

1-2021

Dysregulating the Media: Digital Redlining, Privacy Erosion, and the Unintentional Deregulation of American Media

Jon M. Garon

Nova Southeastern University - Shepard Broad College of Law, garon@nova.edu

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January 2021

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DYSREGULATING THE MEDIA: DIGITAL REDLINING, PRIVACY EROSION, AND THE UNINTENTIONAL DEREGULATION OF AMERICAN MEDIA

Jon M. Garon *

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* Professor of Law, Nova Southeastern University Shepard Broad College of Law; J.D. Columbia Law School 1988. The author would like to express his appreciation to the American Bar Association Business Law Section Cyberspace Committee and for the assistance of Alison Rosenberg, Rob Beharriell, and Michelle Murray.

ABSTRACT

Netflix, Amazon, YouTube, and Apple have been joined by Disney+, Twitch, Facebook, and others to supplant the broadcast industry. As the FCC, FTC, and other regulators struggle, a new digital divide has emerged. The current regulatory regime for television is built upon the government's right to manage over-the-air broadcasting. As content producers shift away from broadcast and cable, much of the government's regulatory control will end, resulting in new consequences for public policy and new challenges involving privacy, advertising, and antitrust law.

Despite the technological change, there are compelling government interests in a healthy media environment. This article explores the constitutionally valid approaches available to discourage discrimination and digital redlining and instead promote the public interest embodied in the Communications Act. Even as broadcast regulation fades away many of the goals should be pursued, including the promotion of diversity of viewpoint, access to news and educational content, and the fostering of cultural content for those without the financial resources to buy broadband access. In addition, the tracking technologies inherent in online media create a compelling need to protect from the heightened risks to personal privacy. The article calls upon the FTC to become the lead regulator, enforcing the Sherman Act, Clayton Act, and the FTC Act's provisions to assure that competition, online advertising, customer privacy, and the public interest are rigorously enforced.

INTRODUCTION

The global entertainment and media industries now exceed two trillion dollars in annual revenue, with the majority of that revenue generated by digital content.¹ Despite its size, however, the economic impact is secondary to the power of these industries to shape political thought, religious faith, and cultural norms across society.² Moreover, modern digital media includes both commercial content producers and a multitude of platforms enabling direct, person-to-person media interactions that shape social media, political thought, and public discourse. Each of these modalities is distinct, but they overlap in a multitude of ways, challenging regulators and frustrating public policy agendas.

For over a century, Congress has struggled to balance public policy considerations and technical regulations with a multitude of legal, cultural, and economic challenges inherent to media and broadcasting. The origins of these efforts began with the Copyright Act of 1909 and the Radio Act of 1912. While the Copyright Act was not wholly revised until 1976, the Radio Act lasted only until

1. PWC, PERSPECTIVES FROM THE *GLOBAL ENTERTAINMENT & MEDIA OUTLOOK 2019-2023*, GETTING PERSONAL: PUTTING THE *ME* IN ENTERTAINMENT AND MEDIA (2019), <https://www.pwc.com/gx/en/entertainment-media/outlook-2019/entertainment-and-media-outlook-perspectives-2019-2023.pdf> [<https://perma.cc/K8LF-REX9>].

2. See, e.g., STIG HJARVARD, *THE MEDIATIZATION OF CULTURE AND SOCIETY* (2013); RONALD INGLEHART, *MODERNIZATION AND POSTMODERNIZATION: CULTURAL, ECONOMIC, AND POLITICAL CHANGE IN 43 SOCIETIES* 70 (1997) (“[A] broad syndrome of changes has been linked with modern economic development. These changes include urbanization, industrialization, occupational specialization, mass formal education, development of mass media, secularization, individuation, the rise of entrepreneurs and entrepreneurial motivations, bureaucratization, the mass production assembly line, and the emergence of the modern state.”).

1927.

The development of the Internet, social media, and mobile telecommunications technology has significantly increased these challenges. Governments face demands to regulate new technologies, manage the broadcast spectrum, control anticompetitive behavior, protect consumers, increase privacy, discourage tobacco use, police advertising, and foster the public good. And unlike much of the world, in the United States, these goals are further constrained by a constitutional imperative to “make no law . . . abridging the freedom of speech, or of the press.”³

Largely unnoticed in the growth of digital distribution services for entertainment and media content has been the diminution of AM, FM, and UHF broadcasting as a structural component of public media consumption. As digitization continues, the use of analog digital airwaves is beginning to fade away. With the demise of over-the-air broadcasting, much of the Federal Communication Commission’s (FCC) jurisdiction will disappear as well.

This article addresses the transition from a broadcast-based regulatory model to its alternative. The article will also address some of the implications for entertainment and media producers and for content publicly produced.

I. THE RISE OF FEDERAL MEDIA REGULATION

By 1901, Marchese Guglielmo Marconi had transformed Heinrich Hertz’s radio experiments into successful point-to-point wireless communications.⁴ Radio was moved under the jurisdiction of the U.S. Navy because of its military importance⁵ and the need to safeguard commercial shipping.⁶ The initial regulation was the Wireless Ship Act of 1910,⁷ but that was quickly supplanted. The Radio Act of 1912 moved jurisdiction to the Department of Commerce and Labor, added provisions regarding foreign ownership, and included many specific regulations regarding the airwaves directly into the text of the Act.⁸

“By 1912, the U.S. subsidiary of the Marconi Wireless Telegraph Company, the Marconi Company of America, controlled nearly all civilian maritime wireless communications from shore stations in the United States and handled most of the nation’s other commercial wireless traffic.”⁹ However, Marconi’s technology was

3. U.S. CONST. amend. I; *see also* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263 (1961) (“In my view, ‘the people need free speech’ because they have decided, in adopting, maintaining, and interpreting their Constitution, to govern themselves rather than to be governed by others.”).

4. HUGH R. SLOTTEN, *RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES, 1920–1960*, at 3 (2000).

5. Rita Zajacz, *Liberating American Communications: Foreign Ownership Regulations from the Radio Act of 1912 to the Radio Act of 1927*, 48 J. BROAD. & ELEC. MEDIA 157, 163 (2004).

6. *See* Daniel D. Hoolihan, *Titanic, Marconi’s “Wireless Telegraphers” and the U. S. Radio Act of 1912*, 5 IEEE ELECTROMAGNETIC COMPATIBILITY MAG. 35, 37 (2016) (“As a result of the Titanic’s disaster and the subsequent congressional investigation, the U. S. Government passed the Radio Act of 1912.”).

7. Wireless Ship Act of 1910, ch. 262, 36 Stat. 629 (1910) (amended 1912).

8. *See* Radio Act of 1912, ch. 287, 37 Stat. 302, *repealed by* Radio Act of 1927, ch. 652, 48 Stat. 1162.

9. SLOTTEN, *supra* note 4, at 3.

crude,¹⁰ and each point-to-point transmission created significant radio interference for other broadcasters. American Telephone and Telegraph (AT&T or the Bell System) and General Electric (GE) were both competing to patent more efficient technologies.¹¹ Marconi Company of America was forced to withdraw from the United States in the face of governmental concerns regarding foreign ownership of radio and pressure to Americanize the technology with the advent of World War I.¹² Encouraged by the War Department, GE acquired Marconi Company of America and launched the Radio Corporation of America (RCA).¹³ Joined by Westinghouse and United Fruit Company, this emerging group of radio, telephony, and technology companies entered into patent licensing and economic agreements that segregated and promoted the growth of the radio industry, wireless telephone industry, and equipment manufacturing.¹⁴ The heart of this arrangement was President Woodrow Wilson's view that global "pre-eminence would be determined by three factors: oil, transportation, and communication. The United States was predominant in oil, but Britain could not be challenged in transportation or cable communications."¹⁵ If the United States could capture the wireless communications industry, it could split communications with Britain, resulting in "a standoff between the two powers."¹⁶

During this same post-war period, the Department of Commerce's role began to change as technology continued to develop. For example, "[t]he war accelerated the development of the art [of radio frequencies] . . . and in 1921 the first standard broadcast stations were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country."¹⁷

Furthermore, Herbert Hoover took over the department in 1921 and transformed it into a regulatory powerhouse that focused on helping businesses, establishing standardization, and promoting the economy.¹⁸ The emerging broadcast industry

10. *Id.* ("Spark transmitters generated radio frequency signals as byproducts of electromagnetic sparking across induction coils. . . . Tuning to one frequency was difficult, interference among transmitters was a major problem, and the technology was not entirely satisfactory for voice transmission, or telephony.")

11. *Id.*

12. See MARC RABOY, MARCONI: THE MAN WHO NETWORKED THE WORLD 443-44 (2016) ("RCA took over British Marconi's interest in its American subsidiary, including the right to use Marconi's patents in the United States. . . . RCA took over not only the American Marconi patents, but also Marconi's high-power stations . . . and Marconi's 37.5 percent interest in the Pan-American Wireless Telegraph and Telephone Company."); W. J. BAKER, A HISTORY OF THE MARCONI COMPANY 1974-1965, at 181 (1970) ("American Marconi Company . . . had no alternative therefor but to discuss terms and eventually agree to the sale of its holdings. Thus, on 17 October 1919, the Radio Corporation of America came into being.")

13. See ROBERT CAMPBELL, THE GOLDEN YEARS OF BROADCASTING: A CELEBRATION OF THE FIRST 50 YEARS OF RADIO AND TV ON NBC 50 (1976).

14. See SLOTTEN, *supra* note 4, at 5; MICHELE HILMES, ONLY CONNECT 43 (4th ed. 2013) ("Westinghouse and the American Telephone and Telegraph Corporation [AT&T] became part of RCA in 1920. In 1921 the United Fruit Company became a minor partner, because of its involvement in radio communication in its fruit shipping.")

15. RABOY, *supra* note 12, at 441.

16. *Id.*

17. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 210-11 (1943).

18. ANTHONY RUDEL, HELLO, EVERYBODY! THE DAWN OF AMERICAN RADIO 40 (2008).

became one of Hoover's areas of focus.¹⁹ Nonetheless, the aggressive control Hoover sought to impose on the fledgling radio industry was met with legal challenges to his plenary authority.²⁰

The radio industry grew at unprecedented speed. In 1922, five radio stations were on the air, but by the next year, the number had increased to 556.²¹ Because of previous antitrust concerns involving the Bell System, AT&T elected to relinquish its efforts at public radio broadcasting to continue its focus—and monopoly—on both wired telephony and wireless telegraphy for point-to-point communication.²² By 1926, the business of telephony had split from the fledgling radio broadcasting industry. AT&T sold its two radio stations to RCA along with all network operations.²³ RCA used the assets to create the National Broadcasting Company (NBC) through a partnership with GE.

The Commerce Secretary faced a series of defeats to his control over the increasingly rapid demand for broadcast licenses.²⁴ With decisions in 1926 from both the courts and the Acting Attorney General turning against Hoover's use of the Radio Act of 1912, something had to be done. The frustrations of Secretary Hoover, the rapid expansion of broadcast radio, and the market power of RCA and NBC to reach across America created the force necessary for a new regulation of the airwaves.

The Radio Act of 1927 moved regulation of radio away from the Department of Commerce to a new, freestanding organization, the Federal Radio Commission (FRC).²⁵ In response to the limitation of the Radio Act of 1912 and the ministerial view of the legislation upheld in *Hoover v. Intercity Radio Co.*,²⁶ Congress included judicial review of broadcast licenses²⁷ in the Act, but the courts subsequently limited the extent of that authority.²⁸ Congress also introduced the bases for broadcast

19. *Id.* at 41 (“[L]isteners . . . found [that] the constant static made listening difficult, [so] radio in 1921 was an ideal candidate for government intervention and Hoover’s brand of organization.”).

20. *See, e.g., Hoover v. Intercity Radio Co.*, 286 F. 1003, 1007 (D.C. Cir. 1923) (“In the present case the duty of naming a wave length is mandatory upon the Secretary. The only discretionary act is in selecting a wave length, within the limitations prescribed in the statute, which, in his judgment, will result in the least possible interference.”).

21. Robert Gobetz, *Communications Act of 1934*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/event/Communications-Act-of-1934> [<https://perma.cc/SCV2-VUNG>] (last visited Dec. 17, 2020).

22. *See* FCC, INVESTIGATION OF THE TELEPHONE INDUSTRY IN THE UNITED STATES 230 (1939); 1 PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW § 1.3.3 (2d ed. 1999 & Supp. 2014).

23. *100 Years, A Visual Memoir of RCA*, RADIO CORP. OF AMERICA, https://www.rca.com/us_en/our-legacy-266-us-en [<https://perma.cc/Q7QS-H547>] (last visited Nov. 24, 2020).

24. *See United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926); Fed. Regul. of Radio Broad., 35 Op. Att’y Gen. 126, 127 (1926), 1926 U.S. AG LEXIS 7, at *8; *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 212 (1943) (“[O]pinion of Acting Attorney General Donovan [stated] that the Secretary of Commerce had no power, under the Radio Act of 1912, to regulate the power, frequency or hours of operation of stations.” (citing Fed. Regul. of Radio Broad., 35 Op. Att’y Gen. 126)).

25. Radio Act of 1927, ch. 169, § 3, 44 Stat. 1162, 1162, *repealed by* Communications Act of 1934, ch. 652, §1, 48 Stat. 1064, 1064.

26. *Hoover v. Intercity Radio Co.*, 286 F. 1003, 1006-07 (D.C. Cir. 1923).

27. Radio Act of 1927 § 16.

28. *Fed. Comm’n v. Gen. Elec. Co.*, 281 U.S. 464, 466-67 (1930) (providing that a de novo trial would violate the principle of separation of powers if held for the purpose of determining whether a

licenses to be granted, including where “public convenience, interest, or necessity” will be served.²⁹

The Radio Act of 1927 also reinforced the separation between telephony and radio. In this way, the regulation reflected the structural approach to radio and telephone that the Bell System and RCA had negotiated through their cross-licensing arrangements. RCA, with its NBC network of broadcasting stations, would control the airwaves, while the Bell System would maintain a monopoly over telephones and the nation’s telecommunications grid.³⁰ The Radio Act “forbade cross-ownership of telephone companies and broadcasting stations and flatly rejected the operation of radio stations as ‘common carriers.’”³¹

These changes, along with rules for telephony and common carriage, were then updated and combined into the Communications Act of 1934, which established the regulatory regime for the next half century.³² As described by the Department of Justice, the Communications Act was

an expansive statute regulating U.S. telephone, telegraph, television, and radio communications. Its seven subchapters regulate virtually all aspects of the communications and broadcasting industry, including assignment of frequencies, rates and fees, standards, competition, terms of subscriber access, commercials, broadcasting in the public interest, government use of communications systems. The Act also provides for more detailed regulation and oversight via the establishment of the FCC.³³

The transition from the Radio Act of 1927 to the Communications Act of 1934 was part of the broader efforts of President Franklin Roosevelt to create a permanent body to replace the FRC and incorporate interstate telephone and telegraph regulation as common carriers into the newly formed FCC, rather than the Department of Commerce.³⁴

For radio, and television when it began to broadcast after World War II, the fundamental issue was what Congress meant by the public interest, convenience, and necessity.³⁵

Writing in 1930, Louis G. Caldwell, the former General Counsel of the FRC, explained the meaning behind the language as he understood it when first adopted into the Radio Act:

Instead of telling the Commission to do the best it can, however, Congress has done

license should issue, since that role would create in the courts a licensing function which is legislative in character).

29. Radio Act of 1927 § 4.

30. HUBER ET AL., *supra* note 22, at 1-19 (“The Radio Act of 1927 sealed the deal. It reaffirmed the general prohibition of ‘monopoly’ of the airwaves—meaning that *competition* over the airwaves was prohibited, at least if it came from Bell.”).

31. *Id.*

32. Communications Act of 1934, ch. 652, 48 Stat. 1064 (current version at 47 U.S.C. §§ 151 to 646).

33. U.S. DEP’T OF JUST., *Privacy and Civil Liberty, The Communications Act of 1934*, JUST. INFO. SHARING, <http://it.ojp.gov/PrivacyLiberty/authorities/statutes/1288> [https://perma.cc/KK2R-HRRW] (Nov. 27, 2013).

34. Communications Act of 1934 § 4.

35. *See* Communications Act of 1934 §§ 4, 214, 303, 307, 309, 312, 319.

virtually the same thing by instructing it that all its acts must meet the standard of “public interest, convenience or necessity” “Public interest, convenience or necessity” means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.³⁶

Caldwell did not put much value in the phrase, pointing out that the terms were generally associated with state and federal licensing commissions to help rationalize the basis on which utility monopolies and other government grants were apportioned.³⁷ He further noted, however, that “as a matter of history . . . each of the four National Radio Conferences called, and presided over, by President Hoover when Secretary of Commerce, emphasized the interest of the listening public as the paramount consideration in the regulation of broadcasting.”³⁸ Section 9 of the Radio Act emphasized the need to give “fair, efficient and equitable radio service” among the states and the communities within the states.³⁹

The use of the public interest, convenience, and necessity standard was incorporated without change into the Communications Act of 1934 and continued to have little structural impact on the provision of radio licenses.

II. CONTENT REGULATION AND THE EVOLUTION OF THE FIRST AMENDMENT

One of the challenges to understanding the public interest, convenience, and necessity standard stems from its intersection with the prohibitions of the First Amendment. For broadcasting, it is reasonable to assume that neither Congress nor the courts considered the First Amendment to be directly applicable at the time of the legislative enactment in 1927 or 1934.

