THE MYTH OF SCARCITY IN THE BROADCASTING SECTOR - AND WHAT IT MEANS FOR PLATFORM REGULATION

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Platform regulation by the state is often described as being at odds with the First Amendment. By drawing a key comparison with broadcasters' regulation, this article shows that some forms of platform regulation are compatible with the First Amendment.

Scarcity of airwaves has usually been interpreted as the main rationale used by the Supreme Court to justify the constitutionality of broadcasting regulation. The false paradigm of broadcasting scarcity, which was dominant at the time the internet was born, has had a tremendous impact on how we regulate—or refuse to regulate—platforms. If scarcity was the only acceptable rationale for regulating broadcasting, it was easy to argue that the internet should not be regulated, given the unlimited "space" that it provided to its users. The scarcity argument helped legitimize the idea that the regulation of broadcasting was "exceptional" and, in contrast, the narrative that any type of platform regulation would be unconstitutional because internet was not scarce.

This article shows that the Supreme Court's argument to uphold broadcasting regulation, and the FCC's Fairness Doctrine—a policy that required the holders of broadcast licenses to present controversial issues of public importance in a manner that reflected differing viewpoints—was not

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relying only on scarcity. It argues that the legal entitlements granted to the licensees is the reason why it was possible to impose on them some public service obligations, such as the Fairness Doctrine. The compatibility of the regulation with the First Amendment was also made possible by the distinction between public discourse, that should not be regulated, and a managerial domain, where the state can impose aims upon persons to achieve its legitimate objectives.

Similarly, platforms are granted some legal entitlements through quasi-property, Intellectual Property, and Section 230 of the Digital Services Act (DSA). Thus, the history of broadcast regulation suggests that it is in fact compatible with the First Amendment to impose some public service obligations on platforms. These public service obligations could be imposed in return for the protection of Section 230, within the boundaries of a managerial domain supervised by a federal agency.

INTRODUCTION

Platform regulation by the State is often described as being at odds with the First Amendment.[1] In this article, I show that some forms of platform regulation are compatible with the First Amendment. I do so by drawing a key comparison with broadcasters' regulation.

In its first major decision regarding social media platforms, *Reno v. American Civil Liberties Union*,[2] the United States Supreme Court drew an explicit comparison with broadcasting and its regulation. The Court found that the rationale for regulating broadcasting, namely its character as an invasive medium and the scarcity of

1. *See* Daphne Keller, *Amplification and Its Discontents,* KNIGHT FIRST AMEND. INST. AT COLUM. UNIV (June 8, 2021), https://knightcolumbia.org/content/amplification-and-its-discontents; *see* Jeff Kosseff, *First Amendment Protection for Online Platforms*, 35 COMP. L & SEC. REV. 1, 2 (2019); Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883, 899 (2011); Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 138 (2021).

2. 521 U.S. 844, 866–70 (1997).

bandwidth, was not applicable to the internet.[3] It called the internet "a vast democratic forum" and it noted that by its nature, communications on the internet are not as invasive as broadcasting because these communications do not appear on one's computer screen unbidden like broadcasting does on one's television.[4]

Most notably, the Supreme Court found that the internet could "hardly be considered a 'scarce' expressive commodity."[5] It stated:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. . . . '[C]ontent on the internet is as diverse as human thought.'[6]

This vision echoes the digital utopianism that characterized the early internet period.[7]

This article returns to the comparison between broadcasting and platforms and shows that the early analysis of the Court was inaccurate. Scarcity of airwaves has usually been interpreted as the main rationale used by the Supreme Court to justify the compatibility of broadcasting regulation with the First Amendment.[8] This article shows that the scarcity argument was greatly overstated, arguing that the legal entitlements granted to the licensees is the reason why it was possible to impose on them some public service obligations, such as the Fairness

3. *Id.* at 868 ("Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers . . . the scarcity of available frequencies at its inception . . . and its 'invasive' nature . . . . Those factors are not present in cyberspace.").

4. *Id.* at 868–69 (quoting Am. C.L. Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

5. *Id.* at 870.

6. *Id.*

7. *See* John Perry Barlow, *A Declaration of Independence of the Cyberspace*, 18 DUKE L. & TECH. REV. 5, 5 (2019); LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE 5 (1999).

8. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197–98 (Univ. of Cal. Press 1st ed. 1987); *see* Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 38–39 (2002).

Doctrine. Similarly, I argue platforms are granted some legal entitlements through quasi-property, Intellectual Property, and Section 230 of the Digital Services Act (DSA). For this reason, following the history of broadcast regulation, it would be possible to impose some public service obligations on platforms through a managerial domain distinct from public discourse.

The false paradigm of broadcasting scarcity—dominant at the time the internet was born—had a tremendous impact on the way we thought about regulation of platforms. If scarcity was the main factor explaining concentration in the sector, and if the scarcity was a natural—as opposed to constructed—phenomenon, it would be easy to argue that another medium would, by essence, reverse the trend.[9] Many authors indeed predicted the disappearance of the concentration phenomenon with the advent of the internet because of the widespread and free availability of this new medium to both speakers and audience.[10] The internet is a decentralized system in which a global end-to-end network, freed from scarcity, facilitates the flow of information between numerous users.[11] The peer-to-peer model of communication was said to have the potential to circumvent the need for intermediaries.[12] Thus, new technologies have the ability to take power away from the state and give it back to individuals.[13] With digital media, we are simultaneously transmitters and receivers:

9. Oren Bracha & Frank Pasquale, *Federal Search Commission - Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1157 (2007) ("Within the decades-long debate over broadcast regulation, there was a strong, though not universal, claim that government regulation was essential in order to enhance diversity and access, keep bias in check, and promote democracy. The Internet, the argument went, fundamentally changed things. Even if the broadcast system needed some speech-enhancing regulation, the decentralized Internet environment was already free from the traditional speech-hierarchy, so regulation would be both unnecessary and dangerous.").

10. *See* Benjamin M. Compaine, *Distinguishing Between Concentration and Competition*, *in* WHO OWNS THE MEDIA? COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 537, 574 (3d ed. 2000).

11. Bracha & Pasquale, *supra* note 9, at 1150–51.

12. *Id.* at 1156.

13. I draw this description of the ideology of digital utopianism from Cédric Durand, *Techno-Féodalisme: Critique de L'Économie Numérique [Techno-Feudalism: Criticism of the Digital Economy]*, 40 QUESTIONS DE COMMUNICATION 587, 587–88 (2021) (Fr.); *see* Barlow, *supra* note 7, at 5.

we create the content others consume, and we consume the content others create.[14] This multidimensional nature of speech, allowed by the internet, gave rise to much hope; it promised a redistribution of power and a rebirth of democratic culture "by ending the one-way broadcast model and debasement of citizens as consumers,"[15] restoring the viability of communicative action, described by German philosopher and social theorist Habermas as a model of deliberative democracy.[16] These early observations of the internet were also based on works dating to the 1960s, such as Marshall McLuhan's vision, partially based on technological determinism, that technological changes would lead to the emergence of a collective consciousness on a mass human scale.[17] Because speakers on the internet have the ability to choose between narrow audiences (like sending an email to a friend) or broad audiences (like posting to an open forum), and because speakers can share communications by others—whether sharing text, pictures, music, in short, files of all kinds—with increased speed, communications promote the continuous circulation of information and content easier and much faster. It democratizes speech because an increasing number of people can respond to messages as they read them.[18]

But to reach this goal, political leaders had, in the utopist mind, the responsibility to facilitate the transition by engaging the withdrawal of the state,[19] through

14. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7–8 (2004).

15. *See* Morgan N. Weiland, *The Intermediated Public Sphere*, Paper Presented at the FESC 4 (2021); *see also* Manuel Castells, *The Rise of the Network Society*, *in* THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE 1, 327–72 (2d ed. 1996); *see also* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 1 (Yale Univ. Press 2006).

16. Weiland, *supra* note 15, at 3.

17. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 1 (1st ed. MIT Press 1994).

18. Balkin, *supra* note 14, at 8.

19. *See* Esther Dyson et al., *Cyberspace and the American Dream: A Magna Carta for the Knowledge Age (Release 1.2, Aug. 22, 1994)*, 12 INFO. SOC'Y 295, 296 (1996); Durand, *supra* note 13, at 29; Barlow, *supra* note 7, at 5; *see also* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 645 (2013) (stating that U.S. authorities

deregulatory action by the State to develop and fulfill its promise of democratic participation. Unfortunately, this dominant idea that broadcasting scarcity was meant to contrast with the unlimited resource of the internet led to an extreme paradox: it allowed for the appropriation of the public sphere by a few oligopolistic enterprises that took advantage of deregulation and the glorification of private property to expand their dominance over the space.[20] More concretely, some of the features of the mass media era that were supposed to be eliminated were reproduced thanks to the policy of non-regulation of the new medium.[21]

Moreover, if the only rationale to regulate broadcasting was scarcity, it was easy to argue, like the Supreme Court in *Reno*, that the internet, given the unlimited space that it provided to its users, should not be regulated, and even that regulation would be contrary to the First Amendment. The scarcity argument helped legitimize the "exceptional" regulation of the broadcasting sector and, in contrast, the deregulation of the internet.[22]

In this article, I show that the scarcity argument has never convinced Supreme Court commentators nor, probably, the Supreme Court itself. It has failed to convince because all media are more or less scarce, but not all media are regulated the same way. Moreover, while scarcity decreased greatly from the 1960s onwards, broadcasting regulation, licensing, and the Fairness Doctrine were never held unconstitutional.[23] The end of the Fairness Doctrine was indeed a policy choice, taken by the Federal Communications Commission (FCC), which followed a massive deregulatory offensive in the broadcasting sector.

"acted with deliberation to encourage new Internet enterprises by . . . reducing the legal risks they faced" and suggesting that such a legal framework is necessary for any country that would want to create its own Silicon Valley).

20. *See* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 75–102 (2019).

21. *See* Weiland, *supra* note 15, at 45.

22. Paul Matzko, *The Fairness Doctrine Was Terrible for Broadcasting and It Would Be Terrible for the Internet*, CATO INST. (June 12, 2019, 11:09 AM), https://www.cato.org/blog/internet-regulation-fairness [https://perma.cc/SA2R-S33Z].

23. The Supreme Court indeed refused to hold the doctrine unconstitutional and argued that the change should come from the FCC. *See* Donna J. Schoaff, Comment, Meredith Corp. v. FCC*: The Demise of the Fairness Doctrine*, 17 KY. L.J. 227, 238 (1988).

The article then comes back to the reasoning of the Court when upholding the regulation in order to offer an alternative rationale for regulation of both the broadcasting and the platform sectors.

Furthermore, the regulation of the broadcasting sector was deemed constitutional because the Court acknowledged the dangers of subordinating the public interest in such an important sector to the formation of public opinion to private interests. Above all, the Court recognized, together with the FCC, that the State had played an important role in creating the oligopoly market. There was indeed a scarcity of broadband, but this scarcity was not a natural phenomenon—it had been created by law. If the State was legitimately able to organize the market so that the "huge potentialities of broadcasting would not be wasted,"[24] it also had the responsibility to ensure that the legal entitlements it granted to some players, but not others, would not lead to the subordination of the public interest to the interest of these players.

