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Forward into the Past: Speech Intermediaries in Television and Internet Ages Symposium: Falsehoods, Fake News, and the First Amendment: Panel 3: The Brave New World of Free Speech

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FORWARD INTO THE PAST: SPEECH INTERMEDIARIES IN THE TELEVISION AND INTERNET AGES

GREGORY P. MAGARIAN*

*(The world is collapsing around our ears,
I turned up the radio, but I can't hear it.)¹*

Communication constructs society. By speaking to, with, and among one another, people and groups build relationships that allow us all to live more fully, understand the world better, and govern ourselves collectively. As societies grow, expression and engagement become more challenging. The presence of more ideas, larger and more diverse potential audiences, and more powerful and remote institutions threatens to reduce communication to a futile exercise. Whatever normative goals different people and groups may want public discourse to serve, pursuing those goals gets harder.

Communication in a society as big and complex as ours inevitably depends on intermediation. *Speech intermediaries*—institutional actors in the private sector that compile, channel, and deliver information on a mass-cultural scale—variously ameliorate and deepen the social problems of communication. Speech intermediaries' forms and qualities become crucial determinants of how well public discourse will serve people's and groups' interests and what sort of society our communication will construct.

In the period before the internet, what I'll call the Television Age, speech intermediaries became increasingly consolidated, commanding, and homogeneous. The three national television networks, along with the major radio stations, daily newspapers, major film studios, book publishers, and record labels, reserved large audiences for only a select few speakers. Those institutions obstructed the path to a more contentious, participatory ideal of public discourse. Government and the public managed to exert substantial control over speech intermediaries through regulations and norms. Most of those external controls, however, reinforced intermediaries' homogenizing tendencies. In the Television Age, free speech values—conventionally understood to include individual self-fulfillment, the pursuit of truth, and effective democracy—suffered under speech intermediaries'

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1. R.E.M., *Radio Song*, on *OUT OF TIME* (Warner Bros. Records 1991).

sometimes oppressive power. In particular, Television Age intermediation stifled what I'll call *dynamic engagement*: communication about varied ideas among people with divergent identities and perspectives.

The internet, when it emerged as a social and cultural force in the 1990s, seemed to promise an undreamed age of effective mass communication without intermediation. People and groups could suddenly communicate with large audiences quickly and inexpensively. Today, many more people exchange much more information than anyone could have imagined even twenty-five years ago. Increasingly, however, online communication carries a familiar aftertaste. Powerful new intermediaries have emerged to undercut the internet's autonomous, democratizing promise. Internet service providers (ISPs) dictate the terms on which information and users travel online. Search engines decide what sources fill our thirst for knowledge. Social media platforms determine with whom we engage and how.

Unlike Television Age speech intermediaries, the new intermediaries of the Internet Age operate substantially free of effective regulatory or normative controls. Their role in structuring public discourse reflects no interest beyond their profit motives. The 2016 presidential election revealed deep pathologies of online mass communication and the new speech intermediation that structures it. The internet widens political divisions into volcanic fissures. The term "fake news" has exploded into our national lexicon, even as political opponents squabble about which news is fake. We decry opinion bubbles even as we luxuriate within them. ISPs, search engines, and social media platforms seem robust in pursuing profit but anemic in recognizing any broader social goal. Where Television Age intermediaries promoted homogeneity at a high cost to dynamic engagement, Internet Age intermediaries promote social fragmentation at a high cost to social cohesion.

Our present social and political climate reveals a paradox about speech intermediation. On one hand, our riven political culture seems to lack, and to need, Television Age intermediaries' function of substantially unifying society under a shared umbrella of cultural and political information. Critics of Television Age speech intermediaries' homogenizing force never imagined a world where neighbors would lose any frame of reference for one another's ways of thinking. We need stronger speech intermediation! On the other hand, Internet Age intermediaries have played a major role in degrading public discourse. ISPs blithely open platforms to hateful and mischievous speakers; search engines steer people toward micro-targeted informational niches; social media platforms bind us in cultural and political cocoons. We need weaker speech intermediation!

The paradox of Internet Age speech intermediation makes this a useful moment for considering what the experience of Television Age intermediation might teach us about our present situation. As private actors, speech intermediaries bear no First Amendment obligations while, in theory, enjoying substantial First Amendment protections against regulatory constraints. Television Age law and politics, however, managed to impose social obligations on intermediaries. The Television Age experience provides a template for imposing social obligations on the new speech intermediaries. At the same time, the homogenizing excesses of Television Age intermediation and regulation underscore the urgency of harnessing Internet Age intermediaries to strike a healthier balance between dynamic engagement and social cohesion.

I. Speech Intermediation in the Television Age

Speech intermediation is inevitable and necessary in large, complex societies.² Speech intermediaries, however, can vary greatly in their characteristics and social effects. Here I describe and critique the conditions of speech intermediation in the Television Age. The technology and profit motives of Television Age speech intermediaries imposed prohibitive costs for all but a few speakers to reach mass audiences. A combination of government regulations and social pressures largely reinforced Television Age intermediaries' tendency to structure public discourse in ways that promoted homogeneity while limiting the ranges of ideas and participants in public discourse.

A. Intermediaries and the Limits of Television Age Public Discourse

The popularization of radio broadcasting in the 1930s began what we can call the Mass Media Era, which encompasses the Television and Internet Ages. The Mass Media Era is defined by the use of information technology to make the same content broadly available to audiences throughout the United States. The federal government chose to make broadcasting a private enterprise structured by public licensure.³ That choice, placing broadcasters on the private side of the public-private divide, had important

2. See, e.g., ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 187–88 (1999) (advocating careful selection and limited oversight of “trusted intermediaries”). Although the issues discussed in this Essay know no borders, my discussion focuses on the United States.

3. See Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (2012)).

consequences for First Amendment law. Similar consequences attended other sorts of speech intermediaries that emerged in the private sphere.

The three national broadcast television networks became the dominant institutions on the mass media landscape from the 1950s into the 1990s. Most people during that time got the bulk of their news and entertainment from the networks.⁴ All three networks followed very similar programming approaches and practices, resulting in a high degree of similarity among their offerings.⁵ Local affiliates offered some finer-grained distinctions, but the local stations' affiliations with the networks ensured substantial national uniformity.⁶ Viewers could supplement the network and affiliate offerings by tuning in to one or two local ultra-high-frequency (UHF) stations, but those stations offered little original programming, and their market shares were limited.⁷ Even the nominally government-run Public Broadcasting System operated on a national network model.⁸

The broadcast television networks dominated the news industry. Local affiliates typically ran half-hour primetime newscasts that focused on local stories, followed immediately by the networks' half-hour national news programs.⁹ As late as 1993, seventy-seven percent of Americans watched local television news broadcasts and sixty percent watched nightly network news broadcasts.¹⁰ Adding to the uniformity of news sources, the networks distinguished themselves primarily through the personalities of their

4. See Amanda Lotz, *What Is U.S. Television Now?*, 625 ANNALS AMER. ACAD. POL. & SOC. SCI., Sept. 2009, at 51–52 (“Program options for viewers were limited to the offerings of the three national networks . . . Minimal choice and control characterized our viewing experience compared with subsequent technological innovations and the modes of engagement they allowed.”)

5. See *id.* at 52 (“All three networks generally pursued the same strategy, so despite the appearance of competition, little differentiated the programs arising at any particular time.”).

6. See Marc Gunther, *The Transformation of Network News: How Profitability Has Moved Networks Out of Hard News*, NIEMAN REPS., June 15, 1999, <http://niemanreports.org/articles/the-transformation-of-network-news/>.

7. See *id.*

8. See Meredith C. Hightower, *Beyond Lights and Wires in a Box: Ensuring the Existence of Public Television*, 3 J.L. POL'Y 133, 147 (1994).

9. See Gunther, *supra* note 6.

10. See *Where Americans Go for News*, PEW RES. CTR. (June 8, 2004), <http://www.people-press.org/2004/06/08/i-where-americans-go-for-news/>. That network number almost certainly understates the dominance of broadcast network news earlier in the Television Age, as the same study shows that thirty-five percent of Americans by 1993 were getting news from the Cable News Network (CNN).

overwhelmingly white, male news anchors.¹¹ They almost never presented different ideological perspectives, demographic identities, or subject matter expertise.¹² Viewers' newscast preferences didn't materially alter what information they got. The emergence of CNN in 1980 became a watershed in the late Television Age, marking a shift toward the more varied channel offerings of cable systems. CNN revolutionized television news by covering stories constantly, like all-news radio stations.¹³ But CNN offered no more substantive diversity than the three broadcast networks.¹⁴ Not until the right-wing Fox News debuted in 1996 did any television news outlet present a distinctive identity.

