Regulating Social Media in the Free-Speech Ecosystem*

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Introduction

To determine the appropriateness of any proposed legal regulation of social media, we need to answer a question the Supreme Court faced in the late 1960s and early 1970s as to newspapers and broadcast media: what institutional role should social media play in the broader free-speech ecosystem? One subset of this question is, where should social media companies lie on what we might call the "speaker-conduit continuum"? In a pair of unanimous decisions half a century ago, *Red Lion Broadcasting v. FCC* and *Miami Herald v. Tornillo*, the Court held that a "right to reply" requirement was constitutional when applied to broadcast media but unconstitutional when applied to newspapers. In so holding, the Court implicitly

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placed newspapers firmly on the "speaker" side of the speaker-conduit continuum and saw broadcast media as having some attributes of a "conduit."

The Court's decisions depended on a social construction of newspapers and broadcast radio, one that intertwines with the *public values* the Court saw each medium as furthering. We thus cannot understand the seemingly paradoxical nature of *Red Lion* and *Miami Herald* without thinking about what attributes of "public-ness"—what public values—the Court understood newspapers and broadcast media as having. In particular, the Court understood broadcast as a Meiklejohnian medium of communication, one where the interests of the public as *audience* were of primary concern.

Similarly, we cannot understand the appropriateness of legal regulation of social media without making judgments about both where on the "speaker-conduit continuum" social media companies should lie and what public values we want them to embody.

This Essay proceeds in three parts. In the first, I explain *Tornillo* and *Red Lion*, and the broadcast-newspaper distinction through the lens of the conduit-speaker continuum. In Part II, I then turn to what we could call the "public-private continuum." I argue that our free-speech ecosystem includes a bevy of entities that are neither "public" nor "private" in a conceptual sense and that we can better understand approaches to social media regulation through the lens of these "quasi-public" entities—or, more precisely, through the public values furthered by the regulatory structure surrounding these entities. In Part III, I conclude with some thoughts on how this lens can help us understand a couple of prominent academic approaches to regulating social media, Professor Rahman's "informational infrastructure" framework and Professor Balkin's "fiduciary" framework.

I. Mass Media and the Conduit-Speaker Continuum

I.A. Introduction

The principal point of this Part is that we have always had entities that are neither pure speakers themselves nor merely conduits of others' speech, and that these entities serve functions that help shape the free-speech ecosystem. I will use a debate from a half-century ago to argue that we can see these different functions in the free-speech ecosystem as premised on different theories of the First Amendment. That debate, about so-called "right to reply" requirements imposed on newspapers and broadcast stations, raised fundamental questions about the First Amendment. I am going to suggest that what the debate shows is that conflicting free-speech values can co-exist, but only if we are sensitive to the institutional context in which those values play out.

That may seem a little abstract, but the core big-picture point for purposes of social media is that figuring out what forms of regulation of social media we want requires understanding what public values we want social media to further. The Court did just this when it decided that a "right to reply" statute for newspapers violated the First Amendment, but that a similar requirement for broadcast radio stations did not.

I.B. *Red Lion*, *Tornillo*, and the Broadcast-Newspaper Distinction

1. *Tornillo*

Tornillo involved a First Amendment challenge to a Florida "right to reply" statute. The statute required newspapers that criticized a candidate for office to give that candidate free space in the paper to reply.[1] In a unanimous decision, the Supreme Court concluded that the statute violated the First Amendment's guarantee of a free press. The Court understood the statute as "[c]ompelling" a newspaper to publish "that which 'reason' tells it should not be published" and held that such a "compulsion" was "a command in the same sense as a statute or regulation forbidding [the Miami Herald] to publish specified matter." The Court further noted that "[t]he Florida statute exacts a penalty on the basis of the content of a newspaper," the penalty being the "cost in printing and composing time and materials in taking up space that could be devoted to other material the newspaper may have preferred to print."[2] The Court also favorably acknowledged a disincentive argument the *Miami Herald* had made: "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy."[3] If that were to happen, the statute might " 'dampen[] the vigor and limit[] the variety of

[1] The statute required any newspaper that "assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose [to], upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply." 418 U.S. at 244 n.2 (quoting Fla. Stat. sec. 104.38 (1973)).

[2] 418 U.S. at 256.

[3] 418 U.S. at 257.

public debate,' "[4] which would in turn undermine the First Amendment value of "discussion of governmental affairs, ... includ[ing] ... candidates."[5]

Finally, the Court made explicit that the questions of space limitations and "costs" imposed on the newspaper were ultimately irrelevant: "Even if a newspaper would face no additional costs to comply with compulsory access and would not be forced to forgo publication of news or opinion by the inclusion of a reply," the statute violates the First Amendment "because of its intrusion into the function of *editors*."[6] Notice this conception of a "newspaper" as including "editors," a point I will return to shortly. This line is then followed by an almost constitutive statement about what a "newspaper" is: "A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—*whether fair or unfair*—constitute the exercise of editorial control and judgment."[7] This is why, as the Court then puts it in the opinion's next sentence, "governmental regulation of this crucial process" violates the "First Amendment guarantees of a free press as they have evolved to this time."

There is no doubt that *Tornillo* fits with a popular conception of the First Amendment: government may not suppress or compel speech. The logic of the Court's opinion does depend on equating a compulsion to speak with an "abridgement" of the "freedom of the press." But, even without citing, say, the compelled pledge-of-allegiance case,[8] the Court's claim on this point seems easy to treat as obvious. At core then, this seems like an easy case, resolvable by a straightforward syllogism: Premise #1: The First Amendment prohibits government from compelling speech. Premise #2: Florida's right-to-reply statute compels the Miami Herald to speak. Conclusion: Florida's right-to-reply statute violates the First Amendment. On the surface, that's all there is to it. Indeed, the case was nine to nothing.

My goal, though, is to convince you that, even if *Tornillo* is an easy case, it raises very difficult issues, issues that resonate today. What makes *Tornillo* "easy" is a series of assumptions about what a newspaper is, assumptions that depend on a social construction of "newspaper," assumptions that are undoubtedly correct as a factual and historical matter, but that were unstated. A newspaper must act, as Professor Blasi has put it, as a "check" on government. In this sense, a newspaper

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[4] 418 U.S. at 257 (quoting New York Times v. Sullivan, 376 U.S. at 279).

[5] 418 U.S. at 257.