A. Early Cases Rejecting the First Amendment

In 1915, the U.S. Supreme Court addressed the scope of the First Amendment with regard to motion pictures and theatrical productions. In *Mutual Film Corp. v. Industrial Commission of Ohio*,⁴⁰ the Court rejected the limitation of the state constitution on the power of the state to censor motion pictures or to restrict the issuance of licenses.⁴¹ Although based on Ohio law, the constitutional protection in question provided that “no law shall be passed to restrain or abridge the liberty of speech, or of the press.”⁴² Instead, the Court rejected the spectacle of film as within the ambit of protected speech.

36. Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930) (“The underlying theory is, however, perfectly sound; only an indefinite and very elastic standard should be prescribed for the regulation of an art and a field of human endeavor which is progressing and changing at so rapid a pace as is radio communication.”).

37. *Id.* at 303-06 (“This phrase, “common convenience and necessity,” has no legal meaning except when used to indicate a public necessity which justifies some act affecting the rights of person or property which would not be justifiable if that necessity did not exist.” (quoting *In re Shelton St. Ry. Co.*, 38 A. 362, 363 (Conn. 1897))).

38. *Id.* at 324.

39. *Id.* at 324-25 (quoting Radio Act of 1927, ch. 169, § 9, 44 Stat. 1162, 1166 (repealed 1934)).

40. 236 U.S. 230 (1915).

41. *Id.* at 244.

42. *Id.* at 239 n.1.

[T]he argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the billboards of our cities and towns . . . and which seeks to bring motion pictures and other spectacle into practical and legal similitude to a free press and liberty of opinion.⁴³

Once the Radio Act was passed, there were specific provisions relevant to speech regulation. Section 29 provided that “[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.”⁴⁴

In *Duncan v. United States*,⁴⁵ the Ninth Circuit upheld an early criminal conviction for violation of section 29, finding the broadcaster used vulgar and profane language to attack certain local politicians.⁴⁶ The opinion reviewed the extent to which the Tenth Amendment governed the authority of the federal government to restrict the criminal prosecution to the states but never addressed either the Free Speech Clause or the Establishment Clause of the First Amendment. Instead, the court found a sufficient basis for a criminal conviction. The opinion explained that “the indictment having alleged that the language is profane, the defendant having referred to an individual as ‘damned,’ having used the expression ‘By God’ irreverently, and having announced his intention to call down the curse of God upon certain individuals,” was sufficient under the statute to uphold the conviction for violating the statutory injunction against the use of profane language in radio broadcasting.⁴⁷

The First Amendment was directly addressed in *Trinity Methodist Church, South v. Federal Radio Commission*.⁴⁸ The Reverend Doctor Robert Shuler was a firebrand evangelist who operated the radio station KGEF (Keep God Ever First), broadcasting “sensational rather than instructive” content.⁴⁹ He had twice been convicted of attempting to obstruct justice using his broadcasts.⁵⁰

The United States Court of Appeals for the District of Columbia Circuit noted the shift in First Amendment jurisprudence away from allowing any form of prior restraint,⁵¹ but the court distinguished the exercise of a prior restraint to enjoin a publication or broadcast from the regulatory function of the FCC to grant or withhold license renewals.

43. *Id.* at 243-44. The Court continued in its condemnation:

[T]he exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.

Id. at 244.

44. Radio Act of 1927 § 29.

45. 48 F.2d 128, 134 (9th Cir. 1931).

46. *Id.*

47. *Id.*

48. 62 F.2d 850, 850 (D.C. Cir. 1932).

49. *Id.* at 851.

50. *Id.*

51. *Id.* (“[T]he universal trend of decisions has recognized the guaranty of the amendment to prevent previous restraints upon publications, as well as immunity of censorship, leaving to correction by subsequent punishment those utterances or publications contrary to the public welfare.”).

But this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it to broadcast defamatory and untrue matter. In that case there is not a denial of the freedom of speech, but merely the application of the regulatory power of Congress in a field within the scope of its legislative authority.⁵²

The court was again clear to distinguish between censorship and “the legitimate exercise of governmental powers for the public good.”⁵³ “This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise.”⁵⁴

Though *Near v. Minnesota ex rel. Olson*⁵⁵ was decided between the adoption of the Radio Act and the Communications Act, the statutory authority of the law also mirrored the distinction made by the court in *Trinity Methodist Church, South*. Congress did not give statutory authority to censor radio communication or signals, but it did give the FRC and later the FCC the power to issue licenses, and Congress gave the Justice Department the authority to bring criminal actions for violation of the law barring the broadcast of “any obscene, indecent, or profane language.”⁵⁶

B. Introducing the Application of the First Amendment

The recognition that the First Amendment applied to radio was made by the Supreme Court in its 1943 decision, *National Broadcasting Co. v. United States*,⁵⁷ where the Court acknowledged that Congress could violate the First Amendment in its efforts to regulate broadcasting. The Court explained that had Congress authorized the FCC “to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis,” then there could be a constitutional challenge.⁵⁸

The Court did not go any further to develop how the Communications Act might run afoul of the First Amendment, since it found “the unique characteristics of radio” made regulation of the airwaves necessary. “Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.”⁵⁹ The Court relied on the “cannot be used by all”—a precursor of scarcity of the airwaves—to affirm the general approach of Congress and uphold the statutory framework of granting broadcasting licenses in the public interest.⁶⁰

In *National Broadcasting Co. v. United States*, the issue was whether NBC-affiliated stations could be denied broadcast licenses because their programming was

52. *Id.*

53. *Id.* at 853.

54. *Id.*

55. 283 U.S. 697 (1931).

56. Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1173, *repealed by* Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064, 1091.

57. 319 U.S. 190 (1943).

58. *Id.* at 226 (“If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different.”).

59. *Id.*

60. *See id.* at 226-27.

distributed as “chain broadcasting.”⁶¹ The Communications Act defined “chain broadcasting” as “simultaneous broadcasting of an identical program by two or more connected stations.”⁶² NBC would transmit its content to its owned and affiliated stations on the Bell System’s leased telephone wires for its stations to air simultaneously across the country. This was how the networks originally operated.

In 1940, the FCC began a comprehensive effort to review the chain broadcasting problem and the dominance that RCA’s NBC had established across national broadcasting.⁶³ NBC operated the Red and Blue networks, with a total of 135 stations. CBS was second in the country with 113 stations.⁶⁴ Programmatically, NBC dominated the market with the most popular performers and shows. Only when the networks began rolling out television was CBS able to become a true competitor to NBC.⁶⁵ The NBC alliance also fueled other monopoly concerns, since RCA “continued to be the world’s largest distributor of radios, which were made by [NBC co-owners] Westinghouse and General Electric.”⁶⁶

The dominance of NBC and the growing power of CBS left broadcasters, such as the Mutual Broadcasting Company, locked out of some geographic markets. When Mutual had exclusive broadcasting rights to the 1939 baseball World Series, parts of the country were unable to listen to the broadcast because only NBC and CBS stations serviced their markets.⁶⁷ Blocking access to the World Series was too much for Congress.

The Supreme Court affirmed the findings of the FCC regarding the monopoly concerns of radio licensing.

A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affect the program structure of the entire industry.⁶⁸

The result of the decision allowed the FCC to force NBC to divest itself of one of its networks. It ultimately sold off the Blue Network, which became the American Broadcast Company (ABC).⁶⁹ The decision also upheld a series of extensive

61. *Id.* at 193-94.

62. *Id.* at 194 n.1 (quoting Communications Act of 1934, ch. 652, § 3(p), 48 Stat. 1064, 1066 (current version at 47 U.S.C. § 153(10) (2018)).

63. See FCC, REPORT ON CHAIN BROADCASTING 8 (1941) [hereinafter CHAIN BROADCASTING REPORT]; see also *Nat’l Broad. Co.*, 319 U.S. at 197 (“The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks.”).

64. CHAIN BROADCASTING REPORT, *supra* note 63, at 30.

65. See *Radio Chains Ask Court Void FCC License Ruling*, CHI. DAILY TRIB., Oct. 31, 1941, at 33; Jon M. Garon, *Hidden Hands that Shaped the Marketplace of Ideas: Television’s Early Transformation from Medium to Genre*, 19 U. DENV. SPORTS & ENT. L.J. 29, 69 (2016) (“Both NBC and CBS brought an action to overturn the rule, but smaller broadcasting groups welcomed the FCC efforts to limit NBC and CBS.”). See generally CHAIN BROADCASTING REPORT, *supra* note 63, at 21-25.

66. SHIRLEY BIAGI, MEDIA IMPACT: AN INTRODUCTION TO MASS MEDIA 114-15 (10th ed. 2012).

67. *Nat’l Broad. Co.*, 319 U.S. at 198-99.

68. *Id.* at 199-200 (quoting CHAIN BROADCASTING REPORT, *supra* note 63, at 52, 57).

69. John C. Abell, *Sept. 9, 1926: Radio Sets Up a National Broadcasting Craze*, WIRED (Sept. 9, 2010, 7:00 AM), <https://www.wired.com/2010/09/0909rca-creates-nbc/> [<https://perma.cc/Q6HA-AGRN>] (“RCA tried some fancy footwork—dividing NBC into two companies, NBC (née Red) and

regulations regarding ownership, limitations on exclusive ownership provisions, and other direct controls over the structure of the management of the U.S. broadcast industry.⁷⁰

As understood by the Supreme Court in the 1930s and 1940s, the public interest standard allowed Congress to provide technical controls, ownership controls, anti-monopoly controls, and to choose non-renewal of broadcasters who used profane or vulgar language. Politicians such as President Roosevelt certainly understood the power of radio and its role as an arm of the press.⁷¹ The Communications Act prohibited Congress from the kind of censorship that was common for the licensure of motion pictures.⁷² But the Commission could still impose its will to deny licenses to those whose “utterances are vulgar” and not “uplifting or entertaining.”⁷³ The Commission continued, “[t]hrough we may not censor, it is our duty to see that broadcasting licenses do not afford mere personal organs, and also to see that a standard of refinement fitting our day and generations is maintained.”⁷⁴

In addition, from 1941 through 1949, the FCC’s so-called *Mayflower Doctrine*⁷⁵ had the effect of barring broadcasters from “editorializing over their own facilities.”⁷⁶ The FCC acknowledged the negative aspects of the *Mayflower Doctrine* for purposes of clarifying the actual position of the Commission on content restrictions of licensees. This was an extension of the 1940 FCC position that “[i]n carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussions of public questions.”⁷⁷

The understanding slowly began to change following World War II. The Commission on Freedom of the Press used the term “press” to include “all means of communicating to the public news and opinions, emotions and beliefs, whether by

Blue Network Company—but a 1943 Supreme Court decision did not go its way. So RCA sold Blue Network for \$8 million, and in 1945 the Blue became the American Broadcasting Company (ABC.”); see *National Broadcasting Company*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/National_Broadcasting_Company [<https://perma.cc/6K2K-SGNV>] (last visited Oct. 30, 2020) (“In 1939, the FCC ordered RCA to divest itself of one of the two networks . . . [Eventually,] RCA sold the NBC Blue Network, Inc. for \$8 million to Lifesavers magnate Edward J. Noble in 1943.”).

70. See *Nat’l Broad. Co.*, 319 U.S. at 200-01.

71. See Alexandra Gil, *Great Expectations: Content Regulation in Film, Radio, and Television*, 6 U. DENV. SPORTS & ENT. L.J. 31, 33 (2009) (“President Franklin Roosevelt called radio ‘a great agent of public service’ and encouraged the industry to ‘be maintained on an equality of freedom similar to that freedom that has been, and is, the keystone of the American press.’” (quoting *Censorship Plan Denied* by Farley, N.Y. TIMES, Oct. 15, 1934, at 9)).

72. See, e.g., Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064, 1091 (current version at 47 U.S.C. § 326) (“Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”).

73. R. H. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1, 9 (1959).

74. *Id.* (citation omitted).

75. *Mayflower Broad. Corp.*, 8 F.C.C. 333, 340 (1940) (“[T]he broadcaster cannot be an advocate.”).

76. Note, *The Mayflower Doctrine Scuttled*, 59 YALE L.J. 759, 759 (1950); see VICTOR W. PICKARD, *AMERICA’S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM* 115-16 (2015).

77. 6 FCC ANN. REP. 55 (1940).

newspapers, magazine, or books, by radio broadcasts, by television, or by films.”⁷⁸ Likely due to the role of broadcasting and movies to maintain public morale during the war, television, radio, and film were all finally accepted as part of the free speech ethos of the United States.⁷⁹

By 1948, the Supreme Court began to recognize a slightly different understanding of the First Amendment.⁸⁰ In yet another case finding that there was no First Amendment implication regarding antitrust enforcement, the Court noted the relevance of free speech. “We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”⁸¹

But the understanding of broadcast regulation continued to focus on the right of the listening public to receive a broad range of content, not controlled by the government and not controlled by monopolistic corporate interests. As the Commission phrased this concern, “[t]he most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.”⁸² The Commission summarized its understanding of broadcast regulation:

[T]he individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee.⁸³

In 1959, the Nobel Prize winning British economist Ronald Coase published an important analysis of the regulation of television and radio by the FCC.⁸⁴ Coase noted that “a commission appointed by the federal government . . . selecting those who were to be allowed to publish newspapers and periodicals . . . would, of course, be rejected out of hand as inconsistent with the doctrine of freedom of the press.”⁸⁵ A decade following the update to the *Mayflower Doctrine*, Coase described an industry that suffered from a great reluctance to editorialize so as to avoid having to give up airtime or come under attack regarding the renewal of the station’s broadcast

78. THE COMM’N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION 109 (1947); Coase, *supra* note 73, at 7.

79. See Scott L. Althaus, *The Forgotten Role of the Global Newsreel Industry in the Long Transition from Text to Television*, 15 INT’L J. PRESS/POL. 193, 197-99 (2010) (“The newsreel was the first global news medium . . .”).

80. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (“[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”).

81. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

82. *Editorializing by Broad. Licensees*, 13 F.C.C. 1246, 1257 (1949).

83. *Id.* at 1257.

84. See Thomas W. Hazlett et al., *Radio Spectrum and the Disruptive Clarity of Ronald Coase*, 54 J. L. & ECON. S125, S125-26 (2011) (“Coase’s (1959) single paper ‘The Federal Communications Commission’ has created such a bountiful account balance as to safely capitalize the Economists’ Bank of Karma for generations to come.”).

85. Coase, *supra* note 73, at 7.

license.⁸⁶

Coase quotes an expert in the field saying that “the most important function of radio regulation is the allocation of a scarce factor of production – frequency channels.”⁸⁷ Despite the numerous examples of the FCC removing problematic broadcasters and limiting the power of RCA, Coase asserts that the allocation of the license is “essentially an economic decision not a policing decision.”⁸⁸ The suggestion he proposes, which is not adopted, is to eliminate the public interest licensing model and replace it with a direct sale of the broadcast licenses to the public.

C. Speech Regulation through the Fairness Doctrine

Coase’s economic model was not adopted by Congress or the Commission. Instead, Congress continued to develop rules to promote its goal for the broadcasts to be managed for the general benefit of the public. Two rules, in particular, came to define this approach: the fairness doctrine and the right of reply regulations. A 1967 amendment to the Communications Act codified these licensee requirements. The fairness doctrine obligated broadcasters to provide equal time to all candidates for public office.⁸⁹ As part of the right of reply regulations,⁹⁰ when a person was attacked during a broadcast, the licensee was required to send a summary, tape, or transcript and offer the opportunity to reply, even if the person could not cover the cost of the airtime.⁹¹

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court addressed the constitutionality of the fairness doctrine and right of reply regulations, finding that these rules were constitutional because they “enhance rather than abridge the freedoms of speech and press protected by the First Amendment.”⁹²

The Court explained the fairness doctrine had two components. “The broadcaster must give adequate coverage to public issues, and coverage must be fair in that it accurately reflects the opposing views.”⁹³ The obligations, of course, ran much deeper.

When a personal attack has been made on a figure involved in a public issue . . . the individual attacked himself [must] be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must

86. *See id.*

87. *Id.* at 14.

88. *Id.* (quoting Leo Herzl, “Public Interest” and the Market in *Color Television Regulation*, 18 U. OF CHI. L. REV. 802, 809 (1951)).

89. Communications Act of 1934, ch. 652, § 315, 48 Stat. 1064, 1088 (current version at 47 U.S.C. § 315(a)) (“315. Candidates for public office; facilities; rules. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting stations”); *see also* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (July 25, 1964); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 371 (1969).

90. *See Times-Mirror Broad. Co.*, 24 P & F Radio Reg. 404 (1962).

91. *See Red Lion Broad. Co.*, 395 U.S. at 371-73.

92. *Id.* at 375.

93. *Id.* at 377 (citing *United Broad. Co.*, 10 F.C.C. 515 (1945)); *New Broad. Co.*, 6 P & F Radio Reg. 258 (1950).

themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine.⁹⁴

The Court discussed the legislative history of the public interest doctrine and found that the right of reply regulations and fairness doctrine were consistently and expansively endorsed by Congress and the Commission throughout its history.⁹⁵ Having found the regulations were consistent with the Communications Act, the Court turned to the appropriateness of these rules within the context of the First Amendment.