Newspapers and radio substantially tracked the homogenizing path of network television. Where a large city in 1950 might have had three or four thriving daily newspapers with competing formats, ideologies, and strengths, by 1990 that number would have fallen to two or even one, and national chains rather than local owners increasingly owned the survivors.¹⁵ Readers could get, at best, two counterpoised partisan takes on the day's events.¹⁶ The debut of *USA Today* in 1982 created a print analogue to the national broadcast networks, forcing local newspapers to compete against a verbally arid, visually appealing national paper.¹⁷ Deregulation of ownership rules for radio stations through the late Television Age let a small number of companies control a large number of stations throughout the country.¹⁸ Under the technological and commercial shadow of television, then, both the newspaper and radio industries became more like

11. See JONATHAN M. LADD, *WHY AMERICANS HATE THE MEDIA AND HOW IT WORKS* 66–68 (2012).

12. See *id.*

13. See Harold L. Erickson, *Cable News Network*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Cable-News-Network> (last visited May 10, 2018).

14. See *id.*

15. See, e.g., BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 120–22 (2004) (discussing the decrease in the number of daily newspapers and the increase in chain ownership).

16. See *id.*

17. See Christine A. Varney, *Dynamic Competition in the Newspaper Industry*, NEWSPAPER ASS'N OF AM. (Mar. 21, 2011), <https://www.justice.gov/atr/speech/dynamic-competition-newspaper-industry>.

18. See Robert Ekelund, Jr., et al., *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 J.L. & ECON. 157, 157 (2000) (“[Deregulation] significantly relaxed local and national ownership restrictions, leading to a string of multi-million-dollar mergers in the radio industry. The structure of radio markets, once forcefully fragmented to a great extent, is now characterized by increasing levels of concentration.” (footnote omitted)).

television: less idiosyncratic, more national, with fewer owners providing more uniform content.

Other sorts of speech intermediaries likewise followed the broadcast pattern. Accelerating concentrations of ownership in the production and distribution of books, movies, and music yielded shrinking numbers of increasingly dominant market actors.¹⁹ Bookstores provide a dramatic example of this trend. Starting in the 1970s and persisting through the 1990s, large chains, notably Borders and Barnes & Noble, came to dominate the bookselling marketplace.²⁰ The American Booksellers Association, which represents the interests of independent bookstores, lost more than two-thirds of its membership between 1971 and 1995, shrinking from 5200 bookstores to 1702.²¹ Such contractions limited opportunities for authors, filmmakers, and musicians to reach audiences. Opening a bookstore or starting a record label entails a substantially lower cost of entry than securing a broadcast license and building a network of television stations.²² Even so, independent publishers and sellers faced ever-deepening struggles to compete for audience attention with their much larger competitors.²³ Consolidation in the cultural production and distribution spheres left audiences with fewer avenues for accessing cultural expression.

Various other speech intermediaries helped to shape public discourse in the Television Age. One example, related to but distinct from this Essay's central story, is the intermediation of political debate by the Democratic and Republican parties. Much like the broadcast networks and daily newspapers, the major parties funneled political discussion toward a narrow set of widely shared alternatives.²⁴ As such, the parties mirrored the homogenizing function of other Television Age speech intermediaries. The major parties still dominate the electoral structure of the Internet Age, but their influence over political debate has waned parallel to the decline of other Television Age intermediaries.

19. See, e.g., ANDRE SCHIFFRIN, *THE BUSINESS OF BOOKS: HOW THE INTERNATIONAL CONGLOMERATES TOOK OVER PUBLISHING AND CHANGED THE WAY WE READ* (2000).

20. See LAURA MILLER, *RELUCTANT CAPITALISTS: BOOKSELLING AND THE CULTURE OF CONSUMPTION* (2006).

21. Paul Collins, *Chain Reaction*, VILLAGE VOICE (May 16, 2006), <https://www.villagevoice.com/2006/05/16/chain-reaction-2/>.

22. See Jonah Engel Bromwich, *What It Takes to Open a Bookstore*, N.Y. TIMES, Nov. 29, 2016, <https://www.nytimes.com/2016/11/29/nyregion/bookstores-opening.html>.

23. See *id.*

24. For a discussion of the major parties' dulling of political discourse and stifling of electoral competition, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

Television Age speech intermediaries were private companies that existed to pursue profit. The dominant mass media depended substantially on advertising revenue for their bottom lines.²⁵ Advertising provided essentially all the revenue for television and radio broadcasters, while newspapers drew on a combination of advertising, subscriptions, and newsstand sales.²⁶ Not until the advent of pay television in the cable era did television and radio diversify their revenue streams by charging users.²⁷ The importance of advertising for Television Age speech intermediaries complicated their pursuit of profits, tying their content decisions not only to their autonomous self-interest but also to the varied interests of their sponsors.

B. The Social-Structuring Function of Television Age Intermediaries: Regulation, Public Norms, and Homogeneity

Beyond their profit motives, Television Age speech intermediaries played an important role in structuring public discourse and social relationships.²⁸ By dictating, and limiting, the range of information available to audiences and of opportunities for speakers to reach audiences, the broadcast networks and other intermediaries strongly encouraged a high degree of homogeneity. To some extent that effect simply reflected the limited number of intermediaries that prevailing technological and economic conditions enabled. In addition, Television Age intermediaries' social-structuring function complemented their profitmaking function in various ways. For example, the broadcast networks' avoidance of partisan identities likely optimized their mass appeal and thus their revenues. Intermediaries' social-structuring function, however, often diverged from their profit motives, mainly because external forces helped dictate how intermediaries performed that function.

1. Federal Regulation

The strongest external driver of speech intermediaries' social-structuring function in the Television Age was federal regulation. Under a conventional understanding of constitutional law, media companies are speakers with

25. *See generally* C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994).

26. *See id.*

27. *See id.*

28. On the relationship between social structure and public discourse, with particular attention to the role of government in regulating speech intermediaries, see OWEN M. FISS, *LIBERALISM DIVIDED* 7–30 (1996).

First Amendment rights.²⁹ In the Television Age, however, the U.S. government imposed substantial public interest regulations on the most powerful, socially influential speech intermediaries: the broadcast media.³⁰ The Supreme Court validated, against First Amendment challenges, two forms of *substantive* broadcast regulation, while a distinct class of *structural* regulations never faced any noteworthy First Amendment challenge.

From the beginning of broadcast licensing, the Federal Communications Commission (FCC) imposed a substantive bar on broadcasting certain content presumed to be morally objectionable.³¹ The Burger Court upheld these “decency” regulations against a radio broadcaster’s First Amendment challenge.³² The Court rested its decision in large part on broadcast media’s social influence—what the Court called the “uniquely pervasive presence” of broadcast programming.³³ A plainer account of speech intermediaries’ social-structuring function, and a more robust defense of government efforts to direct that function toward homogeneity, is hard to imagine. The decency regulations subjected every precinct of our morally diverse society to a common, restrictive conception of “decency” through our most powerful media. In industries like movies and music, where official decency regulations would have presented clearer First Amendment problems, governmental and societal pressure encouraged implementation of “voluntary” rating systems.³⁴

In addition, the Warren Court upheld the federal government’s “fairness doctrine,” which required broadcasters to offer public affairs programming with some balance in the points of view presented.³⁵ In particular, *Red Lion Broadcasting Co. v. FCC* let the government impose on broadcasters a right of reply for subjects of on-air criticisms.³⁶ The Burger Court took exactly the opposite view of a similar right-of-reply regulation that a state government imposed on the more established, less powerful newspaper

29. Mark S. Nadel, *A Technology Transparent Theory of the First Amendment and Access to Communications Media*, 43 FED. COMM. L.J. 157, 158 (1991).

30. See generally Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499 (2000).

31. *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

32. *Id.* at 751.

33. *Id.* at 748.

34. See, e.g., Matt Blitz, *A Brief History of the Movie Ratings System*, GIZMODO (Dec. 30, 2014), <https://gizmodo.com/a-brief-history-of-the-movie-rating-system-1676334900>.

