appeals to decisions made by its content moderators.⁸⁶ Given that they are private institutions, both Facebook's moderation policy and the board's judgments would not be obligated to observe First Amendment protections for speech.⁸⁷ Facebook's CEO has stated that his company considers free speech a "paramount value."⁸⁸ However, social media companies retain the power to police their platforms.

Such authority, though fully justified, opens up significant risks to free speech. Elected and unelected government officials have an interest in what is taken down or left up on social media. They might gain leverage over the platforms through some sort of licensing scheme as proposed by Senator Hawley. Even absent that degree of control, the possibility of government intervention places pressure on Silicon Valley; in order to avoid direct government regulation, online platforms might embrace industry-wide self-regulation standards that suppress political or radical speech. As we have seen, if a government agency has the power to regulate social media in the public interest, such leverage over the platforms is all the more likely to be effective.

How then should we respond to new efforts to regulate social media? History cannot tell us with precision what the correct path forward is, but

the history recounted here does suggest that novel regulations imposed on new communication technologies tend to spawn free speech challenges. Given the risk of regulatory capture of a new internet regulatory agency by political incumbents who could use their power to suppress dissident speech, we propose contesting any such regulations through the courts on First Amendment grounds. Internet searches and platform curation, like the editorial judgment of a newspaper, deserve constitutional protection from government encroachment.⁸⁹ First Amendment concerns would also preclude the internet equivalent of platform licensing. We may even need explicit constitutional protections favoring private regulation of technology and opposing government censorship of the internet.

NOTES

- 1 Marc Andreessen, *Why Software Is Eating the World*, WALL ST. J. (Aug. 20, 2011) <https://www.wsj.com/articles/SB10001424053111903480904576512250915629460> [https://perma.cc/AD24-3VWH].
- 2 See, e.g., TIM WU, *THE CURSE OF BIGNESS: ANTI-TRUST IN THE NEW GILDED AGE* (2018).
- 3 See, e.g., Victor Pickard, *Media and Politics in the Age of Trump*, ORIGINS, Nov. 2016, <http://origins.osu.edu/article/media-and-politics-age-trump> [https://perma.cc/8LWQ-zXYZ]; April Glaser, *Bring Back the Golden Age of Broadcast Regulation*, SLATE (June 6, 2019), <https://slate.com/technology/2019/06/youtube-facebook-hate-speech-regulation-how.html> [https://perma.cc/WS49-RQBN]; Philip M. Napoli, *What Would Facebook Regulation Look Like? Start with the FCC*, WIRED (Oct. 4, 2019), <https://www.wired.com/story/what-would-facebook-regulation-look-like-start-with-the-fcc/> [https://perma.cc/F9CD-DT6z] [hereinafter *What Would Facebook Regulation Look Like?*].
- 4 STIGLER COMM. ON DIGITAL PLATFORMS, FINAL REPORT 191 (2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> [https://perma.cc/VN7R-ZJ7Y].
- 5 PHILIP M. NAPOLI, *SOCIAL MEDIA AND THE PUBLIC INTEREST: MEDIA REGULATION IN THE DISINFORMATION AGE* (2019) [hereinafter *SOCIAL MEDIA AND THE PUBLIC INTEREST*].
- 6 See *Ending Support for Internet Censorship Act*, S. 1914, 116th Cong. (2019).
- 7 *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).
- 8 *Id.* at 148–49. See also JAMIE SUSSKIND, *FUTURE POLITICS: LIVING TOGETHER IN A WORLD TRANSFORMED BY TECH* 43 (2018) (contending that future technology will be more pervasive).
- 9 *SOCIAL MEDIA AND THE PUBLIC INTEREST*, *supra* note 5, at 150.
- 10 See, e.g., Mark MacCarthy, *To Regulate Digital Platforms, Focus on Specific Business Sectors*, BROOKINGS INSTITUTION (Oct. 22, 2019), <https://www.brookings.edu/blog/techtank/2019/10/22/to-regulate-digital-platforms-focus-on-specific-business-sectors> [https://perma.cc/3XLS-V5Z5].
- 11 *SOCIAL MEDIA AND THE PUBLIC INTEREST* *supra* note 5, at 192 (quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1972)). See also *id.* at 191–93 (elaborating on the idea of First Amendment collectivism).
- 12 Owen M. Fiss, *Free Speech and Social Structure*, 17 IOWA L. REV. 1405, 1405–25 (1986).
- 13 *SOCIAL MEDIA AND THE PUBLIC INTEREST* *supra* note 5, at 192.
- 14 Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987) (“The concern is not with the frustration of would-be speakers, but with the quality of public discourse. Autonomy may be protected, but only when it enriches public debate. It might well have to be sacrificed when, for example, the speech of some drowns out the voices of others or systematically distorts the public agenda.”).
- 15 Napoli has noted that the state remains a threat to freedom of expression, but he does not specify there or elsewhere the risks associated with First Amendment collectivism. He focuses instead on the potential benefits of the doctrine for democracy. *SOCIAL MEDIA AND THE PUBLIC INTEREST*, *supra* note 5, at 192.
- 16 Charles Edward Orbison, “Fighting Bob” Shuler and KGEF: The Silencing of a Radio Crusader 44, 95 (Aug. 1975) (unpublished M.S. thesis) https://digital.library.unt.edu/ark:/67531/metadc798063/m2/1/high_res_d/1002773405-Orbison.pdf [https://perma.cc/D6JU-39VR]; JULES TYGIEL, *THE GREAT LOS ANGELES SWINDLE* 280 (Univ. of Cal. Press 1996) (1994).
- 17 U.S. CENSUS BUREAU, *FIFTEENTH CENSUS OF THE UNITED STATES: 1930, POPULATION, VOLUME VI, FAMILIES* 171 (1933).
- 18 *The Radio Act of 1927*, Pub. L. No. 69-632 (1927).
- 19 As Thomas Hazlett has noted, the preference for artificial scarcity in the number of stations dated back to the mid-1920s when the Radio Conference voted down the move to a wider range of frequencies to prevent competition. And a few years later, one of the FCC’s first rulings was to prevent another attempt at widening the allowable spectrum. Hazlett estimates that doing so limited AM radio to just five percent of

