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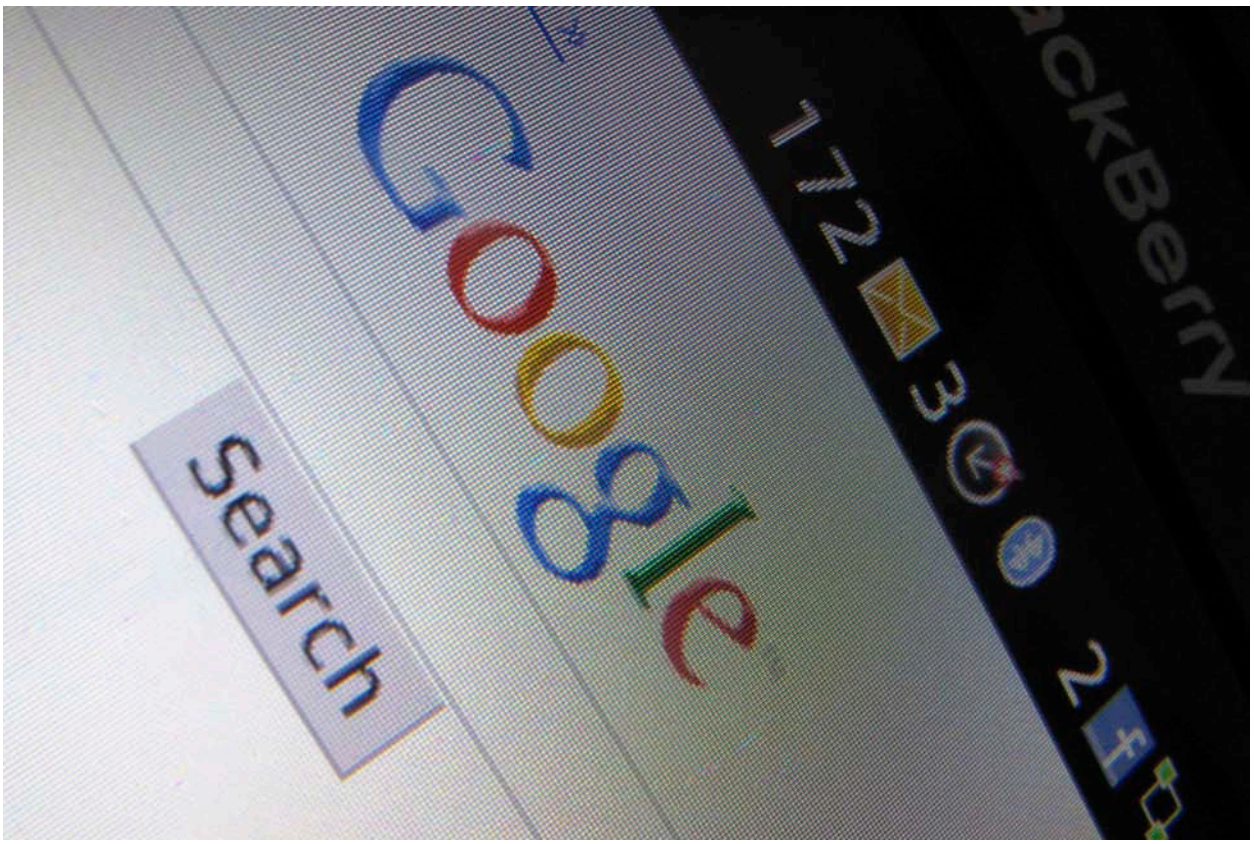

Reuters/Mike Blake

Is Filtering Censorship? The Second Free Speech Tradition

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Governance Studies at BROOKINGS

INTRODUCTION

When Google merged with telecommunications giant AT&T there was, of course, some opposition. Some said, rather heatedly, that an information monopolist of a kind never seen before was in the works. But given the state of the industry after the crash, and the shocking bankruptcy of Apple, there were few who would deny that some kind of merger was necessary. Necessary, that is, not just to save jobs but to save the communications infrastructure that millions of Americans had come to depend on. After it went through, contrary to some of the dire warnings that came out, everything was much the same. Google was still Google, the telephone company was still AT&T, and after a while, much of the hubbub died down.

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It was a few years later that the rumors began, mostly leaks from former employees, suggesting that GT&T (now AT&T again) was up to something. Some said the firm was fixing its search results and taking other steps to ensure that Google itself would never be displaced from its throne. Of course, while it made for some good headlines, no one paid too much attention. The fact is that there are always conspiracy theorists and disgruntled employees out there, no matter what the company. When GT&T went ahead and acquired the New York Times as part of its public campaign to save the media, most people cheered. Yes, there was some of typical outcry from usual sources, but then again, Comcast had been running NBC for years without incident.