35. See generally Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 845 (2008).

36. 395 U.S. 367, 400 (1969).

industry.³⁷ The Burger Court, however, continued to approve legislative access mandates to the broadcast media,³⁸ even as the Justices scuttled any hope *Red Lion* might have offered for constitutionally mandated access rights.³⁹ Then, as the Television Age wound down, the Rehnquist Court in the *Turner Broadcasting* case declined to extend *Red Lion* to cable television, though *Turner* still upheld a form of access regulation for cable providers on the understanding that the regulation was content neutral.⁴⁰

The most common account of *Red Lion* enters the case with the historical anomaly of the finite broadcast spectrum.⁴¹ The decision's discussion of spectrum scarcity offers support for that account.⁴² At a deeper level, though, spectrum scarcity in *Red Lion* was merely an element in broadcasting's social importance and power. Justice White's majority opinion considered the public's interest in getting diverse perspectives from the broadcast media to be a matter of constitutional weight. He emphasized "the First Amendment goal of producing an informed public capable of conducting its own affairs" and found "no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."⁴³ Lee Bollinger contends that broadcasting warranted different constitutional treatment than print media as a matter of pragmatic legal diversification, treating one mass medium differently from others.⁴⁴ The government appears to have chosen broadcasting to bear greater public burdens, and the Court appears to have validated that choice, specifically because broadcasting was the most powerful, most socially important mass medium.

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

38. *See CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (rejecting a broadcast network's First Amendment challenge to a federal requirement that broadcasters make advertising time available to national political candidates).

39. *See CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 121 (1973) (rejecting political groups' First Amendment challenge to a broadcast network's refusal to sell them advertising time).

40. *See Turner Broad. Sys. v. FCC (Turner I)*, 512 U.S. 622, 668 (1994) (deciding to review under intermediate scrutiny a First Amendment challenge to the FCC's requirement that cable operators "must carry" among their channel offerings local affiliates of the broadcast networks); *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 224 (1997) (rejecting the First Amendment challenge and upholding the "must carry" regulations).

41. *See, e.g.,* Christopher S. Yoo, *The Rise and Decline of the Technology-Specific Approach to the First Amendment*, 91 *GEO. L.J.* 245, 266–91 (2003) (critiquing the scarcity rationale and associating its demise with the defeat of the *Red Lion* doctrine).

42. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389–90 (1969).

43. *Id.* at 392.

44. *See* LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* (1991).

The fairness doctrine mandated access to the broadcast airwaves for more speakers. In general, access mandates aim to increase participation in public debate and broaden the ranges of ideas available to audiences.⁴⁵ Access mandates thus cut against homogeneity and toward greater dynamism in public debate. The fairness doctrine in practice, however, presumed that public controversies present only two opposing sides, and it compelled airing of the second side only when a broadcaster chose to air the first. Moreover, the doctrine imposed this binary conception of public debate on all broadcasters alike, thereby discouraging divergences among broadcast stations even as it encouraged diversity within the stations' programming. The doctrine likely made the airwaves more vibrant and public spirited than broadcasters would have on their own, but its limited, bounded model fell short of promoting a truly dynamic public discourse.

In addition to the substantive decency and diversity regulations, federal regulators in the Television Age imposed on the broadcast media major structural regulations, some of which affected the print media as well. Structural regulations deal not with the content of speech but with conditions of media ownership.⁴⁶ Television Age structural regulations included limits on ownership concentration, such as the federal bar on cross-ownership of newspapers and television stations in the same market.⁴⁷ Other structural regulations required a modicum of racial diversity in broadcast licensure.⁴⁸ These regulations never inspired serious First Amendment challenges in the Television Age, likely because ownership rules fit comfortably within the Supreme Court's post-*Lochner* allowance for government regulation of economic matters in the public interest.⁴⁹

45. See generally Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373 (2007).

46. For extensive analysis of media ownership concentration and regulatory responses, see BAGDIKIAN, *supra* note 15; C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2007) [hereinafter BAKER, CONCENTRATION].

47. Jerome A. Barron, *Structural Regulation of the Media and the Diversity Rationale*, 52 FED. COMM. L.J. 555, 555 (2000).

48. See Blake D. Morant, *Democracy, Choice, and the Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 943, 967–74 (2004) (discussing the history of broadcast regulations that mandate demographic diversity).

49. Compare *Lochner v. New York*, 198 U.S. 45, 64 (1905) (imposing substantive due process constraints on economic regulations), with *Nebbia v. New York*, 291 U.S. 502, 538 (1934) (overruling *Lochner* to a substantial extent and vindicating broad government power to regulate the economy).

Structural regulations of Television Age intermediaries diverged from substantive regulations in the sort of influence they exerted on public discourse. Where substantive regulations largely reinforced Television Age intermediaries' promotion of homogeneity, structural regulations by their nature encourage diversification and dynamic engagement. Television Age intermediaries limited the range of speakers and ideas in public discourse, but structural regulations at least ensured greater variety in who controlled the communications infrastructure.

2. Normative Constraints and the "Public Trust" Conception of Speech Intermediation

Beyond, and behind, government regulation of Television Age speech intermediaries, public norms imbued intermediaries, particularly the news media, with obligations to the people. The notion of the news media as the "fourth estate," an essential check on government power, exerted great influence during this period, as manifest in Vincent Blasi's theory that the First Amendment empowers the news media to check abuses of government power.⁵⁰

The fourth estate idea echoes through key First Amendment decisions of the Television Age Supreme Court. *New York Times Co. v. Sullivan*, widely seen as the most important free speech case of the Television Age, limited defamation liability for criticisms of government officials.⁵¹ More pointedly, the Court in *Cox Broadcasting Corp. v. Cohn* ascribed to the news media a responsibility to report accurately and robustly on government actions.⁵² The Court during this period also found a qualified First Amendment right of media access to criminal proceedings⁵³ and let the news media encroach significantly on the federal government's national security prerogatives.⁵⁴ These decisions embodied not any precise constitutional command, but rather a normative premise that the news media bore a public trust to inform the people about their government and thus needed special First Amendment protections.

Reflecting this "public trust" idea, media outlets during the Television Age also imposed substantial constraints on their own operations by

50. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 LAW & SOC. INQUIRY 521, 565–66 (1977).

51. 376 U.S. 254, 292 (1964).

52. 420 U.S. 469, 492 (1975).

53. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

54. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

adopting codes of journalistic ethics.⁵⁵ Ethical codes issued from professional associations like the Society of Professional Journalists, the Radio-Television News Directors Association, and the American Society of Newspaper Editors, as well as individual news outlets like the Associated Press and Gannett.⁵⁶ The ethical code of what is now the Radio Television Digital News Association (RTDNA) shows some characteristic features of these charters. The RTDNA Code's Guiding Principles begin with the statement: "Journalism's obligation is to the public. Journalism places the public's interest ahead of commercial, political and personal interests."⁵⁷ The Code states a commitment to "ethical decision-making," prominently including a duty to seek out divergent points of view on important stories.⁵⁸ The Code then states and develops principles that distinguish journalism from other forms of content: overriding commitments to truth and accuracy, independence and transparency, and accountability.⁵⁹

The normative conception of the news media as the fourth estate and the media's embrace of ethical codes largely worked with substantive media regulations to promote uniformity in Television Age public discourse. The news media's check on government power pushed against a kind of hegemony, and the RTDNA Code's acknowledgement that "[f]or every story of significance, there are always more than two sides"⁶⁰ shows a greater appreciation for dynamism in public discourse than the fairness doctrine did. Still, the fourth estate idea institutionalizes the news media under one overarching model. News outlets all do fundamentally the same democratic job, under a contestable account of liberalism that treats government as distinctly threatening and the institutional media as appropriately positioned to counter the threat. Likewise, media ethical codes instantiate a common professional vision, under which news organizations deserve the public's trust because they all adhere to a common behavioral template. The codes project, and the public comes to expect, a journalistic posture of neutrality and objectivity. That posture

55. See Morant, *supra* note 48, at 951 n.23 (compiling journalistic ethical codes).

56. See *id.*

57. *Code of Ethics*, RADIO TELEVISION DIGITAL NEWS ASS'N, https://www.rtdna.org/content/rtdna_code_of_ethics (last visited May 29, 2018).

58. *Id.*

59. See *id.*

60. *Id.*

inclines journalistic inquiry and analysis toward viewpoints broadly accepted by social and political majorities.⁶¹

The public trust conception of the broadcast media frayed in the deregulatory frenzy of the late Television Age. The Reagan-era FCC abolished the fairness doctrine.⁶² Acquisitions and changes in corporate control changed the cultures of the major television networks and diminished whatever commitment to the public interest the networks had previously internalized.⁶³ Deregulation of media ownership began in the late Television Age and accelerated during the Internet Age,⁶⁴ from the loosening of ownership limits in the 1996 Telecommunications Act⁶⁵ to the Trump FCC's freeing of companies to own newspapers and broadcast stations in the same media market.⁶⁶ At the height of the Television Age, however, the public trust conception strongly influenced how speech intermediaries performed their social-structuring function.