My new account explaining broadcasting regulation by the intervention of the State to shape the market and to grant some legal entitlement to a few players makes the comparison between broadcasting and platforms much more straightforward. As noted by numerous authors, the internet was never unregulated. Quite the opposite, the State created particular laws facilitating the monopolization of network effect allocation.[25] The State also created laws that ensured immunity for internet providers to officially facilitate the flow of speech.[26] In contrast to broadcasting, where the state accrued the benefits of this legal intervention, it did not do so in the platform sector, and public interest today is subordinated to the monopolization of profits and private interests.[27]

24. Nat'l Broad. Co. v. United States, 319 U.S. 190, 213 (1943).

25. *See* COHEN, *supra* note 20, at 170–202; Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1495 (2020); Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237, 238 (2021).

26. Chander, *supra* note 19, at 651; COHEN, *supra* note 20, at 75–102; Kapczynski, *supra* note 25, at 1515.

27. Guggenberger, *supra* note 25, at 242–43.

Society as a whole is bearing the cost of negative externalities produced by the legal framework. There is an alternative to that situation. As shown in the broadcasting sector, if the State is competent enough to organize the market in a certain way, and to grant legal entitlements to private actors in order not to waste the potentialities of the sector, the State should also be competent enough to ensure that these legal entitlements do not subordinate the public interest to private interests. Based on this new account, I suggest that it would be better to characterize platforms as trustees, just as broadcasters were before them. Based on Jack Balkin's idea of fiduciaries,[28] I propose to subordinate the protection granted by Section 230 of the CDA to the implementation of some public service obligations and explain why, based on the comparison with broadcasting, this design would be compatible with the First Amendment.

This article is structured as follows: Part I explains why broadcasting scarcity was a myth that cannot legitimize the imposition of public service obligations to broadcasters. Part II shows that the Supreme Court acted with deference to Congress to recognize—in a legal realist vein—that the State had intervened to structure the market by granting legal entitlements to some players that would influence other actors. The State was thus competent to ensure that this intervention would not allow private actors to act contrary to the public interest. It did so by calling licensees "public trustees" and by upholding a managerial domain, distinct from public discourse, in which the FCC could impose some decision-rules to achieve the ends and purposes of the First Amendment. Part III draws a comparison with the platform sectors. It argues that, like in the broadcasting sector, the State has intervened in the platform sector with the aim not to waste the potentialities of the medium. In the platform sectors, the State has not realized the consequences of that

28. Jack M. Balkin, *The Fiduciary Model of Privacy*, 134 HARV. L. REV. F. 11, 11 (2020); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1186 (2016).

intervention. The State failed to ensure that the legal entitlements it created would not subordinate the public interests to private interests. Part IV offers to draw the consequences of these legal entitlements by subordinating the protection of Section 230 to the imposition of public service obligations to platforms.

I. THE MYTH OF BROADCASTING SCARCITY

There is a widespread opinion that broadband scarcity is a natural phenomenon and that it is this natural phenomenon that justified the regulation of broadcasting from its origin and the imposition of public service obligations to broadcasters.[29] Part I.A reviews the Supreme Court's cases advancing that argument. Part I.B illustrates that even though the scarcity argument was used by the Court, it is too weak to explain, by itself, the constitutionality of the Fairness Doctrine.

A. Scarcity in the Supreme Court's Case Law

Through the Radio Act of 1927, Congress claimed control of the radio spectrum. Radio and broadcasting diffusion were made possible by the emission of electromagnetic signals that are carried by wireless bands in the atmosphere. The wireless spectrum is broad but not unlimited. If two people are using the same frequency (i.e. a piece of the wireless spectrum) at the same time to send a signal, the receipt of the signal will be blurred. After World War I, broadcast stations were rapidly developing, which made the risk of signal interference much higher.[30] Under the Radio Act of 1912, the Secretary of Commerce could not deny a license to an otherwise legally qualified applicant on the ground that the proposed station would interfere with existing private or government stations.[31] The Secretary could neither restrict the hours of operation

29. POWE, *supra* note 8, at 1.
30. TAPAN K. SARKAR ET AL., HISTORY OF WIRELESS 119 (Kai Chong ed., 2006).
31. Hoover v. Intercity Radio Co., 286 F. 1003, 1007 (D.C. Cir. 1923).

nor the use of frequencies by the stations.[32] To address the issues this limitation presented, the Radio Act of 1927 created the Federal Radio Commission and endowed it with wide licensing and regulatory powers.[33] The Communication Act of 1934 created the FCC[34] and vested it with broad authority, particularly the power to assign licenses as "public interest, necessity or convenience would be served."[35] The Supreme Court upheld this regulatory scheme in two important cases, which have usually been interpreted as emphasizing scarcity as the main rationale for regulation. In *National Broadcasting Co. v. United States*, the Supreme Court quickly dismissed National Broadcasting Co.'s (NBC) First Amendment objection to the broadcasting regulatory system, and to the license scheme in particular.[36]

NBC challenged the constitutionality of the chain broadcasting regulation adopted by the Commission, which had the effect of limiting the possibility of networks controlling their radio affiliates' programming.[37] The Commission adopted this regulation because it "believed that the public interest w[ould] best be served and listeners supplied with the best programs if stations bargain freely with national advertisers."[38] NBC contended that "radio is no less entitled to the protection of the guaranties of the First Amendment than is the press."[39] In a single paragraph, Justice Frankfurter, writing for the Court, dismissed NBC's First Amendment claims:

> We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it

32. United States v. Zenith Radio Corp., 12 F.2d 614, 618 (N.D. Ill. 1926).

33. R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 6 (1959).

34. The FCC took over the Federal Radio Commission. *Id.* at 7.

35. *Id.* at 6.

36. Nat'l Broad. Co. v. United States, 319 U.S. 190, 226 (1943).

37. *Id.* at 196–97.

38. *Id.* at 209; Brief for Appellant at 29, *Nat'l Broad. Co.*, 319 U.S 190 (No. 554).

39. Brief for Appellant, *supra* note 38, at 38.

> would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. 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.[40]

The Court here makes a clear link between the "limited facilities of radio" and government regulation.[41]

The scarcity rationale for regulation was reemphasized in *Red Lion Broadcasting Co. v. FCC*, a case that implicated the Fairness Doctrine.[42] At issue was a rule promulgated by the FCC as part of the Fairness Doctrine, providing that if, during the presentation of views on a controversial issue of public importance, a station aired a personal attack against an identified person or group, the station should allow this person or group an opportunity to respond to this attack.[43] Red Lion Broadcasting Co. attacked this requirement, but the Court upheld it, stating:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring

40. *Nat'l Broad. Co.*, 319 U.S. at 226.
41. *Id.*
42. 395 U.S. 367, 376 (1969).
43. *Id.* at 373–74.

> licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.[44]

These statements stood as authoritative for nearly two decades. Most legal scholars interpreted these claims as directly linking broadband scarcity and the government's regulation of spectrum.[45] This is the leading rationale in explaining why the principle of free speech has been interpreted to prohibit any governmental regulation of the newspaper industry, while also being interpreted to permit some regulation of broadcasting.[46]

B. Flaws and Weaknesses of the Scarcity Argument

As many authors have put it, the scarcity argument has never convinced law professors, nor Supreme Court readers.[47] In 1987, Lucas A. Powe, in a book famously known to be pro-deregulation, wrote: "The argument of broadcast scarcity has had a talismanic immunity from judicial scrutiny. It is asserted, not explored. When it *is*

44. *Id.* at 388–89.

45. The literature on *Red Lion* is thus extensive. *See* JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA 1 (Indiana Univ. Press 1973); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (Random House 1971); Roscoe L. Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 660 (1975); Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487, 506 (1968) (all considering that the solutions found in *Red Lion* should be extended to the written press); L.A. Powe, Jr., *Or of the (Broadcast) Press*, 55 TEX. L. REV. 39, 43 (1976) (arguing that both the empirical evidence and the legal theory supporting *Red Lion* are unsound); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 45 (1975) (arguing that most of the case can be understood as compatible with the equality principle and the First Amendment); Abbott B. Lipsky, Jr., *Reconciling* Red Lion *and* Tornillo*: A Consistent Theory of Media Regulation Note*, 28 STAN. L. REV. 563, 573–74 (1975) (arguing that *Red Lion* is an error because the Fairness Doctrine regime established by the FCC is not the "least restrictive speech alternative" to regulate airways); Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 768 (1971) (arguing that since broadcasting has only a limited impact on the public's political consciousness and since extension of the Fairness Doctrine may exact significant costs for freedom of speech, it should be carefully limited).

46. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 282–83 (1964); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247–48 (1974).

47. Benjamin, *supra* note 8, at 5 ("It is hard to find any economist or law professor who supports the differing treatment of spectrum and print based on the scarcity rationale.").

explored outside the Supreme Court opinion, scarcity turns out to be rather elusive."[48]

The first reproach we can make to the scarcity argument is that the Court mixed up two very different phenomena: scarcity and interferences.[49] By stating "[u]nlike other modes of expression, radio inherently is not available to all,"[50] Justice Frankfurter seems to confuse the issue. If the license requirement did not exist, radio could be used by anyone who has enough money to pay for an installation. The problem is that it would probably have created interference that would prevent the signals sent from being received. This is what was happening before 1927, as described by Justice Frankfurter: "[E]xisting stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard."[51]

The confusion and chaos existing before 1927 did not result from scarcity, but from interferences, because every station was trying to emit in the same frequencies at the same time. Interference can arise with any rivalrous good, including tangible goods.[52] If two people try to sit on the same bench at the same time, there will be interference, but it does not necessarily mean the good is scarce. Even if the spectrum was not scarce—if the number of wireless bands in the atmosphere were infinite—there would still be a risk of signal interference that would jeopardize the clear reception of signals. As a result, signal interference would require regulation of a purely technical nature.[53]

Some authors have suggested that the FCC could leave the resolution of interference disputes to common law

48. POWE, *supra* note 8, at 200.

49. Benjamin, *supra* note 8, at 41.

50. 319 U.S. 190, 226 (1943).

51. *Id.* at 212.

52. Benjamin, *supra* note 8, at 42; Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 136 (1990).

53. Laurence H. Winer, *The Signal Cable Sends-Part I: Why Can't Cable Be More Like Broadcasting*, 46 MD. L. REV. 212, 222 (1986).

courts, which would resolve them in trespass or nuisance.[54] But even if we accept the necessity of granting the power to allocate the frequencies to a commission to prevent interferences, interferences by themselves do not explain the imposition of public service obligations to broadcasters. As stated by Laurence Winer, "Even if spectrum space were unlimited, interference problems would remain and require regulation, though only of a technical nature. Scarcity, on the other hand, might justify some resource-sharing regulation if logically related to the scarcity problem."[55]

Scarcity by itself does not seem to necessarily lead to the imposition of public service obligations on broadcasters either. This argument is advanced by Professor Coase in an article about the economics of broadcasting regulation. He recalled that:

> [I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation.56

In a very law and economics style, he suggested that we submit the distribution of frequencies to the marketplace where prices will allocate the benefits without the need for government regulation.[57] He remarked:

> It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this

54. Benjamin, *supra* note 8, at 9; Hazlett, *supra* note 52, at 151 (arguing that common law courts were mediating interference disputes quite reasonably before the creation of the FCC); *see* Tribune Co. v. Oak Leaves Broad. Station, Inc., 68 Cong. Rec. 215, 216, 69th Cong. (2d. Sess. 1926) (involving the adjudication of a claim that one station was interfering with another and damaging the latter's rights).