Looking back, I suppose it was really only after the Presidential election that you might say that things came to a head. In a way, it might have been obvious that Governor Tilden, who'd pledged to aggressively enforce the antitrust laws, wasn't going to be GT&T's favorite candidate. That's fine, and of course corporations have the right, just like any other person, to support or oppose a politician they don't like. But what only came out much later was the full extent of the company's campaign against Tilden. It turned out that every part of the information empire--from the news site to the media properties to the search engines, the mobile video, and the access to emails — all of it was mobilized to ensure Tilden's defeat. It retrospect, it was foolish for Tilden's campaign to rely on GT&T phones, Gmail and apps so heavily. Then again, doesn't everyone?

Everyone knows the effect that the press can have on elections. We've sort of come to expect that newspapers will take one side or another. But no one quite understood or realized how important controlling the very information channels themselves would be--from mobile phones all the way through search and video.

Well, Hayes is President, and nothing is going to change that. But the whole incident has begun to make people wonder. Should we be worried about the influence of the information channel over politics? Are Google or AT&T possibly subject to the First Amendment? Are they common carriers, and if so, what does that mean for speech?

Mention "speech" in America, and most people with legal training or an interest in the Constitution think immediately of the First Amendment and its

champion, the United States Supreme Court. The great story of free speech in America is the pamphleteer peddling an unpopular cause, defended by courts against arrest and the burning of his materials. That is the central narrative taught in law schools, based loosely on Justice Holmes' dissenting opinions[1] and Harvard Law Professor Zechariah Chafee's 1919 seminal paper, *Freedom of Speech in Wartime*. Chafee wrote:

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion. . . Nevertheless, there are other purposes of government. . . Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech…. The First Amendment gives binding force to this principle of political wisdom.[2]

This is the first free speech tradition, the centerpiece of how free speech has been understood in America.[3] Yet while not irrelevant, it has become of secondary importance for many of the free speech questions of our times. Instead, a second free speech tradition, dating from 1910 or the 1940s, much less well known, and barely taught in school, has slowly grown in importance.

The second tradition is different. It cares about the decisions made by concentrated, private intermediaries who control or carry speech. It is a tradition where the main governmental agent is not the Supreme Court but the Interstate Commerce or Federal Communications Commission. And in the second tradition the censors, as it were, are not government officials but private intermediaries, who are often lacking a censorial instinct of their own, but nonetheless vulnerable to censorial pressures from others. Above all, it is a speech tradition linked to the technology of mass communications.

In its heyday from the 1930s through the 1960s the second tradition was anchored in the common carriage rules applied to the telephone company and also, at times, to radio, and later on, in the cajoling of and the public interest duties imposed on broadcasters. In its mid-century incarnation, the regime was a reaction to the concentration at every layer of the communications industry. But today, the industry is different, and in our times, the concerns have changed. As Jeffrey Rosen wrote in 2008, in the *New York Times Magazine*:

At the moment, the person with the most control over free expression around the globe is not a judge, a president, or a monarch. She is Nicole Wong, deputy

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[1] E.g., *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

[2] Zechariah Chafee, *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 956-57 (1919).

[3] Scholars will know that describing Chafee's *Free speech During Wartime* as representative of the First Free speech tradition is controversial, for Chafee is considered by some to have abrogated an older First Amendment tradition and constructed his own twentieth century "tradition." *See* MARK GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991). It would probably be more accurate to speak of three, or four or five major speech traditions in the United States, and a few minor ones thrown in as well.

general counsel at Google. Wong is known within Google as "The Decider," because she alone decides which blogs, videos, articles and other content is posted on YouTube, and which are removed in response to requests from governments and users ranging from the Thai King and the Pakistani prime minister to Hollywood corporations.[4]Captured in this paragraph is an essential feature of the speech architecture of our times and how it affects the speech environment. We live in an age where an enormous number of speakers, a "long tail" in popular lingo, are layered on top of a small number of very large speech intermediaries.[5] Consequently, understanding free speech in America has become a matter of understanding the behavior of intermediaries, whether motivated by their own scruples, law, or public pressure.

The point of this essay is to suggest that anyone who wants to understand free speech in America in the 21st Century needs to understand the second tradition as deeply, if not more so, as the first. That means understanding that the doctrines of common carriage and network neutrality are perhaps the most important speech-related laws of our times. As we shall see, it is a messier tradition and much less familiar, but no less important.

First Principles

For some readers, what I am calling a second speech tradition may not seem to be about free speech as they understand it, because it isn't about government censorship. But the underlying principles of the first and second traditions really aren't that different. I want to suggest that the American First Amendment and the common carriage doctrine are premised, basically, on the same concept: non-discrimination. It is crucial to understand this point if we are to understand how common carriage and its recent manifestation, "net neutrality," are becoming so important as speech doctrines.[6] For the underlying similarity between the First Amendment and common carriage was less clear in earlier times, when common carriage applied mainly to sea ferries, ports and such.