the potential broadcasting spectrum. Thomas Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990). See also BRUCE M. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT (1975); TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 83–84 (2011).

20 FCC v. Nelson Bros. Bond & Mortg. Co., 289 US 266, 271 (1933).

21 Robert McChesney, *Labor and the Marketplace of Ideas: WFL and the Battle for Labor Broadcasting, 1927–1934*, 134 JOURNALISM MONOGRAPHS 14, 22–23 (1992).

22 Nathan Godfried, *Legitimizing the Mass Media Structure: The Socialists and American Broadcasting, 1926–1932*, in CULTURE, GENDER, RACE, AND U.S. LABOR HISTORY 123, 123–49 (Ronald Kent, Sara Markham, David Roediger & Herbert Shapiro eds., 1993).

23 KFKB Broad. Ass’n v. Fed. Radio Comm’n, 47 F.2d 670, 672 (D.C. Cir. 1931).

24 Near v. Minnesota, 283 U.S. 697 (1931).

25 THE NAT’L ASS’N OF BROADS., *Radio Slander Bill Approved*, BROADS.’ NEWS BULL. 122 (May 16, 1931), <https://www.americanradiohistory.com/Archive-NAB-Publications/NAB-Broadcaster-News/NAB-Broadcaster’s-News-1931-Q2.pdf> [<https://perma.cc/Q3G8-4WZ6>].

26 Orbison, *supra* note 16, at 31.

27 *Id.* at 36–38.

28 *Id.* at 44, 75–80.

29 THE NAT’L ASS’N OF BROADS., *KGEF License Renewal Recommended*, BROADS.’ NEWS BULL. 85 (Aug. 15, 1931), <https://www.americanradiohistory.com/Archive-NAB-Publications/NAB-Broadcaster-News/NAB-Broadcaster’s-News-1931-Q3.pdf> [<https://perma.cc/2NCT-LB7Y>].

30 *Id.*; Orbison, *supra* note 16, at 29–30.