55. Winer, *supra* note 53, at 222.

56. Coase, *supra* note 33, at 14.

57. *Id.*

> allocates resources to users without the need for government regulation.[58]

One does not need to be a neoclassical legal economist to recognize that the scarcity argument to legitimize the imposition of public service obligations to broadcasters lacks rigor. The Supreme Court itself recognized in *Red Lion* that:

> [R]ather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week.[59]

Furthermore, as soon as 1970, many scholars from all ideological backgrounds and lower courts agreed to recognize that the number of broadcast stations was at least as important as the number of magazines or newspapers, a sector that had never been regulated.[60] This is because if the number of wireless bands in the atmosphere stays the same, technical progress makes it possible to use fewer wireless bands to transport a given signal.[61] Scholars supporting the regulation of broadcasting were thus doing it on other grounds. Cass Sunstein, Edwin Baker, Jerome Barron, and Owen Fiss supported the regulation of broadcasting based on the need

58. *Id.*

59. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390–91 (1969).

60. *See* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 94 (Univ. of Chi. Press 1991); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787 (1987); Coase, *supra* note 33, at 18–19 (arguing that market position of broadcasting and the press are similar); Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967) (talking about the concentration in the press and the broadcasting sector: "[C]omparatively few private hands are in a position to determine not only the content of information but also its very availability, when the soap box yields to radio and the political pamphlet to the monopoly newspaper.").

61. SARKAR ET AL., *supra* note 30, at 251.

to ensure self-governance and a strong, healthy public debate.[62]

Even the Supreme Court sometimes seemed to be at odds with its argument. In *Red Lion*, when the Court upheld the Fairness Doctrine, it had to justify its continued reliance on this argument, and its justification is not entirely convincing. "It is argued that . . . this condition no longer prevails so that continuing control is not justified," writes the Court.[63] But:

> [S]carcity is not entirely a thing of the past . . . The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra-high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.[64]

This is because the demand—in the broadcasting sector—exceeds the supply.[65] In 1984, in *FCC v. League of Women Voters of California,*[66] the discomfort regarding this argument seems even more perceptible because the scarcity rationale is addressed only in a footnote. If scarcity was indeed the constitutional rationale to regulate broadcasting and to deem the regulation compatible with the First Amendment, one would hope that the Supreme Court would have taken more time to adequately assess the existence and the change of this phenomenon.

62. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 53 (Free Press 1993); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 66–67 (1994); Fiss, *supra* note 60, at 785.

63. *Red Lion*, 395 U.S. at 396.

64. *Id.* at 396–98.

65. John W. Berresford, FCC, Media Bureau Staff Research Paper, The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed 11 (Mar. 2005).

66. FCC v. League of Women Voters of Cal., 468 U.S. 364, 376 n.11 (1984).

II. A NEW ACCOUNT TO EXPLAIN BROADCASTING REGULATION: LEGAL ENTITLEMENTS AND THEIR CONSEQUENCES

Even though the scarcity argument was highly criticized by pro-regulatory and pro-deregulatory authors, the same authors have generally taken for granted the fact that scarcity was the main rationale in the Court's case law that could explain why it was possible to regulate broadcasters but not the press. This article argues that it was not.

Part II.A builds on the foundational cases *National Broadcasting Co.* and *Red Lion,* showing that the Court upheld the regulation because it recognized that the State had shaped the market by granting legal entitlements to some players. Consequently, these players could be asked to use this legal entitlement in respect of the public interest as defined by the FCC.

Part II.B demonstrates that imposing public service obligations to licensees was deemed compatible with the First Amendment because the regulations were part of a managerial domain, distinct from the public discourse.

Part II.C argues that my new account is reinforced by the fact that the Court relinquished the collectivist interpretation of the First Amendment without questioning the Fairness Doctrine. The abandonment of the Fairness Doctrine was indeed a deregulatory policy choice coming from the FCC, and not a constitutional one.

A. Broadcasting Market as a State Construct, and Its Consequences

1. Legal Entitlements and Their Concomitant Duties

In *National Broadcasting Co.*, the Court used different arguments to explain why the license requirement was not raising any First Amendment issues.[67] Admittingly, the

67. *See* Nat'l. Broad. Co. v. United States, 319 U.S. 190 (1943).

Court used the scarcity argument to justify the doctrine: "Unlike other modes of expression, radio inherently is not available to all," wrote Justice Frankfurter.[68] "That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[69] He also writes that "[t]he facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest."[70] However, as pointed out by Coase, these statements cannot be correct.[71] Many goods are limited, as is the written press.[72] The fact that goods are limited does not in itself justify the imposition of public service obligations to their providers. Furthermore, not all limited goods are precious.[73]

Thus, Justice Frankfurter's reliance on something other than scarcity to justify regulation was necessary. Justice Frankfurter first underscores the "dependence upon regulated private enterprise in discharging the far-reaching role which radio plays in our society."[74] This statement, at the very top of the opinion, probably illuminates the meaning of the rest of the decision. It is because radio plays a far-reaching role in our society that it is precious and that our dependence upon private enterprise must be organized by law.

Relying on more than scarcity, the majority of the opinion relies on the way the market had been shaped by legislation and the Commission. By summing up public interest as understood by the Commission, Justice Frankfurter makes wide reference to the way the legislator and the Commission had built the market. He recognizes that the government had to intervene to regulate the market if the potentialities of radio were not to be wasted.[75]

68. *Id.* at 226.
69. *Id.*
70. *Id.* at 216.
71. Coase, *supra* note 33, at 14.
72. *Nat'l Broad. Co.*, 319 U.S. at 216.
73. Coase, *supra* note 33, at 13–14.
74. *Nat'l. Broad. Co.*, 319 U.S. at 193.
75. Coase, *supra* note 33, at 13 ("In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the

In doing so, he observes that "regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile."[76] But the comparison cannot be correct, and Frankfurter rectifies it a few lines later by stating that "the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic."[77]

By distinguishing between the supervision and the composition of the traffic, Frankfurter differentiates the technical (i.e., regulation of frequencies) from the substantial aspects (i.e., regulation of the content) of the market. Because Congress chose to intervene to preserve these potentialities, it was also legitimate for him to impose substantial rules defined by the legislation and the Commission.[78] The method chosen to determine the composition of that traffic is in the public interest, and the public interest must be understood widely as maximizing benefits of radio to all the people of the United States.[79]

The link between the entitlements granted to licensees and their duties to broadcast programs in respect of the public interest is even clearer in *Red Lion*. Justice White, writing for the Court, states that:

> By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First

knowledge that if the potentialities of radio were not to be wasted, regulation was essential.").

76. *Nat'l Broad. Co.*, 319 U.S. at 213.

77. *Id.* at 215–16.

78. *Id.* at 216 ("The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission. The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience, or necessity' . . . . The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services.").

79. *Id.* at 217.

> Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[80]

This formulation is a pure product of the legal realist critique of the formalist public/private distinction. The point is quite straightforward:[81] the licensees have been granted their license—later referred to as a "privilege" by the State.[82] By doing so, the Supreme Court recognized that it had assigned, shaped, and enforced the "background" legal entitlements that form the "rules of the game" of private activity in the broadcasting market.[83] The assignment of such entitlements by the State has significant effects on liberty and the distribution of opportunities among private parties, and more precisely in this case, on the viewers and listeners. These governmental decisions regarding the setting and enforcement of such entitlements have a deep impact, as the Court recognized, on the liberty, rights, and bargaining power of other parties[84]—that is the listeners. This formulation seems to reflect scholar Wesley Hofheld's view that each time the State confers an advantage on some citizen (or a corporation for that matter), it simultaneously creates a vulnerability on the part of others.[85] The Court, more than describing its action, draws conclusions about the critique of the public/private distinction: since the State has

80. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969).

81. Talha Syed, Legal Realism and CLS from an LPE Perspective 8 (unpublished manuscript).

82. *Red Lion*, 395 U.S. at 394 ("It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.").

83. Syed, *supra* note 81, at 7.

84. *Id.*

85. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 987 (1982).

granted some entitlements that have effects on the listeners, the State could also decide to assign some duties together with the legal entitlements it has granted to protect the public interest. As a result, it was not unconstitutional for the government to ask the recipients of such legal entitlements to act in accordance with the public interest and the rights and liberties of the listeners.[86]

2. Legal Entitlements, Market Concentration, Its Benefits, and Its Risks

In these two decisions, the Court also seemed particularly concerned about the impact the assignment of legal entitlements could have on market concentration. More precisely, the Court recognized that market concentration is both necessary and potentially dangerous in the broadcasting sector.[87]

First, the Court recalled that Congress adopted the Communications Act of 1934 as a result of "a widespread fear that . . . the public interest might be subordinated to monopolistic domination in the broadcasting field."[88]

Indeed, at the beginning of the decision, Justice Frankfurter describes the Commission's findings at length as well as the reasoning behind the chain's broadcasting.[89] This reasoning shows that the Commission is competent enough to both organize the concentrated market and to limit the potential negative effects of this concentration on the public sphere. The Commission justifies its policy regarding chain broadcasting by referring to some particular characteristics of the broadcasting industry that are not technical but rather economical and even cultural:

> The growth and development of chain broadcasting…found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a

86. *Red Lion*, 395 U.S. at 367.
87. *Id.* at 388–90; Nat'l. Broad. Co. v. United States, 319 U.S. 190, 197–98 (1943).
88. *Nat'l Broad. Co.*, 319 U.S. at 219.
89. *Id.* at 194.

> single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs.[90]

With this description, the Commission, backed by the Court, seemed to recognize that scarcity of the spectrum is not the sector's only feature explaining the need for concentration. The Commission stated, "the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees."[91] This is because the cost of producing the first copy of one cultural or informative good is usually extremely high; it includes the cost of production, investigation, writing, and shooting for even one person to receive it.[92] It can be used simultaneously by more than one user (it is thus non-rivalrous) and the cost of production of the second similar good is equal or close to zero.[93] However, this concentration, organized and supervised by the Commission for economic and cultural reasons (i.e. not technical), could also bring negative effects that the Commission should be able to control to protect the public interest:

> The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the

90. *Id.* at 198.

91. *Id.*

92. C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 31 (Cambridge Univ. Press 1st ed. 2006).

93. *Id.*; *see* Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 614–15 (1962).