At its most fundamental, both the First Amendment and common carriage are centered on the problem of *wrongful* discrimination in communications. The idea animating First Amendment jurisprudence is that some government entity should use its power to prevent wrongful discrimination between different forms of content or speakers. Common carriage, when applied to information carriers, is premised on the same idea. The government is again insisting that speech be carried regardless of either its content or who said it. The setting and government

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[4] *See* Jeffrey Rosen, *Google's Gatekeepers*, N. Y. TIMES MAG., Nov. 28, 2008, *available at* http://www.nytimes.com/2008/11/30/magazine/30google-t.html.

[5] "For every diverse Long Tail there's a 'Big Dog': a boring standardized industry that isn't sexy like Apple…but that delivers all that niche content you're hungry for." Tim Wu, *The Wrong Tail*, SLATE, July 21, 2006, http://www.slate.com/id/2146225/.

[6] *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003).

actors are different, but the central norm is the same. The point may be mad clearer by explaining concept of common carriage itself. Dating from somewhere in the 15th century or earlier, English courts began to require certain businesses, known as "public callings," to operate in a non-discriminatory fashion. Typically, for example, a public calling, like an inn, or a ferry, was required to serve all customers, typically at posted rates. As explained by an anonymous English judge in 1450, "when a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case [be entitled to sue.]"[7]

The concept made its way to the United States and was at first applied, as in Britain, to innkeepers, ferries and the like. Eventually, however, the law of common carriage was applied to *information* carriers, namely, to telegraph companies, and telephone companies and firms offering radio transmission. All existing telecommunications firms were made subject to the Interstate Commerce Act by the Mann-Elkins Act in 1910.[8] That law specified that, whatever the telephone company did, it would treat its like customers alike—and therefore not favor some speech over others. As the law stated, "[I]t shall be unlawful . . . [for any carrier] to make or give any undue or unreasonable preference or advantage to any particular person … or any particular description of traffic, in any respect whatsoever."[9]

In 1910, the primary interest of this law was commercial or economic; the Interstate Commerce Commission was originally designed to regulate railroads, and motivated mainly by the perceived abuses of the Standard Oil Company. However, whatever the original intent of the law, when applied to an industry that moves information, the common carriage rule automatically became a law affecting speech.

Consider, AT&T, the phone monopolist, federally a common carrier from 1910 onward. We can see that Bell, under common carriage, was not allowed to act as a censor. Customers, for instance, were free to speak of immoral, obscene or illegal topics on the telephone, and Bell, even if it had the technological capacity to monitor conversations and block bad content, was not permitted to act as a filter, even if that's what the State might have liked. Compare this to the First Amendment's ban on governmental interference with speech. If it is fair to summarize the First Amendment this way, the Supreme Court has insisted, since the 1950s or so, that the government refrain from blocking speech or discriminate in favor of one speaker over another unless it has a good reason. This isn't a full description of what the First Amendment prohibits, but it is at the amendment's core. In this sense, the First Amendment is, like common carriage, an anti-discrimination rule.

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[7] Anonymous note quoted in Bruce Wyman, The Law of the Public Callings as a Solution to the Trust Problem, 17 HARV. L. REV. 156, 158 (1903).

[8] Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910).

[9] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

We can see this fact reflected in the First Amendment jurisprudence, where it appears in concepts like "content neutrality," today a cornerstone of First Amendment law. That concept creates an important distinction between laws considered "content specific" or "viewpoint specific" and those considered "content neutral." A law considered "specific" is subject to a higher level of judicial scrutiny, and is therefore likely to be struck down, absent a truly compelling interest. In the famous case *R. A. V. v. City of St. Paul*, for example, the Supreme Court struck down a city ordinance that banned hateful displays (like a burning cross, or a Nazi swastika) because it sought to punish speakers based on the content of their message.[10] On the other hand, "content neutral" regulations are subject to less intense scrutiny. Based on this rationale, the Supreme Court once upheld as "neutral" a New York City rule requiring that concerts use equipment limiting their total sound volume.[11] In this doctrinal rule we can see plainly that the First Amendment isn't telling the government that it cannot regulate speech at all, but that it must do so in a non-discriminatory way.

Of course, First Amendment jurisprudence is far more complex than I've described here, for it also contains a concern for matters like "vagueness" and the "tailoring" of regulations that do not have a counter-part in common carriage regulation. Nonetheless, a basic aim of the law is clear: to require neutrality from the government in its treatment of speech. As such, it shares a basic similarity with the common carriage rule requiring neutral treatment of carried information.

Thinking of the First Amendment as a free speech law is familiar. In contrast, thinking of common carriage rules as speech rules (when applied to information carriers) is novel. But when you take a few steps back, you can't help but notice that both laws enforce an anti-discrimination norm and that both are, in their nature, efforts to control enormous concentrations of power. One happens to be a concentration of public power, the other private.