The Court affirmed the holding of its 1943 decision, *National Broadcasting Co. v. United States*, reasserting that the issuance or denial of a station license when “‘the public interest’ requires it ‘is not a denial of free speech.’”⁹⁶ The Court also explained that broadcast was different than other media:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.⁹⁷

The Court dismissed as speculative the concern that the fairness doctrine and right of reply regulations discouraged licensees from airing content that could trigger an unwanted reply.⁹⁸ The Court noted approvingly that “‘the Commission for 40 years has been choosing licensees based in part on their program proposals.’”⁹⁹ The Court also dismissed the technological innovations that seemed to be making the scarcity of broadcast airwaves a thing of the past.¹⁰⁰

In assessing the continuation of the broadcasting jurisprudence, there is certainly an argument that even by 1969, the changes in broadcasting were not sufficient to overturn forty years of stability in radio and television, or that changes to the First Amendment jurisprudence in areas such as defamation law¹⁰¹ or privacy¹⁰² necessarily expanded the application of the First Amendment to broadcast. At the same time, the Court understood that the interpretation of the First Amendment was beginning to change.¹⁰³ The Court acknowledged the vigorous debate in the legal

94. *Red Lion Broad. Co.*, 395 U.S. at 378.

95. *Id.* at 385-86.

96. *Id.* at 389 (quoting *NBC v. United States*, 319 U.S. 190, 227 (1943)).

97. *Id.* at 390.

98. *Id.* at 393 (“[B]roadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative.”).

99. *Id.* at 394.

100. *Id.* at 396-97.

101. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

102. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

103. *Red Lion Broad. Co.*, 395 U.S. at 386.

literature regarding the argument that the First Amendment can be protected by allowing the government to regulate speech rather than allowing the marketplace to determine the efficacy of speech.¹⁰⁴

The unique regulation of broadcast was highlighted by Florida's effort to enforce a right of reply statute for newspapers. In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court utterly rejected the applicability of *Red Lion* to print media.¹⁰⁵ Nonetheless, the Supreme Court continued to enforce the public interest approach to the First Amendment for broadcast.¹⁰⁶ The specific requirements of the fairness doctrine took nearly two more decades to be finally put to rest.¹⁰⁷ The FCC itself determined that the fairness doctrine chilled speech, metastasizing into "a pervasive and significant impediment to the broadcasting of controversial issues of public importance."¹⁰⁸

D. Continued Regulation Beyond the Fairness Doctrine

The Supreme Court has continued to permit regulation of broadcast television and radio to different standards than those of other media.¹⁰⁹ In *Turner Broadcasting System, Inc. v. FCC (Turner I)*,¹¹⁰ the Court again noted the distinction between broadcast radio and television from the regulation of the cable industry.¹¹¹ Since the focus of the case was the level of First Amendment scrutiny appropriate to regulation governing the cable industry, the Court declined to address the relevance of the scarcity doctrine.¹¹² The Court reviewed the must-carry provisions of the Cable Act

104. *Id.* ("The general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news were discussed at considerable length by Zechariah Chafee in *Government and Mass Communications* (1947).").

105. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

106. *See CBS v. FCC*, 453 U.S. 367, 396 (1981) (upholding broadcasters' obligations to provide time for national political candidates upheld).

107. *See Inquiry into Section 73.1910 of the Comm'n's Rules & Reguls. Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d 142, 169 (1985), *appeal dismissed sub nom. Radio-Television News Dirs. Ass'n v. FCC*, 809 F.2d 860 (D.C. Cir. 1987) [hereinafter 1985 Fairness Report]. *See generally* Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, Memorandum Opinion and Order, 2 FCC Rcd. 5043 (1987) (providing a comprehensive review of the fairness doctrine and determining "the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest. We therefore conclude, under existing Supreme Court precedent, as set forth in *Red Lion* and its progeny, that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest.").

108. 1985 Fairness Report, *supra* note 107, at 169 para 42; *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989) ("[T]he FCC's decision that the fairness doctrine no longer served the public interest was neither arbitrary, capricious nor an abuse of discretion, and are convinced that it would have acted on that finding to terminate the doctrine even in the absence of its belief that the doctrine was no longer constitutional.").

109. *See generally* *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984); *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

110. *Turner I*, 512 U.S. at 645.

111. *Id.* at 637 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.").

112. *Id.* at 638-39 ("Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast

and ultimately remanded after establishing that “the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.”¹¹³

In an important reassessment of the case following its remand, the Supreme Court upheld the must carry provisions as meeting the intermediate scrutiny standard of *United States v. O’Brien*.¹¹⁴ The Court found that the three goals of the must-carry provisions were to further important governmental interests: “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”¹¹⁵

Unlike the vague demands of the public interest standards underlying the Communications Act, the goals of continuing free access to public news, entertainment, and educational information provides a very clear goal for Congress and administrative regulators. The goal to maintain a multiplicity of sources remains essentially the same goal that drove the original Radio Act and shaped the Chain Broadcasting prohibitions. Promoting fair competition is a standard much more open to interpretation, but in the remand of *Turner Broadcasting System, Inc. v. FCC (Turner II)*, the question was not whether such a standard could be upheld, but whether there was a sufficiently demonstrated governmental need to support the must-carry rules as a way to promote the multiplicity of news and information sources.

With regard to the third goal, promoting fair competition for television, the Court found little difficulty in upholding the efforts of Congress. “[T]he Government’s interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.”¹¹⁶

In concurrence, Justice Breyer emphasized an aspect of the must-carry provisions that received only minimal attention from the majority.

[The statute] undoubtedly seeks to provide over-the-air viewers who lack cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate. I believe that this purpose—to assure the over-the-air public “access to a multiplicity of information sources,”—provides sufficient basis for rejecting appellants’ First Amendment claim.¹¹⁷

Thus, Justice Breyer emphasized the second public interest goal of Congress.

jurisprudence, and see no reason to do so here. . . . [C]able television does not suffer from the inherent limitations that characterize the broadcast medium.” (internal citation omitted)).

113. *Id.* at 662 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)); *United States v. O’Brien*, 391 U.S. 367 (1968).

114. *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 189 (1997) (“A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”).

115. *Id.* at 189.

116. *Id.* at 190 (quoting *Turner I*, 512 U.S. at 664).

117. *Id.* at 226 (Breyer, J., concurring) (quoting *Turner I*, 512 U.S. at 663).

The majority was specific, if not as voluble, as the concurrence regarding the importance of this goal. The Court said, “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.”¹¹⁸ The *Turner II* Court rejected arguments that this goal could be satisfied by assuring a minimum number of broadcasters.¹¹⁹

The ability for Congress to continue to address the concerns regarding those listeners and viewers who lack access to paid content services from cable systems remains a growing concern. As such, the transition from a First Amendment jurisprudential model with no meaningful oversight to a system requiring content neutral regulations that further the government interest should not impose burdens too high for the government to overcome.

III. THE MOVE TO DIGITAL DISTRIBUTION

At first glance, the history of radio and television regulations may have little relevance to the transformation of media in the Internet Age. However, television and radio companies remain dominant as media producers and distributors, so the potential for them to be disconnected with mainstream media could have far-reaching implications. The FCC’s broadcast media policy provides the scaffolding against which cable, satellite and Internet content distribution is structured.

Traditional broadcasters CBS, NBC, and ABC were founded during the age of radio regulation.¹²⁰ Fox was the only successful network launched during the age of television regulation.¹²¹ There are a multiplicity of cable “networks,” which are services providing programming on one or more cable channels.¹²² The four major network-owned or affiliated stations, however, account for approximately eighty percent of the television broadcasters. The remaining broadcasters are comprised of noncommercial stations, independent stations, and stations affiliated with smaller networks with specialty program, such as Spanish language content.¹²³

Although it was not the first online streaming media service, when Netflix

118. *Turner I*, 512 U.S. at 663; *Turner II*, 520 U.S. at 190.

119. *Turner II*, 520 U.S. at 191-92.

120. See Harold L. Erickson, *CBS Corporation*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/CBS-Corporation> [<https://perma.cc/T2EX-7MBF>] (last visited Dec. 17, 2020) (formed in 1927 and launched in 1929 when Columbia Phonograph and Records Co. was purchased by William S. Paley to help promote sales of La Palina cigars, owned by Paley’s father); see also Garon, *Hidden Hands*, *supra* note 65, at 69 (discussing *NBC v. U.S.* and requirement of RCA’s divestment of the Blue network).

121. 1 THOMAS D. SELZ ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 1:21 (2019) (“In 1986, the Fox Broadcasting Company grew out of six television stations owned by the Fox Television Stations Group and 90 independent broadcasters that became affiliates of a fourth national broadcast network, the Fox Broadcasting Company.”). Paramount’s UPN, TimeWarner’s WB and its successor CW, which was a joint effort of CBS and TimeWarner, were never able to establish their programming as broadcast networks.

122. See, e.g., *Cable Television*, FCC, <https://www.fcc.gov/media/engineering/cable-television> [<https://perma.cc/QNU4-GYQ5>] (Dec. 15, 2015).

123. JOSEPH TUROW, MEDIA TODAY: MASS COMMUNICATION IN A CONVERGING WORLD 391-92 (6th ed. 2017) (“[T]here are also more than a couple dozen smaller advertising-supported networks in English or Spanish that local stations contract to carry on extra digital signals that they send out Examples are Me-TV and Antenna TV.”).

switched from a DVD-by-mail service to a streaming service, it heralded in a new era in film and television content distribution.¹²⁴ Unlike Hulu, which continues to be owned by various traditional media conglomerates,¹²⁵ Netflix represented a media competitor without any ties to the broadcast industry.¹²⁶

The gravitational center of traditional television is shifting from the broadcaster—as delivered through cable systems—to the online, “over-the-top” (OTT or streaming) media services.¹²⁷ “18 to 34-year-olds spent just 25% of their media consuming time with the TV, compared to 58% on connected devices.”¹²⁸ The trends are beginning to impact older viewers as well. “[O]lder audiences globally also are jumping on the OTT bandwagon, with 42% of consumers 45-54 years old having at least one [subscription video on demand (SVOD)] in 2016, up from 25% a year earlier. In 2017, nearly one-third of consumers 55+ subscribed to a video service, up from 19% in 2016.”¹²⁹

By 2019, the expansion of streaming services was even more pronounced:

A special survey into U.S. consumer sentiment toward streaming platforms . . . found that 91% of all respondents and a whopping 96% of respondents 18-34 subscribe to a paid streaming video service. Beyond that, there is still room to expand the number and variety of services, as nearly one-third of all respondents and almost half (47%) of respondents 18-34 say they currently subscribe to three or more paid services.¹³⁰

Consumers are increasingly turning to streaming content first and to live television as a supplement, which is a fundamental restructuring of the relationship between the content producers and the public. “Subscription and ad-supported OTT services are steadily replacing traditional content delivery and there’s no end to the opportunity to create connections with a global audience. OTT is not traditional TV.”¹³¹

124. See THE NETFLIX EFFECT: TECHNOLOGY AND ENTERTAINMENT IN THE 21ST CENTURY 139-40 (Kevin McDonald & Daniel Smith-Rowsey eds., 2016) (“In redefining how we see, experience, and interact with cinema and television, Netflix raises an array of considerations about how we project an innovative cinematic vision for the future of viewing . . . media.”); GINA KEATING, NETFLIXED: THE EPIC BATTLE FOR AMERICA’S EYEBALLS 225 (2012).

125. Kirsten Korosec, *Hulu Buys Back AT&T’s Minority Stake in Streaming Service Now Valued at \$15 Billion*, TECH CRUNCH (Apr. 15, 2019, 6:28 PM), <https://www.fcc.gov/media/engineering/cable-television> [<https://perma.cc/Y2BY-UPDS>].

126. JIM O’NEILL, STATE OF THE BROADCAST INDUSTRY 2019: BROADCASTERS AND OTT: IT’S ALL IN THE FAMILY 1 (Ooyala 2019), <http://go.ooyala.com/rs/447-EQK-225/images/Ooyala-State-Of-The-Broadcast-Industry-2019.pdf> [<https://perma.cc/E8ZG-CQSU>] (“Netflix’s move into streaming video on demand was met with a shrug of shoulders and, occasionally, outright dismissal.”). See generally KEATING, *supra* note 124, at 225.

127. Sahil Patel, *WTF is OTT?*, DIGIDAY (July 7, 2015), <https://digiday.com/media/what-is-over-the-top-ott/> [<https://perma.cc/M4PN-S2WZ>] (“OTT stands for ‘over-the-top,’ the term used for the delivery of film and TV content via the internet, without requiring users to subscribe to a traditional cable or satellite pay-TV service like a Comcast or Time Warner Cable.”).

128. O’NEILL, *supra* note 126, at 2.

129. *Id.*

130. NIELSEN CO., THE NIELSEN TOTAL AUDIENCE REPORT: FEBRUARY 2020, at 5 (2020), <https://go.nielsen.com/totalaudience/report/2020/feb/> [<https://perma.cc/2ZB9-S58S>].

131. O’Neill, *supra* note 126, at 4.

There is also more than viewer preference driving the transformation. According to Nielsen Co., “time and money—not interest—are the limiting factors. Nearly two-thirds cited the overall cost of media services, while 40% admitted there is only so much content they currently have time to consume.”¹³² While digital advertising is growing, television advertising payments are evidencing a steady decline.¹³³ Unlike the advertising buy on television which is distributed to all viewers, digital advertising can be tailored to specific audience targets.¹³⁴ While some OTT services such as Netflix and Amazon Prime are ad-free, others are not. For advertiser-funded OTT, the distributors have the ability to provide television with segmented advertising.¹³⁵

Advertisers have a strong incentive to direct their content at the consumers most likely to respond to their ads. Yet seventy-four percent of the public surveyed said they find the television commercials irrelevant.¹³⁶ Advertisers hate the waste, and they hope the public will be more willing to watch relevant ads.¹³⁷ “The stitching together of digital audiences with TV audiences opens up the market to become more fluid for marketers looking to target consumers beyond the typical Nielsen age, sex demos.”¹³⁸

If addressable advertising drives advertisers to shift their investment in OTT rather than in broadcast content, the financial support for broadcasting will erode. Faced with consumer flight to the OTT platforms and advertiser flight driven by addressable advertising and the consumption shift, the economic viability of broadcast could soon hit a tipping point.¹³⁹ Once that happens, most content would

More than 76% of America’s 128 million broadband households take at least one major streaming service—Netflix, Amazon or Hulu Another 8% take a virtual pay-TV service like YouTube TV or DirecTV Now. A Deloitte study found the average streaming household subscribes to three services, and that doesn’t include ad-supported services.

Id.

132. NIELSEN CO., *supra* note 130, at 8.

133. *Id.* (“National TV ad sales peaked in 2016, when they exceeded \$43 billion, according to data from Magna, the ad-buying and media intelligence arm of IPG Mediabrands. Sales fell 2.2 percent last year, and the firm estimates that they will fall at least 2 percent each year through 2022.”).

134. *Id.* (“Companies love digital advertising because it gives them the ability to target ads based on their own lists of customers—like holders of store loyalty cards—and profiles like ‘first-time car buyers’ or ‘people who like foreign travel.’”).

135. See Edward C. Malthouse et al., *Understanding Programmatic TV Advertising*, 35 INT’L J. ADVERT. 769, 773 (2018).

There are two different, and increasingly competing, approaches to buying/selling advertising media. The mass approach is characterized by media companies selling mass audiences through a sales force to advertisers who inform their decisions with probability samples such as Nielsen panel data. The computational advertising approach is marked by purchasing individual exposures informed by whatever data may be available about the device, cookie, household, etc.

Id. at 769.

136. Alan Wolk, *Television is Embracing Audience Segmentation as Addressable OTT Continues to Explode*, FORBES (Aug. 6, 2018, 10:43 AM), <http://www.forbes.com/sites/alanwolk/2018/08/06/television-is-embracing-audience-segmentation-as-addressable-ott-continue-to-explode/#380f81f85c12> [https://perma.cc/LYG6-ZQ6C].

137. See *id.*

138. *Id.*

139. The third factor disrupting broadcast and cable is the availability of 5G or faster wireless. This technology is anticipated to roll out over the next 2–3 years. See Todd Haselton, *The Way You Get TV*

be originated for OTT and the infrastructure for broadcasting would be discarded. Congress may receive significant pressure to eventually auction off the broadcast spectrum that it has managed on behalf of the public for radio and television broadcast.

IV. FCC BACKS OFF OWNERSHIP RULES BUT RETAINS PUBLIC INTEREST GOALS FOR PUBLIC BROADCASTING AND CHILDREN'S PROGRAMMING

To many, the shift to OTT content distribution is an inevitable and welcome change. Nonetheless, the FCC remains a significant influence on broadcast content, and without the use of the scarce broadcast spectrum, these regulations could cease to exist.¹⁴⁰ The scope of the regulation is a mere shadow of the FCC's control of radio and television in its early years. The rules barring common ownership of television and newspaper stations in the same market were eliminated in 2017.¹⁴¹

The change allowed Sinclair Broadcast Group to acquire Tribune Media through a merger that significantly increased Sinclair's national reach.¹⁴² Sinclair distributes the same content to all its stations, highlighting concerns first raised during debates on the Radio Act that national operators would fail to support local journalism or be mindful of local interests.¹⁴³ The two dissenting members of the Commission raised concerns that the change undermines access to local news coverage.¹⁴⁴ The New York Times quoted Democratic Commissioner Mignon Clyburn, "who voted against the orders," as saying that "[d]uring the first 10 months of 2017, the [FCC] majority has given the green light to more than a dozen actions that are a direct attack on consumers and small businesses."¹⁴⁵

Although television ownership rules have been significantly relaxed, they have not yet been eliminated. The television ownership rules operate to keep a network from owning stations that reach more than thirty-nine percent of the U.S. TV

and Internet at Home is about to Change Drastically – for the Better, CNBC (Aug. 15, 2018, 5:26 PM), <http://www.forbes.com/sites/alanwolk/2018/08/06/television-is-embracing-audience-segmentation-as-addressable-ott-continue-to-explode/#380f81f85c12> [<https://perma.cc/A5DD-3KWU>] ("The current wireless standard . . . is fast but not quite fast enough for an entire house of people to play games and stream 4K movies at the same time The technology for 5G is fast enough for that, and you can forget the cords.").