> ability of licensees to operate in the public interest are eliminated.[94]

The Commission thus recognized the risks that monopoly domination—organized by the State—could inflict on the public sphere. For this reason, government intervention was legitimate to ensure that the public interest was prevalent in the private use of the spectrum.

This concern is also underlined by the Court in *Red Lion*, drawing a direct link with the First Amendment: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[95]

These two decisions reflect the legal realist view that if the State is qualified to grant some "privileges" in the market, then it is also qualified to organize the consequences of these entitlements. Because the government has granted certain entitlements (a license that allowed powerful networks to practice chain broadcasting) to some private persons but not others to organize the market, it is also obligated to limit the potential negative effects that this concentration could create and ensure that these entitlements are still subordinate to the public interest.[96]

The fact that the Court refers to the licensees as trustees is also highly reminiscent of the critique of the public/private distinction dear to the realists.

B. Broadcasters as Trustees

1. An Intermediate Position Between Private and Public Actors

The compatibility of the Fairness Doctrine with the First Amendment does not rely only on the critique of the

94. Nat'l Broad. Co. v. United States, 319 U.S. 190, 198 (1943).
95. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).
96. *See id.* at 389.

public-private distinction. On the contrary, the Supreme Court concluded the privileges conferred to the licensee by calling them "Trustees" and assigned them an "intermediate position[] between private participants in public discourse and state actors."[97] It is this new institutional design that makes possible the compatibility of the regulation with the First Amendment.

In the foundational *Red Lion v. FCC* case, the Court decided that because there is no constitutional right to be the one who holds a license, it is not contrary to the First Amendment for the government to ask the licensee to conduct themselves as "a proxy or fiduciary."[98] It thus considered that broadcasters were not independent and private participants in public discourse, but "public trustees."[99] Consequently, broadcasters do not hold First Amendment rights the same way as private people do. The Court refrained from granting First Amendment rights to broadcasters, and interpreted the First Amendment as protecting the speech directed to listeners rather than the broadcasters' independent contribution to public discourse:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the [broadcast] 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 broadcasters, which is paramount.[100]

Four years later, in *Columbia Broadcasting System Inc. v. Democratic National Committee*,[101] the Court seemed to craft an intermediate position for

97. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 158 (1996).

98. 395 U.S. 367, 389 (1969) ("By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.").

99. Post, *supra* note 97, at 159.

100. *Red Lion*, 395 U.S. at 390.

101. 412 U.S. 94 (1973).

broadcasters.[102] The Move for Vietnam Peace Association filed a complaint with the FCC, alleging that a broadcaster had violated the First Amendment by refusing to sell it time to broadcast spot announcements expressing the group's views on the Vietnam conflict.[103] The FCC rejected the Fairness Doctrine challenge and ruled that a broadcaster had a right to reject a paid advertisement by individuals and respondents.[104] The D.C. Circuit Court of Appeals reversed, holding that a "ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted."[105] In a fractured decision, the Supreme Court reversed the decision of the D.C. Circuit, holding that "[n]either the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements."[106] Though the Court of Appeals held "broadcasters are instrumentalities of the Government for First Amendment purposes," the Supreme Court explained that the broadcasters' speech is not that of the government itself.[107] Therefore, the broadcasters' behavior did not constitute State action for the purpose of the First Amendment.[108] This is because as soon as they meet their "public trustee" duties (to balance coverage of issues and events) the licensees have the choice on how they will implement them.[109] In other words, "[a] licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'"[110]

In 1981, the full Supreme Court ratified this compromise in *CBS, Inc. v. FCC*,[111] and this balanced

102. Post, *supra* note 97, at 159–60.
103. *Columbia Broad. Sys. Inc.*, 412 U.S. at 98.
104. *Id.* at 99.
105. Bus. Execs.' Move for Vietnam Peace v. FCC, 450 F.2d 642, 646 (D.C. Cir. 1971).
106. *Columbia Broad. Sys. Inc.*, 412 U.S. at 94.
107. *Id.* at 115, 121.
108. *Id.* at 120–21.
109. *Id.*
110. *Id.* at 118.
111. 453 U.S. 367, 390 (1981).

position of the "public trustee."[112] It referred to the need to balance the "rights of federal candidates, the public, and broadcasters"[113] and stated that "the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties.]'"[114]

In *FCC v. League of Women Voters*, the Court held that because debate on public issues should be "uninhibited, robust, and wide-open,"[115] and because this was a profound national commitment, broadcasters should be regarded as independent contributors to public discourse when editorializing.[116] As explained by Robert Post, broadcasters were thus to be regarded as public trustees without independent First Amendment rights in some circumstances, and as constitutionally protected private participants to public discourse in others.[117]

The constitutionality of the Fairness Doctrine relied not only on this intermediary position but also on the distinction between public discourse and the managerial domain.

2. The Managerial Domain and the Distinction Between Conduct-Rules and Decision-Rules

In these cases, the compatibility of the Fairness Doctrine relied not on the scarcity of the spectrum argument but on the distinction between a managerial domain and public discourse. As explained by Robert Post, the Court in *Red Lion* upheld some regulations that would have been plainly unconstitutional had they been within the boundary of public discourse.[118] It could uphold these regulations because it considered them part of a

112. Post, *supra* note 97, at 160.
113. *CBS, Inc.*, 453 U.S. at 397.
114. *Id.* at 395.
115. 468 U.S. 364, 382 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
116. Post, *supra* note 97, at 161.
117. *Id.*
118. *Id.* at 158.

"managerial" domain.[119] Managerial domains and public discourse are distinct because the State must be able to achieve objectives that have been democratically agreed upon. It must thus be able to organize its resources to achieve specified ends, including in the domain of speech. As Robert Post has convincingly demonstrated, the State does regulate speech within public educational institutions to achieve the purpose of education.[120] It forces students to talk during their exams without calling that compelled speech.[121] The State also regulates speech within a court of justice to attain the ends of the judicial system.[122] While within the boundaries of public discourse, "the political imperatives of democracy require that persons be regarded as equal and as autonomous."[123] Outside of the realm of public discourse the law drops this assumption that everyone is equal and independent and "commonly regards persons as dependent, vulnerable, and hence unequal."[124] Within the boundaries of the managerial domain, the state can impose aims upon persons[125] and it can also regulate speech so to achieve its explicit objectives.[126]

In the case of the broadcasting market, the Court considered that because the licensees had been conferred a privilege and were to be considered trustees, it could uphold a managerial domain—distinct from the public discourse, where regulation would be constitutional—as long as the regulation aimed to pursue the ends and purposes of the First Amendment.[127]

119. Post, *supra* note 97, at 164.

120. *Id.*; Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 320 (1991).

121. Example taken from Robert Post in his First Amendment Class at YLS.

122. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1809 (1987).

123. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 23 (2012).

124. *Id.*

125. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 4–6 (1995).

126. Post, *supra* note 122, at 1769.

127. *See* Post, note 97, at 161.

The constitutionality of the doctrine also relied on the distinction between "conduct-rules" and "decision-rules."[128] While conduct rules are the rules aimed at directly regulating public discourse, decision-rules are internal policy guidelines explaining the criteria on which the State—through its federal commission—should intervene to achieve defined objectives.[129] This constitutional distinction relies on the fact that the "state is prohibited from imposing any particular conception of collective identity when it regulates public discourse," but when it acts for itself, the state must inevitably implement a certain impression of collective identity.[130] The State cannot regulate public discourse directly through "conduct rules," but the FCC can promulgate, inside the managerial domain, the Fairness Doctrine, characterized as a decision-rule, in order to serve the purpose of ensuring that the public receives "suitable access to social, political, esthetic, moral, and other ideas and experiences."[131] The Fairness Doctrine is, according to Post, conceptualized as an allocation criteria for state subsidies addressed not directly to the participants in public discourse but to the administrators of state organizations.[132]

If First Amendment doctrine prohibits the State from regulating speech directly within the boundaries of public discourse, it does not prohibit the State from participating in public discourse by funding certain types of speech.[133] It would be unconstitutional for the State to regulate public discourse directly on TV to ensure that a wide variety of views reach the public, but it is within the Constitution for

128. *Id.* at 180–84.

129. *Id.* at 182; *see* Kathleen M. Sullivan, *Artistic Freedom, Public Funding, and the Constitution*, *in* PUBLIC MONEY AND THE MUSE: ESSAYS ON GOVERNMENT FUNDING FOR THE ARTS 86 (Stephen Benedict ed., 1991).

130. Post, *supra* note 97, at 183.

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

132. Post, *supra* note 97, at 183.

133. *Id.*

the State to establish a commission that makes decision-rules based on certain purposes previously defined.[134]

C. The Meiklejohnian Justification of the Fairness Doctrine and Its Limits

It has often been highlighted that the free speech theory that underlines *Red Lion* is close to the view advocated by Alexander Meiklejohn, the well-known First Amendment scholar.[135] This view places the concept of citizenry at the center of the justification[136] and relies on a "collectivist"[137] or "republican"[138] version of the First Amendment, in which it is fundamental that everything worth being said be said.[139] If this collectivist interpretation of the First Amendment has played an important role in upholding the regulation, it cannot explain by itself the constitutionality of the Fairness Doctrine because it was abandoned before the Fairness Doctrine was repealed by the FCC in 1987.[140] Repealing the Fairness Doctrine was thus a deregulatory policy choice and was never justified by the end of scarcity nor by the novel interpretation of the First Amendment.

134. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 380 (1984) ("[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern.").

135. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

136. POWE, *supra* note 8, at 42.

137. Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993).

138. Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1394 (2017).

139. *See* Alexander Meiklejohn, *'Everything Worth Saying Should Be Said,'* N.Y. TIMES (July 18, 1948), https://www.nytimes.com/1948/07/18/archives/everything-worth-saying-should-be-said-an-educator-says-we-talk-of.html (This expression comes from an Op-Ed published by Alexander Meiklejohn in the New York Times Magazine) [https://perma.cc/AA6A-EAWD].

140. *See* Syracuse Peace Council v. Television Station WTVH, Memorandum Opinion and Order, 2 F.C.C. Rcd. 5043, 5057 (1987).

1. Greatness and Misery of the Meiklejohnian Interpretation of the First Amendment

In *Red Lion*, by stating that the State is qualified to prevent the monopolization of the market, whether it be by the government or private actors, the Court showed that it sees the private economic powers as a threat to freedom of speech in the same way as the State.[141] As noted by Genevieve Lakier, this vision was in line with the New Deal Court's broader view that "'liberty' is . . . something that may be infringed by other forces as well as by those of government; indeed, something that may require the positive intervention of government against those other forces."[142] In its 1945 decision in *Associated Press v. United States*, the Court recognized that if private parties are to impede the free flow of information and limit the exercise of constitutional rights of other private parties, government intervention can be necessary to protect, and not threaten, these constitutional rights.[143] The New Deal Court not only rejected the Lochner-era rule, which established that the legislative intervention to regulate the private sphere was unconstitutional, it went further by affirming the right, for citizens, that the State would intervene in order to organize their freedom of speech and, subsequently, to secure their capacity to effectively exercise their democratic role.[144] It is therefore non-surprising that the Fairness Doctrine was embraced by the Court at this very moment. However, the Fairness

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

142. Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. Chi. L. Rev. 1241, 1305 (2020).