* * *

Television Age speech intermediation combined several features that undermined free speech values: a prohibitive cost of entry for most speakers, concentrations of power over public discourse, and homogenization of information. Leading free speech theorists of the Television Age, particularly those concerned with the importance of robust political debate, voiced concerns about intermediation. Alexander Meiklejohn, the avatar of democracy-focused free speech theory,

61. For a discussion and critique of media ethical codes and professional journalistic norms, see C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 154–63 (2002) [hereinafter BAKER, *MEDIA*]; see also ROBERT W. MCCHESENEY, *THE POLITICAL ECONOMY OF MEDIA: ENDURING ISSUES, EMERGING DILEMMAS* 125 (2008) (critiquing professional norms in Television Age journalism as “more conducive to the needs of media owners than to journalists or citizens”); Morant, *supra* note 48, at 985 (arguing that media ethical codes don't ensure presentation of diverse viewpoints).

62. See *In re Syracuse Peace Council*, 2 FCC Rcd. 5043 (1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F. 2d 654 (D.C. Cir. 1989).

63. See Gunther, *supra* note 6; Lotz, *supra* note 4, at 52 (“The buyouts of the networks in the mid-1980s . . . led to decreased institutional commitment to the democratic, informational role of television as commercial goals increasingly trumped the remaining vestiges of public service.”).

64. See, e.g., BAKER, *CONCENTRATION*, *supra* note 46 (describing and critiquing deregulation of media ownership).

65. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

66. See Cecelia Kang, *F.C.C. Opens Door to More Consolidation in TV Business*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/business/media/fcc-local-tv.html>.

condemned “the commercial radio” as unworthy of First Amendment protection.⁶⁷ He couldn’t abide dominant intermediaries that failed to present a diverse range of ideas about matters of public concern. Calls for rights of access to mass media reflect an even more acute critique of Television Age intermediaries’ power. Jerome Barron envisioned the mass media as a vehicle for widespread popular engagement in a multi-directional conversation: not just diverse information but diverse participation.⁶⁸ C. Edwin Baker subjected the mass media to the tools of political economy, showing how reliance on the free market to shape mass media content would inevitably underproduce the material required to satisfy either consumer preferences or democratic interests.⁶⁹

Television Age speech intermediaries were large, powerful institutions that generally limited the range of speakers and ideas in public discourse, diminishing opportunities for dynamic engagement. They functioned both to make profits and to structure society, and their social-structuring function reflected constraints imposed by federal regulations and public norms. The substance of those intermediaries’ social structuring was to promote a homogeneous public discourse that shortchanged free speech values. We can imagine (and some of us can remember) the daydream of Television Age intermediation’s critics: If only we could somehow develop an inexpensive form of mass communication that would afford many and varied speakers access to a broad and diverse audience. Then we wouldn’t let intermediary behemoths like the television networks flatten public discourse as the cost of effective mass communication. Then we could just talk to each other.

Welcome to paradise.

II. *Speech Intermediation in the Internet Age*

The Internet Age dawned in the mid-1990s with prophecies of a free speech apotheosis: disintermediation. Libertarian Eugene Volokh predicted a regime of “cheap speech” that would shift power away from intermediaries.⁷⁰ “Control over what is said and heard,” he asserted, “will shift from intermediaries—publishers, bookstore and music store owners,

67. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 86–87 (1948).

68. See Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641, 1656–60 (1967).

69. See generally BAKER, *MEDIA*, *supra* note 61.

70. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

and so on—to speakers and listeners themselves. Private parties will thus find it harder to use their market power to stifle speech.”⁷¹ Progressive Seth Kreimer celebrated “technologies of protest” that would give political dissidents an unprecedented capacity to reach audiences and mobilize support.⁷² Technological optimists generally believed the internet would both optimize personal autonomy and nurture a democratically fecund environment of diverse information.⁷³ Striking down a ham-fisted congressional mandate of online “decency” in *Reno v. ACLU*, the Supreme Court inscribed cyberspace into law, hailing “the vast democratic forums of the Internet.”⁷⁴

The internet’s development has borne out some of the promise those early boosters celebrated. Disintermediation, however, has proved to be a fantasy. In the Internet Age, a new class of speech intermediaries, highlighted by ISPs, search engines, and social media platforms, has largely supplanted the intermediaries of the Television Age. Like the old speech intermediaries, the new intermediaries both make profits and structure society. In contrast to the Television Age, however, the new speech intermediaries’ profitmaking function dominates their social-structuring function. Internet technology greatly increases the range of potential social-structuring outcomes from speech intermediation, but Internet Age law and politics have kept actual outcomes within the narrow boundaries of the new intermediaries’ self-interest. Regulation and social norms have done very little to influence how online intermediaries structure our public discourse. The substantive result of this arrangement sharply contrasts with the Television Age. Rather than making society more homogeneous, Internet Age intermediaries promote social fragmentation.

A. Internet Age Intermediaries, Profit, and the Rise of Customized Truth

The early cyberspace optimists were substantially right to predict the decline of Television Age intermediaries. The broadcast networks have become a few islands, albeit big ones, in the enormous sea of broadband news and

71. *Id.* at 1807. For a similar view, see Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 U.C.L.A. L. REV. 1653 (1998).

72. See Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119 (2001).

73. See, e.g., Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619 (1995).

74. 521 U.S. 844, 868 (1997). The opinion invalidating the online “decency” requirement was penned by Justice Stevens, who two decades earlier had authored the opinion in *Pacific* that validated broadcast “decency” mandates.

entertainment. They no longer set the terms of mass culture. The largest U.S. radio holding company, a principal beneficiary of broadcast deregulation, recently filed for bankruptcy in an attempt to restructure billions of dollars in debt.⁷⁵ The print editions of daily newspapers linger on life support.⁷⁶ Venerable national and international brand names—*The New York Times*, *The Wall Street Journal*, CNN—retain prominence, but even those giants have shed staff amid major operational and commercial transformations.⁷⁷ The political right has found a strident media voice through outlets of Television Age form like Fox News and the Sinclair Broadcast Group, but those outlets owe much of their success to broadband distribution and amplification, linking them to Internet Age fellow travelers like Breitbart and 4chan.⁷⁸

Amid the husks of the old speech intermediaries, powerful new ones have emerged. Online speech intermediaries control the technological infrastructure required for twenty-first century communication. They include entities as varied as the domain name system, backbone providers, and providers of application software.⁷⁹ The most ubiquitous speech intermediaries of the Internet Age include ISPs, which let users access the internet's information systems; search engines, which sort through and organize the blizzard of information available online; and social media platforms, the most recent intermediaries to emerge in the Internet Age, which increasingly organize interpersonal connections.⁸⁰ Unlike Television Age intermediaries, the new intermediaries enable, transmit, and amplify communication by and among a vast range of people, with very low entry

75. See Soma Biswas & Anne Steele, *iHeart Media Files for Bankruptcy, Reaches Restructuring Agreement in Principle*, WALL STREET J. (Mar. 15, 2018), <https://www.wsj.com/articles/radio-giant-iheartmedia-files-for-bankruptcy-reaches-restructuring-agreement-in-principle-with-investors-1521092058>.

76. Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RES. CTR. (June 1, 2017), <http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/>.

77. See *id.*

78. Lucia Graves, *This Is Sinclair, 'The Most Dangerous US Company You've Never Heard Of.'* GUARDIAN (Aug. 17, 2017), <https://www.theguardian.com/media/2017/aug/17/sinclair-news-media-fox-trump-white-house-circa-breitbart-news>.

79. For a discussion of types of online speech intermediaries, see 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, 385–89 (2010).

80. See *id.*

costs.⁸¹ The internet contains many more ideas and hosts many more speakers than any prior medium.⁸² At the same time, the internet depends on a technological infrastructure far larger, more complex, and more sophisticated than the infrastructure of broadcasting.⁸³ Thus, as in the Television Age, a few extremely powerful companies dominate Internet Age speech intermediation.

The new speech intermediaries undermine free speech values in numerous ways. In consideration of speech intermediaries' central role in facilitating online communication, Congress enacted § 230 of the Communications Decency Act (CDA), which grants "provider[s] or user[s] of . . . interactive computer service[s]" sweeping immunity from liability for harm caused by the speech they transmit or host.⁸⁴ That immunity would seem to incentivize openness to varied content. Several factors, however, create contrary incentives for intermediaries to restrict speech. Just as government pressure in the Television Age encouraged movie studios and music labels to censor their output, government pressure in the Internet Age, usually based on national security concerns, enlists ISPs as secondhand regulators of their individual users.⁸⁵ A potent incentive for intermediaries to censor speech arises from the Digital Millennium Copyright Act's immunization of ISPs from copyright infringement liability as long as they remove material the copyright holder identifies as infringing.⁸⁶ Online speech intermediaries also face increasing public pressure to block content from neo-Nazis, white supremacists, and other hate groups.⁸⁷

81. *See id.* at 391.