[6] 418 U.S. at 258.

[7] 418 U.S. at 258 (emphasis added).

[8] *West Virginia v. Barnette*

must be not only a "speaker" as opposed to a "passive receptacle or conduit," but it must also be a "private" entity. Or, perhaps more precisely, it must be, I will argue, very far over on the "private" side of the private-public continuum. If we take away those assumptions, then the case isn't easy at all. And it is those assumptions that do not necessarily apply to a host of media in the 21st century. Perhaps it is obvious that developments in communications technology have confounded the question of who is a speaker and who a "passive receptacle or conduit" in the twenty-first century. But my argument is that technological developments will force us to ask questions not just about the blurred lines of the speaker-conduit dichotomy, but also about the public-private continuum. Importantly, my claim is that we simply cannot decide the appropriateness of most proposals for social media regulation without answering (at least implicitly) the question of where on that public-private continuum the entity being regulated lies.

Before we get there, though, we need to go back five terms in the Supreme Court's life, to 1969 and *Red Lion Broadcasting v. FCC*.

2. *Red Lion*

Red Lion Broadcasting v. FCC involved a statutory and constitutional challenge to the FCC's then so-called "fairness doctrine," a requirement that radio and television broadcasters present discussion of public issues and that each side of those issues be given fair coverage. Included in this broad requirement was a specific obligation that a broadcaster provide equal broadcast time to anyone or any group whose "honesty, character, integrity or like personal qualities" had been subject to "attack" during a broadcaster's "presentation of views on a controversial issue of public importance."[9] To put it simply, this obligation was effectively identical to the Florida "right to reply" statute the Court addressed in *Tornillo*, but of course as applied to the broadcast medium, not newspapers.

Red Lion, the owner of a Pennsylvania radio station, broadcast a speaker, Reverend Billy James Hargis, who harshly criticized Fred Cook, an author who had written a critical biography of Barry Goldwater, the Republican candidate for President. This was in November 1964, a few weeks after the 1964 Presidential election. When Cook heard that he had been criticized, he demanded free reply time, which Red Lion refused. The FCC then concluded "that Red Lion had failed

[9] 395 U.S. at 373 (quoting 47 CFR ss. 73.123, 73.300, 73.598, 73.679).

to meet its obligation under the fairness doctrine."[10] Red Lion sought review in the D.C. Circuit and then, after the FCC prevailed there, petitioned for certiorari in the Supreme Court, arguing that the fairness doctrine exceeded the FCC's authority under the Federal Communications Act and violated the First Amendment.

The Court began its discussion of the First Amendment challenge by declaring that, "[a]though broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[11] Before turning to broadcasting specifically, the opinion mentioned the "technology" of the "sound truck," noting that because a sound truck can "produce sounds more raucous than those of the human voice," government is permitted to impose restrictions "so long as [they] are reasonable and applied without discrimination."[12] It is then that the Court analogizes the broadcaster to the sound truck operator: "The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."[13]

Before I turn to the rest of the Court's reasoning, notice this analogy, made at the very outset of the Court's constitutional analysis: the broadcaster who fails to give equal time is like a "sound truck ... snuff[ing] out the free speech of others." On first blush, this is a bizarre analogy—the broadcaster is nothing like a sound truck and isn't really "snuff[ing] out" anyone. But if we probe the analogy, we can see something about the conception of broadcasting the Court brings to its constitutional interpretive task, a conception that will connect to my claim that what we are really deciding when we regulate social media is where on the public-private continuum social media as a communications medium belongs. First, consider how a sound truck "snuff[s] out the free speech of others": by being loud, a sound truck crowds out other speech *within a certain geographic area*. Once someone is outside of the geographic area, no speech is being "snuff[ed] out." How is broadcasting analogous? The broadcaster has exclusive access *to a certain airwave frequency within a certain geographic area*. Once someone is outside either the broadcaster's exclusive frequency or outside of the geographic area, no speech is being "snuff[ed] out."

Key here is that neither the sound truck nor the broadcast station is preventing anyone from speaking. Instead, both are monopolizing a certain *audience*, a group of people who are within the range. And even so, the monopolization isn't literally complete. A speaker can circumvent the sound truck by getting close enough

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[10] 395 U.S. at 372.

[11] 395 U.S. at 386.

[12] 395 U.S. at 387 (citing Kovacs v. Cooper, 336 U.S. 77 (1949)).

[13] 395 U.S. at 387 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)).

to a listener to get one's message across: people do of course still have conversations when a sound truck is blaring! Similarly, a speaker can broadcast on a different frequency and get the message to the exact same geographic area. No doubt, Fred Cook could have found some radio station in the same region of south-central Pennsylvania to broadcast his response to Hargis. What Fred Cook couldn't do without using Red Lion's radio frequency, though, is to reach the very *audience* that heard Hargis's attack on him.

The Court's sound-truck analogy becomes important at the next step of the Court's analysis too, as we see the Court recognizing that the free-speech question is affected by technology. Both the sound-truck and radio waves are technologies that affect not only speaking, but more importantly, *listening*. When explaining what we now think of as the scarcity rationale, the Court made not only the now familiar (and roundly criticized) point that government needed to regulate the broadcast medium in order to ensure that broadcasting did not become a Tower of Babel (Babble??), but that what mattered was "meaningful communications" between speakers and listeners: "When two people converse face to face, *both should not speak at once if either is to be clearly understood.*"[14] Notice the assumption that, even without technological aid, the point of communication is for someone "to be clearly understood." This may all seem obvious, but it is crucial to realize that the Court is implicitly understanding the point of communication to be for the listener, that is, the audience, not for the speaker.

The Court is quite explicit about this, tying it to the scarcity rationale, by imputing to the broadcaster a public purpose. The crux of the opinion starts with a typical "greater includes the lesser" argument: "No one," the Court says, "has a First Amendment right to a license." Thus, "to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" Importantly, because the "licensee has no constitutional right to be the one who holds the license," the licensee thus has no right "to monopolize a radio frequency to the exclusion of his fellow citizens." Instead, the government may "requir[e] 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."[15]

Notice a couple of things here. First, the portion I have italicized, the reference to the licensee as a "fiduciary with obligations." For those familiar with

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[14] 395 U.S. at 387.