143. Associated Press v. United States, 326 U.S. 1, 20 (1945).

144. *See* Terminiello v. City of Chicago, 337 U.S. 1, 4–6 (1949); Schneider v. State, 308 U.S. 147, 150 (1939); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (holding that government has the duty to grant speakers rights of access to parks, streets and sidewalks, but also to bear the cost of their speech such as the security costs that could result from unpopular speakers and speeches in the public domain); *see also* Marsh v. Alabama, 326 U.S. 501, 509 (1946) (holding that this rule applies not only when the streets and sidewalks are public, but also when they are privately owned, only if they are sufficiently important public places); Lakier, *supra* note 142, at 1256. For the rejection of this traditional dichotomy between negative and positive rights, because all rights need an intervention from the state to be enforced, see STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (W.W. Norton & Co. 1st ed. 1999).

Doctrine, despite its critics,[145] has survived First Amendment scrutiny even when the court embraced a much more liberal vision of the First Amendment. The Court's realist conception of free speech attentive to social and economic inequality[146] was widely beaten back, from the 1970s onwards, by the Burger Court.[147] In *Miami Herald Publishing Co. v Tornillo*, the Burger Court markedly rejected the realist approach that had been developed in *Red Lion*.[148] The Court rejected the possibility of imposing a right of access because any government intrusion into the editorial choices of a newspaper would be contrary to the First Amendment.[149] If this case is said to reflect the particular solicitude for freedom of the press, it also expresses a deep rejection of the premises on which the New Deal Courts had judged earlier cases; that is, the idea that courts should take into account facts such as market concentration or media diversity.[150] The court thus rejected the claims for an equalization of the marketplace of ideas[151] and made clear that "the negative right of a speaker to be free of government interference prevailed over the positive right of the public to access a

145. *See* BARRON, *supra* note 44, at 134–35; EMERSON, *supra* note 44, at 80; Barrow, *supra* note 44, at 659; Barron, *supra* note 44, at 509 (all considering that the solutions found in *Red Lion* should be extended to the written press); POWE, *supra* note 8, at 42 (arguing that both the empirical evidence and the legal theory supporting *Red Lion* are unsound); Jaffe, *supra* note 45, at 779–80 (arguing that "since broadcasting has only a marginal impact on the public's political consciousness and that since extension of the [F]airness . . . [D]octrine[] may exact significant costs" for freedom of speech, it should be carefully limited).

146. John E. Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court Constitutional Review—Foreword*, 7 HASTINGS CONST. L.Q. 263, 276 (1979).

147. Martin H. Redish, *Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1031 (1983); Norman Dorsen & Joel Gora, *Free Speech, Property and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195, 196 (1982); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 423 (1980); *see also* Russell W. Galloway Jr., *First Decade of the Burger Court: Conservative Dominance (1969-1979), The Supreme Court History Project: The Burger Court*, 21 SANTA CLARA L. REV. 891, 937 (1981); William W. Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 L. & CONTEMP. PROBS. 66, 70 (1980).

148. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256–57 (1974).

149. *Id.* at 258.

150. Lakier, *supra* note 142, at 1315.

151. Dorsen & Gora, *supra* note 147, at 210; *see generally* Karst, *supra* note 45.

meaningfully diverse public debate."[152] In other decisions, the Burger Court also argued that the free flow of commercial information was protected by the First Amendment,[153] argued that a free speech claim should be given heightened protection when it is correlated to the use of the speaker's own property,[154] and rejected the free speech claim of the "public forum" doctrine when it conflicted with the interests of a private or public owner.[155] This shift has been widely documented by scholars who rightly argue that the First Amendment is now widely used by corporations as a deregulatory weapon:[156] corporations urge the courts, with success, to strike down any regulation aimed at protecting consumers or citizens as a violation of corporations' speech rights.[157]

However, as extreme as the switch toward a libertarian First Amendment has been,[158] the Fairness Doctrine was not repealed by the Court on that basis. On its first encounter with the issue of broadcasting, in *Columbia*

152. Lakier, *supra* note 142, at 1315.; *see Miami Herald Pub. Co.*, 418 U.S. at 258.

153. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 755 (1976) (*overruling* Valentine v. Christensen, 316 U.S 52 (1942)) (creating the so-called commercial speech doctrine).

154. Spence v. Wash, 418 U.S. 405, 408–09 (1974).

155. Lloyd Corp. v. Tanner, 407 U.S. 551, 565 (1972); Greer v. Spock, 424 U.S. 828, 838 (1976); Hudgens v. NLRB, 424 U.S. 507, 519 (1976); Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 130 (1973); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974); FCC v. WNCN Listeners Guild, 450 U.S. 582, 604 (1981). *But see*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 86–88 (1980); Columbia Broad. Sys., Inc. v. FCC, 453 U.S. 367, 377–78 (1981).

156. *See* Weiland, *supra* note 138, at 1393; *see also* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 37 (1976); J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384 (1990) (identifying quite early this ideological shift: "Business interests and other conservative groups are finding that arguments for property rights and the social status quo can more and more easily be rephrased in the language of the first amendment by using the very same absolutist forms of argument offered by the left in previous generations."); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 937–38 (1993); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 L. & CONTEMP. PROBS. 173, 201 (2003); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1387 (1984); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 168 (2015); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 135–36 (2016); Julie E. Cohen, *The Zombie First Amendment,* 56 WM. & MARY L. REV. 1119, 1123 (2015); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. F. 179, 189–95 (2018).

157. *See* Shanor, *supra* note 156.

158. Weiland, *supra* note 138, at 1389; Post & Shanor, *supra* note 156, at 181.

Broadcasting System, Inc. v. Democratic National Committee, the Burger Court distinctly limited the scope of *Red Lion* by upholding the right of broadcasters to refuse to accept a paid advertisement as part of their journalist discretion right.[159] In his concurrent opinion, Justice Douglas wrote that the Fairness Doctrine "puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."[160] However, the Court continued to conceptualize broadcasters as trustees and held that the Fairness Doctrine does not contradict the First Amendment.

2. The Repeal of the Fairness Doctrine: A Policy Choice, Not a Constitutional One

I argue that the way the Fairness Doctrine has been repealed demonstrates that neither scarcity nor the interpretation of the First Amendment by the Court could fully explain the doctrine. The deregulatory offensive against broadcasting regulation[161] carried out by the FCC led to the end of the Fairness Doctrine, not the end of the scarcity nor the new interpretation of the First Amendment. This deregulatory offensive move was made possible by a change in the FCC's understanding of the public interest in the broadcasting sector and reflects the agency's ability to change how they construe their enabling acts over time.[162]

In 1984, in *FCC v. League of Women Voters of California*, Justice Brennan, writing for the majority, recalled that the court upheld the Fairness Doctrine because "the doctrine advanced the substantial governmental interest in ensuring balanced presentations of views in this limited medium and yet posed no threat

159. 412 U.S. 94, 94 (1973).

160. *Id.* at 154 (Douglas, J., concurring).

161. *See* Philip M. Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, 49 J. COMMC'N 151, 155 (1999).

162. *See* Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 3 (2017).

that a 'broadcaster [would be denied permission] to carry a particular program or to publish his own views.'"[163] In a footnote, he clarified that:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years… We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.[164]

In 1985, the FCC, chaired by conservative Mark Fowler, was ready to start its official fight against the doctrine. Appointed by President Reagan in 1981, Chair Fowler held a strong charge against the doctrine because he was a fervent defender of broadcasting deregulation.[165]

In fighting the Fairness Doctrine, the FCC did not rely much on the scarcity doctrine, but attacked the precedent construction of the FCC's substantive statute, particularly its view of "the public interest" that had made the doctrine possible.[166] In its 1985 report, the FCC wrote that it was firmly convinced that the "[F]airness [D]octrine, as a matter of policy, disserves the public interest" and violated the First Amendment.[167] In doing so, the Commission invoked the end of the scarcity argument. It mainly advocated the fact that the doctrine worked to dissuade broadcasters from presenting any treatment of controversial viewpoints,[168] and gave the government the

163. FCC v. League of Women Voters of Cal., 468 U.S. 364, 378 (1984).

164. *Id.* at 376 n.11.

165. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 207 (1982).

166. 47 U.S.C. § 303.

167. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Obligations of Broadcast Licensees in Gen. Docket No. 84-282, 102 F.C.C.2d 145, 148 (1985).

168. Christopher A. Hilen, *Alternatives to the Fairness Doctrine: Structural Limits Should Replace Content Controls*, 11 HASTINGS COMM. & ENT. L.J. 291, 301 n.72 (1988) ("The Doctrine inherently provides incentives more favorable to the expression of orthodox opinion than to less well-established viewpoints. Evidence of this is seen in the number of broadcasters denied or threatened with denial of license renewal on fairness

power to evaluate program content and intimidate broadcasters.[169] The FCC, however, questioned its self-authority to call the doctrine into question and deferred to Congress for guidance.[170] The question was whether Congress intended to codify the Fairness Doctrine in 1959 when it amended section 315(a) of the Communications Act of 1934,[171] since an administrative agency does not have the authority to amend an enactment from Congress.[172] In *TRAC v. FCC*, the D.C. Circuit resolved the dilemma by ruling that the doctrine was not a statutory obligation.[173] Based on the legislative history of the 1959 Act and a historical judicial deference to the FCC for the application of the Fairness Doctrine, the D.C. Circuit held that it was an administrative policy, and the agency had discretion to implement it or not.[174] Two years before the D.C. Circuit's decision, the Court ruled in one of the most important cases of American administrative law: *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[175] It held that the judiciary should defer to a federal agency's interpretation of ambiguous language from Congressional legislation.[176] The ambiguity of what constituted the "public interest" in the broadcasting sector was thus left to the FCC, which could change its mind to reflect new learning or if it could show that facts had changed.

grounds, even though they had provided controversial issue programming far in excess of the typical broadcaster. These broadcasters experienced Fairness Doctrine challenges not because they aired controversial issue programming, but because they espoused provocative opinions that many found to be abhorrent and extreme. Licensees, therefore, have strong incentives to stifle viewpoints which may be unorthodox, unpopular or unestablished.").

169. *Id.* at 301.

170. Schoaff, *supra* note 23, at 230.

171. Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (codified as amended at 47 U.S.C. § 315(a)).

172. Schoaff, *supra* note 23, at 230.

173. Telecomm. Rsch. & Action Ctr. v. FCC, 801 F.2d 501, 517 (D.C. Cir. 1986).

174. *See* American Security Council v. FCC, 607 F.2d 438, 447–48 (D.C. Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (quoting Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 which states "[w]e are mindful that the Commission's task in administering the [F]airness [D]octrine is one of great delicacy and difficulty, and that the Commission's experience in this matter accordingly is entitled to 'great weight'").

175. 467 U.S. 837 (1984).

176. *Id.* at 843–44.