I suspect that many readers have noticed that the comparison focuses on the similarities between the First Amendment and Common Carriage, not the differences. Before proceeding, it's worth considering whether the differences render the comparison inapt.

First, and most importantly, the First Amendment serves as a restraint on acts of State, while Common Carriage rules regulate private entities. It is true that the First Amendment restrains governments (state actors), and common carriage is a constraint on private companies. But the point is that they are interested in the same evil, as it were.[12] It is common to have laws that ban the private and public

[10] 505 U.S. 377 (1992).

[11] See Ward v. Rock Against Racism , 491 U.S. 781 (1989).

[12] The point is clearest when who we are calling the "private censor" is so entwined and supported by the State that it approaches what other countries call a Crown Corporation. In American history, the Bell telephone companies and parts of the Broadcast industry were, historically, nominally private firms, but have been so close to government for so long, and owe so much of their livelihood to public spectrum and rights of ways that they can in many respects be better understood as what other nations term "crown corporations."

version of the same misfeasance. We are comfortable saying that both Title VII (the federal law against employment discrimination) and the Equal Protection clause of the Fourteenth Amendment are, most of all, meant as a remedy for racism and other forms of harmful discrimination. Similarly, wiretapping is a restricted act both when performed by private parties and government. One version of the restraint binds States, the other private parties, but the point is basically the same. It should not be hard to see, similarly, the common points of the First Amendment and Common carriage (as applied to communications) or net neutrality in the sense that both are means of dealing with the problem of discrimination and between speakers.

A similar argument is to suggest that calling common carriage a speech rule misses the fact that what I am calling discrimination is, in fact, also form of speech.[13] While we shall return to this point, let's also consider briefly the more difficult objection that discrimination is a form of editing, and hence speech itself, not a form of speech control. When a newspaper or magazine includes some stories and rejects others, that act can be described as an act of discrimination. But it can also be described as an act of speech: the selection itself is an act of self-expression. So when an information carrier decides not to carry some speech and to carry others, perhaps the discrimination is simply editorial judgment and the common carriage law itself a device of censorship?[14]The answer is that an act of discrimination can be both a form of speech and censorship at the same time. If carrier like Western Union in the 19th telegraph company decides (as it did), to use its telegraph network favor the Republican Party over the Democratic Party, it is in a sense expressing itself politically. Yet the decision also holds a danger of warping the political process. Hence the possibility, at least, that some channels of communication are essential enough that the problem of private censorship is more important than the use of that channel for expression.

I think this answers the main question, but it opens up a new one: namely, how far should Government go in the regulation of private intermediaries for speech-related reasons? It's one thing, and a less controversial proposition, to demand that AT&T or Western Union not favor some speakers over others. But what about when we are speaking about the printed press or news broadcasters, entities that, by their very nature, need to make selections as to what they will carry, selections that are inherently driven by their viewpoint? More broadly, is it possible to distinguish regulations like the Manns-Elkin Act of 1910, that applied common carriage rules to telephone and radio companies, to the more general issue of regulating the media and the press?

This is a challenging question. I've said that common carriage (or net

[13] Here is what I mean by Free speech, and particularly the word "free." What I really mean is the *cost* of speech. Free speech sets out an ideal – that the cost of speech might be zero. It is of course unattainable. So what I am talking about is really society's interest in cheap speech.

[14] Similar arguments animated the First Amendment cases surrounding the cable industry, which claimed to be a speaker based on selective carriage. See, e.g., Turner Broadcasting System, Inc.. v. F.C.C. (93-44), 512 U.S. 622 (1994).

neutrality), when applied to information firms, is a speech law. But whom exactly does common carriage apply to? Whom are we talking about when we say "common carriers"? That's an extremely hard question to answer in general terms, beyond the rather circular answer that firms that offer information carriage—moving information from one place to another, without modification, editing and the rest—attract non-discrimination duties.[15] We can be sure that it excludes the press, bookstores, and other information-relevant firms who exercise discretion is what they carry. This is what distinguishes common carriage from the more general idea of media regulation.

History offers some guidance for trying to understand what it might mean to regulate speech intermediaries – not just carriers, but broadcast networks and everything once called the "mass media." We can get some insight into this issue by looking back to the 1930s and 1940s as the FCC came to life and began to exercise its powers over both the telephone companies and broadcast, or mass, media.

The Second Tradition in the Mid-Century

In 1961, in one of John Kennedy's less remembered speeches, he said to a group of TV broadcasters: "You are the guardians of the most powerful and effective means of communications ever designed."[16] Memorable or not, Kennedy was correct about the power of American broadcasting in 1961. A broadcast of the musical Cinderella in 1955 attracted 107 million viewers, nearly 60% of the entire U.S. population.[17] Shows like *I Love Lucy* or the *Ed Sullivan Show* regularly attracted more than half of American TV households, reaching more than 80 percent of the public for such popular episodes as the first appearance of Elvis Presley on *Ed Sullivan*. Since the final *M*A*S*H* episode, in 1983, U.S. television viewerships have never equaled these numbers. The period from 1930s till the early 1990s was the era of the true national mass media --a thing that did not exist before, and a thing which has been unraveling since. Lasting, by coincidence, roughly the same length of time as the communist state, it was a time, to a degree unparalleled in history, when people in the same nation mostly watched and listened to the same information.