140. The FCC also has regulations related to efforts to promote diversity in the media workforce. See Christina Shu Jien Chong, *Back to the Drawing Board! Legislating Hollywood: A Regulation that Resolves the Film Industry's Conflict Between the First and Fourteenth Amendments*, 35 GA. ST. U. L. REV. 605, 611-14 (2019) (raising public interest claims regarding employment and anti-discrimination).

141. See 2014 Quadrennial Regul. Rev.—Rev. of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9806-24 (2017) [hereinafter Order on Reconsideration]; Rules and Policies to Promote New Entry and Ownership Diversity in Broadcasting Services, 83 Fed. Reg. 774 (proposed Jan. 8, 2018) (to be codified at 47 C.F.R. pt. 73).

142. See Cecilia Kang, *F.C.C. Opens Door to Increased Consolidation in TV Industry*, N.Y. TIMES, Nov. 17, 2017, at B2.

143. See *id.*; see also John Samples, *Broadcast Localism and the Lessons of the Fairness Doctrine*, POLICY ANALYSIS, no. 639, May 27, 2009, <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa639.pdf> [<https://perma.cc/24S2-WDBC>].

144. Kang, *supra* note 142.

145. *Id.*

households to effectively bar a merger among ABC, CBS, Fox, and NBC.¹⁴⁶ This rule is no longer designed to protect the diversity of viewpoint and content in any particular television market, but instead to slow the consolidation of the media industry.¹⁴⁷

Despite political criticism, there has been no significant movement to eliminate the separate existence of the Corporation of Public Broadcasting and the regulations that allow for special set-asides and regulations for noncommercial broadcasting.¹⁴⁸ Given the scarcity of broadcast spectrum, setting aside broadcast licenses for noncommercial broadcasters is a form of content regulation, but it is also a congressional statement about public interest priorities. The Public Broadcasting Act was passed in 1967 in furtherance of that public interest.¹⁴⁹ Public Broadcasting

further the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation.¹⁵⁰

Similar to the must-carry rules for cable systems, the congressional mandate to set aside broadcast spectrum for this purpose is an appropriate solution to address the substantial governmental interest.¹⁵¹

Another area where the Commission has not completely deregulated the broadcast marketplace involves children's television. In 1990, Congress passed the Children's Television Act (CTA), mandating at least three hours of educational children's television programming and limiting the advertisements offered during

146. *FCC Broadcast Ownership Rules*, FCC, <http://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules> [<https://perma.cc/5SCX-46C2>] (Jan. 17, 2020).

147. See Gerard Daley, *Column: Closing Argument Fight the Entertainment Industry Cartel*, 23 L.A. LAW. 68, 68 (2000).

When the Media Monopoly, Ben Bagdikian's classic vivisection of the media industry's power relations, was published in 1983, the number of corporations that effectively controlled publishing, print journalism, film production and distribution, music, radio, television, and eventually the Internet was about 50. When his book went into its fifth edition in 1997 that number had dwindled to 10. In light of the recent Viacom-CBS nuptials, a sixth edition is sorely needed: the cartel's membership today is down to about five.

Id. at 68.

148. See, e.g., 47 U.S.C. §§ 303(a)-(b), 394, 396, 399a, 399b (2018); 47 C.F.R. § 73.503 (2020); see also Jonathan M. Phillips, *Freedom by Design: Objective Analysis and the Constitutional Status of Public Broadcasting*, 155 U. PENN. L. REV. 991, 992 (2007) ("[T]he interplay between governance and programming content choices raises salient First Amendment issues of editorial autonomy and independence from government influence.")

149. See Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C. §§ 390-397, 609).

150. Public Broadcasting Act of 1967 § 201(9) (current version at 47 U.S.C. § 396(a)(5)).

151. See *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1201-04 (9th Cir. 2013) (The regulations of the Public Broadcasting Act were "designed to further the important governmental interest in preserving the essentially noncommercial nature of public broadcasting *within a minimal regulatory framework* by insulating public broadcasters from commercial marketplace pressures and decisions." (quoting Comm'n Pol'y Concerning the Noncom. Nature of Educ. Broad. Stations, 90 F.C.C.2d 895, 896 (1982))).

those broadcasts.¹⁵²

Although there was originally great skepticism regarding the need for the CTA,¹⁵³ the commitment to children's broadcast content dropped significantly in the 1980s. Television shows like *Captain Kangaroo* disappeared from the morning schedule,¹⁵⁴ and overall hours of production "dropped from 11 per week in 1980" down to "fewer than two per week in 1990."¹⁵⁵ Following the adoption of the statute, the FCC issued comprehensive regulations to define educational and informational programming and set the minimums for broadcaster compliance.¹⁵⁶ Although the policies are complex and allow for a number of exceptions, the general obligation requires each broadcaster provide three hours of "[c]ore [p]rogramming" to serve "the educational and informational needs of children 16 years of age and under."¹⁵⁷

Somewhat surprisingly, despite the massive deregulation by the FCC, these rules are being adjusted only modestly.¹⁵⁸ Under the 2019 rules, the core programming requirement will expand to start at 6:00 a.m. rather than 7:00 a.m., permit expanded use of educational specials, and permit more short-form content.¹⁵⁹ The obligation to maintain 156 hours of core children's programming annually remains in place.¹⁶⁰ One of the important findings of the Commission focuses on the impact of poverty and access disparity to broadcast regulations. The Commission recognized that new media alternatives are not universally available equally to all members of the public:

Nevertheless, while it is clear that the media landscape has evolved dramatically since the children's programming rules were adopted, we recognize that not all children, particularly children in minority and low-income households, have access to the wealth of children's educational programming available on non-broadcast platforms. Nielsen data indicate that as of May 2018, more than 14% of television households in the U.S. (over 16 million households) are over-the-air households

152. See Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996; *Minority Television Project, Inc.*, 736 F.3d at 1201; Joel Timmer, *Changes in the Children's Television Marketplace, the Children's Television Act, and the First Amendment*, 37 CARDOZO ARTS & ENT. L.J. 731, 739 (2019) ("[B]roadcasters are not required to air three hours of core programming per week; however, those that do simply have the certainty that the CTA portion of their license renewal would be routinely approved.").

153. See Child.'s Television Programming & Advert. Pracs., Report and Order 96 F.C.C.2d 634, 647-48 para 32 (1984).

154. See *Regulations on Children's Television Programming in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Regulations_on_children%27s_television_programming_in_the_United_States [<https://perma.cc/9MDL-27CM>] (last visited Oct. 30, 2020) ("In 1982, the Reagan administration's FCC chairman Mark S. Fowler lamented upon CBS's decision to move its long-running children's series *Captain Kangaroo* . . . to weekends, in order to accommodate an expanded morning newscast. CBS had already shortened the program from a full hour to 30 minutes in 1981 . . .").

155. Timmer, *supra* note 152, at 736 (quoting S. REP. NO. 101-66, at 1 (1989)).

156. Pol'ys & Rules Concerning Child.'s Television Programming, Report and Order 11 FCC Rcd. 10660, 10662-63 para. 5 (1996).

157. 47 C.F.R. § 73.671(c) (2020).

158. See *generally* Children's Television Programming Rules; Modernization of Media Regulation Initiative, 84 Fed. Reg. 41917 (Aug. 16, 2019) (to be codified at 47 C.F.R. pt. 73).

159. *Id.* at 41921

160. *Id.* at 41922.

(i.e., they do not subscribe to cable or satellite television).¹⁶¹

The statutory authority and regulatory implementation of public broadcasting set-asides continue to be judged using the intermediate scrutiny standard articulated in *O'Brien*.¹⁶² Given the substantial public interest of Congress in providing access to educational and cultural content to members of the public, including a significant population who may not be able to afford purchasing non-broadcast access, these regulations are likely to continue to be upheld under intermediate scrutiny. The children's programming rules have not been challenged in court, and the Commission seems well within its mandate "to strike a balance between our interest in modernizing our rules to reflect the growth in the amount of children's educational programming available on broadcast . . . with the reality that some children in minority and low-income households still rely on live, over-the-air broadcast television."¹⁶³

V. THE LIKELY DEMISE OF INDECENCY REGULATION

Explicit content regulation is another area for which the FCC has famously attempted to regulate the air. Presently, 18 U.S.C. § 1464 provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both."¹⁶⁴ The FCC had been enforcing various versions of the indecency standard since the adoption of the Radio Act,¹⁶⁵ but the Commission formalized the standard in response to the increasing significance of the First Amendment over the decades.¹⁶⁶ The FCC has used license authority and pressure on the broadcasters, but has not often involved the criminal provisions until urged by Congress to do so.¹⁶⁷ The Supreme Court upheld the indecency policy in *FCC v. Pacifica Foundation*,¹⁶⁸ but has since avoided

161. *Id.* at 41921.

162. *See, e.g.*, *FCC v. League of Women Voters*, 468 U.S. 364, 402 (1984) (striking down ban on editorializing); *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1195 (9th Cir. 2013) (upholding ban on advertising on public television stations).

163. Children's Television Programming Rules; Modernization of Media Regulation Initiative, 84 Fed. Reg. at 41921.

164. 18 U.S.C. § 1464 (2018); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 243 (2012).

165. *See, e.g.*, *Trinity Methodist Church, S. v. Fed. Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932); Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 FED. COMM. L.J. 195, 198 (2010) ("Both § 1464 of the Criminal Code and section 326 of the Communications Act originated in the Radio Act of 1927. . . ."); Lili Levi, "Smut and Nothing but": *The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 ADMIN. L. REV. 509, 520 (2013) ("NBC's banning of Mae West from the air for a suggestive reading of a radio skit [on the Edgar Bergen show, playing Eve in the Garden of Eden] indicates that such informal reprimands were sufficient to maintain decorum on the air." (citing Steve Craig, *Out of Eden: The Legion of Decency, the FCC, and Mae West's 1937 Appearance on The Chase & Sanborn Hour*, 13 J. RADIO STUD. 232 (2006) as background information)).

166. *See* Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C § 1464 & Enf't Pol'ys Regarding Broad. Indecency, Policy Statement, 16 FCC Rcd. 7999, 8000 para. 4 (2001).

167. *See* Campbell, *supra* note 165, at 199 ("In practice, neither the DOJ nor the FCC actively enforced § 1464 prior to 1970. In 1969, the Senate Subcommittee on Communications held a hearing and strongly suggested that the FCC do more to curb offensive broadcasting.").

168. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

either reaffirming that decision or rejecting the standard.¹⁶⁹

Outside of the broadcast context, however, the Supreme Court has been quite strident in rejecting indecency regulations. Early efforts by Congress to tame the indecent, vulgar, and pornographic content on the Internet were met with little success. Congress began its efforts to reign in the Internet with the Communications Decency Act of 1996 (CDA).¹⁷⁰ In *Reno v. American Civil Liberties Union*, the Supreme Court struck down portions of the CDA “enacted to protect minors from ‘indecent’ and ‘patently offensive’ communications on the Internet.”¹⁷¹ The Court found that the statute was neither narrowly tailored to serve a compelling governmental interest nor did it offer the least restrictive alternative to its goals, however compelling they might have been.¹⁷²

The Court rejected the second effort of Congress to regulate minors’ access to indecent online speech in *Ashcroft v. American Civil Liberties Union*.¹⁷³ The Supreme Court made the point very clear that “[c]ontent-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid.”¹⁷⁴

More recently, in *Matal v. Tam*, the Supreme Court struck down the regulations of the Patent and Trademark Office to deny trademark registration for any mark that may “disparage . . . or bring . . . into contemp[t] or disrepute” any “persons, living or dead.”¹⁷⁵ Although there is a distinction between the government’s interest in preventing speech that offends because of its message—as framed in *Tam*—instead of its vulgarity, as understood in *Pacifica*, the governmental interest seems very similar.

The distinction became even smaller when the Supreme Court followed *Tam* with *Iancu v. Brunetti*.¹⁷⁶ Here, the Supreme Court struck down another of the Trademark Act’s “prohibitions on registration—one applying to marks that ‘[c]onsist[] of or comprise[] immoral[] or scandalous matter.’”¹⁷⁷ The test for the Patent and Trademark Office turned on the examiner’s understanding whether the term was disgraceful, offensive, disreputable, or vulgar.¹⁷⁸ It is very hard to

169. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 258 (2012) (“[B]ecause the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission’s indecency policy.”).

170. Communications Decency Act of 1996, Pub. L. No. 104-104, §§ 501-561, 110 Stat. 133, 133-143.

171. *Reno v. ACLU*, 521 U.S. 844, 906 (1997).

172. *Id.* at 879 (“The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so.”).

173. *Ashcroft v. ACLU*, 542 U.S. 656, 659 (2004).

174. *Id.* at 660. While other decisions distinguish between restrictions on obscene material that lies outside the scope of First Amendment protection and indecent or pornographic material that retains such protection, obscenity is quite narrowly drawn. See *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 124 (1989) (“The protection of the First Amendment does not extend to obscene speech.”).

175. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (quoting 15 U.S.C. § 1052(a)).

176. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

177. *Id.* at 2298.

178. *Id.* The larger list of offensive synonyms is described by the Court:

distinguish this standard from the indecency standard of *Pacifica*. This is even more obvious since the trademark denied registration was the word “Fuct.”¹⁷⁹

For OTT, the modality of the television content is distributed on the Internet. Congress did not place much effort in controlling obscenity or indecency on the Internet,¹⁸⁰ but instead focused its efforts on protecting children from harmful speech. In the Child Online Protection Act (COPA),¹⁸¹ Congress tried to provide a narrowly tailored protection for minors against content “harmful to minors.”¹⁸² Congress could not, however, demonstrate that the statute represented the least restrictive means to accomplish the congressional goal. Ultimately, Congress could not draft a sufficiently narrow statute to withstand constitutional scrutiny.¹⁸³

As these free speech cases suggest, the indecency regulation of the FCC will likely end with the demise of over-the-air broadcasting. It is possible that these regulations will end much earlier because the increasingly insignificant market share of broadcast makes the enforcement somewhat arbitrary.¹⁸⁴ Furthermore, *Iancu v. Brunetti* cast any remaining legitimacy of *Pacifica* into grave doubt. Given the difficulty faced by the FCC in crafting a sufficiently narrow regulation in *FCC v. Fox*, indecency regulation may be a thing of the past.¹⁸⁵

To determine whether a mark fits in the category, the PTO asks whether a “substantial composite of the general public” would find the mark “shocking to the sense of truth, decency, or propriety”; “giving offense to the conscience or moral feelings”; “calling out for condemnation”; “disgraceful”; “offensive”; “disreputable”; or “vulgar.”

Id.

179. *Id.* at 2297 (“Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT.”).

180. See Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133. This statute was immediately struck down as unconstitutional. See *Reno v. ACLU*, 521 U.S. 844 (1997).

181. Child Online Protection Act, Pub. L. No. 105-277, § 231, 112 Stat. 2681, 2861736 to -739 (1998) (codified at 47 U.S.C. § 231).

182. Child Online Protection Act § 231(e)(6) (codified at 47 U.S.C. § 231(e)(6)).

Material that is “harmful to minors” is defined as:

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id.

183. *ACLU v. Mukasey*, 534 F.3d 181, 207 (3d Cir. 2008) (“It is apparent that COPA, like the Communications Decency Act before it, ‘effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another,’ . . . and thus is overbroad.” (quoting *Reno*, 521 U.S. at 874)).

184. See, e.g., Maria Fontenot & Michael T. Martinez, *FCC’s Indecency Regulation: A Comparative Analysis of Broadcast and Online Media*, 26 UCLA ENT. L. REV. 59, 64 (2019) (considering *FCC v. Fox*); L.A. Powe, Jr., *Red Lion and Pacifica: Are They Relics?* 36 PEPP. L. REV. 445, 452-53 (2009).

185. See Barton Beebe & Jeanne C. Fromer, *Immoral or Scandalous Marks: An Empirical Analysis*, 8 NYU J. INTELL. PROP. & ENT. L. 169, 199-200 (2019).

VI. THE NEED FOR CONTENT NEUTRAL REGULATIONS OF THE MARKETPLACE

The Internet has not proved to be the utopian media platform some hoped it would become.¹⁸⁶ Tim Berners-Lee, one of the pioneers of the World Wide Web, “understood how the epic power of the Web would radically transform governments, businesses, [and] societies. He also envisioned that his invention could, in the wrong hands, become a destroyer of world[s]”¹⁸⁷ Much like the radio of the early twentieth century, the various platforms are filled with both high quality fare and the vulgar and profane.¹⁸⁸

Nonetheless, as established by *Reno v. American Civil Liberties Union, Sable Communications of California, Inc. v. FCC*, and *Ashcroft v. American Civil Liberties Union*, the Supreme Court has limited congressional oversight of content to the obscene material that is outside the scope of First Amendment protection. This article does not suggest that Congress should continue any efforts at limiting access to constitutionally protected speech, even for minors.