[15] 395 U.S. at 389; *see also id.* at 391 ("[T]he First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resources which the Government has denied others the right to use.").

modern scholarly discourse about social media, they will immediately recognize the "fiduciary" reference as the basis of a conceptions of the online companies introduced and argued for by Professors Jack Balkin and Jonathan Zittrain.[16] I will return to this shortly.[17] Second, and related, the reference to "monopoliz[ing]." As I noted earlier, any monopolization is limited to a specific radio frequency and a geographical area. Or, as the antitrust lawyers and economists might put it, the "market" being monopolized is pretty narrow.

But, in what way is it really "monopoliz[ation]"? What "market" is being monopolized when a sound truck drowns out other speech or a broadcaster refuses to carry the speech of another? It is the monopolization of a *specific audience*, the eardrums and auditory cortex of a *specific group of people for a specific time*. We can see the Court make this crystal clear in what may be *Red Lion*'s most well-known line: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[18] But of course, there is no evidence whatsoever that the "listeners" of Reverend Hargis's attack on Fred Cook wanted to hear from Fred Cook at all. The "right" of the "listeners" in this context is thus pretty nebulous as far as rights go—indeed, it is perhaps more of a quasi-*duty* to hear from Fred Cook than a right to hear him. But why should this be so? The answer, the Court tells us, is "the First Amendment goal of producing an informed public." Those subject to "personal attacks occurring in the course of discussing controversial issues" and "opponents of those endorsed by the station" should "be given a chance to communicate with the public."[19] Of course, Fred Cook has plenty of opportunities "to communicate with the public"—he wrote a book after all.[20] What he doesn't have without the FCC's fairness doctrine, however, was a chance to communicate with the specific audience that heard Hargis's attack on him.

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[16] *See, e.g.*, Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016); Jack M. Balkin and Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, THE ATLANTIC (Oct. 3, 2016), https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/ . Neither Balkin nor Zittrain rely on or hearken back to *Red Lion*, and as we will see, they view tech companies as fiduciaries to their users as data providers broadly, whereas the *Red Lion* Court's reference to "fiduciary" sees broadcast licensees as fiduciaries to *listeners*.

[17] *See infra* Section III.B.

[18] 395 U.S. at 390; *see also id.* ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.").

[19] 395 U.S. at 392.

[20] And by the way, I checked. Even today, you can still buy used copies on Amazon!

2. The Conduit-Speaker Continuum: Reconciling *Red Lion* and *Tornillo*

For more than half a century, scholars and policymakers have debated the merits of *Red Lion* and for nearly as long, they have debated the question of whether it can be reconciled with *Tornillo*. Even as the case was being decided, many scholars found the scarcity rationale factually suspect and today, most think that, even if it was plausible at the time, its technological assumptions no longer hold.

Some scholars have attempted to reconcile the two,[21] and others have simply viewed *Red Lion* as anomalous in the context of not only *Tornillo*, but the whole edifice of the modern First Amendment; still others have seen it as part of another tradition of First Amendment jurisprudence.[22] Those who view *Red Lion* as anomalous have seen it as reflecting a Meiklejohnian approach to the First Amendment,[23] rather than the more libertarian, "hands off" approach to the First Amendment. This is undoubtedly correct, as the Court's numerous references to the importance of the "listeners" makes clear. But I want to frame *Red Lion* and *Tornillo* through a slightly different lens, one that will draw on Meiklejohnian principles, but that will put the distinction between newspapers and broadcast in the broader context of the free-speech ecosystem. In so doing, I hope that we will see that virtually all attempts to conceptualize the regulation of social media can be seen through this lens.

Let me start with a long-standing paradigm, the conduit-speaker dichotomy. Some "media," or what I'll call "communications institutions," are viewed as

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[21] *See, e.g.*, Lillian R. BeVier, Red Lion Broadcasting Co. v. FCC*: A Different Perspective on the First Amendment Cathedral*, *in* FIRST AMENDMENT STORIES 319 (Richard W. Garnett and Andrew Koppelman, eds., 2012) (arguing that *Red Lion* can best be viewed through the lens of the government as "property owner" of the airwaves).

[22] Fiss, Barron. For a recent claim along these lines, see, for example, Genevieve Lakier and Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment* (situating *Red Lion* in a line of cases including *Marsh v. Alabama* and *Associated Press v. United States* during "an earlier epoch of First Amendment jurisprudence ... that [was] much more attentive to the problem of private power than the current framework tends to be, and far less antagonistic to the possibility of democratic supervision of the mass public sphere").

[23] *See, e.g.*, Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 486–87 (2011). Meiklejohn argued that the proper metaphor for understanding the First Amendment was the New England town hall meeting, where, as he famously put it, "What is essential is not that everyone shall speak, but that everything worth saying shall be said." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948). This approach is associated with Professors Owen Fiss, Cass Sunstein, and Jerome Barron. Professor Barron, indeed, argued *Tornillo*, defending the constitutionality of Florida's statute on Tornillo's behalf.

conduits, the United States Postal Service,[24] or the old-style AT&T being the paradigm. Notice here that I am using the term "media" as simply the plural of "medium" and so as a broader term than we colloquially think of it. We call AT&T (and now Verizon, T-Mobile, etc.) "common carriers," in large part because of the mandatory nature of their "carry[ing]" obligations. In the context of their ordinary telephone service, we recognize providers of such a service as "conduits" of the speech of others. On the one hand, we create a legal obligation on such service providers to carry all speech, while on the other, we absolve them of responsibility for any of that speech. That's the quid pro quo of being a conduit, and we recognize that quid pro quo as necessary for the operation of conduits. Without that quid pro quo, the post office or the phone company simply wouldn't work. Nor could they serve the role in the free-speech ecosystem that society expects: if we made the phone company or post office responsible for traffic through its network, it would have too much of an incentive not only to surveil but also to "take down" content.

On the other hand, other entities we call "media" are viewed as speakers, say HarperCollins or *The New York Times*. The legal responsibility we place on them clearly incentivizes them to surveil and take down content. They only publish what they are legally willing to stand behind. At the same time, the law doesn't require them to "carry" anyone's content unless they want to. On the conduit-speaker dichotomy, we denominate them "speakers." But in a literal sense, neither is a "speaker." They are both artificial legal entities; they're simply aggregators of other people's speech, filtered through a corporate form. But their legal form doesn't preclude them from the benefits of the First Amendment,[25] nor does it shield them (limited liability principles aside) from the legal responsibility that goes with being speakers.