The repeal of the Fairness Doctrine arrived in 1987, in the *Syracuse Peace Council* decision, with a 4–0 vote.[177] The FCC ruled, as a matter of policy, that the doctrine was unconstitutional on its face and judged that constitutional infirmity "goes to the very heart of the enforcement of the [F]airness [D]octrine as a general matter."[178] Thus, it does not serve the public interest. To support these new findings, the FCC reaffirmed the conclusion in the 1985 report—namely that "the [F]airness [D]octrine chills speech and is not narrowly tailored to achieve a substantial government interest."[179] However, the FCC stated that "the policy and constitutional considerations in this matter are inextricably intertwined,"[180] which allowed the *Syracuse* court to uphold the decision without reaching the constitutional question.[181] The court held that the policy argument on which the decision was based was sufficient since the Fairness Doctrine inhibited, rather than enhanced, the presentation of controversial issues of public importance.[182]

The end of the Fairness Doctrine was therefore a policy choice and not a constitutional one. The legal arguments surrounding this policy choice relied mainly on the new interpretation of "public interest" by the FCC.[183] This new interpretation was not based on changes of facts, but rather on new findings regarding the impact of the Fairness Doctrine on the broadcasters and the public debate. These new findings reflected the deregulatory offensive in the

177. Syracuse Peace Council v. Television Station WTVH Syracuse, Memorandum Opinion and Order, 2 FCC Rcd. 5043, 5052 (1987).

178. *Id.* at 5047.

179. *Id.* at 5057.

180. *Id.* at 5046.

181. Syracuse Peace Council v. FCC, 867 F.2d 654, 657 (D.C. Cir. 1989) (quoting Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) ("[I]t is an elementary canon that American courts are not to 'pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.'").

182. *Id.* at 657–58 ("[A]s we explain in part III, we have no doubt that even in the absence of constitutional problems the Commission would have reached the same outcome.").

183. Schoaff, *supra* note 23, at 229.

broadcasting sector, with many economists and legal scholars publishing articles based on the assumption that competitive, unregulated markets are the preeminent way to maximize efficiency and consumer satisfaction.[184]

The fact that the conservative-led FCC rescinded the Fairness Doctrine following the conclusion that regulation was chilling broadcasters' speech puts into question the direct link between scarcity, the interpretation of the First Amendment, and the Fairness Doctrine. Indeed, if scarcity was the only factor constitutionally legitimizing the Fairness Doctrine, the FCC could have used the end of scarcity or some indications that this argument was flawed in the early 1980s, with technologies already enabling many more stations to repeal the Fairness Doctrine. On the contrary, by advancing policy arguments to make the case for the unconstitutionality of the doctrine, the FCC showed the lack of importance it paid to the doctrine.

III. A LEGAL REALIST VIEW ON THE PLATFORM MARKET

The development of Silicon Valley from the 1980s onwards relied on the ideological view that—as opposed to the broadcasting market limited by scarcity and costs of production—the internet as a new medium would allow startups to effectively and fairly compete to continuously promote innovation.[185] This ideological view was built upon the Schumpeterian idea of "creative destruction," the theory that economic growth happens when new incumbents enter the market, replacing old ones, thereby enhancing innovation and progress and preventing the creation of monopolies.[186]

The realization of this economic utopianism was short-lived. The startups became large, powerful monopolies,

184. *E.g.*, Fowler & Brenner, *supra* note 165, at 256; Hazlett, *supra* note 52, at 175; Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 286 (1997).

185. Durand, *supra* note 13, at 40–41.

186. Philippe Aghion & Peter Howitt, *A Model of Growth Through Creative Destruction* 7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 3223, 1990), http://www.nber.org/papers/w3223.pdf; Philippe Aghion & Jean Tirole, *The Management of Innovation*, 109 Q. J. ECON. 1185, 1202 (1994) [https://perma.cc/UB5M-X3KQ].

disproving the theories of digital utopias and the economists who supported them.[187] What they took as structural characteristics of the new techno-economic regime were, in reality, transitory characteristics of this digital installation.[188]

As in the broadcasting sector, where scarcity and concentration of economic and media power is reinforced by law and policy choices,[189] the concentration of the platform sector has been made possible by and facilitated through the virtue of law and policy.[190] Numerous authors have highlighted and developed the centrality of the law's facilitation of movement toward informational capitalism.[191] However, because of different characteristics of the sector, a certain degree of concentration is necessary for platforms to be efficient. This legally organized concentration based on some features of the sector can be compared to the legally organized concentration of the broadcasting era.

A. Network Effects and Their Benefits

For social media platforms, the new concentration results from the network effects, which derives from the two-sided markets and some amplifying factors.

1. Network Effects

Jeffrey Rohlfs was the first to articulate the now common understanding of network externalities: "The

187. Durand, *supra* note 13.

188. Durand, *supra* note 13, at 50.

189. The most evident example is in Italy, where legal limits of anti-concentration were established in reference to the existing situation—in order to make it legal and constitutional for Berlusconi to own the three big private channels at the liberalization of the sector. *See* Pauline Trouillard, Le Service Public Audiovisuel Dans Les Etats Membres de l'Union Européenne [The Public Audiovisual Service in the Member States of the European Union] (June 25, 2019) (Ph.D. dissertation, Panthéon-Assas University Paris II) (on file with thesis.fr).

190. *See* COHEN, *supra* note 20, at 8 (explaining the "[l]aw's facilitative role in these processes of ideological and economic transformation").

191. *See* COHEN, *supra* note 20, at 15 (highlighting the processes of "propertization . . . of intangible resources, the dematerialization and datafication of the basic factors of industrial production, and the embedding . . . of patterns of barter and exchange within information platforms.").

utility that a subscriber derives from a communications service increases as others join the system."[192] While most goods are rivalrous, meaning that their usage by one person excludes others from using the same goods,[193] networks—like knowledge, ideas, and software—are anti-rivalrous:[194] Not only are we not harmed when more users use the good, as in the case of a non-rival good, but we also benefit from it. The economic intake of platforms is to aggregate network externalities,[195] meaning the network is the product. In the case of social media platforms, the network effect is referred to as direct because one new user provides positive externalities to the same class of users.[196] For example, the more friends a user has on Facebook, the more interesting it becomes for this user to stay on the platform. These network externalities create network effects that in turn create significant barriers to entry for nascent competitors.[197]

Other economic phenomena, such as the first-mover advantage and the switching-costs advantage, result from those network effects and reinforce the concentration in these sectors.[198] The first-mover advantage, in social media platforms such as Facebook, refers to the fact that early entry into a field may give an entity substantial competitive advantage over others.[199] Early entry may give an entity substantial advantage through technology leadership, control of resources, and "lock-in" resulting from switching costs.[200] For social media platforms, it

192. Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 BELL J. ECON. & MGMT. SCI. 16, 16 (1974).

193. Guggenberger, *supra* note 25, at 277.

194. *See* Lawrence Lessig, *Open Code and Open Societies: Values of Internet Governance*, 74 CHI. KENT L. REV. 1403, 1406 (1999).

195. Guggenberger, *supra* note 25, at 278; Marshall W. Van Alstyne et al., *Pipelines, Platforms, and the New Rules of Strategy*, HARV. BUS. REV. (Apr. 2016), https://hbr.org/2016/04/pipelines-platforms-and-the-new-rules-of-strategy [https://perma.cc/RZ3R-N526].

196. Guggenberger, *supra* note 25, at 278.

197. *Id.*

198. Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1065 (2017).

199. *Id.* at 1065–66.

200. *Id.*

seems that barriers to entry would be, in theory, quite low for nascent competitors. Indeed, Facebook's platforms are "relatively easy to mimic," and platforms like Facebook and Twitter are not characterized by investments in physical space.[201] However, given the extremely high positive externalities resulting from the direct network effect in social media platforms, switching costs are extremely high. It might take time to build a real network on one platform and switching to another platform might mean you lose all the network you have built. To be beneficial, all the users should thus decide to move at the same time, but this move is extremely difficult to coordinate.[202]

This network effect is reinforced by the scale efficiency resulting from the high-fixed cost of the use of algorithms and data.

2. Amplifying Network Effects

Other features of the social media platform industry amplify the network effects. The infrastructure of social media platforms, consisting of, among other things, data collection and processing through algorithms and content moderation, have "high fixed costs and close to zero marginal costs."[203] This creates important economies of scale—that is, a decreasing average cost of one unit with the augmentation of the size of the undertaking.[204] Thanks to big data analytics and algorithms,[205] the more data you

201. *Id.*

202. Nikolas Guggenberger, Exec. Dir., Yale Info. Soc'y Project, Reframing the Digital Public Sphere: Industrial Policy for Digital Pluralism 19 (Feb. 2022) (on file with author) ("[U]sers willing to switch to a nascent competitor might have to leave behind their existing connections or convince those connections—friends, family, colleagues—to follow suit. . . . [A]n all but insurmountable collective action problem captures even users who are otherwise open to change"); Guggenberger, *supra* note 25, at 280 ("In effect, the value of the network, as measured by transactions it enables, renders gradual migrations of customers from one platform to another all but impossible, especially as many consumers single-home—they only actively participate in one network of several with similar features. Overcoming lock-in effects, or the 'start-up problem,' would require a critical mass of users switching at the same time."); *see also* Ulrich Witt, *"Lock-in" vs. "Critical Masses" — Industrial Change Under Network Externalities*, 15 INT'L J. INDUS. ORG. 753, 770 (1997).

203. Guggenberger, *supra* note 25, at 285.

204. *Id.*

205. *Id.* at 285–86.

aggregate into a database, the more value you create out of that database. This facilitates "effective micro-targeting through advertisements, tailored product recommendations, and personalized search results."[206] It also enables, in the case of social media platforms, the means to train content moderation algorithms in an effective way. The more data you have, the more effective your prediction and content moderation algorithms will be, and the more likely you are to attract new users.[207] Data collection creates product improvement, and the two are "mutually reinforcing processes."[208] As a result, in social media platforms, scale creates efficiency that we might want to preserve as a society by granting legal entitlements to some players. The mechanisms reinforcing network effects arise from the market's characteristics, but the legal entitlements that allow a few actors to monopolize the rent of the network effects are granted by the State.[209] These legal entitlements, that should not be taken for granted, have consequences on other players in the market.[210]

B. Network Effects Allocation in the Digital Public Sphere

In the classical economics account, contrary to broadcasting that was tinted with the original sin of scarcity, new technologies were said to have the ability to take the power away from the state and give it back to individuals.[211] But in order to reach this goal, political leaders were responsible for facilitating the transition by engaging the withdrawal of the State.[212] Numerous

206. *Id.* at 286.
207. *Id.*
208. Guggenberger, *supra* note 25, at 286.
209. *Id.*
210. *Id.* at 286–87.
211. Durand, *supra* note 13, at 15–90 (description of the ideology of digital utopianism); *see* Barlow, *supra* note 8, at 6.
212. *See* Dyson et al., *supra* note 19, at 303; Durand, *supra* note 13; *see also* Barlow, *supra* note 7, at 5–7; *see also* Chander, *supra* note 19, at 645 (showing that U.S. authorities "acted with deliberation to encourage new internet enterprises by . . . reducing the legal risks they faced" and suggesting that such a legal framework is necessary for any country that would want to create its own Silicon Valley).

authors have already highlighted the ambiguity of the utopian discourse that was both a description and a prescription.[213] Digital utopianism widely relied, as Karl Polanyi had observed,[214] on the action of the State to deregulate the sector. As noted by numerous authors, the internet was indeed never unregulated—conversely, the State created laws to allow "innovation" by the monopolization of network effects' surplus.[215] The government also created wide immunity for internet providers and officially facilitated the flow of speech.[216]

1. Quasi-Property, Intellectual Property and Platform's Legal Entitlements

As noted by Nikolas Guggenberger, network effects by themselves do not cause concentration—"the legal allocation of network effects" does.[217] The legal allocation of network effect results from the decision made over the distribution of surplus generated by the private gain.[218] As highlighted by Julie Cohen[219] and Amy Kapczynski,[220] among others, monopolization in the digital public sphere has been made possible by a legal regime mainly defined by policy choices made in the 1990s, allowing platforms to expand their scale, exclude competitors, and extract surplus.[221] Intellectual property has been the central legal tool used to do so. The Computer Fraud and Abuse Act, by prohibiting "intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing] information from any protected

213. Durand, *supra* note 13, at 29; Guggenberger, *supra* note 202, at 6.

214. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 147 (Beacon Paperback 2d ed. 2001) ("While laissez-faire economy was the product of deliberate State action, subsequent restrictions on laissez-faire started in a spontaneous way. Laissez-faire was planned; planning was not.").