Nonetheless, there remain substantial and compelling interests at stake in a lightly regulated media environment on the Internet. Primarily, these interests fall into three categories. First, there is a compelling need to continue free access to news, educational, and cultural programming for the economically disadvantaged. Second, there is a need to assure that all members of the public are afforded equal access to the content provided by media providers, and to prohibit “digital redlining” of public accommodations to enforce civil rights laws. And third, there is a compelling government interest in the privacy of its citizens to regulate the tracking and surveillance of the public. Each of these interests is content neutral and can be accomplished in manners that place little or no burden on lawful speech.

In addition, the government has a compelling interest in promoting a diversity of viewpoint; upholding free and fair elections; enforcing constitutionally permitted defamation actions; and in punishing criminal and fraudulent conduct committed

186. See Bill Wasik, *The Internet Dream Became a Nightmare?*, N.Y. TIMES MAG (Nov. 13, 2019), <http://www.nytimes.com/interactive/2019/11/13/magazine/internet-future.html> [https://perma.cc/CB36-475T] (“Having built a machine to connect the world and let everyone have a say—thereby giving rise to a new social reality in which, . . . ‘people no longer have to rely on traditional gatekeepers in politics or media to make their voices heard’—Facebook now had to concede that there was no foolproof way to stop those voices from saying things that were unfactual or malevolent, or to stop their friends and followers from believing them.” (quoting Facebook founder Mark Zuckerberg)); Noah Kulwin, *The Internet Apologizes...*, N.Y. MAG., <http://nymag.com/intelligencer/2018/04/an-apology-for-the-internet-from-the-people-who-built-it.html> [https://perma.cc/HWH6-QL8R] (last visited Oct. 30, 2020) (“[P]rogrammers and investors and CEOs [have made] clear” that the business model is what turned “the Silicon Valley dream of building a networked utopia . . . into a globalized strip-mall casino overrun by pop-up ads and cyberbullies and Vladimir Putin.”). See generally SIMON LINDGREN, DIGITAL MEDIA AND SOCIETY (2017).

187. Katrina Booker, “I Was Devastated”: Tim Berners-Lee, *The Man Who Created the World Wide Web, Has Some Regrets*, VANITY FAIR (July 1, 2018), <http://www.vanityfair.com/news/2018/07/the-man-who-created-the-world-wide-web-has-some-regrets> [https://perma.cc/9HAN-FVMR].

188. See Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435 (2011); see also Henry H. Perritt, Jr., *The Internet as a Threat to Sovereignty?*, 5 IND. J. GLOB. LEGAL STUD. 423, 431 (1998) (“In the twentieth century, fascist and totalitarian governments attempted to determine the information that reached their citizens by controlling print, radio, and television media.”).

through speech. These goals, however, are content based, making any narrow tailoring of these efforts extremely challenging. Nonetheless, since the public is served best if these goals are met, regulatory efforts may be justified.

A. Public Access to Narrow the Digital Divide

Public access to telecommunications has been a fundamental part of the U.S. communications policy since its early inception. The 1934 Communications Act included an obligation to “make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”¹⁸⁹ While ubiquitous, 10% of the U.S. public still did not use the Internet in 2019.¹⁹⁰ Although that number has dropped from 48% when the Pew Research Center began its study in 2000,¹⁹¹ there is still a significant population not being served.

The population not using the Internet is older and poorer. Twenty-seven percent of adults over 65 do not use the Internet, compared with just 3% of those between 30-49.¹⁹² But even among adults age 50-64, the number of non-users is 12%.¹⁹³ Equally important, for those with incomes under \$30,000, the percentage of all adults who do not use the internet is 18%.¹⁹⁴ In addition, to use the new media services, usage requires more than the Internet. The user must have a broadband connection or sufficiently robust service that it can support video streaming or downloading.

Penetration of Internet and broadband are not reaching the entire republic, emphasizing economic, age, geographic, and racial disparities.¹⁹⁵ Price continues to be a significant barrier to broadband access, and in order “to achieve a 10% increase in broadband subscribership, an average price decrease of approximately 15% is needed.”¹⁹⁶ In addition, there are related barriers to broadband adoption. These may include “factors such as lack of skills to use the technology, lack of computer or device, and lack of relevance of the online experience.”¹⁹⁷

In addition, the cost for content is added on top of the cost for Internet access. Netflix, Disney+, CBS All Access, and most of the new media platforms are behind financial paywalls, requiring monthly or annual fees.¹⁹⁸ Since 76% of newspapers

189. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064, 1064 (current version at 47 U.S.C. § 151 (2018)).

190. Monica Anderson et al., *10% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 22, 2019), <http://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they> [<https://perma.cc/3B5V-N9MP>].

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. See Octavian Carare et al., *The Willingness to Pay for Broadband of Non-Adopters in the U.S.*, 30 J. INFO. ECONS. & POL'Y 19 (2015).

196. *Id.* at 21.

197. *Id.*

198. See Amol Sharma & Joe Flint, *The Great Streaming Battle Is Here. No One Is Safe*, WALL ST. J. (Nov. 9, 2019), <http://www.wsj.com/articles/the-great-streaming-battle-is-here-no-one-is-safe-11573272000> [<https://perma.cc/5PQJ-7FHU>] (“Titans of media and technology are wagering billions that consumers will pay them a monthly fee to stream TV and movies over the internet . . . AT&T Inc.

have switched to paid service,¹⁹⁹ it is very likely that most media companies will eventually adopt a similar strategy. Unlike the advertising-supported model of broadcasting that existed for nearly a century, much of the original programming and news content published online is moving behind paywalls and further limiting access to a significant population.²⁰⁰ “Thus, those who might benefit the most from good internet access – and its ability to provide access to jobs, education, and knowledge – may be the least likely to have it. This ‘digital divide’ is well-documented.”²⁰¹

Information access is a recognized fundamental right,²⁰² and that public policy has transformed the role of the Internet into an essential service. Efforts have been made by Congress through the Telecommunications Act of 1996 to narrow this gap.²⁰³ Among the goals, all providers of telecommunications services are expected to “make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service”²⁰⁴ and provide “specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”²⁰⁵ These public policy goals will not be met merely by helping fund the price of the broadband service, but must also expand to address the cost of the paywalls for news, entertainment, and cultural services.

As a result of the shift from free, public media to pay-walled online content, the purpose of the Telecommunication Act’s universal service requirements needs to be expanded to include a funding strategy to provide the content that makes the Internet so valuable. “The case for a robust universal service program is even stronger in the digital age. As more of our daily activities move online, it becomes increasingly important to make sure that all consumers can continue to participate in society and benefit from the information revolution.”²⁰⁶

B. Prohibition of Digital Redlining

Also embedded in the universal service requirements are obligations to provide

and Comcast Corp.’s NBCUniversal next year will mount their own challenges to streaming juggernaut Netflix Inc.”).

199. See Laura Hazard Owen, *Tighten up That Paywall! (And Some Other Lessons from a Study of 500 Newspaper Publishers)*, NIEMAN LAB (Aug. 13, 2019, 9:00 AM), <http://www.niemanlab.org/2019/08/tighten-up-that-paywall-and-some-other-lessons-from-a-study-of-500-newspaper-publishers/> [https://perma.cc/QB7G-93JX] (stating that paywall models have “become common among newspaper publishers – 76 percent of whom had one in place in 2019”).

200. See Karthik Babu Nattamai Kannan, *Essays on the Economics of Internet Enabled Markets: Last Mile Internet, E-Commerce, and Digital Divide 6* (Aug. 2018) (Ph.D. dissertation, Georgia Institute of Technology).

201. *Id.*

202. See World Summit for Social Development, *Report of the World Summit for Social Development*, ¶ 19, U.N. Doc. A/CONF.166/9 (Apr. 19, 1995) (“Absolute poverty is a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to social services.”).

203. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 104(a), 110 Stat. 56, 71 (current version at 47 U.S.C. § 254 (2018)).

204. § 254(b)(4).

205. *Id.* § 254(b)(5).

206. Daniel A. Lyons, *Narrowing the Digital Divide: A Better Broadband Universal Service Program*, 52 U.C. DAVIS L REV. 803, 809 (2018).

the telecommunication services in “an equitable and nondiscriminatory” manner.²⁰⁷ At first blush, the transition of media from broadcast television to the Internet should reduce rather than increase the risk of discriminatory programming. After all, a UHF broadcaster serving a small geographic market may select programming based on the stereotypes associated with that geographic region, excluding minority populations. In contrast to this hypothetical, the Spanish language broadcaster Univision is the only broadcast network to show market growth in 2018 because it can leverage its terrestrial broadcast with streaming and other platforms.²⁰⁸

Nonetheless, there is a significant risk that the ability to track the individual consumers on internet-based devices could lead to market segregation based on discriminatory practices under various state and federal laws.²⁰⁹ Targeting or withholding services based on race, color, national origin, sex, religion, familial status, physical or mental disability, age, sexual orientation, military or veteran’s

207. § 254(b)(3)-(4).

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

Id.

208. See Univision to End 2018 as the Only Broadcast Network with Primetime Audience Growth During Fourth Quarter, Finishes Year As No. 1 Spanish-Language Network Across Primetime and Total Day, ASSOCIATED PRESS (Dec. 19, 2018), <http://apnews.com/ed2c1ef179fa436b9663df1eba370180> [https://perma.cc/5YXK-K972] (“Univision . . . is set to end 2018 as the only top-rated broadcast network reporting audience growth in primetime during fourth quarter.”); see also Natalie Escobar, *How Spanish-Language Broadcasters Gave Voice to America’s Hispanics*, SMITHSONIAN MAG. (Oct. 30, 2017), <https://www.smithsonianmag.com/smithsonian-institution/how-spanish-language-broadcasters-gave-voice-americas-hispanics-180966985/> [https://perma.cc/W66X-F687] (“Ever since Telemundo launched in Puerto Rico in 1954 and expanded to the U.S . . . they have spoken directly to a community who were never properly served by English-only stations. ‘Those people are the people we are privileged to give a voice.’”).

209. See Angelisa C. Plane et al., *Exploring User Perceptions of Discrimination in Online Targeted Advertising*, in 26th USENIX SEC. SYMP. 936 (USENIX Ass’n ed., Aug. 16-18, 2017) (“[O]nline behavioral advertising . . . has also raised serious concerns including threats to consumer privacy and the potential for discrimination. [In one example,] Google showed ads promoting certain high-paying jobs more frequently to men than women.”); JOSEPH TUROW, *NICHE ENVY: MARKETING DISCRIMINATION IN THE DIGITAL AGE* 186 (Routledge, 6th ed. 2017) (“For decades, marketing and media firms learned as much as they could about social groups (women, baby boomers, rich people, African-Americans, and so on) The emerging process is almost the opposite: They learn enormous amounts about individuals . . . then determine whether and how . . . to deal with them.”); Brendesha M. Tynes et al., *An Unwelcomed Digital Visitor in the Classroom: The Longitudinal Impact of Online Racial Discrimination on Academic Motivation*, 44 SCH. PSYCH. REV. 407 (2015) (“Online racial discrimination experiences often reflect attacks on the humanity and intelligence of members of specific racial groups (e.g., African Americans and Latinos). Such experiences may have detrimental effects on academic outcomes over time.”).

status, genetic information, or use of public subsidies are all identifiers that can be applied in an illegal and discriminatory fashion.²¹⁰

There is a long history of using both discriminatory and facially neutral data to further racial discrimination.²¹¹ Known as “redlining,”²¹² this practice is now illegal, but it is still not uncommon.²¹³ It originated with the Home Owners’ Loan Corporation (HOLC), the predecessor of the Fair Housing Administration,²¹⁴ which later became part of U.S. Department of Housing and Urban Development (HUD).²¹⁵ “HOLC appraisers divided cities into neighborhoods and developed forms which were distributed to real estate professionals . . . [incorporating] ‘notions of ethnic and racial worth’ utilized by real estate appraisers.”²¹⁶ Expanding on the redlining practices of the HOLC, the Fair Housing Administration used lot size, setbacks, single-dwelling rules, and professional estimates to set a policy that devalued urban communities and prized suburban developments in a systematic practice that strongly disadvantaged African-American home owners.²¹⁷ “Foremost among the variables considered by the [Fair Housing Administration] appraisal were the location of the property and the racial composition of the surrounding neighborhood.”²¹⁸

Eventually, of course, Congress passed Title VIII of the Civil Rights Act of

210. See e.g., 42 U.S.C. §§ 1981, 1982, 3604 (2018); 29 U.S.C. § 794 (2018).

211. See Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 170 (2008) (“At the beginning of the twentieth century, the majority of African Americans resided in the South, trapped in a system of debt peonage driven by predatory lending and crop liens that deprived them of the ability to accumulate assets.”); Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1056 (1998).

212. Denver D’Rozario & Jerome D. Williams, *Retail Redlining: Definition, Theory, Typology, and Measurement*, 25 J. MACROMARKETING 175, 175 (Dec. 2005).

Redlining is a widely known practice that used to be employed by banks and insurance companies in the United States in the past. Firms in these industries, when they employed this practice, would decide that they were not going to serve certain neighborhoods, if they were composed primarily of ethnic-minority households, regardless of their creditworthiness or insurability. Consequently, they would, for example, take a map of the area in question and, using a red pencil, place a red line around the areas they were not going to serve and use such a marked-up map (often prominently displayed in offices in firms that employed this practice) as a visual aid to guide their responses to all future requests for loans and insurance policies from the area in question.

Id.

213. *Id.* (Redlining was “outlawed by the federal government through the Fair Housing Act of 1968. Consequently, it is now not as common a practice as it used to be, although it still figures from time to time in sporadic lawsuits and settlements.”).

214. See Nier, *supra* note 211, at 175, 179.

215. See *The Federal Housing Administration (FHA)*, HUD, http://www.hud.gov/program_offices/housing/fhahistory [<https://perma.cc/RB25-FPV9>] (last visited Oct. 30, 2020).

216. Nier, *supra* note 211, at 176-77 (quoting KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 199 (1985)).

217. *Id.* at 182 (“Indeed, by 1960, nearly three-fourths of the African American population was concentrated in cities throughout the United States. First, the FHA favored the financing of single-family detached homes over multifamily projects by adopting policies which favored open areas outside the congested center city.”).

218. *Id.*

1968, later known as the Fair Housing Act.²¹⁹ Enforcing the Fair Housing Act (FHA), HUD reversed its policy, and eventually it became a champion for fair housing. Through congressional expansion and court decisions, overt racism has been reduced.²²⁰

In early 2019, HUD sued Facebook for violations of the FHA precisely because it facilitated ad buyers targeting “audiences that included or excluded certain races, religions, or genders.”²²¹ Earlier cases of internet-based housing discrimination had mixed results. In *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, the Seventh Circuit applied Section 230 of the Communications Decency Act to the ads posted by users of the craigslist service.²²² Craigslist had no editorial role and did not write any of the ads itself. The court explained that “[n]othing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination . . . [and if] craigslist “causes” the discriminatory notices, then so do phone companies and courier services.”²²³ In contrast, Roommates.com was not protected by Section 230 of the Communications Decency Act because it did much more than simply post the advertisements provided by the public. In *Fair Housing Council of San Fernando Valley v. Roommates.com*,²²⁴ the service required parties seeking roommates to fill out a questionnaire that enabled site users to discriminate on matters of sex, sexual orientation, and family status of the roommate. “Roommate’s own acts – posting the questionnaire and requiring answers to it – are entirely its doing and thus section 230 of the CDA does not apply to them.”²²⁵

Today, digital tracking technology can do far more to find the answers to the questions asked in the Roommates.com questionnaire. Databases that cross-reference a person’s online activities, physical movements, purchasing history, and charitable giving can create profiles that are highly predictive for many of the race, sex, nationality, sexual preference and other categorizations. And—while most advertisers are primarily concerned with age, sex, wealth, and geographic information—the other criteria will enable the advertiser to focus its ads on target populations and withhold those ads from individuals who do not meet the advertiser’s target audience. Since it is a violation of the FHA to advertise for a “whites only” apartment complex,²²⁶ it should similarly be a violation for advertisers

219. Fair Housing Act, Pub. L. No. 9-284, §§ 801-819, 82 Stat. 73, 81-89 (1968) (current version at 42 U.S.C. §§ 3601-19, 3631 (2018)). The Fair Housing Act was improved with the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.

220. *McKivitz v. Twp. of Stowe*, 769 F. Supp. 2d 803, 815 (W.D. Pa. 2010) (“The FHA must be broadly construed to effectuate its purpose of providing for ‘fair housing throughout the United States.’” (quoting 42 U.S.C. § 3601)). *But see* *Armstrong*, *supra* note 211, at 1052 (“Although Title VIII is finally providing substantial monetary remedies, the frequency of complaints and awards indicate that extensive housing discrimination still occurs.”).

221. Adi Robertson, *What Happens Next in the Housing Discrimination Case Against Facebook?*, VERGE (Apr. 2, 2019, 1:09 PM), <http://www.theverge.com/2019/4/2/18286660/facebook-hud-housing-discrimination-case-section-230-legal-defense> [https://perma.cc/4AWV-5E68].