It was in the middle part of the twentieth century, this age of the true mass media, that the second speech tradition in the United States took its furthest reach and faced the hardest questions. During that time, in scholarship that has been long forgotten, professors noticed that to control broadcasting or the telephone

[15] For a much deeper look at who, historically, is and isn't classified as a common carrier, see Thomas B. Nachbar, The Public Network, 17 CommLaw Conspectus 67, 127 (2008).
[16] President John F. Kennedy, Address at the 39th Annual Convention of the National Association of Broadcasters (May 8, 1961), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=8120.
[17] Irving Haberman, *The Theatre World Brings A Few Musical and a Stage Success to Television This Week*, N.Y. TIMES, Mar. 31, 1957.

lines was to control a huge part of speech in the United States. They pushed the government and other entities to take an active role in shaping the behavior of both common carriers and more selective speech intermediaries--namely, broadcasters.

It is true that, in the view of some, including many free speech scholars, the Federal Government went too far in this era, and in that sense the origins of the tradition can serve as a lesson. The FCCs crossed the line between the regulation of pure information carriers and firms that themselves made editorial choices, most clearly and controversially in the use of the "Fairness Doctrine." The tradition, in this respect, remains controversial to this day. But instead of engaging in the lengthy debate over the Fairness doctrine and related policies, I want instead to understand what it was and how it operated.

In 1960 Newt Minow was an obscure Chicago lawyer and a friend of the Kennedy family. That year, at age 34, Minow became the youngest FCC Chair in the history of the organization. Minow was an outsider: no expert on telecom law or media policy, and a complete unknown to the broadcasting industry. But he did have his opinions about TV, and had been influenced by writers like Walter Lippmann, founder of the *New Republic* and author of famous tract on media policy, *The Phantom Public*. Minow, in any event, was determined to put some teeth in the FCC's role in overseeing what broadcasters did with their trusteeship of the nation's spectrum--the right to reach the masses.

After a few months on the job, Minow gave his first speech at the National Association of Broadcasters. He said some nice things. But it is not for that that his speech is remembered, but for this:

> I invite each of you to sit down in front of your own television set when your station goes on the air and stay there, for a day, without a book, without a magazine, without a newspaper, without a profit and loss sheet or a rating book to distract you. Keep your eyes glued to that set until the station signs off. I can assure you that what you will observe is a vast wasteland. You will see a procession of game shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western bad men, western good men, private eyes, gangsters, more violence, and cartoons. And endlessly commercials – many screaming, cajoling, and offending. And, most of all, boredom. True, you'll see a few things you will enjoy. But they will be very, very few. And if you think I exaggerate, I only ask you to try it.[18]

Decades later, what is so interesting about Minow's speech is not just that he had the guts to attack the broadcast lobby at the very beginning of his FCC career.

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[18] Newton N. Minow, Chairman, Fed. Commc'ns Comm., "Television and the Public Interest," National Association of Broadcasters (May 9, 1961), *available at* http://www.americanrhetoric.com/speeches/newtonminow.htm

What's interesting is what he presumed: the networks--three of them only--were the source of television content. Period. And it was the job of government to cajole, pressure, and tell them how to do their job better. Today, it is hard to imagine an FCC chair's telling bloggers to improve their work, or telling the hosts of cable news to quit fighting. The reason for the difference is industry structure

Minow's comments, while bold, reflected FCC policy. In 1946, the FCC published what was called the "Blue Book," a detailed criticism of the quality of radio broadcasting at the time.[19] The Commission asserted that it "not only has the authority to concern itself with program service, but that it is under an affirmative duty, in its public interest determinations, to give full consideration to program service."[20]Minow's comments and the Blue Book reflected a particular conception of government's role in the speech environment. Broadcasters and the television networks were highly concentrated industries, and also owed their existence to the spectrum licenses issued by the FCC. As such, broadcasters were, in their speech, subject to certain duties of good behavior, enforced not so much by legal orders as by official nagging.

At all times, any broadcaster had, and still has, under the law a duty to use the airwaves-- the property of the people--in the public's interest. The nagging involved an implicit threat of loss of that license.

Early on, that meant a duty to produce what was called "sustaining" content in network jargon, paid for by the networks themselves: what we might call "public service" programs. A long-standing example was *America's Town Meeting of the Air*. This NBC show invited in experts to face a town hall meeting on the issues of the day. Its motto was "dedicated to the advancement of an honestly formed public opinion." Its ambitions were summed up by its host, George Denny, who said in 1936, "If Democrats go only to hear Democrats, and Republicans go out only to hear Republicans, and Isolationists to hear Isolationists, can we possibly call this an honest or intelligent system of political education?"[21]

But perhaps the most important expression of this role was the news department, a money loser, but a department which ideally took seriously its duty to try to educate the public and restrain government and private powers. Oddly enough, then, it was the government that pushed the networks to push back on the government.