But it doesn't take too much imagination to recognize that the conduit-speaker dichotomy I've just alluded to isn't really a dichotomy at all. It's a continuum. We have always had communications institutions, intermediaries in fact, that didn't fit directly into a conduit-speaker dichotomy. Think, for example, of bookstores or newsstands, or libraries. The law calls them "distributors," and we do not view them as "common carriers." Unlike AT&T or the USPS, the bookstore or library has no obligation to carry any content. At the same time, neither the bookstore nor the library has quite the same immunity from liability as the common carrier.

So, for example, consider defamatory materials. It has long been black-letter doctrine that a library can be required to take a book off its shelves, but only after a legal determination that the book was defamatory. At the same time, however, unlike

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[24] UPS and Fed Ex are in the same category.

[25] Citizens United

"speakers" (say a newspaper), the law doesn't demand that a bookstore or library take responsibility for everything on its shelves. We have effectively had what we would today call a "notice and take down" regime,[26] but with a stringent requirement of what constitutes adequate notice. Importantly, though, the complex web of defamation law that applies to "publishers" generally doesn't apply to "distributors." And my guess is that most of us would probably say, with good right. Libraries and bookstores are in a different place on the conduit-speaker continuum from either, say, newspapers or book publishers on the one hand or the post office or phone company on the other. In the free-speech ecosystem, they play a different role, and the legal system treats them accordingly.

Jumping to the 21st century, we see the conduit-speaker continuum play out in all sorts of policy debates. Consider, for example, the debates about "net neutrality." If Verizon is a common carrier (i.e., with the legal obligations and immunities of a conduit) when it's carrying your voice, why shouldn't it be one when it's carrying your internet traffic, say the proponents of net neutrality. At the same time, if the government can't require Comcast and Charter Communications to carry ESPN or CNN on their cable service,[27] why can the government require them to carry espn.com or cnn.com on their internet service, ask the opponents of net neutrality.[28] The debate can thus be seen as whether the law should require an "internet service provider" (or, for some, an "internet *access* provider") to be treated like a pure conduit. Similarly, as several universities recently found out, Zoom isn't just a conduit through which anyone who wants can communicate as they see fit. Rather, Zoom calls itself a "community" with "community standards." By taking Zoom outside of the legal regime for conduits, Zoom's "community standards" raise concerns that Zoom might be subject to laws prohibiting material support for terrorist groups.[29] Of course, the phone company and USPS/UPS/FedEx wouldn't be subject to such laws, because they cannot be: they are conduits.

I'll turn to online "platforms" and social media soon, but numerous scholars thinking about online "platforms" have seen them through this lens. Of course, for some entities, section 230 of the Communications Decency Act seemed to contract this continuum into a dichotomy, dividing the online world into "interactive

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[26] See DMCA s. 512.

[27] Of course, they are subject to must-carry, a quasi-common carrier like obligation for broadcast and public access channels. See Turner Broadcasting. But they are clearly not viewed as the equivalent of the phone company.

[28] Often, they ask why the government should be able to prevent Comcast from allowing the packets from, say, msnbc.com to travel more quickly than the packets from cnn.com.

[29] Cites.

computer service providers" and "information content providers"[30] and thus, for liability purposes, lumping all "interactive computer service providers" into the "conduit" category. But, virtually every "problem" caused by section 230 can be seen as due to this contracting of what is a conduit-speaker continuum into a conduit-speaker dichotomy. Why, for example, should the Facebook function allowing users *to post* cat videos result in immunity for Facebook's algorithmic choice *to promote* cat videos? With the former function, Facebook is acting like UPS or the old AT&T, as a conduit, whereas with the latter, it is acting as, well, maybe a speaker, but certainly not as a conduit. The point of course is that section 230 effected this contraction of legal categories in a world where technological change was enabling opportunities for new communications institutions to lie at different spots along the conduit-speaker continuum.

But before we get to social media, let me return to the question of reconciling *Tornillo* and *Red Lion*. How if at all is a "newspaper" different from a "radio station"? Both are corporate entities; both have the technological hardware necessary to transmit speech (e.g., printing press v. microphones/radio transmitter), and yet the law (not just *Tornillo* and *Red Lion*, but also the host of regulatory obligations imposed on broadcasters by Title 47 of the United States Code and the FCC) treats them differently. One frame for the distinction is technological (print v. broadcast), which of course underlies the so-called "scarcity rationale." But let me put that aside for a moment, because it's clear today, even if it wasn't fifty years ago, that there is no scarcity of space on the radio spectrum for plenty of "radio stations." The distinction I want to focus on is the conduit-speaker dichotomy—or, more precisely, the fact that the dichotomy is a continuum.

The *Red Lion* Court views the radio station as a different type of entity from a newspaper, not as a speaker, but instead as a communications intermediary somewhere between a conduit and a speaker. The radio station is clearly not a pure "speaker." This is why the Court can say that the government can require Red Lion to "share [its] frequency with others." At the same time, this "shar[ing]" obviously does not make the radio station a pure conduit like the post office or telephone company either. No one is forcing the radio station to carry *everything*. It is not a conduit for anyone who wants to speak on the radio. Radio stations are not just "speakers," nor are they just "conduits." Of course, they aren't bookstores or libraries either, and so when I use the term "continuum," I do not mean to analytically create a one-dimensional line from conduit to speaker. But the Court views the "radio station" as serving a different role in the free-speech ecosystem from a pure "speaker," a role that encompasses Meiklejohnian values about the audience.

[30] *See, e.g.*, Blumenthal v. AOL

At core, then, my claim is that between the "speaker," that has unbridled First Amendment rights against the government, and the "conduit," upon whom the government imposes what we call "common carrier" obligations, lie numerous players that serve roles in the free-speech ecosystem distinct from speaker and conduit. Radio stations in the Fairness-Doctrine era were viewed (at least by the FCC, the Court and defenders of *Red Lion*) as just that. Was there some "technological" reason why they couldn't have been a speaker just like a newspaper? As critics of the scarcity doctrine rightly argued, of course not. But at the same time, there isn't any "technological" reason why bookstores and newsstands have neither the same free-speech rights and obligations as newspapers nor the same common-carrier obligations and immunities as telephone companies either.