215. Guggenberger, *supra* note 202, at 10–11; Thomas E. Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951, 986 (2021); COHEN, *supra* note 20, at 6.

216. Chander, *supra* note 19, at 651; COHEN, *supra* note 20, at 97; Kapczynski, *supra* note 25, at 1507.

217. Guggenberger, *supra* note 202, at 47.

218. *Id.*

219. COHEN, *supra* note 20, at 29.

220. Kapczynski, *supra* note 25, at 1515.

221. Guggenberger, *supra* note 202, at 48.

computer"[222] it has created a regime of quasi-property for the operators over their virtual environment.[223] Patents and trade secrets have also allowed social media platforms to enforce their dominance.[224] Today, the most impactful recommendation algorithms of social media platforms are considered trade secrets by the platforms that have created them.[225] This means that any unauthorized disclosure would lead to a criminal conviction.[226] Granting exclusive rights, and mobilizing the government to enforce these legal entitlements is not neutral, either legally or economically. Granting quasi-property and exclusive rights to platforms enables them to exclude others from the market and privately extract the surplus created from network effects.[227] But the network effect has not been created only by social media firms– it has been made possible by the aggregation of numerous actors, starting with the users.[228] This means that the law has enabled platforms to monopolize the surplus created by the network effect that has been formed by all of us. By showing that the monopolization has been facilitated by law—in opposition to the lawlessness narrative[229]—we rely on the contribution of the legal realists. Legal realists have shown that private property, freedom of contract, and liberty were not natural, universal principles, pre-existing the intervention of the State.[230] Freedom of contract and private property cannot be analyzed as the absence of state intervention, or more precisely, state coercion, because, as shown by Hale and others, the State enforces private

222. 18 U.S.C. § 1030(a)(2)(C). The CFAA features several variations, but for the purposes of this Article, the broad limitation among private entities is most relevant.

223. *See* Kadri, *supra* note 215; Guggenberger, *supra* note 202, at 1.

224. Guggenberger, *supra* note 202, at 55.

225. *Id.*

226. Kadri, *supra* note 215, at 958.

227. Guggenberger, *supra* note 202, at 1.

228. *Id.*

229. Kapczynski, *supra* note 25, at 1465 (opposing Shoshanna Zuboff's "lawlessness" narrative that explains the rise of surveillance capitalism by the absence of a legal regime regulating the sector, compared to Julie Cohen's narrative that places law as a central explanation of the monopolization).

230. *See generally* Joseph William Singer & Laura Kalman, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988).

rights.[231] It assigns, shapes, and enforces the legal entitlements that form the rules of the game of private activity in the market, hence playing a significant role in determining the distributive outcomes of so-called natural liberty.[232] This refers not only to cases where a private party clearly relies on government enforcement of their legal entitlements of property and contract, as in the case of intellectual property, but also to cases where "private parties exercise their at large liberties or Hohfeldian privileges, free from tort or criminal liability."[233] Such privileges, to be free from torts and criminal liability, have been granted to platforms through Section 230 and they have contributed to shaping the market the way it is today.

2. Section 230 and Platforms' Hohfeldian Privileges to Be Free from Liabilities

Digital utopianism has led to the adoption of a normative framework designed to foster innovation and facilitate free expression. Congress and the courts have granted providers of "interactive computer services" with a broad immunity from liability over user-generated content. Section 230 of the Communication and Decency Act states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[234] This provision is followed by another, often known together as the Good Samaritan provision, explicitly stating that no providers shall be held liable on account of any action taken to restrict access to any material, or any action taken to make this material available.[235] The adoption of this law followed two important cases that suggested internet intermediaries would be held liable for unlawful content posted on their

231. *Id.*; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923); Hohfeld, *supra* note 85, at 34.

232. Syed, *supra* note 81, at 8.

233. *Id.*; *see* Hohfeld, *supra* note 85, at 55.

234. 47 U.S.C. § 230(c)(1).

235. 47 U.S.C. § 230(c)(2).

website as soon as they had exercised an editorial discretion removing speech they considered offensive.[236] These two cases taken together were said to create a "wide and unpredictable range of tort liability for internet providers if they exercised any editorial discretion over content posted on their sites."[237] Thus, they created a strong disincentive for online intermediaries to moderate unlawful content posted on their website and was said to threaten the developing internet landscape and free flow of expression on these platforms.[238] Reacting to the concerns from *Stratton Oakmont Inc. v. Prodigy Services Co.*, two representatives introduced an amendment to the Communication and Decency Act Bill, which had been introduced in Congress earlier in 1995 to regulate indecent content aimed at minors.[239] This amendment, which became Section 230 of the Act, relied on the explicit assumptions that "the services offer users a great degree of control over the information that they receive," that "the internet and other interactive computer services offer a forum for a true diversity of political discourse," and that they "have flourished . . . with a minimum of government regulation."[240] These official findings supporting the

236. Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991) (considering that since CompuServe Inc. did not actively review any content posted on their site and was acting as a distributor of content, not a publisher. For this reason, it could not be held liable for a defamation it did not know about); Stratton Oakmont Inc. v. Prodigy Servs. Co., WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) *superseded in part by* statute 47 U.S.C § 230 (finding Prodigy should be held liable as a publisher for all the posts on its website because it actively exercised moderation in deleting some of the posts; using automated software to do so, which indicated they wanted to gain from the benefits of editorial control).

237. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1605 (2018).

238. *Id.*; David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 391–92 (2010); Assaf Hamdani, *Who's Liable for Cyberwrongs*, 87 CORNELL L. REV. 901, 921 (2001) (noting the consequential link between intermediaries liability and collateral censorship by intermediaries); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278–79 (1964) ("[I]f the bookseller is criminally liable without knowledge of the contents, [. . .] he will tend to restrict the books he sells to those he has inspected [. . .] And the bookseller's burden would become the public's burden, for by restricting him, the public's access to reading matter would be restricted.").

239. Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 67 (1996).

240. 47 U.S.C. § 230(a)(2)–(4).

normative part of Section 230 reflect the digital utopian ideology that prevailed at that time in doctrine and discourse. A year later, the Court embraced this vision of the internet as a medium in the well-known case *Reno v. American Civil Liberties Union*.[241]

These affirmations now appear overly optimistic, and they have led to an expansive interpretation of Section 230 and its purpose in subsequent cases. In the foundational case *Zeran v. America Online, Inc.,* the plaintiff, Zeran, argued that AOL should be held liable for a defamatory statement posted on an AOL board by a user, since the platform was notified of the statement but did not take it down.[242] Zeran argued the immunity provided by Section 230 eliminated publisher liability, but not distributor liability.[243] The court rejected this argument and found that distributor liability was merely a subset of publisher liability and, therefore, foreclosed by Section 230.[244]

The court also made an important reference to the good Samaritan clause adopted in response to *Prodigy*. It recalled that Congress enacted the good Samaritan clause to remove disincentives to both self-regulation and the development and use of blocking and filtering technologies which empower parents to restrict their children's access to objectionable or inappropriate online material.[245] In other words, the *Zeran* court gave platforms the power and the duty to engage widely in self-regulation.

This regulation was passed to push companies—especially the dominant platforms—to engage in adequate moderation of harmful content. It has also concretely allowed social media platforms to base their business model on the amplification of harmful contents.[246] Some

241. 521 U.S. 844, 850 (1997).

242. 129 F.3d 327, 330 (4th Cir. 1997).

243. *Id.* at 331.

244. *Id.* at 332.

245. *Id.* at 331.

246. Ysabel Gerrard & Tarleton Gillespie, *When Algorithms Think You Want to Die*, WIRED (Feb. 21, 2019, 12:41 PM), https://www.wired.com/story/when-algorithms-think-you-want-to-die/; Karen Hao, *How Facebook Got Addicted to Spreading Misinformation*, MIT TECH. REV. (Mar. 11, 2021),

content is a priori harmful and undesirable—or can be assimilated as propaganda—such as hate speech and conspiracy theories.[247] This content is promoted by platforms' algorithms because it promotes engagement and keeps users on the platforms, leading to a more profitable arrangement between the platforms and their advertisers.[248] The role of Facebook in Myanmar's genocide has, for example, been highlighted by both whistleblowers[249] and scholars.[250] Due to Section 230, social media platforms do not bear the consequences or negative externalities of their actions. As a result, all of society bears these negative externalities instead, thanks to the State adopting this regulation. This legal framework places public interests in subordination to quasi-monopolization and private interests.

This section indicates that some important features that have explained the regulation of the broadcasting sector and its compatibility with the First Amendment were also found in discussions about the platform sector. In the broadcasting sector, Congress intervened in order not to waste its economic and cultural potentialities. Similarly, it intervened in the platform sector to preserve not only the technical possibilities of the sector but also some economic and cultural features that were seen as

https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation/ [https://perma.cc/W4MY-CLUS].

247. *See* Ayelet Evrony & Arthur Caplan, *The Overlooked Dangers of Anti-Vaccination Groups' Social Media Presence*, 13 HUM. VACCINES & IMMUNOTHERAPEUTICS 1475, 1476 (Apr. 13, 2017) (providing an example of the anti-vaccination movement); *see also* Zolan Kanno-Youngs & Cecilia Kang, *'They're Killing People': Biden Denounces Social Media for Virus Disinformation*, N.Y. TIMES (last visited July 19, 2021), https://www.nytimes.com/2021/07/16/us/politics/biden-facebook-social-media-covid.html [https://perma.cc/9AY3-MMWR]; *see generally* Danielle Keats Citron, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

248. Tarleton Gillespie, *Platforms Are Not Intermediaries*, 2 GEO. L. AND TECH. REV. 198, 202 (2018); Hao, *supra* note 246.