Regulating the conduct of news departments were complex rules of fairness, most famously, the "Fairness Doctrine"—a federal rule, enforced mainly through pressure backed by threats of enforcement, that the required the presentation of both points of view on an issue, and that required broadcasters to allow response time when they attacked a public or private figure. It all fit the tenor of balance, fairness, or generality that the networks and government wanted.

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[19] FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946).

[20] *Id.*, at 12.

[21] George Denny, Address at League for Political Education Spring Luncheon (April 3, 1936), *in* NBC: AMERICA'S NETWORK (Michele Hilmes, ed. 2007) at 46-7.

> The importance of these means of regulating the mass media was the subject of Professor Zechariah Chafee's much less famous book on free speech written in 1947, named *Government and Mass Communications*.[22] We have already seen that Chafee was the anchor and perhaps the inventor of the free speech theories that prevented government censorship under the First Amendment. But here is Chafee's lost commentary on what we call the second tradition. As the co-authored preamble to that work (technically a commission report) says, in matters of speech, Governmental action is only part of the main problem … perhaps a small part. As one wise informant told us: 'It is not governmental restraint which either creates nor can completely solve the problem of free communication. Not even ten percent of the problems of a free press arise from governmental action.'[23]

The book goes on to say that Government couldn't necessarily solve many of these problems. However, it might do what it can to help. "If we think of the flow of news and opinions as the flow of intellectual traffic" wrote Chafee, "government can also try to widen the channels and keep traffic moving smoothly."[24]

Chafee advanced the idea that it was the FCC's role to push broadcast to do its best; he stopped short only of more radical ideas, such as a common carriage policy for newspapers. Nonetheless, what is evident from his treatment is how front and center the control of intermediaries was to the question of free speech in America.

I describe the mid-century role of the FCC to give one version--in American history, the strongest version--of what the second free speech tradition can mean. As discussed earlier, a central challenge for the second tradition has been, and will always be, the challenge of boundaries. Who are the critical private intermediaries whose influence over speech is so great that their actions and their regulation make such a difference?

From the 1930s through the 1960s, the FCC and scholars like Professor Chafee took the view that all of the "new media," the telephone and the radio, operating on a mass level, held enough power over speech that their behavior needed to be carefully overseen, and at times, directly controlled. They didn't think that the same types of regulation suited all private intermediaries, but rather adopted different approaches for different actors.

Implicit in this approach was a categorization of private speech intermediaries into three rough groups. One was the common carrier, to whom the most rigorous rules applied: a strict non-discrimination standard. A second group,

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[22] Zechariah Chafee, GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS (1947).

[23] *Id*., at ix.

[24] *Id*.

comprised, in practice, of broadcasters, was subject to government oversight, and the Fairness Doctrine. The reason, as stated above, was the sheer power these entities had over American speech, along with the fact that their power came from a federal license to operate on scarce, publicly-owned radio airwaves. Unlike the common carriers, by their nature these entities chose what to broadcast. But as we have seen, the FCC attempted to pressure them into carrying a broad variety of content, and also to present all views on controversial subjects. The third group, comprising small carriers, and everything related to the printed movement of information, was subject to no direct regulation whatsoever.

There is much about the second tradition in the 1940s that may seem hard to swallow today. In particular, in its regulation of broadcasters, it is easy to argue that there was just too much Governmental meddling with private speech. The FCC, for its part insisted (and the Supreme Court agreed) that the scarcity of the power of broadcasting--the very few people who got to be broadcasters, justified rules like the Fairness Doctrine.[25] In this sense, the Second tradition began to run afoul of the First.

My point here is not to endorse the regulation of mass media as it was, for we don't have the problems or the industry of the 1940s. I don't think that we want the media regulations of the 1940s for the twenty-first century. Rather, I am trying to suggest that some of the underlying concerns that animated regulators in the mid-century period remain today, and we may see them take on a primary importance during the next decades.

The Present

The second free speech tradition may be assuming (or retaking) a primary place in the early 21st century. A reasonable reader may ask why. Don't we live in an era of unprecedented speech pluralism? Yes, but matters aren't that simple. The American speech industry is less concentrated in some ways today, but it is more concentrated in others. Stated otherwise, we simply have a different speech architecture now than in the 1990s, the 1970s or the 1940s.