222. *Chi. Laws.’ Comm. for C.R. Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

223. *Id.* at 671-72.

224. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

225. *Id.* at 1165.

226. *See* 42 U.S.C. § 3604(c) (2018).

to discriminate by using their a promotional budget to target likely white customers but not purchasing ads distributed to African American or Hispanic customers.²²⁷

Access to housing is just one example of the potential for digital redlining. Billions of dollars are spent by pharmaceutical companies on advertising each year.²²⁸ A study from back in 2005, before the explosion in pharmaceutical television ads, focused on magazine ads.²²⁹ The study found that “readers of African American and Hispanic magazines were exposed to proportionally fewer health-promoting advertisements and more health-diminishing advertisements. Photographs of African American role models were more often used to advertise products with negative health impact than positive health impact, while the reverse was true of Caucasian role models.”²³⁰

As a consequence, the targeting of minorities in advertising likely plays a contributing factor for poorer health outcomes.²³¹ “An extensive literature on television, radio, print, and Internet ads has examined the ways in which the food industry targets minority audiences.”²³² To the extent that outdoor advertising can be used to target particular populations, the patterns are clear: “communities at highest risk of obesity, low-income Latinos and African-Americans, had the highest density of unhealthy food and beverage ads. Disparities were present also in low-income neighborhoods, regardless of race, and in multiracial neighborhoods, regardless of income.”²³³ The only advertising more specifically targeted than neighborhood outdoor ads are targeted behavioral ads.

For broadcast, the FCC has regulations requiring the disclosure of payments for advertising, when those ads are not self-evident.²³⁴ They are primarily designed to restrict the practice of payola, or paying programmers to promote certain songs on radio or particular content on television.²³⁵ These rules, however, do not control the

227. See *id.* § 3535(d) (2019). See generally, *Advertising Guidelines*, NAT’L FAIR HOUSING ALL., <http://nationalfairhousing.org/responsibleadvertising/> [<https://perma.cc/BE79-WWWH>] (last visited Oct. 30, 2020).

228. Beth Mole, *Big Pharma Shells Out \$20B Each Year to Schmooze Docs, \$6B on Drug Ads*, ARS TECHNICA, at 3 (Jan. 11, 2019, 11:25 AM), <http://arstechnica.com/science/2019/01/healthcare-industry-spends-30b-on-marketing-most-of-it-goes-to-doctors/> [<https://perma.cc/RWA6-LWRT>] (“[M]oney spent on [direct-to-consumer]—mostly TV commercials and glossy magazine ads—went from \$2.1 billion in 1997 to \$9.6 billion in 2016. And of that \$9.6 billion, about \$6 billion was for marketing prescription drugs, the analysis found.”).

229. Susan C. Duerksen et al., *Health Disparities and Advertising Content of Women’s Magazines: A Cross-sectional Study*, 5 BMC PUB. HEALTH 1, 2 (Aug. 18, 2005), <https://bmcpubhealth.biomedcentral.com/track/pdf/10.1186/1471-2458-5-85> [<https://perma.cc/56YE-3HQX>].

230. *Id.* at 1.

231. Diana L. Cassady et al., *Disparities in Obesity-Related Outdoor Advertising by Neighborhood Income and Race*, 92 J. URB. HEALTH 835, 835 (2015) (“African-Americans and Latinos are more likely to be obese and to suffer disproportionately from diabetes, heart disease, and other obesity-related conditions compared to their white counterparts.”).

232. *Id.* (“Food marketing is a leading driver of the obesity epidemic where each food advertisement serves as a prompt for automatic eating.”).

233. *Id.* at 841.

234. See, e.g., 47 U.S.C. §§ 317, 507 (2018) (requiring sponsorship disclosure).

235. See, e.g., 47 C.F.R. § 73.1212, (2019), (establishing broadcasters’ responsibilities for sponsorship identification); *Payola and Sponsorship Identification – SPONSID*, FCC, <https://www.fcc.gov/enforcement/orders/1835> [<https://perma.cc/5E3C-KDTM>] (last visited Oct. 30, 2020) (“If record companies, or their agents, are paying persons other than the broadcast licensee (such as the station’s

placement of the advertising or create any obligation to provide the same economic opportunity to acquire goods and services to all consumers equally. The national nature of most broadcast networks and the lack of sophisticated targeting technology has meant that the FCC has not addressed redlining in the context of television broadcasting. The FCC has received a complaint about redlining in the context of cable service speeds against AT&T, supported by a study provided by the National Digital Inclusion Alliance, highlighting concerns about disparate treatment in the delivery of services.²³⁶

As noted by the Supreme Court, “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”²³⁷ Once advertising is made available to the public, the civil rights that protect against discrimination can be reasonably balanced against what is only an economic burden to include the public equally rather than to target in a discriminatory fashion.²³⁸

Targeted media and advertising are often supported by complex algorithms.²³⁹ As consumers watch media and interact with commercial products through online engagement and commercial transactions, the data collected is used to build individual customer profiles used to select and highlight the next set of promoted products and services.²⁴⁰ The goal for content providers is to maximize market

Music Director or its on-air personality) to have records aired, and fail to disclose that fact to the licensee, the person making such payments, and the recipient, are also subject to criminal fine, imprisonment or both.”).

236. See Formal Complaint at 1-2, *Elkins v. AT&T Corp.*, No. EB-17-002 (filed Sept. 27, 2017), https://ecfsapi.fcc.gov/file/1092355565047/Final%20Elkins%20Lee%20Lanfair%20vs%20ATT%20Redlining%20Cleveland_updated_9.22_v3.pdf [<https://perma.cc/8XTL-ZZ5K>]; John Eggerton, *Broadband Redlining Complaint Filed Against AT&T at FCC*, BROAD.+CABLE (Aug. 24, 2017), <https://www.nexttv.com/news/broadband-redlining-complaint-filed-against-att-fcc-168100> [<https://perma.cc/46BG-4JKV>] (“The complainants . . . allege that ‘wealthier and predominantly white areas have gotten premium upgradable high speed broadband access at bullet speed,’ while the three complainants ‘receive slow speeds . . . although they pay AT&T for high speed access.’” (quoting Formal Complaint at 1-2, *Elkins v. AT&T Corp.*)).

237. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

238. Cost is certainly a reasonable basis for scaling the size of an advertising campaign. The balancing is only required where the cost is reduced by using race or other discriminatory tests for the provision of those advertisements. See, e.g., *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 189 (1997) (allowing some economic burdens provided the regulation “does not burden substantially more speech than necessary to further the compelling government interests”).

239. See Nicholas Carah, *Algorithmic Brands: A Decade of Brand Experiments with Mobile and Social Media*, 19 NEW MEDIA & SOC’Y 384, 385 (2015) (“The emergence of data-driven web-based media enables brands to customise and personalise content. And, the data consumers generate enable media organisations to qualify the audience attention they sell in increasingly refined ways.” (internal citation omitted)); see also, Method & Sys. for Making Targeted Offers, U.S. Patent Appl. Pub. No. 2016/0063547 [0011] (published on Mar. 3, 2016) (In 2016, Mastercard International applied for a patent to do just this, providing “[a] method for making a targeted offer by an entity to an audience of potential acceptors using a media streaming service . . .”).

240. See Carah, *supra* note 239, at 387-89.

share,²⁴¹ and the goal for advertisers is to maximize revenue.²⁴² As algorithms become faster, the scale grows larger, and the potential for secondary effects of criteria are left unstudied. These tools can also promote discriminatory practices.²⁴³

A.I.-powered systems have a dark side. Their decisions are only as good as the data that humans feed them. As their builders are learning, the data used to train deep-learning systems isn't neutral. It can easily reflect the biases—conscious and unconscious—of the people who assemble it. And sometimes data can be slanted by history, encoding trends and patterns that reflect centuries-old discrimination.²⁴⁴

In a recent example, Apple has been accused of gender bias involving its credit card, issued by Goldman Sachs.²⁴⁵ Goldman Sachs disputes that it collects sex information or marital status, but acknowledges that it downgrades the significance of credit cards for applicants who are the secondary holder on the account.²⁴⁶ This potentially neutral choice means that the second spouse on a particular credit card—historically, often the wife—will not be counted as a full credit partner on that card. The choice regarding the valuation of secondary cards is not inherently discriminatory, but the impact will be noticeable and significant. It illustrates the decision making that often occurs and the types of digital redlining that is already taking place.

As the primary national media producers move into unregulated cyberspace, the potential for far greater harm only grows. Targeted, discriminatory marketing

241. See Michael Wiggins De Oliveira, *Disney vs. Netflix: The Streaming Video Battle Is Officially On*, THE STREET (Apr. 16, 2019, 6:30 AM), <http://www.thestreet.com/investing/disney-netflix-streaming-battle-14926392> [<https://perma.cc/KF26-Y2PH>] (“If Disney delivers a strong platform and gains significant share, some portion of Netflix’s market cap could be added onto to Disney’s current market cap.”); Amanda Lotz & Ramon Lobato, *Apple, Disney and Netflix’s Streaming Battle Isn’t Winner-Take-All*, THE CONVERSATION (Nov. 8, 2019, 7:14 AM), <http://theconversation.com/apple-disney-and-netflixs-streaming-battle-isnt-winner-take-all-125360> [<https://perma.cc/S578-JRPN>] (“The major streaming services – both old and new – all have different catalogs, pricing and strategies. While all services seek viewers’ time and attention, in other respects they are different beasts.”).

242. See, e.g., Stacy Willis, *What is a Revenue Strategy*, IMPACT (June 17, 2015), <http://www.impactbnd.com/blog/what-is-a-revenue-strategy> [<https://perma.cc/ULV9-9XCN>] (“Any successful company would agree that its top priority is to drive revenue through their sales process By aligning the content you publish with your target audience’s interests, you naturally attract organic website traffic that you can then convert, close, and delight. This, in turn, generates more revenue.”).

243. See CATHY O’NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016) (describing inherently biased algorithms as “weapons of math destruction” to catalog the unintended and harmful consequences of indiscriminate use of data for decision making); Neil Vigdor, *Apple Card Faces Investigated After Gender Discrimination Complaints*, N.Y. TIMES, Nov. 11, 2019, at B4 (“‘Any algorithm that intentionally or not results in discriminatory treatment of women or any other protected class violates New York law,’ an agency spokeswoman said in a statement on Saturday night.”).

244. Jonathan Vanian, *Unmasking A.I.’s Bias Problem*, FORTUNE (June 25, 2018, 6:30 AM), <http://fortune.com/longform/ai-bias-problem/> [<https://perma.cc/WC4P-723D>].

245. See Jen Wieczner & David Z. Morris, *The Apple Card’s Algorithm Goes Both Ways on Women’s Credit Limits*, FORTUNE (Nov. 13, 2019, 11:49 AM), <http://fortune.com/2019/11/13/apple-card-bias-women-goldman-sachs/> [<https://perma.cc/4HQS-QEZ2>] (“David Heinemeier Hansson . . . began tweeting last week that the Apple Card . . . was a ‘sexist program.’ He had received a credit limit 20 times higher than the measly \$57.24 limit his wife received . . . despite the fact that they have shared assets and her credit score is higher . . .”).

246. See *id.*

already exists. In the future, integrating customer tracking with these discriminatory practices could yield a much costlier, and potentially deadlier outcome.

Recently, the Federal Bureau of Investigation (FBI) highlighted the ongoing practices of consumer tracking.²⁴⁷ As part of the 2019 Black Friday shopping season, the FBI issued a warning stating “[b]eyond the risk that your TV manufacturer and app developers may be listening and watching you, that television can also be a gateway for hackers to come into your home.”²⁴⁸ The FBI highlighted that many new smart TVs include microphones and built-in cameras.²⁴⁹

“In some cases,” the warning explained, “the cameras are used for facial recognition so the TV knows who is watching and can suggest programming appropriately.”²⁵⁰ The use of these devices is premised on the exploitation of the audience member’s behavior and viewing information. Mobile devices also have cameras, microphones, and similar capabilities to add surveillance to the consumer profile.

Advertising targeted at taking advantage of a particular audience, such as minors, has been regulated by the FCC and may constitute a deceptive or unfair practice under section 5 of the Federal Trade Commission Act (FTC Act).²⁵¹ The advertisers might also run afoul of the Children’s Online Privacy Protection Rule.²⁵² The FTC has also taken action in the past to stop deceptive advertisements targeted at children, including the ballerina doll who could not dance on her own,²⁵³ the toy helicopter that did not actually fly,²⁵⁴ or the horse that could not stand up.²⁵⁵ But

247. Jason Aten, *If You Bought a Smart TV on Black Friday, the FBI Has a Warning for You: Your Brand–New Smart TV Might Have All the Latest Technology, but It’s Still Vulnerable to Hackers*, INC. (Sept. 25, 2020, 8:56 AM), <http://www.inc.com/jason-aten/if-you-bought-a-smart-tv-on-black-friday-fbi-has-a-warning-for-you.html> [https://perma.cc/9Z65-LQ86].

248. *Id.* (The warning continued, stating that a “bad cyber actor may not be able to access your locked-down computer directly, but it is possible that your unsecured TV can give him or her an easy way in the backdoor through your router.”).

249. Beth Anne Steele, *Oregon FBI Tech Tuesday: Securing Smart TVs*, FBI PORTLAND (Nov. 26, 2019), <http://www.fbi.gov/contact-us/field-offices/portland/news/press-releases/tech-tuesdaysmart-tvs/?=portland-field-office> [https://perma.cc/GF4V-T7NQ].

250. *Id.*

251. See Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 717, 719 (current version at 15 U.S.C. § 45(a)(1) (2018) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”)).

252. See Kristin Cohen, *YouTube Channel Owners: Is Your Content Directed to Children?*, FTC BUS. BLOG (Nov. 22, 2019, 12:56 PM), <http://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-children> [https://perma.cc/E2HV-DXBZ] (“COPPA applies in the same way it would if the channel owner had its own website or app. If a channel owner uploads content to a platform like YouTube, the channel might meet the definition of a ‘website or online service’ covered by COPPA, depending on the nature of the content and the information collected.”); Press Release, FTC, *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law*, (Sept. 4, 2019), <http://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations> [https://perma.cc/55EU-ABKX] (Google and its subsidiary, YouTube required to pay a record \$170 million “for allegedly violating the Children’s Online Privacy Protection Act (COPPA) Rule.”).

253. *Lewis Galoob Toys, Inc.*, 114 F.T.C. 187, 188 (1991) (consent order).

254. *Hasbro, Inc.*, 116 F.T.C. 657 (1993) (consent order).

255. *Gen. Mills Fun Grp., Inc.*, 93 F.T.C. 749 (1979) (consent order); see J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, 12 GEO. MASON L. REV. 873, 875 (2004).

these cases are relatively rare and do not necessarily relate well to the unregulated broadcast of entertainment content that play as little more than program-length commercials which fall under the jurisdiction by the FCC for broadcast television.²⁵⁶ There are no similar rules for online platforms, so Amazon Prime can run hours of children's programming featuring program-length commercials with embedded "buy now" buttons driving purchasing behavior on the Amazon Toy Store component of the marketplace.

In the context of digital redlining, the FTC needs to do much more. At a presentation before the American Bar Association, FTC Commissioner Rohit Chopra noted the problem. "Outsized power in the tech market has invited scrutiny about a panoply of problems, from mass surveillance to digital redlining to the decline of journalism."²⁵⁷ The FTC must take actions that recognize the use of algorithms that discriminate, product placements that are selected on the basis of race and other inappropriate qualifiers, and behavioral advertising that is designed to provide separate and inequal treatment; all of which constitute unfair and deceptive trade practices that violate the FTC Act.²⁵⁸ This leadership will also help empower the states to treat these trade practices as illegal under the state versions of the unfair and deceptive trade laws.²⁵⁹

Whether the practice is focused on children, minorities, or other groups, the examples of advertiser misconduct are sufficiently robust to make this an ongoing concern. Additional risks also exist, such as the media companies selling the behavior information to insurance companies and employers to be used to make underwriting decisions or hiring decisions. While most content regulation may be overreaching, the basic antidiscrimination policies that already exist in state and federal law need to be explicitly incorporated into regulations governing the practices for online media. For most of the harmful behavior, this can be done through additional FTC guidance on its existing advertising policies. For certain other areas, however, such as the facilitation of housing discrimination and other forms of discrimination of public accommodations, Congress will need to revise the section 230 of the CDA to reflect the modern nature of the Internet.

C. Regulating Intrusions into Privacy

As noted in the previous section, many of the concerns about digital redlining often start with the exploitation of personal data, highlighting the concerns about the

256. See Pol'ys & Rules Concerning Child.'s Television Programming, Report and Order, 6 FCC Rcd. 2111, 2118 para. 44 (Apr. 9, 1991); Pol'ys & Rules Concerning Child.'s Television Programming, Memorandum Opinion and Order, 6 FCC Rcd. 5093, 5099 para. 31 (Aug. 1, 1991).

257. Comm'r Rohit Chopra, U.S. Fed. Trade Comm'n, Prepared Remarks at the Am. Bar Ass'n Section of Antitrust L. Ann. Spring Meeting: Tech Platforms, Content Creators, and Immunity (Mar. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1510713/chopra_-_aba_spring_meeting_3-28-19_0.pdf [<https://perma.cc/DWF2-EUMW>].