82. *See id.* at 385–86.

83. *See id.*

84. 47 U.S.C. § 230(c)(1) (2012). For discussions of § 230 immunity, see Ardia, *supra* note 79; Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986 (2008).

85. *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2308–14 (2014) (describing Internet Age "collateral censorship"); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006).

86. *See* 17 U.S.C. § 512 (c)-(d) (2012). For a discussion of censorship by ISPs pursuant to the Act, see DAWN C. NUNZIATO, *VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE* 17–19 (2009).

87. *See generally* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435 (2011).

Stronger than external pressures to restrict speech is the internal pressure of the profit motive. ISPs sometimes seek to preempt controversy by censoring politically sensitive content, including antiwar messages and criticisms of the ISPs themselves or their commercial partners.⁸⁸ More broadly, ISPs want the power to charge different rates for different kinds and grades of content and to deliver different access speeds to content providers based on their abilities to pay.⁸⁹ The FCC during the Obama administration issued regulations that barred such differential treatment, establishing a legal principle of “net neutrality.”⁹⁰ Under the Trump administration, the FCC has repealed the net neutrality regulations, freeing ISPs to discriminate with impunity in how they manage flows of data.⁹¹

Search engines, like ISPs, play a crucial role in enabling online communication, and they accordingly exercise formidable power.⁹² Search engines’ proprietary algorithms for delivering results that satisfy users’ queries give them a marginally stronger prima facie case than ISPs for the proposition that they exercise a kind of editorial discretion. Search engines, however, have even deeper incentives than ISPs to compromise the free flow of information online. Selling prime positions in search results can bring potentially enormous profits.⁹³ Sometimes search engines sell positions openly, through “sponsored” results.⁹⁴ That designation at least provides transparency, although Google muddies the picture with tactics

88. See NUNZIATO, *supra* note 86, at 5–11.

89. See *id.*

90. See Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015). Net neutrality has prompted a voluminous academic debate. Compare, e.g., Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003) (advocating net neutrality) with Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006) (opposing net neutrality and advocating an alternative principle of “network diversity”). For major treatments of net neutrality as a matter of free speech concern, see NUNZIATO, *supra* note 86; Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L.J. 1211 (2007); Moran Yemini, *Mandated Net Neutrality and the First Amendment: Lessons from Turner and a New Approach*, 13 VA. J. L. & TECH. 1 (2008).

91. See Cecelia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>.

92. See Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J. L. & TECH. 188 (2006).

93. See Jennifer Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1113–15 (2007).

94. See *id.* at 1112.

like restricting availability of sponsored links for controversial political content.⁹⁵ An even greater danger to open public discourse arises when search engines disguise bought results as unbiased. Search engines may also remove results altogether from their indexes or manipulate the rankings of results.⁹⁶ Effective regulatory checks on these practices would require knowledge of search engines' algorithms and other proprietary methods, but the search engine companies have strong profit incentives to protect their trade secrets.

Social media platforms represent the next generation of online speech intermediaries. They establish systems and protocols to identify people with whom one will communicate and determine what sorts of communication one can share with those people, including short text, longer text, still images, and moving images. Some social media platforms exercise degrees of active control over content, as with YouTube's varied tools for promoting certain videos.⁹⁷ Social media's negative consequences for free speech lie in the gulf between its limited expressive capacities and its users' intense reliance on its services. Twitter's cramped format (280 characters per Tweet, doubled from 140 in late 2017) truncates any possibility of thoughtful discussion.⁹⁸ Facebook provides more space to explain ideas and positions, but its customized interface lets users surround themselves entirely with people who reinforce their social and political biases.⁹⁹ Sometimes social media platforms deliberately push falsehood and division, as with YouTube's steering users toward sensationalist content through its "up next" feature.¹⁰⁰ Some architects of social media have strongly condemned their creation's corrosive effects on public discourse.¹⁰¹

95. See NUNZIATO, *supra* note 86, at 14–17.

96. See *id.* at 12–14; Chandler, *supra* note 93, at 1109–11.

97. Chandler, *supra* note 93, at 1124.

98. See Robinson Meyer, *7 Questions About Twitter's Doubled Character Limit*, ATLANTIC (Sept. 26, 2017), <https://www.theatlantic.com/technology/archive/2017/09/oh-jack-dorsey-we-love-you-get-up/541203/>.

99. See John Keegan, *Blue Feed, Red Feed*, WALL ST. J. (May 18, 2016), <http://graphics.wsj.com/blue-feed-red-feed/> (showing stark differences in users' exposure to information depending on their ideological identities). This "filter bubble" phenomenon affects search engines as well as social media. See generally ELI PARISER, *THE FILTER BUBBLE* (2011).

100. See Paul Lewis, "Fiction Is Outperforming Reality": How YouTube's Algorithm Distorts Truth, GUARDIAN (Feb. 2, 2018), <https://www.theguardian.com/technology/2018/feb/02/how-youtubes-algorithm-distorts-truth>.

101. See Mike Allen, *Sean Parker Unloads on Facebook: "God Only Knows What It's Doing to Our Children's Brains,"* AXIOS (Nov. 9, 2017), <https://www.axios.com/sean-parker-unloads-on-facebook-god-only-knows-what-its-doing-to-our-childrens-brains-15133>

The 2016 election starkly demonstrated social media's power and pathologies. Users soaked up selective information, much of it manifestly false, from weaponized sources of what we can call *customized truth*. Facebook's increasing dominance in news distribution multiplied the power of hyper-partisan websites, mainly on the right, and enabled the proliferation of verifiably fake news.¹⁰² The Russian government notoriously spread propaganda and disinformation on Facebook, and Russian "trolls" also manipulated Twitter, YouTube, and Instagram.¹⁰³ The Internet Research Agency, a Russian company with Kremlin links, posted content on Facebook that reached twenty-nine million people, who then shared the posts with tens of millions more.¹⁰⁴ The Internet Research Agency also posted over one million election-related tweets via automated Twitter accounts and created YouTube channels on which it uploaded over 1000 videos.¹⁰⁵ Topics included contentious issues from race and religion to gun regulation and LGBTQ+ rights.¹⁰⁶ The Russians scattered posts and ads on both sides of these issues, exploiting political polarization to increase social fragmentation.¹⁰⁷ To make matters worse, the right-wing data analytics company Cambridge Analytica, employed by the Trump campaign, illegally harvested tens of millions of U.S. Facebook profiles in order to target inflammatory political advertising at specific voters.¹⁰⁸

06792-f855e7b4-4e99-4d60-8d51-2775559c2671.html; James Vincent, *Former Facebook Exec Says Social Media Is Ripping Apart Society*, VERGE (Dec. 11, 2017), <https://www.theverge.com/2017/12/11/16761016/former-facebook-exec-ripping-apart-society> (reporting comments of Chamath Palihapitiya).

102. See Alexis C. Madrigal, *What Facebook Did to American Democracy*, ATLANTIC (Oct. 12, 2017), <https://www.theatlantic.com/technology/archive/2017/10/what-facebook-did/542502/>.

103. See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 17 FIRST AMEND. L. REV. (forthcoming 2018) (manuscript at 6–9); Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html>.

104. See Isaac & Wakabayashi, *supra* note 103.

105. See *id.*

106. See *id.*

107. See John Krugel, *Russia's Social Media Efforts in 2016 Were Not Just False but Inflammatory*, POLITIFACT (Dec. 21, 2017), <http://www.politifact.com/truth-o-meter/article/2017/dec/21/russia-social-media-2016-false-inflammatory/>.

108. See Carol Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, GUARDIAN (Mar. 17, 2018), <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>.

While social media platforms often tout their capacities to democratize political communication, the 2016 election underscored their weaknesses—particularly their inability to foster dynamic engagement.¹⁰⁹ No ethos of civic or social responsibility impeded social media platforms from following their single-minded profit motive down a democratic sinkhole.