To understand this point we need to focus on the architecture of speech during different periods and how that affects the perceived need for regulation. [26] Consider, first, broadcasting in the mid-century. As described above, the effective

[25] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

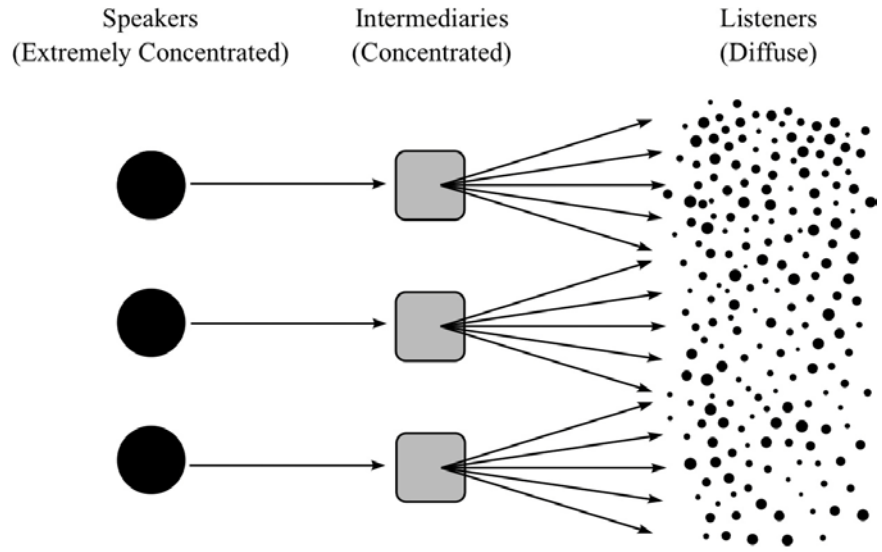
[26] This basic point, that the architecture of the Internet itself was responsible for plural speech, and could be changed, was made memorably in 1998 by Lawrence Lessig, in a paper named *What Things Regulate Speech*. As he put it:

> "Our tradition is to fear government's regulation, and turn a blind eye to private regulation. Our intuitions are trained against laws, not against code. But my argument in this essay has been that we understand the values implicit in the Internet's architecture as well as the values implicit in laws. And they would be as critical of the values within the architecture as we are of the values within the law."

What Things Regulate Speech at 55 (Sept. 1997), *available at* http://ssrn.com/abstract=33067.

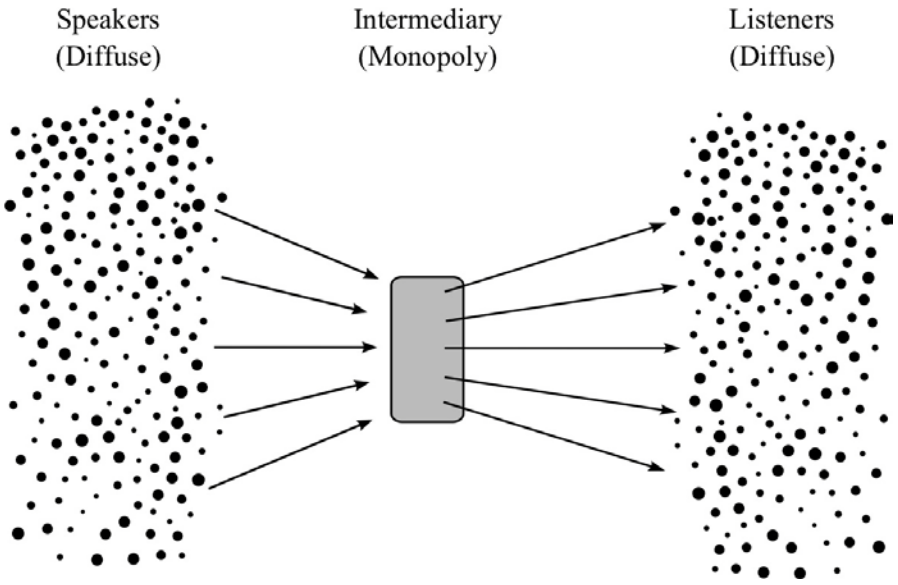
"speaker" industry was heavily concentrated in the three networks, though there were also independent producers. The intermediary or distribution industry (stations) was somewhat less concentrated; yet still, it was hardly a competitive industry, as it was based on the grant of an FCC license.