258. See 15 U.S.C. § 45(a)(1) (2018).

259. Jonathan Lazar, *The Potential Role of Us Consumer Protection Laws in Improving Digital Accessibility for People with Disabilities*, 22 U. PA. J.L. & SOC. CHANGE 185, 198-99 (2019) ("By the 1980s, every state had some form of Consumer Protection Act (CPA), which vary greatly but generally offer a private right of action."); see Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 169, 173 (2011).

unregulated use of consumer information. But the concerns about intrusion into privacy extend to all consumers, not just those who may fall within protected classifications under state or federal law.

Both advertisers and content creators desire to know as much about their audiences as possible.²⁶⁰ Integrating microphones, cameras, GPS, biometrics, IoT enabled products, and facial recognition into the devices used to consume content has the potential to strip away almost all notions of privacy. It is not too fanciful to imagine that heart rate monitoring technology integrated into wearable devices (including smartwatches, headphones, or other wearables) can be tied to the consumption of adult content to inform producers which passages have the most immediate salacious impact, as well as to report on the extent to which the consumer fast forwards videos and flips past the pages of the content that furthers the plot in search of the next moment of titillation.²⁶¹ The days of finding the dirty passages in *Lady Chatterley's Lover* by checking for dog-eared pages are long gone.²⁶² Sellers of fast food, alcohol, cigarettes, lottery tickets, and casino visits could carefully

260. See, e.g., Martin Jones, *Knowing Your Audience is Key to Content Marketing Success*, SOC. MEDIA TODAY (June 9, 2016), <http://www.socialmediatoday.com/marketing/knowning-your-audience-key-content-marketing-success> [<https://perma.cc/UGQ4-H6UW>] (“This is a fundamental part of marketing your business – before you can deliver a marketing message effectively, you need to know who you’re delivering it to and why.”); Spider Graham, *5 Steps You Must Take to Reach Your Target Customer*, BUS. JS. (Nov. 19, 2013, 10:26 AM), <http://www.bizjournals.com/bizjournals/how-to/marketing/2013/11/5-steps-all-marketers-should-use-to.html> [<https://perma.cc/9QHL-KXUA>] (“One of the biggest challenges marketers face is getting word out to the people who are most likely to become our customers. In fact, the whole goal of all marketing is to ‘get the right message to the right person at the right time.’”); Philippe Ross, *Were Producers and Audiences Ever Separate? Conceptualizing Media Production as Social Situation*, 15 TELEVISION & NEW MEDIA 157, 158 (2014) (“[T]he need for producers to speak and act on behalf of the intended audience is an important feature of media . . . [T]he leap of faith required of producers as they engage, and respond to, groups that they cannot observe directly or fully know is a feature of mass communication . . .”).

261. See, e.g., Charlie Warzel, *Facebook and Google Trackers Are Showing Up on Porn Sites*, N.Y. TIMES (July 17, 2019), <http://www.nytimes.com/2019/07/17/opinion/google-facebook-sex-websites.html> [<https://perma.cc/B8JW-2UWZ>] (“A new study scanned 22,484 pornography sites and found them riddled with trackers from major technology companies.”); Lizzie Dearden, *Woman Has Sex Wearing Fitbit - Here Is What Happened*, INDEP. (Aug. 13, 2015, 1:02 PM), <https://www.independent.co.uk/news/science/woman-has-sex-wearing-fitbit-here-what-happened-10451295.html> [<https://perma.cc/P2S2-3DFW>] (“Writing on Reddit under the name noveltysin, she said the wrist-worn gadget started tracking her heart rate after 20 minutes of foreplay. . . . The graph has so far been viewed more than 1.7 million times on Imgur. . . .”); Jeff John Roberts, *Sex Toy Maker Pays \$3.75 Million to Settle ‘Smart’ Vibrator Lawsuit*, FORTUNE (Mar. 10, 2017, 6:02 PM), <http://fortune.com/2017/03/10/sex-toy-maker-settlement-smart-vibrator-lawsuit/> [<https://perma.cc/6B6K-VQJT>] (“[T]he company was [] using the smart phone app to harvest data about how customers used the vibrators. The apps collected information such as what temperature and intensity settings the owners used, as well as how often they used the toys.”).

262. See, e.g., Kelly Faircloth, *Now You Can Own a Dog-Eared Piece of Obscenity History: This Copy of Lady Chatterley’s Lover*, JEZEBEL (Sept. 26, 2018, 1:43 PM), <http://pictorial.jezebel.com/now-you-can-own-a-dog-eared-piece-of-obscenity-history-1829334478> [<https://perma.cc/XF8S-4YQH>]; darkorpheus, Comment to *Eloise’s Reading List*, OUTMODED AUTHORS, (Aug. 19, 2007, 6:41 AM), <http://outmodedauthors.blogspot.com/2007/08/eloises-reading-list.html> [<https://perma.cc/RKH3-RY2C>] (commenting “[a] friend of mine once passed her copy of Lady Chat to me with the dirty pages dog-eared (we were that young once, reading Lawrence and Anne Rice for the SEX!) I forever associate Lady Chat with mental images of flowers BURSTING into bloom, and vigorous pounding of mortar and pestle.”).

monitor their targets to assure that the optimal mix of direct advertising, product placement, and social media promotions enable the advertisers to know precisely how best to reshape public behavior. At a minimum, updated regulations should make such tracking subject to opt-in consent requirements and public disclosures.

The expansion of media consumption on tracking devices should trigger an understanding that the historical model of sectoral data privacy policy is inadequate to address the systemic issue involved in tracking a global population.²⁶³ Instead, as has been highlighted elsewhere, the value of privacy should be characterized as a public good.²⁶⁴ While each of these products and services are legal to sell to adults, the public bad caused by optimizing public policy to thwart regulation will lead to poor health outcomes and other social costs that will be shouldered by all of society, not just the individual consumer.

The laissez-faire alternative would allow the marketing firms an unregulated hand to track, target, and incentivize its customers to abuse alcohol and smoke their lungs out. The employers, insurance companies, and municipalities who shoulder the costs for these destructive behaviors, would be equally free to apply the same technologies and tactics to exclude these people from the workforce and the employment pool. Government could deny public benefits based on the same tracking. To finish the laissez-faire model, zip-code and other demographic tools would be added to the hiring and coverage models to squeeze out those individuals who are associated as likely candidates for unhealthy behavior, which would generally result in another form of digital redlining. Neither of these outcomes is socially desirable.

While this example may seem farfetched, it has been well-documented that a variety of technologies are being used by U.S. and foreign governments to increase surveillance.²⁶⁵ It is naïve to believe that these agencies would not use the content

263. See Lauren Henry Scholz, *Privacy Remedies*, 94 IND. L.J. 653, 657 (2019) (“Privacy advocates cannot assume that merely conceptualizing a right to privacy can protect privacy interests, even if that right is enshrined in statutory law.”); Joel R. Reidenberg et al., *Disagreeable Privacy Policies: Mismatches Meaning and Users’ Understanding*, 30 BERKELEY TECH. L.J. 39, 41-42 (2015); Kathryn McMahon, *Tell the Smart House to Mind Its Own Business!: Maintaining Privacy and Security in the Era of Smart Devices*, 86 FORDHAM L. REV. 2511 (2018).

264. Joshua A.T. Fairfield & Christoph Engel, *Privacy As a Public Good*, 65 DUKE L.J. 385, 425 (2015) (“Treating privacy as a public good thus goes a long way toward explaining the central conundrum of commercial privacy—why it is that consumers claim to want privacy, but do not refuse valuable goods and services that come at a significant privacy cost to both themselves and others.”); Priscilla M. Regan, *Response to Privacy As a Public Good*, 65 DUKE L.J. ONLINE 51, 64 (2016) (“If privacy is viewed not as a private good but as a public good, then the policy question becomes how to encourage individuals as members of groups and organizational platforms on which these groups operate to take into account social benefits and social costs.”).

265. See, e.g., Chris Buckley & Paul Mozur, *How China Uses High-Tech Surveillance to Subdue Minorities*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/world/asia/china-surveillance-xinjiang.html> [<https://perma.cc/A3PV-P7H4>] (“[T]he system in Kashgar is on the cutting edge of what has become a flourishing new market for technology that the government can use to monitor and subdue millions of Uighurs and members of other Muslim ethnic groups in Xinjiang.”); Jack Brook, *Miami Police to Buy Spy Gear to Track Phones, Social Media*, GOVERNING (Oct. 12, 2019), <http://www.governing.com/news/headlines/Miami-Police-to-Buy-Spy-Gear-to-Track-Phones-Social-Media.html> [<https://perma.cc/4X49-7CK8>]; David Gilbert, *About 3 Billion Social Media Users Are Being Spied On by Their Governments*, VICE (Nov. 5, 2019, 7:07 AM), http://www.vice.com/en_us/article/zmj74a/about-three-billion-social-media-users-are-being-watched-by-their-governments

of media as an additional criteria in their surveillance or that the private sector will refrain from making the same efforts. Governments, private contractors, and commercial vendors could all have reasons to track the public based on personal viewing content in particular languages and dialects; a person downloading or streaming documentaries promoting specific ideological perspectives; or a person making positive comments on social media tied to broadcast content. In the absence of a legitimately issued warrant, such intrusions should not be sanctioned.

The broader issues of privacy in the United States are beyond the scope of this article. There are unique aspects of traditional media distribution, however, that reflect a subset of privacy practices. For example, Congress passed the Video Privacy Protection Act of 1988²⁶⁶ to prohibit the sharing of “prerecorded video cassette tapes or similar audio visual material.”²⁶⁷ The law was extended to some online streaming services.²⁶⁸ In actions against Cartoon Network and CNN, courts have distinguished between a subscriber or renter of a streamed video with those who watch content without first subscribing.²⁶⁹ In denying standing, the court found that allegations of watching video clips online were insufficient to receive protection under the statute.²⁷⁰

The Video Privacy Protection Act of 1988 was further weakened by a 2013 amendment that added a consent provision, enabling rental and streaming companies to obtain written consent to collect and share the record history and viewership information.²⁷¹ The change had been requested by Netflix, which wanted to create an ability to promote social exchanges around shared viewing habits.²⁷²

Although there are no similar federal laws for public libraries, the majority of states provide statutory protection from the disclosure of reading histories.²⁷³ Media content consumption reflects the raw material from which the development of

[<https://perma.cc/VV7H-EQ6R>] (“Governments and populist movements are using social media to manipulate elections on a grand scale, and governments are using technology to monitor their own citizens on an unprecedented scale,” Mike Abramowitz, president of Freedom House, told reporters Monday.”).

266. Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (current version at 18 U.S.C. § 2710).

267. *Id.* § 2.

268. See, e.g., *Locklear v. Dow Jones & Co.*, 101 F. Supp. 3d 1312 (N.D. Ga. 2015); *In re Hulu Priv. Litig.*, No. C 11-03764 LB, 2012 WL 3282960 (N.D. Cal. Aug. 10, 2012).

269. *Perry v. Cable News Network, Inc.*, No. 1:14-CV-02926-ELR, 2016 WL 4373708, at *3 (N.D. Ga. Apr. 20, 2016), *aff’d*, 854 F.3d 1336 (11th Cir. 2017).

270. *Id.*; see also *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1253 (11th Cir. 2015).

271. Video Privacy Protection Act Amendments of 2012, Pub. L. No. 112-258, 126 Stat. 2414 (2013) (current version at 18 U.S.C. § 2710(b)(2)(B)).

272. See Steven Musil, *Obama Signs Netflix-Backed Amendment to Video Privacy Law*, C|NET (Jan. 10, 2013, 4:42 PM), <http://www.cnet.com/news/obama-signs-netflix-backed-amendment-to-video-privacy-law/> [<https://perma.cc/E3VJ-5VTY>] (“Netflix, which had argued that the 25-year-old law was outdated and due for an overhaul, has said it plans to introduce social features for subscribers this year, . . . Netflix users outside the United States already have the option to link their accounts with Facebook.”).

273. See Bryan M. Carson, *Surveying Privacy: Library Privacy Laws in the Southeastern United States*, 49 SE. LIBRARIAN 19, 19 (2001) (“According to the American Library Association, library records should be kept private and confidential. Most states also have laws that protect the confidentiality of library records.”); Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465 (2015).

political ideas and free speech are formed. To track a person's reading or viewing history has a significant potential to chill speech.²⁷⁴ It has been true in print and in the video store. It is just as true for the online content consumer. This theoretical concern is backed by empirical data that "supports the protection of reader and viewer privacy under many of the theories used to justify First Amendment protection."²⁷⁵ It has also been understood by the Supreme Court.

[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read, and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community.²⁷⁶

The right to free speech necessarily includes the right to create content and the right to consume content.²⁷⁷ If the right to receive information has meaning, it should not be subject to warrantless searches by the government nor commercial exploitation without consent provided in a meaningful manner that cannot be easily thwarted through click-wrap agreements, changed unilaterally by ISPs, or made the condition of access to content.²⁷⁸

The right to review, listen, and view content is a fundamental right. It must be treated as such and provided federal protection that expands on the original protections in the Video Privacy Protection Act to include all content consumers (rather than merely subscribers and renters), to use a broad definition of personal information, and to make the opt-in consent meaningful, non-conditional, and fully revocable.

D. Promoting Diversity of Viewpoint and Content in the Public Interest Through Expanded Antitrust Enforcement and Increased Public Support for News, Educational, and Cultural Content

The proliferation of online content suggests that concerns over diversity of viewpoint have disappeared, but this may not be the case. Congress has remained committed to diversity and public interest.²⁷⁹ Because of social media and the increased ease to produce podcasts and videos, the production of content has

274. Kaminski & Witnov, *supra* note 273, at 467.

275. *Id.*

276. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952).

277. *See generally* *People v. Freeman*, 46 Cal. 3d 419 (1988) (upholding the right to make non-obscene, pornographic films as protected by the First Amendment notwithstanding pandering statutes); Jon Garon, *Star Wars: Film Permitting, Prior Restraint & Government's Role in the Entertainment Industry*, 7 LOY. L.A. ENT. L.J. 1, 47 (1996) (discussing same).

278. *See* Kaminski & Witnov, *supra* note 273, at 477; BJ Ard, *Confidentiality and the Problem of Third Parties: Protecting Reader Privacy in the Age of Intermediaries*, 16 YALE J.L. & TECH. 1, 3 (2013); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 387-93 (2008); Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 799-809 (2006); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 981-83 (1996).

279. *See, e.g.*, 47 U.S.C. §§ 303 (2018); *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192 (9th Cir. 2013).

exploded.²⁸⁰ Further, the stark demarcations among content producers, advertisers, and audiences have been eroded through the development of transmedia and social media platforms.²⁸¹

Nonetheless, while the bottleneck for the production of media has diminished, the competition for audience scale has only increased. Actual media concentration has increased considerably, especially with the introduction of Netflix, Amazon Prime, Apple and Google serving both to create original content and to distribute the content of others.²⁸² Ownership concentration and advertising chokepoints raise concerns about the nature of the content available to the public.²⁸³ The cost of promoting a studio-produced movie provides an excellent example:

Hollywood continues to wrestle with rising marketing costs, particularly overseas, which can make up 70 percent of a film's gross thanks to booming markets in Russia, Latin America and Asia. Two years ago, the cost had crept up to \$175 million globally. Now, studios say it has hit the \$200 million mark per picture In 1980, the average cost of marketing a studio movie in the U.S. was \$4.3 million (\$12.4 million in today's dollars). By 2007, it had shot up to nearly \$36 million. If the MPAA still tracked spending on P&A, that number would be north of \$40 million today for medium-size films like *The Fault in Our Stars* or *Tammy*.²⁸⁴ Unlike the early days of radio, the digital marketplace does not suffer from static and interference. But the competition for the attention of the audience creates a different kind of interference that can be solved only through massive advertising investments or the power of media influencers.²⁸⁵ Both these approaches are focused on selling

280. See NYC MEDIA & ENTERTAINMENT, NEW YORK CITY, THE PODCASTING CAPITAL, http://www1.nyc.gov/assets/mome/pdf/MOME_PODCAST_REPORT_Web_Final.pdf [<https://perma.cc/22AY-HSCG>] (last visited Oct. 30, 2020) (As of 2016, "Apple, the platform through which the majority of podcasts are downloaded, has over 350,000 active podcasts, with 13 million episodes of audio and video content."); Bob Woods, *The Podcasting Revenue Boom Has Started*, STRATEGY+BUS.: TECH & INNOVATION (Oct. 18, 2018), <http://www.strategy-business.com/article/The-Podcasting-Revenue-Boom-Has-Started?gko=d3034> [<https://perma.cc/A33Y-F479>] ("[T]he audience has attained critical mass. . . . Simultaneously, the podcast universe has exploded to more than 500,000 shows, and the quality of the content and production values have gone up, as well.")

281. See Ross, *supra* note 260, at 158 ("For media and communication theory, then, the opportunity for audiences to act as mass communicators represents a blurring of production and reception, social settings typically conceived as interdependent but separate.")

282. See Ashley Lutz, *These 6 Corporations Control 90% of the Media in America*, BUS. INSIDER (June 14, 2012), <http://www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6?IR=T> [<https://perma.cc/X89Q-RMJZ>] ("In 1983, 90% of US media was controlled by 50 companies; as of 2011, 90% was controlled by just 6 companies In 2017, the number was also 6.")