B. Internet Age Intermediaries' Social Structuring and Its Discontents

In contrast to Television Age speech intermediaries, Internet Age intermediaries' profitmaking self-interest fully subsumes and defines their social-structuring function. Law, politics, and technology have combined to prevent external constraints on the new intermediaries. We see no online analog to Television Age structural regulations of media ownership, let alone substantive regulations like the fairness doctrine. Net neutrality has set the high-water mark to date for government efforts to influence the new speech intermediaries. Public norms have failed to constrain social media platforms' choices in the way the public trust idea constrained the Television Age news media.¹¹⁰ Internet Age speech intermediaries haven't embraced anything like the journalistic ethical codes of the Television Age.¹¹¹ At most, they attempt to placate public criticism by tweaking their algorithms and platforms in ways that do little for positive social structuring.¹¹² Intermediaries' profit motives deter them from focusing on the public good.¹¹³

109. See Madrigal, *supra* note 102; Sam Sanders, *Did Social Media Ruin Election 2016?*, NPR, Nov. 8, 2016, <https://www.npr.org/2016/11/08/500686320/did-social-media-ruin-election-2016>. While U.S. attention has focused on Russia's interference in our election, other governments manipulate social media to influence domestic public opinion. See *Freedom on the Net 2017: Manipulating Social Media to Undermine Democracy*, FREEDOM HOUSE (Nov. 2017), https://freedomhouse.org/sites/default/files/FOTN_2017_Final.pdf.

110. Operating norms, as Mark Tushnet has pointed out, can't take hold in an information environment as vastly inclusive as the Internet. See Mark Tushnet, *Internet Exceptionalism: An Overview From General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1648–51 (2015).

111. See Renee Diresta & Tristan Harris, *Why Facebook and Twitter Can't Be Trusted to Police Themselves*, POLITICO (Nov. 1, 2017), <https://www.politico.com/magazine/story/2017/11/01/why-facebook-and-twitter-cant-be-trusted-to-police-themselves-215775>.

112. See *id.*; Sam Levin, "Way Too Little, Way Too Late": Facebook's Factcheckers Say Effort Is Failing, GUARDIAN (Nov. 13, 2017), <https://www.theguardian.com/technology/2017/nov/13/way-too-little-way-too-late-facebooks-fact-checkers-say-effort-is-failing>; Laura Hazard Owen, *Facebook's Newsfeed Changes Attempt to Curb the Spread of Fake News*, INT'L JOURNALISTS' NETWORK (Jan. 19, 2018), <https://ijnet.org/en/blog/facebooks-newsfeed-changes-attempt-curb-spread-fake-news>.

113. See Diresta & Harris, *supra* note 111; Hasen, *supra* note 103 (manuscript at 26).

Commentators during the early Internet Age offered prescient warnings that the capacity to tailor our online experiences to fit our preexisting preferences would fray the social fabric, dividing people with different beliefs and values. Andrew Shapiro warned that news media without intermediation could, in the manner of Kurosawa's *Rashomon*, yield a dizzying array of perspectives that would make actual states of affairs hard to discern.¹¹⁴ Personalization of information sources, what Cass Sunstein called "the Daily Me," could lead to a paralyzing morass of polarized disagreements over basic truths.¹¹⁵ These early commentators tended to think the market, driven by user demands, would generate effective solutions to these problems.¹¹⁶ Our present media environment, notably the problems of filter bubbles, fake news, and manipulation of social media that plagued the 2016 election, bears out these commentators' warnings while exposing the weakness of their *laissez-faire* prescriptions. Online intermediaries' damaging effects on public discourse—notably, though not exclusively, their promotion of social fragmentation—have prompted calls for subjecting the new intermediaries to some degree of legal control.

Most reformers advocate scaling back present First Amendment doctrine to permit legislative and administrative regulation of online intermediaries. Jack Balkin, for example, advocates a free speech regime based on a mix of private sector initiatives and technocratic government oversight.¹¹⁷ In the Internet Age, he argues, protection of free speech values won't depend on affirmative constitutional rights but rather on "the design of technological systems—code—and . . . legislative and administrative schemes of regulation, for example . . . open access requirements or the development of

114. See SHAPIRO, *supra* note 2, at 188–92.

115. CASS SUNSTEIN, *REPUBLIC.COM 2.0* at 1, 46–96 (2007) (warning about dangers of a fragmented information environment).

116. See SHAPIRO, *supra* note 2, at 206 (positing that "[a] combination of corporate goodwill and consumer pressure" would lead online intermediaries to steer users toward encounters with unexpected information sources); Berman & Weitzner, *supra* note 73, at 1626–29 (positing the internet's "[d]ecentralized architecture" as a sufficient mechanism to fulfill democracy's need for diverse information). Professor Sunstein showed some ambivalence about regulation. Compare SUNSTEIN, *supra* note 115, at 190–211 (arguing that mechanisms for encouraging individual Web sites to spur critical and civic engagement should be entirely voluntary), with Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757, 1795–1803 (1995) (advocating various legislative regulations of services that provide Internet access).

117. See 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, 52–54 (2004).

compulsory license schemes in copyright law.”¹¹⁸ Several commentators contend that ISPs should be subject to regulation as common carriers.¹¹⁹ This approach, embodied in net neutrality, would roughly extend the Supreme Court’s treatment of broadcasters in *Red Lion* and cable companies in *Turner* to ISPs. Advocates of legislative reform have proposed a range of regulatory strategies beyond net neutrality, including requirements that intermediaries disclose their methods for aggregating and presenting information¹²⁰ and safeguards against intermediaries’ encroaching on users’ privacy¹²¹ and intellectual property.¹²²

Congress has given small indications that it might consider regulatory reform strategies to constrain online speech intermediaries. In the wake of the 2016 election, a bipartisan group of legislators sponsored a bill that would regulate online intermediaries like traditional media by making them disclose who pays for political advertisements.¹²³ The Cambridge Analytica scandal has also led Congress to take a greater interest in social media firms’ data practices.¹²⁴

A more radical strategy for constraining the new speech intermediaries would fundamentally recast First Amendment law to give intermediaries affirmative constitutional obligations to promote free speech.¹²⁵ Advocates of this approach view the internet as a communications environment in

118. *Id.* at 54.

119. See NUNZIATO, *supra* note 86, at 135–46; Sunstein, *supra* note 116, at 1798 (suggesting that regulation of Internet access providers as common carriers wouldn’t violate the First Amendment); Tushnet, *supra* note 84, at 1010 (proposing common carrier regulation as one appropriate form of compensation for ISPs’ statutory immunity from liability for harms of the speech they transmit).

120. See NUNZIATO, *supra* note 86, at 149–51; Chandler, *supra* note 93, at 1117–18.

121. See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1185–87 (2016).

122. See Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L. Q. 235, 293–94 (2014).

123. See Steven T. Dennis, *Senators Propose Social-Media Ad Rules After Months of Russia Probes*, BLOOMBERG (Oct. 19, 2017), <https://www.bloomberg.com/news/articles/2017-10-19/russia-probes-spur-lawmakers-on-election-security-social-media>.

124. See, e.g., David Smith, *Zuckerberg Put on Back Foot as House Grills Facebook CEO Over User Tracking*, GUARDIAN (April 11, 2018), <https://www.theguardian.com/technology/2018/apr/11/zuckerberg-hearing-facebook-tracking-questions-house-back-foot>.

125. See Goodman, *supra* note 90, at 1211–17; Yemini, *supra* note 90, at 1–7; see also NUNZIATO, *supra* note 86, at 105 (contending that courts should treat ISPs as state actors). For an extended discussion of the tensions between affirmative constitutional proposals for access rights and constitutional allowances for access regulations, see Magarian, *supra* note 45.

which multiple speech interests—of many and varied content providers, intermediaries, and audiences—routinely conflict. First Amendment doctrine should evolve to fit this new, complex communication ecosystem by recognizing net neutrality, and perhaps other structural and even substantive reforms, as mandatory preconditions for preserving expressive freedom in the Internet Age. “[T]he real justification for network neutrality,” contends Moran Yemini, “is content providers’, and especially users’, own individual free-speech rights, stemming directly from the First Amendment.”¹²⁶ Such a bold shift in First Amendment doctrine would require—and its supporters encourage—openly normative judicial assessments of competing rights claims in challenges to structural regulations like net neutrality.¹²⁷ In Ellen Goodman’s formulation, “where there truly are speech interests on both sides, the question [should be] whether the government intervention is actually pro-speech or anti-speech in ways that are constitutionally meaningful.”¹²⁸ This affirmative constitutional approach to constraining intermediaries would invert, not just dodge, the barriers to reform erected by present First Amendment doctrine.

III. Back to the Future

Consideration of speech intermediation and its critics in the Television and Internet Ages provides raw material for thinking through some of the deepest challenges on our present communications landscape. In particular, this Essay’s discussion of old and new speech intermediaries sheds some light on the paradox of Internet Age speech intermediation. Many people simultaneously believe that online intermediaries have too much power, because of the various ways they degrade public discourse, and that online speech needs stronger intermediation, because we’ve lost the relative unity that old media intermediaries enforced during the Television Age. Lessons from the Television Age suggest a two-part program for moving forward. First, we should create legal space for Internet Age analogs to the Television Age regulations that placed social policies above speech

126. Yemini, *supra* note 90, at 38; *see also* MCCHESENEY, *supra* note 61, at 143–45 (positing the necessity of net neutrality for the availability of quality journalism online).