For those of us old enough to remember such a thing, we might think of the bookstore as a place where one can go to browse and buy books. What the advent of the internet has made obvious though, if it wasn't before, is that the bookstore is a sociological construct and the legal regime that governs it is dependent on an understanding of the role it plays in facilitating the relationship between writers (speakers) and readers (listeners). So, when the Colorado Supreme Court creates a "privilege" for a bookstore, requiring a special "balancing test" to determine whether a prosecutor can subpoena records from a bookstore,[31] it is recognizing just that.

Implicitly, then, the *Red Lion* Court recognized the "radio station" as just such a sociological construct. Not of course the same as a bookstore, but instead as an entity that is part of a broader free-speech institution, broadcast media. The FCC, and the Federal Radio Commission before it, had set the contours of that institution so that the "radio station" was not a pure "speaker" like a newspaper, just as a bookstore is not a "speaker" like a newspaper either. It is its own thing, and it plays a different role in the free-speech ecosystem than a newspaper does. Of course, it isn't a pure conduit either. The constitutionality of the Fairness Doctrine was one thing, but I'm relatively confident that, even in 1969, the Court would have struck down any attempt by the FCC to turn radio stations into common carriers, even though nothing in the technology of radio waves requires a "radio station" to have control over the communications that pass through "its" frequency. Indeed, if "its" frequency "belongs" to the public,[32] there should be no constitutional objection to turning radio stations into common carriers.

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[31] Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044 (Colo. 2002).

[32] As some have suggested. *See, e.g.*, BeVier

II. The Public-Private Continuum and Non-government Actors as "Public"

If the idea of the speaker-conduit distinction as a continuum does not strike us as hard to grasp in this context, I want to shift to another dichotomy, the public-private distinction. My claim is that the public-private distinction is similarly a continuum, not a dichotomy, and our free-speech ecosystem includes institutions that play roles that are neither uniquely public nor uniquely private.

Before turning to social media, let me return to broadcast media. The *Red Lion* Court understood the broadcast station as playing a role somewhere between pure private and public, a role that represents the Meiklejohnian tradition in the free-speech ecosystem. The Court saw the broadcast station as a place where the *audience*, the listening "public," matters more than the speaker. Indeed, while the use of "fairness" in the phrase "fairness doctrine" might be thought of as "fairness" to the person given the right to reply, it might be more accurate to call it "fairness" to the *audience*.[33] If the airwaves are to be viewed as a public resource to be shared, it cannot be because of any putative technological constraints of the airwaves, but instead because of a conception of the appropriate role for radio stations in the broader free-speech ecosystem.

I want to suggest that almost all approaches to regulating social media are implicitly asking us the same question: how much, or what kinds of, "public-ness" do we want to embed into social media? One frame, although it's not the only one, stems from *Red Lion*: how Meiklejohnian do we want social media to be? How much do we want it to reflect a concern for fairness to the audience? That is a public value that some institutions in our free-speech ecosystem embody, values that policy makers and courts will at times embed into the law and policy of that institution.

Conduits like the post office or the "phone company" have embedded into them the value of content neutrality, which is of course one of the key components of modern First Amendment law.[34] But that value is not just a constitutional value.

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[33] Of course, no one views radio stations as Meiklejohnian in this sense today. We have no Fairness Doctrine, and my sense is that we would find it unfathomable if the government attempted to, for example, require Fox News to give time to Ilhan Omar on Tucker Carlson's timeslot to reach Carlson's audience. Broadcast stations are more like speakers today than they were a half-century ago. But that is a descriptive claim about the world in this post-Fairness Doctrine repeal era: broadcast stations have moved closer to newspapers on the speaker-conduit continuum, and we generally treat them as such. *But cf.* indecency rules; political advertising requirements

[34] *See* casebooks.

It has long been embedded into postal policy[35] and is the very basis of common carriage in the communications infrastructure. Thus, this "content neutrality" is not just content neutrality in the abstract. Instead, it is content neutrality in *access to a network*. Content neutrality in this more limited sense is thus also more broadly a *public* value, one that frames our thinking about communications entities that have no "constitutional" import at all, like UPS, FedEx and the old AT&T. Whether that public value of content neutrality in access should be embedded into "last-mile" internet access is, I suspect, the core of the dispute between proponents and opponents of net neutrality. Similarly, the recent controversies about whether uses of Zoom might violate Zoom's "community standards" could be seen through the same lens. Should the law view Zoom as a mere conduit like, say, UPS?

Before I turn in Part III to a couple of the approaches scholars have taken to regulating social media, let me complicate the picture of the free-speech ecosystem a bit more. For this, though, we need to go further afield. By doing so, we'll see other values that we would probably think of as "public." So, consider for a moment a university. I know what you're thinking: what does all this have to do with social-media regulation? Bear with me for a moment. We have public universities and private universities, and neither is ordinarily viewed as a "conduit" like the post office or UPS. Yet sometimes universities embody conduit-like characteristics and thus incorporate conduit-like values. So, when Milo Yiannopoulos is invited to speak at Berkeley, Berkeley insists that it is acting somewhat as a conduit. Or, we might say, as a "platform," perhaps in the most literal sense.[36] When University of San Diego Law Professor Thomas Smith writes a blogpost that suggests that those who believe that the coronavirus did not escape from a Wuhan lab might be "idiots ... swallowing whole a lot of Chinese cock swaddle," the university claims to be a conduit of sorts too.

How is it that the university claims to be a conduit in such circumstances? It does so by affirmatively disavowing the speech. The University of California at Berkeley didn't invite Yiannopoulos, the university will insist; the *California Patriot*, a conservative student magazine, did. But Berkeley has neutral rules about invitations by student groups (in part because of the so-called "public forum" doctrine, though many private universities do something similar). So, the university is in this context simply a conduit for the speech of the invitees of student groups. Not a conduit for

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[35] *See* Desai Hastings; cf. Desai Stanford.

[36] *See generally* Tarleton Gillespie, *The Politics of "Platforms"*, 13 NEW MEDIA & SOCIETY 347 (2010) (noting the "architectural definition" of platform as "[a] raised level surface on which people or things can stand, usually a discrete structure intended for a particular activity or operation").

all speech, just the speech of such invitees. Berkeley is not the post office, but it is nonetheless a conduit of sorts.

Importantly, the university in these circumstances is also embodying a value of content-neutrality, but not the same sort of broad content-neutrality of access as the post office. Instead, it's a neutrality that serves a different value, the value of student-driven extracurricular participation in an educational institution. This is different from the value a pure conduit serves, of simply facilitating communication. Giving students the right to use institutional resources to pursue their extracurricular interests is viewed as part of the broader educational mission of the university ... and thus part of the free-speech environment that the university seeks to foster.