Figure 1



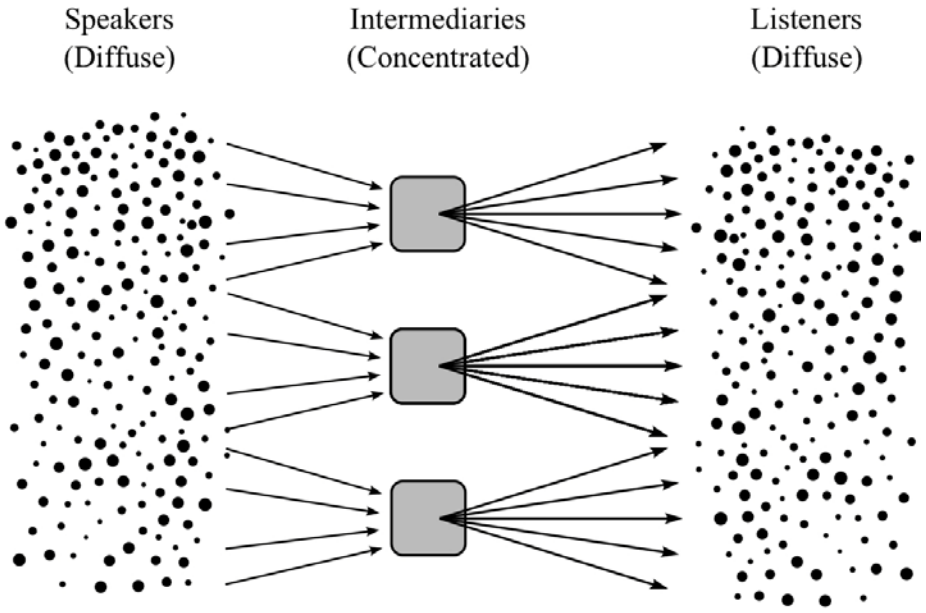
Meanwhile, the telephone industry, as a speech carrier, was as concentrated as possible – as a monopoly, under AT&T. Yet it carried speech from any speaker to any speaker:

Figure 2



That was then. In the 2010s, the architecture of speech features an enormous number of speakers, layered on top of a small number of intermediaries. That is why the behavior of large intermediaries has become so important:

Figure 3



This means that we live in an age of concentrated distribution and switching (better known as "search"), but extremely diffuse speech. It is easy to publish or to find nearly any viewpoint relevant to a given issue. That's why there is only limited demand for something like a Fairness Doctrine for the Internet.

In contrast, carriage is relatively concentrated. Here in the early 2010s, there are now merely a handful of companies that deliver or switch most of the information in the United States. They are the two main telephone companies, Verizon and AT&T, the cable industry, and a handful of crucial switches, Google most obviously.[27] An astonishing volume of content runs through or is switched by these firms, and consequently they are in a unique position to control speech in America.

This explains why that the focus of speech questions has come to center on net neutrality, the contemporary version of common carriage. The concentrated internet speech intermediaries of our time look and act like carriers. Consequently, the felt demands for their regulation are similar to those applied, historically, to the carrier industry, the telephone and telegraph firms. The general concern is with the potential misbehavior of the great carriers and switches, the

[27] While technically Google is a search engine, not a switch, it can be understood to perform the function of a switch in a network architecture – namely it takes people to the party they are seeking, the classic function of the telephone switch.

firms already named – because that is where the industrial concentration is found. The discussion of the influence of powerful entities in American speech is a discussion of common carriage or network neutrality, rather than Newt Minow-style efforts to tell powerful speakers what they should be doing.

At this time of writing, in 2010, the FCC was in the midst of adopting a new set of Net Neutrality rules, albeit on somewhat shaky jurisdictional grounds. This article is not the place for a lengthy discussion of the limits of the FCC's jurisdiction. The more important fact is that questions of private discrimination will always have a central place in the regulation of communications.[28] That is true whether it is common carriage, net neutrality, cable regulation, spectrum regulation or whatever the future may bring. That, in turn, suggests that the Second Speech Tradition is certain to have a lasting significance in the next several decades.

Conclusion

This essay began with an Ishiguroesque portrayal of the potential political consequences that can come from abuse of the most powerful speech infrastructures in the nation. The story may strike some as far-fetched, science fiction, perhaps. And yet the example was based not on fiction but fact: the events surrounding the election of 1876.

In the early 1870s, Western Union, not AT&T, was the uncontested monopolist of the telegraph, then the only instantaneous long-distance communications technology. It made an agreement with the Associated Press, making the latter the exclusive source of wire news in the United States. Combined, the Associated Press, as historians have documented,29 used their power to promote or suppress wire news, and the device of spying on private telegraphs, in an effort to destroy the candidacy of the Democratic candidate, Ohio governor Samuel Tilden, and to make Rutherford Hayes President. An election is a complex thing, and it is impossible to measure exactly the effects of the Western Union--AP campaign on the election, but that it had an effect, and a potentially decisive one, also cannot be doubted.

The broader point is simply that private power over speech can be nearly as terrifying as public power. And why not? Power is power, wherever it is found. We already know that the more tyrannical the Government, the more important the First Amendment becomes. But it's important to understand the same idea in a private setting: the greater the concentration of the speech industry grows, the more important the second speech tradition will become.

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[28] See Tim Wu, Why Have a Telecommunications Law?: Anti-Discrimination Norms in Communications, 5 J. Telecom & High Tech. L. 15 (2006).

[29] See, for example, Menahem Blondheim, News Over the Wires: The Telegraph and the Flow of Public Information in America, 1844-1897 (Harvard University Press, 1994).

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