127. I have advocated this sort of approach generally for cases that present conflicts between First Amendment interests. *See* Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation Enhancing Review*, 83 NOTRE DAME L. REV. 185, 185–91 (2007).

128. Goodman, *supra* note 90, at 1258. Professor Goodman advocates an analysis akin to rational basis review for content-neutral government regulations designed to enhance speech opportunities. *See id.* at 1256–61.

intermediaries' profits. Second, we should push for Internet Age intermediaries' structuring of public discourse to strike a healthy balance between the dynamic engagement we lacked in the Television Age and the social cohesion we increasingly lack now.

A. First Amendment Law vs. Free Speech Principles

Our substantive aspirations for public discourse in the Internet Age will either be borne on the wings or ground in the teeth of the First Amendment. A regulatory program that pushed intermediaries to promote a system of communication that served the public interest might stop at structural regulations like net neutrality, or it might proceed through some version of substantive regulation. Whatever form such a program took, some intermediaries would insist it transgressed First Amendment boundaries. Those boundaries, as a general matter, do valuable work. They embody a well-grounded presumption that substantive government regulations of speech are usually too ill-motivated or ill-conceived to permit.¹²⁹ Should that insight leave any room for regulation of the new speech intermediaries?

Both opponents and advocates of greater legal constraints on Internet Age speech intermediaries agree that prevailing, libertarian First Amendment doctrine presents strong—perhaps impregnable—barriers against most approaches to regulating intermediaries.¹³⁰ Conventional First Amendment doctrine, constrained by the state action principle that grounds most constitutional rights, refuses to confront conflicts between speech interests. Like an old formula Western, the doctrine requires a good guy and a bad guy: a putatively censored speaker and the putatively censorious government. The rigid, parallel distinctions of public from private and of censors from speakers have always limited First Amendment law's responsiveness to speech controversies and distorted how legal doctrine reflects the values that animate constitutional speech protection.¹³¹ First Amendment law insulates speech intermediaries to pursue profit while

129. See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

130. See Chandler, *supra* note 93, at 1124–29 (evaluating against First Amendment concerns various proposals for regulating intermediaries); Tutt, *supra* note 122, at 272–86 (discussing elements of First Amendment doctrine that impede intermediary regulation); Yemini, *supra* note 90, at 13–32 (same); Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 697–703 (2010) (praising present First Amendment doctrine as a barrier to regulations of speech intermediaries).

131. See Magarian, *supra* note 127, at 191–93; Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 135–146 (2004).

shielding them from social obligations. That's why Television Age critics of speech intermediation sought to move First Amendment doctrine in a direction that would allow greater regulation of intermediaries¹³² or affirmatively subject them to constitutional free speech obligations.¹³³ Those critics saw the need to change First Amendment law in order to promote free speech values.

The contrast between *Miami Herald v. Tornillo* and *Red Lion* reveals an apparent distinction the Television Age Supreme Court drew between newspapers' axiomatic editorial integrity and broadcasters' more crassly commercial priorities.¹³⁴ No one ever denied, however, that broadcasters, by creating and disseminating content, were speakers in some important sense. It's hard to find the same expressive character in Comcast, Google, or Facebook. These new intermediaries all convey information, but autonomous third parties—individual users and creators—produce the information the intermediaries convey.¹³⁵ Most online intermediaries don't even actively select those users and creators, as cable systems select channels.¹³⁶ Rather, the new intermediaries flourish by making their services generally available.¹³⁷ “The very term ‘intermediaries,’ as opposed to ‘the press,’” notes Rebecca Tushnet, “emphasizes that aggregators, compilers, and other more passive conduits are not themselves the source of speech.”¹³⁸ First Amendment interests of online intermediaries generally derive from the interests of their users. Granting First Amendment protection to intermediated online speech presents little problem when intermediaries and their users stand in common cause against government efforts to censor speech that the users make or seek and the intermediaries

132. See, e.g., BAKER, MEDIA, *supra* note 61, at 63.

133. See, e.g., BARRON, *supra* note 68, at 1662–63.

134. Compare 418 U.S. 241 (1974) with 395 U.S. 367 (1969).

135. See NUNZIATO, *supra* note 86, at 114.

136. See *id.* at 115.

137. Online intermediaries vary substantially in how they organize, channel, and promote content. Thorough First Amendment analysis of any regulatory proposal would need to consider the particular attributes and practices of the regulated intermediaries. See, e.g., TUSHNET, *supra* note 110, at 1670 (suggesting that the constitutionality of regulating intermediaries as common carriers might vary with different intermediaries' degrees of editorial intervention in the content they carry).

138. TUSHNET, *supra* note 84, at 988; see also SULLIVAN, *supra* note 71, at 1654.

carry.¹³⁹ The situation changes dramatically when the interests of intermediaries and users diverge.

Other commentators, however, have sought to bring ISPs within the First Amendment's protection for intermediaries' editorial discretion.¹⁴⁰ For example, Jonathan Zittrain justifies strong First Amendment protections for online intermediaries by characterizing them as "content curators."¹⁴¹ Meanwhile, courts have strengthened the foundation for treating intermediaries as First Amendment speakers. While intermediaries have grown more powerful and harder to restrain, First Amendment doctrine has grown more formalistic in its reflexive concern for wealthy and privileged speakers.¹⁴² The "fourth estate" justification for imposing social obligations on the news media (whatever entities that category now includes) has gone the way of eight-track tapes.¹⁴³ The hardening of the public-private distinction in First Amendment law presents a particularly rough thicket for reform efforts.¹⁴⁴

I have argued elsewhere that the Roberts Court's version of First Amendment doctrine protects the speech interests of powerful, established institutions while letting the government restrict much speech from the social and political margins.¹⁴⁵ This approach to the First Amendment, which I call "managed speech," promotes a conservative ideal of social and political stability while stifling dynamism in public discourse.¹⁴⁶ The Court doesn't simply favor wealthy and powerful speakers and disfavor poor and marginal speakers; rather, it enlists the former as guardians of a social order threatened by the latter. Managed speech reinforces First Amendment doctrine's preference for the interests of online speech intermediaries over

139. An example of this scenario is a federal court's recent holding that the President violated the First Amendment when he blocked Twitter followers who criticized him. *See Knight First Amendment Institute v. Trump*, No. 17 Civ. 5205 (S.D.N.Y. May 23, 2018).

140. *See Yemini*, *supra* note 90, at 17–20; *Yoo*, *supra* note 130, at 742–45.

141. Jonathan Zittrain, *Facebook Could Decide an Election Without Anyone Ever Finding Out*, *NEW REPUBLIC* (June 1, 2014), <https://newrepublic.com/article/117878/information-fiduciary-solution-facebook-digital-gerrymandering>.

142. *See generally* Julie E. Cohen, *The Zombie First Amendment*, 56 *WM. & MARY L. REV.* 1119 (2015).

143. *See, e.g., In re Grand Jury Subpoena: Judith Miller*, 397 F. 3d 964, 968–72 (D.C. Cir. 2005) (taking a narrow view of journalists' legal latitude to protect the identities of confidential sources).

144. *See Tushnet*, *supra* note 110, at 1667–72; *Tutt*, *supra* note 122, at 265–66.

145. *See* GREGORY P. MAGARIAN, *MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT* (2017).

146. *See id.* at xiv–xvi (introducing the managed speech conception of First Amendment jurisprudence).

those of individual users.¹⁴⁷ Intermediaries are exactly the sort of formidable institutions whose speech interests the Roberts Court values most.¹⁴⁸ This Court's limited forays into new media First Amendment issues consistently resist government regulation.¹⁴⁹ Down the road, however, online intermediaries' promotion of social fragmentation could conceivably set managed speech's methodology of empowering the powerful against its mission of reifying stability.

The absence online of the spectrum scarcity often portrayed as animating Television Age broadcast regulations eliminates a conventional justification for imposing substantive regulations on speech intermediaries. The Internet Age, however, features its own scarcity.¹⁵⁰ The proliferation of available information has exposed the importance of audience attention as a scarce resource in today's system of free expression.¹⁵¹ Attention scarcity allows for the aggressive use of information overload as a tool for drowning out other speech.¹⁵² In addition, the Internet Age has continued—and even exacerbated—the Television Age pattern of concentrated intermediary ownership.¹⁵³ Old media entities have carried their concentrations of ownership with them to the internet.¹⁵⁴ As for the new speech intermediaries, the roster of dominant ISPs, search engines, and social media sites looks barely more extensive or diverse than the “big three” networks and other concentrated intermediaries of the Television Age.