Similarly, if the University of San Diego makes clear that it has no position on the origins of the coronavirus (or whether there even is such a thing as "Chinese cock swaddle"), its neutrality is similarly not like the content-neutrality of the post office. Its neutrality is not about access to a medium of communication. Instead, the university's neutrality on these questions serves the broader goal of academic freedom: more precisely in this case, faculty members' freedom of extramural expression as embodied at least as far back as the AAUP 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*. It is a neutrality designed to allow *professors* to express themselves unimpeded by the fear of sanction.[37] This too is a *public* value, designed to give faculty broad breathing space, a "prophylactic protection for freedom of research and freedom of teaching."[38]

Yet, at the same time, universities are often speakers too—every time a university hires someone, denies someone tenure, promotes affirmative action in its admissions or hiring, chooses which courses to teach, etc., the university is denying someone "access" to the university's "platform" in some meaningful sense based on its own normative judgments. In the context of public universities—indeed, many other government institutions too—the First Amendment makes the determination of whether the university is a speaker or a conduit through various doctrinal categories, such as "government speaker" or "public forum." But the details of that aren't important. What is important is that the legal structure around universities reflects and embodies these values because society recognizes these values as important to furthering some broader public goal, not just abstractly because the university is a conduit or a speaker. We might doctrinally view the question differently at a private rather than public university. So, if the University of San Diego had sanctioned Professor Smith for his blogpost, any claim he might have had would of course not be "constitutional"—instead, it would probably be "contract" (and, in California,

[37] *See generally* MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 127-148 (2009)

[38] *Id.* at 140.

statutory). But the core of it would still take much the same form that it would have taken had he been teaching at the public university ten miles up I-5.

Implicit in all this is that while the public-private question might intertwine with the conduit-speaker question, the two don't necessarily line up. There are aspects of "public"-ness in all manner of entities in the free-speech ecosystem. The USPS, my paradigm of the conduit, is "public": it's an independent agency in the federal government. At the same time, though, UPS, similarly a conduit with similar common-carrier obligations and immunities, is a corporation and so we think of it as a "private" entity. But even UPS has attributes of "public-ness." For one, it is a *publicly* traded corporation and so in exchange for access to capitalization through the public financial markets, it is subject to a host of legal requirements that it otherwise wouldn't be, requirements that are aimed at protecting the public when purchasing its securities. Second, because it is "open to the public," it is subject to what we call "public accommodations" laws, laws that prohibit it from discriminating on the basis of race, color, religion, or national origin.[39] Of course, such laws apply broadly these days, but importantly, they do not apply to "a private club or other establishment not in fact open to the public."[40] And third, of course, because it is a common carrier, the law prohibits UPS from discriminating on the basis of the content of speech that passes through its network. That too is a way in which we can characterize UPS as serving a "public" function.[41] For purposes of the free-speech ecosystem, of course, it is its common-carrier responsibilities, its legal obligation to content-neutrality in access, that we care about.

[39] See, e.g., Title II of Civil Rights Act of 1964.

[40] 42 U.S.C. § 2000a(e). When we get to social media, perhaps Raya might be an example of a platform not subject to public accommodations laws. *See, e.g.*, https://people.com/movies/ben-affleck-sends-raya-match-woman-video-message/

[41] Professor Yoo has recently laid out the relationship between common carriage and public accommodations laws. *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463 (2021). Historically, common carriers were one of the two types of entities universally accepted as constituting public accommodations. *Id.* at ___ . Of course, our current conception of "public accommodations" encompasses a far broader swath of our economy than does the list of "common carriers."

III. The Public-Private Continuum and Social Media Regulation

I turn now to two prominent academic frameworks for thinking about social media regulation. Both, I will argue, are attempts to embed public values into social media companies, and both depend on claims about what role social media should play in the free-speech ecosystem. Even non-regulation is a choice, and it's a choice to further a public value. This was my point about starting this essay with my discussion of *Tornillo*. A "newspaper" is a corporate entity that funnels the speech of "reporters," "columnists," and non-employees through "Op-Eds" and "letters to the editor" through a collective "editorial" process embedded in an enterprise that embodies "journalistic" values. Yet, for purposes of the free-speech ecosystem, we call it a "speaker" and imbue it with the strongest "private" protections from government interference with its speech. Why? One central reason is that a modern-day democracy needs strong private entities to counter, to "check," governmental power. That is itself a *public* value.

As we think about social media, we cannot assess the merits of a regulation without some conception of what public value or values we want it to serve. In this final portion of the Essay, I describe two prominent approaches to social media regulation and frame them through this lens. First, I turn to Professor Rahman's approach of reconceptualizing a variety of online providers, from Google and Facebook to Amazon, as "utilities." Next, I look at Professor Balkin's approach of thinking about online providers as "information fiduciaries." Both approaches, I argue, depend on assumptions about the public values that social media should further in the broader free-speech ecosystem.

III.A. Social Media as Utilities

Professor Rahman argues that social media, or at least Facebook, should be seen as "informational infrastructure." Framing social media through the lens of "infrastructure" is an attempt to analogize to other types of infrastructure. Although we ordinarily conceive of the term "infrastructure" as physical objects such as roads and bridges, Professor Rahman describes infrastructure more broadly, as "those goods and services that are foundational, and that we expect the public to provide—or at least oversee."[42] This broader conception of "infrastructure" clearly underlies,

[42] K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 236 (2018); *see also* K. Sabeel Rahman, *Infrastructural*

for example, the diversity of items in the proposed package of "infrastructure" spending currently on Capitol Hill.[43] But, calling something "infrastructure" for a rhetorical battle for a spending bill is different from the potential implications that proponents of the informational-infrastructure concept have in mind.

By calling a company's core product or service "infrastructure," proponents of this way of thinking seek to evoke the concept of a "public utility."[44] Notice first that linguistically, the concept of a "*public* utility" incorporates some notion of "publicness." The details and history of the concept are not crucial here,[45] but think of the electric company as one model. Electricity is a necessity for modern life, and while the company that provides electricity in many places in the U.S. is "public" (i.e., a government agency), most Americans receive their electricity from a privately owned corporation that is heavily regulated by both law and a regulatory agency/commission.