31 Trinity Methodist Church v. Fed. Radio Com., 62 F.2d 850, 853 (D.C. Cir. 1932).

32 Letter from Philip Loucks, Managing Dir., Nat’l Ass’n of Broads., to the officers and directors of the Nat’l Ass’n of Broads., (Jan. 23, 1933) <https://www.americanradiohistory.com/Archive-NAB-Publications/NAB-Broadcaster-News/NAB-Broadcast->

[er’s-News-1932-Q1.pdf](https://perma.cc/ZDF8-5MTD) [<https://perma.cc/ZDF8-5MTD>]; THE NAT’L ASS’N OF BROADS., *Intervene in Shuler Case*, BROADS.’ NEWS BULL. 325 (Feb. 11, 1933), <https://www.americanradiohistory.com/Archive-NAB-Publications/NAB-Broadcaster-News/NAB-Broadcaster’s-News-1932-Q4.pdf> [<https://perma.cc/Q3G8-4WZ6>].

33 CHRISTOPHER H. STERLING & JOHN MICHAEL KITROSS, STAY TUNED: A HISTORY OF AMERICAN BROADCASTING 209 (1978).

34 See, e.g., Frank McNinch, Chairman, FCC, Subsequent Punishment: Commission Attitude on Complaints, Address Before the National Association of Broadcasters (Feb. 15, 1938), in RADIO CENSORSHIP, 97, 111–12 (H.B. Summers ed. 1939).

35 Paul Matzko, *The National Council of Churches versus Right-Wing Radio: How the Mainline Muted the New Christian Right*, in THE LIVELY EXPERIMENT: RELIGIOUS TOLERATION IN AMERICA, FROM ROGER WILLIAMS TO THE PRESENT 267, 267–68 (Chris Beneke & Chris S. Grenda eds., 2015); Paul Matzko, *Radio Politics, Origin Myths, and the Creation of New Evangelicalism*, 48 FIDES ET HISTORIA 61 (2016).

36 Mitchell Dawson, *Censorship on the Air*, 31 AM. MERCURY 257, 267–68 (1934).

37 JIM FARLEY, BEHIND THE BALLOTS: PERSONAL HISTORY OF A POLITICIAN 319 (1938), quoted in GWENYTH L. JACKAWAY, MEDIA AT WAR: RADIO’S CHALLENGE TO THE NEWSPAPERS, 1924–1939, at 137 (1995).

38 Daniel R. Ernst, *The Shallow State: The Federal Communications Commission and the New Deal*, 4 U. PA. J.L. & PUB. AFF. 403, 451 (2019).

39 RICHARD W. STEELE, PROPAGANDA IN AN OPEN SOCIETY: THE ROOSEVELT ADMINISTRATION AND THE MEDIA, 1933–1941, at 177 (1985); Drew Pearson, *FDR Disgusted with Radio Board; Plans to Fire All Members*, ST. PETERSBURG TIMES (Nov. 3, 1938), at 4.

40 ERIK BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES: THE GOLDEN WEB, VOLUME II, 1933 TO 1953, at 170 (1968) (quoting from the James L. Fly papers).