147. See MAGARIAN, *supra* note 145, at 227–53.

148. See *id.* at 252–53.

149. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732–33 (2017) (striking down a ban on registered sex offenders' access to social media sites); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 798–805 (2011) (striking down a ban on selling violent video games to minors); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572–79 (2011) (striking down a ban on drug makers' use of mined prescription data as a marketing tool).

150. I don't mean to argue, and I don't believe, that physical scarcity is a necessary precondition for media regulation. *Cf., e.g., Sunstein, supra* note 116, at 1764–65 (advocating a normative conception of First Amendment law without regard to spectrum scarcity).

151. See BAKER, CONCENTRATION, *supra* note 46, at 101–10 (analyzing audience concentration on the Internet); Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failure of Digital Markets*, 19 BERKELEY TECH. L.J. 1389 (2004).

152. See Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete>.

153. See BAKER, MEDIA, *supra* note 61, at 285–307; Tushnet, *supra* note 84, at 992–93; see also Morant, *supra* note 48, at 979–84 (advocating a conception of scarcity that counts only the dominant media sources from which most people get information).

154. See BAKER, CONCENTRATION, *supra* note 46, at 111–12.

Despite the threats that attention scarcity and ownership concentration pose to free speech, we face a severe disconnect between what First Amendment doctrine permits and what a socially constructive account of free speech principles compels.

We need a First Amendment doctrine that can advance a regime of speech intermediation to serve the public interest. The doctrinal path could lead in any of several directions.¹⁵⁵ We could seek to persuade courts to impose affirmative First Amendment obligations on speech intermediaries. Alternatively, we could seek to persuade courts to construe the First Amendment as letting Congress and administrative agencies regulate intermediaries in public-regarding ways. Those regulations might focus on broad structural reforms. Recall how structural regulations in the Television Age distinctively countered intermediaries' tendency to promote homogeneity. One familiar structural approach would be to treat intermediaries as common carriers, as the net neutrality principle treats ISPs. A different structural approach could invoke pro-competitive principles to subject dominant intermediaries to greater market competition,¹⁵⁶ although economic qualities of the internet would pose substantial challenges to anti-monopolistic reforms.¹⁵⁷ Alternatively, a substantive regulatory strategy might compel intermediaries to monitor content based on accuracy, privacy, or harm-based concerns. That sort of strategy could entail relaxing or ending online intermediaries' CDA immunity. Whatever path we follow, if we want Internet Age speech intermediation not just to maximize private profit but to serve some conception of the public good, we need to rethink First Amendment doctrine.

B. Reconciling Social Cohesion and Dynamic Engagement

The profitmaking function of speech intermediation presents the same problems in the Internet Age that it presented in the Television Age. Speech intermediaries are private companies that exist to make money. From the perspectives of all but the most convinced right-wing libertarians, intermediaries' profits are at best incidental and at worst contrary to society's well-being. The early cyberoptimists were right to understand the

155. See *supra* notes 117–128 and accompanying text.

156. Cf. STEVE COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1988).

157. See, e.g., Neil W. Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 439–43 (2000) (discussing the importance of economies of scale, network benefits, and market entry costs for the emergence of dominant online intermediaries).

internet's technology as creating a far broader set of possibilities than the Television Age ever offered for how public discourse can work. We should maintain a healthy skepticism about the political and legal mechanisms by which we impose social obligations on intermediaries. However, we have good reasons to hope that the lessons of the past and the innovations of the present will help the Internet Age improve over the substantive results of regulating speech intermediaries in the Television Age.

What kind of social structure should we aim for Internet Age speech intermediaries to promote? One of the abiding challenges of public discourse in a democratic society is to reconcile the values of social cohesion and dynamic engagement. Members of a community need common frames of reference to help them engage with one another and participate together in political and social processes. At the same time, democratic politics and societal progress depend on the ability and willingness of everyone in the community to question what we think we know.¹⁵⁸ Social cohesion and dynamic engagement provide complementary benefits for public discourse. At the same time, the two values elementally conflict. Too much cohesion brings a stultifying conformity that can dull the critical edge of political debate. Conversely, an overly sensitive critical trigger can curdle dynamic engagement into nihilistic cynicism, corroding public discussion by preventing any meaningful consensus.

Speech intermediation in the Television Age overvalued uniformity in public discourse at a steep cost to dynamic engagement. The broadcast television networks, along with other speech intermediaries, homogenized debate and flattened difference. The image of the world they beamed into everyone's brains was oppressively white, aggressively male, reflexively middle class and gentile, and thoughtlessly straight and cisgender. Their politics congealed in a mushy center.

People in the Television Age, of course, frequently disagreed with one another and assessed public issues critically. Most vividly, social movements against the Vietnam War, racial apartheid, and subordination of women forcefully challenged settled allocations of power. For the most part, however, efforts to destabilize prevailing ideas worked against the dominant speech intermediaries, not through them. We can be grateful that the internet's technological infrastructure makes Television Age intermediaries' pressure toward conformity impossible for online

158. This dichotomy is a variation on what Robert Post calls "the paradox of public discourse." ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 147–48 (1995).

intermediaries to replicate. Even so, our present vantage point suggests that Television Age critics may not have sufficiently valued the social responsibilities that period's regulations and norms imposed on speech intermediaries. Journalistic standards and ethical codes, for instance, look very appealing in an age of fake news and filter bubbles.

Our society has grown more contentious in the Internet Age for many reasons, some of them laudable. Today we have greater access to more information and a broader range of viewpoints, causing inevitable divergences between different people's bases of knowledge. People divided by continents, with radically different cultural and political values, can engage or confront one another as easily as if they met across a backyard fence. Liberation movements have brought members of marginalized groups greater agency and autonomy, increasing social and cultural heterogeneity. The shift from the old to the new speech intermediaries has aided these positive developments by lowering entry costs into public discourse. Unfortunately, online intermediaries have also helped to erode social cohesion in less beneficent ways, mainly by accelerating the customization of truth. The Internet Age indulges biases to virtually no end—or to no virtual end.

Even as the customization of truth weakens social cohesion, it simultaneously garbles dynamic engagement. When you live in an echo chamber, you lose any reason to believe you might be wrong. You therefore lose any motive to interrogate your beliefs. Customized truth creates false certainty. People who get most of their knowledge from their like-minded friends and followers on Facebook and Twitter may forget how to look for other sides of a story. At worst, we become susceptible to an absurd degree of faith in the public figures and ideas that we've favored all along and an automatic willingness to believe the worst about the people and ideas we've opposed. Customized truth makes sense from a commercial standpoint: the ability to micro-target goods and services based on preexisting preferences is great for business. It's not so great for democracy.

Comparison of Television and Internet Age speech intermediation should reassure us that both epochs' critics had sound reasons for their contrasting complaints. The expressive infrastructure of the Mass Media Era has never delivered a healthy balance between social cohesion and dynamic engagement. The Television Age overvalued uniformity; the Internet Age has degraded both qualities. Reasonable (and unreasonable) people will, of course, disagree normatively about where the optimal balance falls. The problem is sufficiently abstract and complex to make it very difficult. The importance of the outcome justifies the effort.

Conclusion

Speech intermediation will always be necessary in our massive, complex, diverse society. The essential questions about speech intermediaries are what shapes they'll take under different social and technological conditions and in which directions they'll move public discourse. In the Television Age, speech intermediaries were huge, concentrated institutions that kept most speakers from mass audiences and pushed society toward numbing conformity. Law and public norms regulated and influenced intermediaries' behavior in ways that generally exacerbated their homogenizing tendencies. In the Internet Age, intermediaries are huge, concentrated institutions that give many speakers access to mass audiences and push society toward chaotic fragmentation. We indulge their profit-motivated autonomy in ways that let them degrade social cohesion and dynamic engagement all at once.

One key difference between Television Age and Internet Age speech intermediation is the content of First Amendment law. Our retreat from regulation has something to do with the technological qualities of online speech intermediaries, but it also has a lot to do with a doctrine that has shifted toward an overbearing solicitude for powerful institutions. If we want intermediaries to serve the public good, then we need to change First Amendment law, whether incrementally to permit regulation of intermediaries or radically to compel them to promote free speech values. If we can fix the doctrine, then we have to figure out what kind of public discourse we want intermediaries to foster. The excesses of Television Age homogeneity and Internet Age fragmentation, viewed together, commend the middle ground: a healthy balance between social cohesion and dynamic engagement. May the lessons of our past help guide us to a brighter future.