Importantly, telecommunications—the telegraph and eventually the telephone—was among the original areas in which the concept of the "public utility" developed in the American context. In virtually every other country in the world, the postal authorities subsumed the telegraph and telephone into the government ambit. In the U.S., in contrast, private companies owned and eventually controlled as a monopoly these mediums of long-distance communications.[46]

As we think of social media in the early 2020s, however, this conception of "infrastructure" is probably best limited to Facebook.[47] Professor Rahman aims his approach at "the major technology companies—Amazon, Google/Alphabet, and Facebook,"[48] and the key problems that the "infrastructure" model is aimed at solving

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Regulation and the New Utilities, 35 YALE J. REG. 911, 913 (2018) (describing infrastructure as "those goods and services that are essential, upon which much of our economic and social life are built").

[43] *See* Infrastructure Investment and Jobs Act (including human and social infrastructure, such as childcare, immigration, etc.)

[44] *See, e.g.*, K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234 (2018) (title of article)

[45] *See generally* BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 161-204 (2001); William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* THE CORPORATION AND AMERICAN DEMOCRACY (Naomi R. Lamoreux & William J. Novak eds., 2017).

[46] *See generally* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 153-230 (2004); *see also* RICHARD JOHN, NETWORK NATION (2010)

[47] Do we have to say "Meta" now?

[48] 2 GEO. L. TECH. REV. at 234.

are largely premised on monopolistic or near-monopolistic power.[49] Of course, the question of whether Facebook is a monopoly that requires, say, an antitrust response is hotly contested. It is in any event well beyond the scope of this Essay.

For my current purposes, the important point is that whether to frame social media as "infrastructure" and thus regulate it as a "public utility" requires that we ask what *public* purpose social media companies serve, what public values we want it to further. Without answering that question, we simply cannot have a reasoned debate about the appropriateness of any regulation that depends on conceiving of Facebook as "infrastructure." So, consider that one likely implication of viewing Facebook as "infrastructure" would be to impose some form of common carrier obligation upon it. We cannot do it without being clear that the value here is *public access* to Facebook's network, and hence *content neutrality* on Facebook's part. That would raise questions about whether Facebook should be treated as a conduit like UPS, Verizon, etc.,[50] including questions about disaggregating the numerous services Facebook provides[51]. This public access value would likely justify laws mandating hosting of everyone's content, but would not justify any regulation of the "mass media" functions of Facebook. At core, choosing an "infrastructure"—and hence "public utility"—model for Facebook depends upon a conception of "public" that emphasizes the value of public access to the platform. This would of course be highly controversial and raise slippery slope questions that even net neutrality in the context of internet service providers arguably raised.[52] Key, though, is that the model depends on content neutrality in access.

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[49] *See generally id.* at 241 ("these information platforms represent key *nodes* in economic, social, and informational flows ... afford[ing] Google, Amazon, or Facebook tremendous power over the larger ecosystem of media, economic actors, and even our politics"); *id.* at 242-46 (arguing that what makes these companies "infrastructural" is three forms of power—"gatekeeping power, transmission power, and scoring power").

[50] *See generally, e.g.*, Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021)

[51] *See id.* at 408-411.

[52] *Compare* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 433 (D.C. Cir. 2017) (Kavanaugh, J., dissent. den. pet. for r'hg en banc) ("If market power need not be shown, the Government could regulate the editorial decisions of Facebook and Google, of MSNBC and Fox, of NYTimes.com and WSJ.com, of YouTube and Twitter. Can the Government really force Facebook and Google and all those other entities to operate as common carriers? Can the Government really impose forced-carriage or equal-access obligations on YouTube and Twitter? If the Government's theory in this case were accepted, then the answers would be yes. After all, if the Government could force Internet service providers to carry unwanted content even absent a showing of market power, then it could do the same to all those other entities as well. There is no *principled* distinction between this case and those hypothetical cases.") *with id.* at 392 (Srinavasan, J., concur. den. pet. r'hg en banc) (noting that the companies then-Judge Kavanaugh lists "are not considered common carriers that hold themselves out as affording

Importantly, if we return to where I started, the conception of broadcast articulated by the *Red Lion* Court, we can see what the "public utility" model does not seem to encompass: a Meiklejohnian institutional framework. As conduits, neither the postal service nor the telephone company embody Meiklejohnian values, values designed to make the audience's interests paramount. Interestingly enough, the common-carriage requirement implied by a public utility model would be regulation with a potentially deregulatory effect in the broader speech ecosystem. Just as the USPS isn't allowed to do "content moderation," Facebook wouldn't be either ... at least as to its "platform"—i.e., hosting—function.

In short, any regulatory intervention premised on social media as "informational infrastructure" depends on a conception of "publicness." That conception of "publicness" has both private and public attributes and thus rests on an understanding of the public-private divide as a continuum, not a dichotomy. It rests in turn on, and demands that we articulate, the public value of content-neutrality in access as the regulation's basis.

III.B. Social Media as "Information Fiduciaries"

Another framework for regulating social media comes from thinking about social media as an "information fiduciary." Most social media companies—certainly Facebook—fall into the category of "online service providers and cloud companies who collect, analyze, use, sell, and distribute personal information."[53] And this is the broader category of entity that Professor Balkin (and fellow traveler Professor Zittrain) believe should be thought of as "information fiduciaries."[54]

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neutral, indiscriminate access to their platform without any editorial filtering. If an agency sought to impose such a characterization on them, they would presumably disagree. Here, by contrast, the rule applies only to ISPs that represent themselves as neutral, indiscriminate conduits to internet content, and no ISP subject to the rule—including Alamo Broadband—has disclaimed that characterization in this court.").

[53] Jack Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1886 (2016).