249. *See* Adam Smith, *Facebook Whistleblower Says Riots and Genocides Are the 'Opening Chapters' if Action Isn't Taken*, INDEP. (Oct. 25, 2021, 7:05 PM), https://www.independent.co.uk/tech/facebook-whistleblower-zuckerberg-frances-haugen-b1944865.html [https://perma.cc/MJZ9-ZDWR].

250. Jenny Domino, *Crime as Cognitive Constraint: Facebook's Role in Myanmar's Incitement Landscape and the Promise of International Tort Liability*, 52 CASE W. RES. J. INT'L L. 143, 153–54 (2020); Shannon Raj Singh, *Move Fast and Break Societies: The Weaponization of Social Media and Options for Accountability Under International Criminal Law*, 8 CAMBRIDGE INT'L L. J. 331, 331 (2019).

desirable by the State. The legal entitlements and privileges that Congress created by intervening have had important effects on the liberties, rights and bargaining powers on platforms' users. For this reason, it would be constitutional to consider platforms as trustees and regulate them through some decision-rules adopted by an administrative agency.

IV. PLATFORMS AS TRUSTEES

A. The Great Bargain: Legal Entitlements and Their Consequences

The provision of Section 230 of the Communications Decency Act (CDA) goes much further than the First Amendment.[251] The First Amendment protects platforms from strict liability for the content posted by their users they did not know about.[252] Section 230 and its wide interpretation by the courts protects much more than that: it has allowed platforms to be largely shielded from any kind of liability, not only for the content posted by their users, but also for the content amplified by them for financial or political reasons, or for the personalized experience that they provide to users. Section 230 thus protects platforms from liability for many harms that happen on the platforms and are of their own making. The difference between what the First Amendment protects and Section 230 is what Professor Jack Balkin has called "a regulatory subsidy."[253] Professor Balkin has recommended viewing platforms as information fiduciaries when they collect, analyze, use, sell, and distribute

251. Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 39 (2019).

252. Restatement (Second) of Torts § 581(1) (1977) (providing that distributors of content are not held liable for the content they distribute unless they know or should have known of the defamation); *see also* Smith v. California, 361 U.S. 147, 153 (1959) (holding that making the bookseller criminally liable for a book he did not know the content of would chill non-obscene, constitutionally-protected literature).

253. Balkin, *The Fiduciary Model of Privacy*, *supra* note 28, at 32.

personal information about their users.[254] He offers to subordinate the enjoyment of the regulatory subsidy of Section 230 by the platforms to the imposition of public service obligations regarding the way platforms use their users' data.[255] My new account of broadcasting regulation, which explains the constitutionality of the Fairness Doctrine by the legal entitlements granted to some players in the market, shows that his design idea should be held consistent with the First Amendment based on a historical understanding of the courts.

This article proposes, following Professor Balkin's argument, that platforms could be offered a safe harbor, as in the case of copyright infringement. Platforms have been granted a 'regulatory subsidy' that allows them to govern the private sphere without being subjected to the common law legal status. In return for this legal entitlement, following the broadcasting example, it should be compatible with the First Amendment for the State to ask for some public obligations to be carried by platforms as a condition to enjoy the safe harbor. The State would thus create a managerial domain and would impose some public service obligations linked to the achievement of the legitimate ends to which the managerial domain is dedicated. To enjoy the wide liability shield from Section 230, social media platforms should agree to be supervised by a bipartisan authority seen as an overseer or guardian of the public interest and the First Amendment.

As shown in Part II, the creation of such a Federal Commission (or the granting of this power to the FCC) to oversee platforms' behavior is not contrary to the First Amendment, because under that model, the government does not intervene directly into public discourse. The Commission would instead intervene within the boundaries of the managerial domain, to adjudicate

254. Balkin, *Information Fiduciaries and the First Amendment*, *supra* note 28, at 1186.

255. Balkin, *supra* note 14, at 33; *see also* Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, ATLANTIC (Oct. 3, 2016), https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346 [https://perma.cc/45UG-Y7RX].

whether private actors have respected the conditions that are necessary to benefit from the subsidy of Section 230. The rules deployed to explain which criteria the State will grant the subsidy would be characterized as "decision-rules" rather than as "conduct-rules."[256]

Professor Balkin's account of information fiduciary only addresses the question of the uses of end-user's data, but some other public service obligations could be imposed on the platforms. Through decision-rules, the Commission could ask platforms to adopt some community standards that are compatible with the ends and purposes of the First Amendment. The platforms would commit to being bound by such standards when deciding to amplify or take down content.

The FCC would have the power to review community standards and ask social platforms to improve standards that do not comply with the internal guidelines previously issued by the FCC.[257]

The FCC could also be in charge of reviewing whether algorithms used by the platforms to offer "personalized content" to their users are compatible with the platform's community standards.[258] This is extremely important because there is an enormous disparity between what platforms say they do and what they actually do. For example, Facebook and Instagram's algorithms amplify self-harm videos despite their commitment to "not allow people to intentionally or unintentionally celebrate or promote suicide or self-injury."[259] This transparency

256. Post, *supra* note 97, at 183.

257. *See* Trouillard, *supra* note 189, at 606–734 (this process of so-called self-regulation, where the Commission steps in only if it determines that private actors are unable to follow the guidelines, has been widely adopted in the UK to regulate the broadcasting sector); *see also* Ilaria Buri & Joris van Hoboken, *The Digital Services Act (DSA) Proposal: A Critical Overview*, INST. INFO. LAW (IVIR), UNIV. AMSTERDAM (Oct. 28, 2021).

258. Jennifer Cobbe et al., *Reviewable Automated Decision-Making: A Framework for Accountable Algorithmic Systems*, *in* CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 607 (2021); Jennifer Cobbe & Jatinder Singh, *Regulating Recommending: Motivations, Considerations, and Principles*, 10 EUR. J.L. & TECH. (2019).

259. Monica Greep, *Teenager, 17, Who Simply 'Liked' Some Sad Quotes on Instagram Reveals How the Site's Algorithm Sucked Her into Suicide Groups—and Admits It Made*

requirement would waive trade secret protection for algorithms used in the "feed" process, at least in the relationship between the Commission and private enterprise platforms. Social media platforms should also commit to suppressing illegal content to benefit from the liability shield.

B. Unconstitutional Conditions and the Managerial Domain

The imposition of public service obligations on platforms in return for their enjoyment of Section 230 might be attacked under the unconstitutional conditions doctrine. This section explains why this argument should be rejected.

Under the unconstitutional conditions doctrine, the State cannot condition the granting of a benefit on a recipient's agreement to waive their constitutional rights (in this case, their First Amendment rights).[260] The problem with this observation is that this doctrine is tautological: it does not help to define the nature and extent of constitutional rights. It therefore does not define an "unconstitutional condition."[261] As explained by Robert Post, in the case of the First Amendment, the unconstitutional conditions doctrine does not give mechanisms to determine the domain in which speech is allocated.[262] Yet, as we have seen, the distinction between public discourse and managerial domain is crucial to

Her Believe Self-harm Was 'Glamorous', DAILY MAIL (Feb. 7 2022, 11:45 AM), https://www.dailymail.co.uk/femail/article-10485227/Facebook-whistleblower-Frances-Haugen-warns-teens-killing-Instagram.html (A teenager, aged 17, who simply "liked" some sad quotes on Instagram was sucked into suicide groups by the site's algorithm. She admits it made her believe self-harm was "glamorous.") [https://perma.cc/4G4U-E2DE]; Meta, *Suicide and Self Injury*, FACEBOOK (last visited Nov. 30, 2023) https://transparency.fb.com/policies/community-standards/suicide-self-injury/ [https://perma.cc/BY74-GSJ9].

260. Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or association, his exercise of those freedoms would in effect be penalized and inhibited.").

261. Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 390 (1995).

262. Post, *supra* note 97, at 169.

determining the nature of the rights that are to be protected.[263] While in public discourse, participants enjoy their full array of First Amendment rights; in managerial domain, the State can impose some aims upon persons, regulate speech, and discriminate based on viewpoints. Robert Post further explains that historians who deny the Holocaust are not likely to receive appointments in a history department,[264] and this does not sound intuitively problematic. In contrast, a case where a chemistry department awards research grants only to students who are against abortion rights would sound more problematic. In both cases, there is viewpoint discrimination. However, in the second case, the criterion is "completely irrelevant to any legitimate educational objective of the department," while in the first case, it is not.[265] The unconstitutional conditions doctrine has been interpreted as prohibiting the imposition of conditions unrelated to the subsidy's grant or the contract's performance.[266] According to that view, a condition is constitutional if it is located within the boundaries of a managerial domain dedicated to achieving legitimate ends and if the condition is linked to achieving these ends.[267]

To analyze the conditions imposed on platforms in exchange for the regulatory subsidy of Section 230, we should thus ask if the conditions are linked to the managerial domain and its legitimate ends. In *Zeran*, the court recalled that Congress enacted the Good Samaritan clause of Section 230 to remove the disincentives to self-regulation.[268] In other words, the legislature and the court

263. *Id.*

264. *Id.* at 166; *see* POST, *supra* note 125, at 5.

265. Post, *supra* note 97, at 167 (analyzing Rust v. Sullivan, 500 U.S. 173 (1991)). *Compare* Elrod v. Burns, 427 U.S. 347, 357 (1976) (holding that a city governor cannot offer employment as a police officer on the condition that the employee refrain from speaking negatively, in his spare time, of the mayor's views), *with Rust*, 500 U.S. at 173 (holding that it is not contrary to the constitution to ask a family counselor employed by the government to forego the advocacy of his viewpoints during the counselling session).

266. *Elrod*, 427 U.S. at 347.

267. Post, *supra* note 97, at 170.

268. Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

gave platforms the power and duty to engage widely in self-regulation to govern the private sphere.

The adoption of appropriate community standards, the transparency requirement, and the privacy requirement are directly linked to realizing the legitimate ends that have justified the regulatory subsidy of Section 230—the self-governance of social media by the platforms. For this reason, this design does not violate the unconstitutional conditions doctrine and does not contradict the First Amendment.

CONCLUSION

This article demonstrates that scarcity was not the main rationale for explaining the compatibility of broadcasting regulation with the First Amendment. Scarcity as a rationale to regulate has been criticized for a long time by authors who supported the regulation and those who did not. I have provided an alternative narrative: the compatibility of the Fairness Doctrine with the First Amendment relied on the legal entitlements that the State granted to select actors in the market. Since the State shaped the broadcasting market in a certain way, it should also be qualified to organize the consequences of the legal entitlements it had granted. This viewpoint allows for a straightforward comparison to the platform sector. The State has similarly granted many legal entitlements that have shaped the platforms market in a certain way, and therefore should also be qualified to organize the consequences of these legal entitlements and ensure they fulfill the public interest. Such an intervention is not contrary to the First Amendment because it happens within the boundaries of a managerial domain, where the State can impose conditions upon persons to further legitimate aims.