283. Google is particularly of concern in this regard, since it remains primarily an advertising company that hosts content to drive ad sales. See J. Clement, *Advertising Revenue of Google from 2001 to 2019*, STATISTA, (Feb. 5, 2020), <http://www.statista.com/statistics/266249/advertising-revenue-of-google/> [<https://perma.cc/Q7FT-SFAZ>] ("In 2019, advertising accounted for the majority of Google's total revenue, which amounted to a total of 160.74 billion U.S. dollars. In the most recent fiscal period, advertising revenue through Google Sites made up 70.9 percent of the company's revenues.")

284. Pamela McClintock, *\$200 Million and Rising: Hollywood Struggles with Soaring Marketing Costs*, HOLLYWOOD REP. MAG. (July 31, 2014, 5:00 AM), <http://www.hollywoodreporter.com/news/200-million-rising-hollywood-struggles-721818> [<https://perma.cc/7YMH-3QNL>].

285. See Vivian Wagner, *The Power of Influencer Marketing*, E-COMMERCE TIMES (Apr 5, 2019, 5:00 AM), <https://www.ecommercetimes.com/story/85939.html> [<https://perma.cc/YSD4-S75A>] ("Influencer marketing is one of the fastest-growing marketing channels today," said digital strategist

audiences to the highest bidder.

For the same reasons, the market power of the media conglomerates does raise some concerns. For example, when Jeff Bezos, founder of Amazon, purchased the Washington Post, there were concerns about the exploitation of the newspaper to further a tech-industry agenda.²⁸⁶ Bezos has been circumspect about his role in the paper, but the economic control remains troubling.²⁸⁷

There are two discrete governmental approaches to these concerns—expanding FTC enforcement of antitrust principles and increasing support for publicly funded education, news, and cultural programming.

The first is to expand antitrust enforcement, with the FTC paying particular attention to the potential of a future merger or consolidation which tends to lessen competition among those enterprises that produce the top seventy to eighty percent of consumed content.²⁸⁸

The market segmentation rules of the Communications Act and Telecommunications Act have become increasingly weak barriers to media concentration.²⁸⁹ As recently summarized by the Third Circuit, “[b]y preventing any one entity from owning more than a certain amount of broadcast media, these rules limit consolidation and promote a number of interests, commonly stated as

Shane Barker. ‘It involves leveraging social media influencers or key leaders to get more people to trust your brand,’ he told the E-Commerce Times.”); Rory Cellan-Jones, *Tech Tent: The Power of Influencers*, BBC NEWS (Jan. 25, 2019), <https://www.bbc.com/news/technology-47001461> [<https://perma.cc/98Y4-Z3BT>] (Werner Geyser, founder of the Influencer Marketing Hub, asserted “that there was an average earned media value of \$5.20 per dollar spent.” “That earned media value turns out to include something as nebulous as ‘increasing brand awareness,’ but Mr Geyser insists companies do see real returns in the form of extra sales.”).

286. See Jack Shafer, *What Does Jeff Bezos Want?*, POLITICO (Apr. 18, 2018), <https://www.politico.com/magazine/story/2018/04/18/jeff-bezos-amazon-washington-post-217994> [<https://perma.cc/3WBL-3UCW>] (“By retaining both the editor and the editorial page editor he inherited, Bezos has maintained the basic course plotted by the Post’s previous owners, the Graham family. He’s also kept his nose out of news coverage, which has delighted journalists . . .”).

287. See *id.*; Alex Shephard, *The Other Side of Jeff Bezos’s Washington Post*, THE NEW REPUBLIC (June 27, 2018), <https://newrepublic.com/article/149404/side-jeff-bezoss-washington-post> [<https://perma.cc/LAL5-6BF5>] (“Since Amazon CEO Jeff Bezos purchased The Washington Post in 2013, the newspaper has been one of the great—and few—success stories in media, legacy or otherwise.”).

288. See Howard A. Shelanski, *Antitrust Law As Mass Media Regulation: Can Merger Standards Protect the Public Interest*, 94 CAL. L. REV. 371, 374 (2006) (“[P]olicy makers concerned with preserving competition and diversity in media markets should supplement their attention to deregulating media ownership with attention to improving the effectiveness of antitrust enforcement in deregulated media markets.”).

289. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (reducing cross-ownership regulations and directing the FCC to review media ownership rules to determine whether they are “necessary in the public interest as a result of competition,” and to “repeal or modify any regulation it determines to be no longer in the public interest”); see also 47 CFR § 73.3555 (2020) (regulations on cross-ownership and multiple ownership). See generally 2014 Quadrennial Reg. Rev.—Rev. of the Comm’n’s Broad Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, Second Report and Order, 31 FCC Rcd. 9864 (2016), *vacated and remanded*, *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3rd Cir. 2019); *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

‘competition, diversity, and localism.’²⁹⁰ Nonetheless, even before the FCC faces loss of control over media distributors, it has abandoned this approach for most purposes.²⁹¹ Since this Article has stressed that the FCC will lose its jurisdictional ability to impose these regulations on companies not involved in over-the-air broadcasting, the loss of anti-competition rules has only a short-term public harm. If anything, the continued enforcement of these rules might have motivated companies to abandon their over-the-air broadcasting earlier, such that their repeal may have some limited benefit.

It remains, however, that the FCC action has placed most antitrust and anti-competition issues in the hands of the FTC. Fortunately, the FTC does not base its jurisdiction on the scarcity doctrine or the public interest of the airwaves. Instead, the FTC bases its regulation on the Sherman Act,²⁹² FTC Act,²⁹³ and the Clayton Act.²⁹⁴ There is ample space within the traditional jurisdiction of the FTC to address the accumulation of market power achieved as a result of media industry consolidation and its negative impact on the ability for new entrants to purchase sufficient advertising and influence to gain market share. There is also an opportunity for the FTC to look more carefully at the negative impacts of tying arrangements,²⁹⁵ which had once been unlawful *per se*²⁹⁶, but now require that the seller have appreciable market power.²⁹⁷ The market power of the media companies and the companies operating the two largest app stores have significant power to

290. Prometheus Radio Project, 939 F.3d at 573 (reviewing the FCC’s diversity initiatives and broadcast media ownership rules).

291. Order on Reconsideration, *supra* note 141, at 9802 para. 2. The action ended a century of cross-ownership policies designed to promote diversity of viewpoint:

Specifically, we (1) eliminate the Newspaper/Broadcast Cross-Ownership Rule; (2) eliminate the Radio/Television Cross-Ownership Rule; (3) revise the Local Television Ownership Rule to eliminate the Eight-Voices Test and to modify the Top-Four Prohibition to better reflect the competitive conditions in local markets; (4) decline to modify the market definitions relied on in the Local Radio Ownership Rule, but provide a presumption for certain embedded market transactions; (5) eliminate the attribution rule for television joint sales agreements (JSAs); and (6) retain the disclosure requirement for shared service agreements (SSAs) involving commercial television stations.

Id.

292. Sherman Antitrust Act of 1890, ch. 647, §§ 1-2, 26 Stat. 209, 209 (current version at 15 U.S.C. §§ 1-2) (Section 1, prohibiting unreasonable restraints of trade; and Section 2, prohibiting the monopolization, attempted monopolization, and conspiracy to monopolize).

293. Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 717, 719 (current version at 15 U.S.C. § 45) (prohibiting unfair and deceptive trade practices).

294. Clayton Act of 1914, ch. 323, § 3, 38 Stat. 730, 731 (current version at 15 U.S.C. § 14) (prohibiting anticompetitive sales conditions and practices).

295. See *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 462 (1992) (explaining that a “tying arrangement is ‘an agreement by a party to sell one product on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier’”).

296. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (“It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se.’”), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (eliminating presumption of monopoly power for patented product).

297. *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 815 n.2 (6th Cir. 1997); see also *Ill. Tool Works, Inc.*, 547 U.S. at 38-40.

promote a particular media product or to bury it beyond the reach of the ordinary consumer. If a media host features an app, game, or movie, it jumps to the top of the public's attention.²⁹⁸ If it does not show up early in the search results, most consumers will go elsewhere.²⁹⁹ The advice given to developers to be featured on the app stores is to incorporate the tools of the platform's developer and to be interactive with all versions of the platform developer's products.³⁰⁰ If it is a requirement to be featured on the Apple App store that the proposed app must work on iPhones, iPads, and Apple Watches, then perhaps the market share and tying requirements are met.

As media content moves to app marketplaces on Roku, Amazon Fire, and similar devices, the potential to throttle or prioritize content for noncompetitive purposes becomes increasingly likely. When these issues arose in broadcast and cable, Congress adopted must-carry rules to protect the public from similar anti-competitive behavior and to promote content diversity and localism.³⁰¹ The FTC must be prepared to take similar steps using the regulations under its jurisdiction. If the FTC determines that these competitive games are not barred by existing regulations, then Congress should act to protect the public from uncompetitive behavior among the media conglomerates to continue to promote content diversity.

The second strategy to promote viewpoint and content diversity is for federal and state agencies to fund free educational and cultural content, and to support the nonprofit sector in these efforts. As empirical research demonstrates:

[B]roadcasting subsidies create better informed . . . [and] more equally informed citizens. . . . [Public broadcasters] focus on goals other than attracting the largest audience and provide more political coverage. This in turn creates higher levels of political knowledge among viewers of public broadcasting and works to blunt knowledge variations created by differences in class . . . and political interest.³⁰²

298. See *Top 10 Ways to Get Your App Featured in the App Store*, CLEARBRIDGE MOBILE, <https://clearbridgemobile.com/top-10-ways-to-get-your-app-featured-in-the-app-store/> [<https://perma.cc/7TDZ-3FFT>] (last visited Oct. 30, 2020) ("Everybody wants to be featured in the App Store. A spot on Apple's feature page is a powerful way to boost traffic, increase visibility and drive downloads. With over 2 million apps available in the App Store today, the competition for getting noticed by editors is aggressive.").

299. See *id.*

300. See Deepak Abbot, *How to Get Featured on the App Store Today*, GROWTH BUG (Sept. 1, 2018), <https://growthbug.com/how-to-get-featured-on-the-app-store-today-tab-19ed37cf5afc> [<https://perma.cc/2S2S-2H6V>] ("Apple doesn't pick up apps randomly. . . . [P]aid apps, or apps with in-app purchases, are more likely to be featured, especially if those apps have high ratings and are available for other Apple products, such as the iPad or the Apple Watch."); *App Hacks: How to Get Your Android App Featured on the Google Play Store*, INSTABUG BLOG, <https://instabug.com/blog/android-app-featured-google-play/> [<https://perma.cc/EUK4-WA2A>] (last visited Oct. 30, 2020) ("Google releases tons of products each year at Google I/O, such as Firebase and Google Maps SDKs, for developers to make use of them. . . . Google tends to feature strong apps using these new technologies as a way of validating their own innovations.").

301. See 47 U.S.C. § 534(b)(1)(B) (2018); *Turner Broad. Sys. v. FCC (Turner I)*, 512 U.S. 622, 630 (1994).

302. Patrick O'Mahen, *A Big Bird Effect? The Interaction Among Public Broadcasting, Public Subsidies, and Political Knowledge*, 8 EUR. POL. SCI. REV. 311, 312 (2016) ("[P]ublic broadcasters that rely on government subsidies can break out of the shareholder-profit model embraced by commercial broadcasters. This consistent revenue stream allows them to focus on goals other than attracting the

Through additional empirical research, it has been demonstrated that high quality public media broadcasts both increased the public's general interest in becoming better informed and increased the willingness to watch media representing a more diverse set of political viewpoints.³⁰³ High quality educational programming and programming addressing cultural interests not captured by the commercial market promote diversity of viewpoint and an informed citizenry. These results reinforce the congressional findings that serve as the basis for the Corporation for Public Broadcasting:

- (1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;
- (2) it is in the public interest to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services;
- (3) expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both local and national levels;
- (4) the encouragement and support of public telecommunications, while matters of importance for private and local development, are also of appropriate and important concern to the Federal Government;
- ...
- (9) it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies; and
- (10) a private corporation should be created to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control.³⁰⁴

The nature of content produced for public radio and public television are often quite different than the commercial content produced by the media conglomerates. The nonprofit content producers have the ability to emphasize children's programming and programming designed to address traditionally underserved communities. While some of the content is similar to commercial productions (particularly during pledge drives), these broadcasters have the ability and the mandate to address the public interest without the commercial pressures that exist

largest audience and provide more political coverage.”); *see also* Karen Donders, *Public Service Media Beyond the Digital Hype: Distribution Strategies in a Platform Era*, 41 *MEDIA, CULTURE & SOC'Y* 1011 (2019); Laia Castro-Herrero et al., *Bridging Gaps in Cross-Cutting Media Exposure: The Role of Public Service Broadcasting*, 35 *POL. COMM'N* 542 (2018).

303. Castro-Herrero et al., *supra* note 302, at 553.

[M]edia systems with strong PSB facilitate access to politically balanced news information, and spread standards of political diversity across media outlets. This increases the opportunities for less motivated individuals to encounter cross-cutting information without actively searching for it and have an equalizing effect on the level crosscutting exposure between more and less politically interested individuals. . . . Our findings thus complement cross-national studies showing that lower news media fragmentation and greater news reach provide citizens with abilities and motivations conducive to all forms of news media exposure.

Id. (internal citations omitted).

304. § 396(a)(1)-(4), (9), (10).

among the commercial ventures.

These efforts do nothing to discourage the commercial marketplace and they fall well within the promotional powers of Congress and the states.³⁰⁵ The government has a long history of providing financing to support arts, education, and culture without running afoul of any First Amendment limitations.³⁰⁶ The Supreme Court has made clear that “government has broad discretion to make content-based judgments in deciding what private speech to make available to the public.”³⁰⁷

As the government reduces its involvement in the regulation of broadcast content and monetizes the frequencies dropped from broadcast,³⁰⁸ Congress should move to set aside these funds as a trust for funding noncommercial content rather than merely providing yet another subsidy to the media conglomerates that have benefitted from the public interest revenue for so many generations.³⁰⁹

An additional benefit of an endowed trust is that it enables federal and state funding while separating the decisions about spending the funds from the vagaries of congressional politicking.³¹⁰ It creates a long-term, sustainable model for nonprofit and public-sector arts, news, and media organizations to help foster the diversity of viewpoint and informed citizenry essential to a healthy nation.

CONCLUSION

Despite many concerns, the Internet is in ascendance as the primary platform for distribution of news, films, television, radio, podcasts, games, social media, and other forms of cultural content. Technological innovation continues to expand the availability for the content on home and mobile devices. As this technology continues to evolve, the historical reliance on the broadcast spectrum for radio and television will increasingly be eclipsed.

Over-the-air broadcasting once had many benefits, but the advent of new technologies, the limitations of over-the-air broadcasting and the scarcity of the bandwidth spectrum made this platform increasingly obsolete. From a historical and regulatory perspective, however, it was precisely the nature of the airwaves that gave

305. See, e.g., 20 U.S.C. § 953 (2018) (National Foundation on the Arts and the Humanities); 20 U.S.C. § 954 (2018) (National Endowment for the Arts).

306. See, e.g., *United States v. Am. Libr. Ass’n, Inc.*, 539 U.S. 194 (2003) (funding for public libraries); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding cash grants awarded to artists).

307. *Am. Libr. Ass’n, Inc.*, 539 U.S. at 204.

308. See 47 U.S.C. § 1452 (2018) (“The Commission shall conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights in order to make spectrum available for assignment through a system of competitive bidding . . .”).

309. There may, of course, be some small-station operators in their first three-year license that have invested heavily and not had an opportunity to recoup their costs. Reasonable compensation might be appropriate for station owners that can show actual harm in the change of policy. This is not, however, the majority of license holders.

310. See *Nat’l Endowment for the Arts*, 524 U.S. at 574 (“Throughout the NEA’s history, only a handful of the agency’s roughly 100,000 awards have generated formal complaints about misapplied funds or abuse of the public’s trust. Two provocative works, however, . . . led to congressional reevaluation of the NEA’s funding priorities and efforts to increase oversight of its grant-making procedures.”).

rise to the FCC and many of its jurisdictional powers. Particularly with regard to media protected by the First Amendment, only the scarcity of the airwaves (and the cable bandwidth that came after) provided the Commission its ability to regulate in the public interest, requiring diversity of viewpoint that sometimes veered into the compelled airing of content adverse to the position of the broadcaster.

The changes in economics and technology are driving media producers to the Internet, and eventually, they will shed their historical connections to over-the-air broadcast. As each company leaves the over-the-air broadcasting sphere, the FCC loses much of its regulatory authority over that company.

Nonetheless, there are compelling government interests in a healthy media environment, and some of these efforts can withstand constitutional scrutiny without reliance on the scarcity doctrine. To promote the public interest of diversity of viewpoint, Congress should expand funding for news, educational content, and cultural content—building on what it has done over the past century. The FTC must step into the void created by the FCC's departure, enforcing both the FTC Act's provisions to assure that online advertising, customer privacy, and COPA protections are rigorously enforced. The FTC must also reexamine the nature of the online transactions to better reflect the Sherman Act and Clayton Act provisions of antitrust regulation as it applies to this new model of media distribution.

There were many lessons learned by the FCC during the law's development from the Radio Act through the Communications Act and into the Telecommunications Act. The media has changed but the audience has not. These lessons are essential if the next century of telecommunications policy will be able to help usher in another golden age and avoid the creation of an online media wasteland.

The transition from over-the-air broadcasting to an entirely online experience has not occurred. But policy makers understand the days of broadcast are numbered. As always, the time to prepare for the future is now.

Stay tuned.