[54] *See id.*; Jack M. Balkin, *Information Fiduciaries in the Digital Age*, BALKINZIATION (Mar. 5, 2014), available online at https://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html; *see also* NEIL RICHARDS, INTELLECTUAL PRIVACY 168 (2015); Balkin & Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, THE ATLANTIC (Oct. 3, 2016), available online at https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/ ; Jonathan Zittrain, *Facebook Could Decide an Election Without Anyone Finding Out*, THE NEW REPUBLIC

The core concern Professor Balkin and Zittrain are aiming at solving is the use of personal data. On first blush, this is a very different kind of problem than others that implicate the free-speech ecosystem. Indeed, we ordinarily place these concerns within the rubric of "privacy," premised on the idea that "certain kinds of information are *matters of private concern*." But those who oppose privacy regulations have long seen them as implicating free-speech values, because such regulations do in fact regulate the dissemination of information.[55] Just as importantly, those who seek privacy regulation have also long seen it as necessary in part for reasons having to do with the broader free-speech ecosystem.[56]

Like Professor Rahman, Professor Balkin too relies on an analogy to justify categorizing Facebook et al. as "information fiduciaries": an analogy to doctors, lawyers, and accountants. These are professional relationships where the professional has "special duties to act in ways that do not harm the interests of the people whose information they collect, analyze, use, sell, and distribute."[57] At core, a fiduciary is to act for the benefit of their beneficiary, and the law thus imposes special duties of loyalty and trustworthiness on fiduciaries.

Key is that government may regulate information flow consistent with the First Amendment *because of the relationship* between the fiduciary and the beneficiary. Extending this analogy, Professor Balkin conceives of Facebook as like the lawyer who receives information within a relationship of trust and confidence. Of course, Professor Balkin recognizes that Facebook is not *exactly* like a lawyer or doctor.[58] Instead, the argument is that because "we trust them with sensitive information, certain types of online service providers take on fiduciary responsibilities." Many, even those sympathetic to greater regulation of online providers, have expressed

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(June 1, 2014), available online at https://newrepublic.com/article/117878/information-fiduciary-solution-facebook-digital-gerrymandering

[55] The seminal article making this argument dates back to 2000 and conceptualizes of privacy regulation as a "right to stop people from speaking about you." *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

[56] *See, e.g.*, Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609 (1999); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000); *see generally* NEIL RICHARDS, INTELLECTUAL PRIVACY (2015).

[57] Jack Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1886 (2016).

[58] Jack Balkin, *The Fiduciary Model of Privacy*, 134 HARV. L.REV. F. 11, 15 (2020) ("Digital companies like Facebook do not perform the same kind of services that doctors and lawyers offer.").

skepticism about the analogy.[59] But I want to put most of those criticisms to the side here.

This "fiduciary" nature of a company like Facebook is in practice another way of saying that Facebook has public responsibilities, responsibilities that are needed to properly shape the broader free-speech ecosystem. Consider the analogy to lawyers. Lawyers are part of a profession with public, not just private, responsibilities. Lawyers are "officers of the court" and subject to a complex array of specialized speech regulation: their speech is constrained by an extensive set of "rules of professional responsibility."[60] Many of them are designed to regulate parts of the free-speech ecosystem to further a *public* goal. The lawyer-client privilege, for example, is designed to further the truth-seeking function of the broader legal system. So, even in the narrow context of an individual lawyer-client relationship, the fiduciary relationship is not just a private relationship, but is instead somewhere along the public-private continuum, implicating public values.

Moreover, as Professor Balkin has recognized, online companies like Facebook "have so many end users that a requirement that they must act in the interests of their end users effectively requires them to act *in the interests of the public as a whole*."[61] While there may be an open question as to whether social media companies other than Facebook would likewise have to "act in the interests of the public as a whole," since no other social media company has Facebook's reach,[62] we can see that at core, Professor Balkin is conceiving of social media companies as playing a role in the free-speech ecosystem distinct from on the one hand, a traditional private "speaker" like a newspaper, and on the other, a pure conduit.

Privacy regulation premised on conceptualizing Facebook as participating in a "relationship" with its "users" hearkens back, albeit perhaps just faintly, to the very Meiklejohnian conception of the broadcast media articulated by the *Red Lion* Court.

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[59] *See, e.g.*, Lina M. Khan and David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019). *But see* Jack M. Balkin, *The Fiduciary Model of Privacy*, 134 HARV. L. REV. F. 11 (2020).

[60] We could see these rules as a comprehensive speech code, see, e.g., Rules 1.4, 1.6, 2.1, 3.3, 3.6, 4.1, 4.2, 4.3. Avoiding the free-speech implications of the rules may well be one reason the "Model Rules" are denominated the "Model Rules of Professional *Conduct*" (emphasis added).

[61] Jack M. Balkin, *The Fiduciary Model of Privacy*, 134 HARV. L. REV. F. 11, 18 (2020) (emphasis added).

[62] *See id.* at ___ (discussing third-party harms and privacy harms from open protocols and data sharing across social media platforms); *id.* at 21-22 (discussing privacy harms from open protocols and data sharing across social media platforms).

How so? The harms caused to "users" are based on "surveillance capitalism"[63] and "end-user manipulation," and at least one primary form of that manipulation is to the end-user as a *recipient* of information. For example, Professor Balkin distinguishes between contextual and behavioral advertising,[64] arguing that the latter can be viewed as a misuse of the end-user's personal information. If, as Professor Balkin appears to advocate, we prevent advertisers from using personal information gathered elsewhere to target ads, this form of regulating social media is designed to structure parts of the free-speech ecosystem for the benefit of the recipient of information. The lodestar of such a regulatory intervention seems to be "fairness" to the end-user as audience, the very basis of the Meiklejohnian conception of broadcast media articulated by the *Red Lion* Court.

Conclusion

Social media regulation matters for the same reason that regulation of *any* communications medium matters: it shapes the free-speech ecosystem. The choice of regulatory framework for any given type of entity in that ecosystem depends on the public value(s) we want that type of entity to play. Even the most private of media—entities like the newspaper—exist within a regulatory structure that furthers some public value. The same goes for the most public, the post office or a public library. Whether for a conduit—like the post office or common carriers like UPS—or for a speaker—like newspapers or book publishers or quite frankly, anyone with a social media account—or an entity in between—bookstores, libraries, or even broadcast media—regulation must be designed to further such values. The regulation of social media is no different. As we look to proposed regulation, we need to be sensitive to, and explicitly articulate, just what role in the free-speech ecosystem we want social media to play and what values we want it to promote.

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[63] SHOSHONA ZUBOFF

[64] *See, e.g.*, 134 HARV. L. REV. F. at 28. Contextual advertising does not require use of personal data acquired elsewhere. So, for example, someone searching for tourist sites in New York City might receive an ad about a Broadway show. Behavioral advertising would depend not just on the immediate search but also on other information collected about the searcher: behavioral advertising would be able to target the person searching for tourist sites in New York City based on, say, a history of listening to Broadway tunes on Spotify or YouTube.