41 SUSAN L. BRINSON, THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–1960, at 45 (2004).

42 Ernst, *supra* note 38, at 452.

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- 43 Decision and Order on Motion to Vacate Orders No. 79 and 79-A, 8 F.C.C. 589, 589-91 (1941).
- 44 JACKAWAY, *supra* note 37, at 143.
- 45 Ernst, *supra* note 38, at 452.
- 46 *Id.* at 451.
- 47 STERLING & KITROSS, *supra* note 33, at 293-94.
- 48 For a detailed exploration of the counter-Radio Right censorship campaign, see PAUL MATZKO, THE RADIO RIGHT (forthcoming 2020). See also HEATHER HENDERSHOT, WHAT'S FAIR ON THE AIR? COLD WAR RIGHT-WING BROADCASTING AND THE PUBLIC INTEREST (2011).
- 49 For more on the IRS's targeted audits of conservative broadcasters, see JOHN A. ANDREW III, POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON 25-75 (2002). For older work on the targeted use of the FCC's Fairness Doctrine by former CBS news producer Fred Friendly, see FRED FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING (1976). Invoked throughout this paper, Friendly's papers are housed at Columbia University and he conducted interviews with several of the prime actors in the Democratic National Committee censorship operation.
- 50 For an extended description of the Mayflower ruling and the Yankee Network case, see Matzko, *Radio Politics, Origin Myths, and the Creation of New Evangelicalism*, *supra* note 35, at 6.
- 51 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1254-55 (1949), quoted in GIRAUD CHESTER, GARNET R. GARRISON & EDGAR WILLIS, TELEVISION AND RADIO 129 (1971).
- 52 Handwritten note, Interview by E. William Henry with Fred Friendly (undated) (on file with Columbia University, folder 6, box 81, Fred Friendly Papers ("FFP")).
- 53 Statement of E. William Henry, Chairman, FCC (July 16, 1963) (on file with University of Wisconsin-Madison, folder "Editorializing, 1963-1965," box 21, E. William Henry Papers).
- 54 For more on the Citizens Committee for a Nuclear Test Ban, see Erin L. Richardson, SANE and the Limited Test Ban Treaty of 1963: Mobilizing Public Opinion to Shape U.S. Foreign Policy (Nov. 2009) (unpublished M.A. thesis) (https://etd.ohiolink.edu/letd.send_file?accession=ohiou1257556741&disposition=inline [<https://perma.cc/AH7Q-WJY6>]); RONALD TERCHEK, THE MAKING OF THE TEST BAN TREATY 84-85 (1970).
- 55 Responsibility Under the Fairness Doctrine, 40 F.C.C. 576 (1970) (response dated Sept. 18, 1963).
- 56 For an excerpt from DNC Chairman John Bailey's report on the Fairness Doctrine / monitoring of the Radio Right, see Memorandum from Wayne Phillips to Fred Friendly (Oct. 17, 1974) (on file with Columbia University, folder 6, box 81, FFP). See also Confidential Memorandum from Martin Firestone to Wayne Phillips (Oct. 28, 1964) (on file with Columbia University, folder 6, box 81, FFP).
- 57 Memorandum from J.S. Magruder on The Shotgun versus the Rifle to H.R. Haldeman (Oct. 17, 1969) (on file with Columbia University, folder 2, box 81, FFP).
- 58 *Id.*
- 59 Thomas Thompson, *Chet Heads for the Hills*, LIFE, July 17, 1970, at 33, 36.
- 60 Memorandum from Jeb S. Magruder containing a tentative plan on press objectivity to Mr. Haldeman & Mr. Klein (July 17, 1970) (on file with Columbia University, folder 2, box 81, FFP) (hereinafter Magruder Tentative Press Plan); Memorandum from L. Higby to Mr. Magruder (July 16, 1970) (on file with Columbia University, folder 2, box 81, FFP).
- 61 Magruder Tentative Press Plan, *supra* note 60.
- 62 Memorandum from L. Higby to Mr. Magruder (July 16, 1970) (on file with Columbia University, folder 2, box 81, FFP).
- 63 Memorandum from Charles Colson to H.R. Haldeman (Sept. 25, 1970) (on file with Columbia University, folder 2, box 81, FFP).
- 64 *Id.*
- 65 Dr. Whitehead and the First Amendment, WASH. POST (Dec. 22, 1972), at A22.
- 66 *Restrained Freedom*, TIME, Jan. 1, 1973, at 63.
- 67 Dr. Whitehead and the First Amendment, *supra* note 65.
- 68 Address by Clay T. Whitehead, Director, Office of Telecommunications Policy, Executive Office of the President, Before Sigma Delta Chi, Indianapolis Chapter (Dec. 18, 1972), in WILLIAM E. PORTER, ASSAULT ON

THE MEDIA: THE NIXON YEARS 300, 301 (1976).

69 JOSEPH C. SPEAR, *PRESIDENTS AND THE PRESS: THE NIXON LEGACY* 151 (1984). *See also* PORTER, *supra* note 68, at 172–74 (1976).

70 *Dr. Whitehead and the First Amendment*, *supra* note 65.

71 CQ PRESS, *HISTORIC DOCUMENTS OF 1973*, at 56 (1974).

72 *Id.* at 57.

73 Memorandum from Charles Colson to H.R. Haldeman, *supra* note 63; THOMAS W. HAZLETT, *THE POLITICAL SPECTRUM* 152 (2017).

74 Brooks Boliek & Katy Bachman, *Nixon’s Newspaper War*, *POLITICO* (Aug. 8, 2014), <https://www.politico.com/story/2014/08/another-nixon-reminder-media-ownership-rules-109825> [<https://perma.cc/5H9A-UWFP>].

75 DNC operative Wayne Phillips provided significant financial aid and technical advice to Fred Cook, the freelance journalist who sued the Red Lion station owner. *See, e.g.*, Memorandum from Fred Cook to Wayne Phillips (Jan. 25, 1965) (on file with Syracuse University Libraries, folder 7, box 1, Fred Cook Papers (“FCP”)); Memorandum on Dr. Billy James Hargis, His Christian Crusade, His Christian Echoes National Ministry, and Connections with other Groups (Oct. 10, 1962) on file with Syracuse University, folder 13, box 1, FCP); Letter from Wayne Phillips (Oct. 24, 1974) (on file with Columbia University, folder 3, box 82, FCP).

76 *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 393 (1969).

77 Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 *Nw. J. TECH. & INTELL. PROP.* 51, 51–52 (2010).

78 521 U.S. 844 (1997).

79 *What Would Facebook Regulation Look Like?*, *supra* note 3; Gerald Torres, *Who Owns the Sky?*, 19 *PACE ENVTL. L. REV.* 227, 247 (2001).

80 Philip Napoli, *User Data as Public Resource* (June 2019) (working paper) (manuscript available at <https://perma.cc/Q7QF-M6XL>).

81 Ending Support for Internet Censorship Act, *supra* note 6.

82 Press Release, Senator Josh Hawley, Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies (June 19, 2019), <https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies> [<https://perma.cc/TE9T-T54Z>].

83 Ending Support for Internet Censorship Act, *supra* note 6, at §§ 2-3(b)(iv)(i).

84 Brian Fung, *White House Proposal Would Have FCC and FTC Police Alleged Social Media Censorship*, *CNN* (Aug. 10, 2019), <https://www.cnn.com/2019/08/09/tech/white-house-social-media-executive-order-fcc-ftc/index.html> [<https://perma.cc/9NN2-LKP8>]; Makena Kelly, *White House Launches Tool to Report Censorship on Facebook, YouTube, Instagram, and Twitter*, *THE VERGE* (May 15, 2019), <https://www.theverge.com/2019/5/15/18626785/white-house-trump-censorsip-tool-twitter-instagram-facebook-conservative-bias-social-media> [<https://perma.cc/QWN5-BFB5>].

85 *SOCIAL MEDIA AND THE PUBLIC INTEREST*, *SUPRA* note 5, at 165.

86 *See* Brent Harris, *Establishing Structure and Governance for an Independent Oversight Board*, *FACEBOOK NEWSROOM* (Sept. 17, 2019), <https://newsroom.fb.com/news/2019/09/oversight-board-structure> [<https://perma.cc/P36C-CZS7>].

87 John Samples, *Why the Government Should Not Regulate Content Moderation by Social Media*, *CATO INST.* (Apr. 9, 2019), <https://www.cato.org/publications/policy-analysis/why-government-should-not-regulate-content-moderation-social-media> [<https://perma.cc/79J2-UEUN>].

88 Mark Zuckerberg, *Remarks at Georgetown University: Standing for Voice and Free Expression* (Oct. 17, 2019), <https://www.facebook.com/notes/mark-zuckerberg/standing-for-voice-and-free-expression/10157267502546634> [<https://perma.cc/KA3A-AE9T>].

89 *Miami Herald v. Tornillo* recognized that the First Amendment protects editorial judgement. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). *See also* EUGENE VOLOKH & DONALD FALK, *FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS* (Apr. 20, 2012), <https://ssrn.com/abstract=2055364> [<https://perma.cc/7XCZ-CH74>]. In

their white paper commissioned by Google, Volokh and Falk argue that search engine results “are all, at their core, editorial judgements about what users are likely to find interesting and valuable. And all these exercises of editorial judgement are fully protected by the First Amendment.” *Id.* at 4-5.

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The Knight First Amendment Institute at Columbia University defends the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. Its aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

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