



MAKING BROADCAST CONTENT REGULATION AGGRESSIVE AGAIN

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The Federal Communications Commission has statutory authority over broadcasting that far exceeds any governmental authority over online platforms, cable television, or newspapers: Every license renewal or transfer depends on the FCC’s determination that it is consistent with “the public interest, convenience, and necessity.” In its early decades, the Commission used that authority to aggressively regulate broadcast content, and the Supreme Court upheld such regulation. But starting with the Reagan Administration, and continuing through the Biden Administration, the FCC eliminated or curtailed the content regulations it had imposed, with the exception of bursts of indecency regulation in 1987 and the early 2000s. As a result, content regulation of broadcasting was largely quiescent.

The second Trump Administration seems poised to end that long period of bipartisan restraint, underscoring how contingent that restraint always was. In this Article I canvass the most important content regulations of broadcasting and the changes to them wrought by Reagan and largely continued by his successors through Biden. I then discuss the key Supreme Court cases that have permitted content regulation of broadcasting before turning to the lack of meaningful administrative law constraints on the FCC Chair’s promised and partially implemented reinvigoration of such regulations.

This leads to the question of possible legal responses to such a reinvigoration. Options exist—both broadcast-specific and more general doc-

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trines, notably including limits on jawboning. But there are legal and practical obstacles, including limits on standing and intermediaries' misaligned incentives. And a President who makes it clear that he will lambaste anyone he dislikes can achieve the results of jawboning without having to issue a single threat of government punishment or public criticism.

Ultimately, broadcasting serves as a case study in the limits of legal protections for speech when the executive branch is willing to use all available levers, formal and informal, to influence media entities. Norms of self-restraint, rather than legal constraints, have been doing much of the work—and the erosion of those norms would have profound implications for the future of media in the United States.

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INTRODUCTION

Starting in the 1980s under President Reagan, the FCC curtailed or abandoned most of the content regulations of broadcasting that it had earlier promulgated.¹ That pattern continued through the Biden Administration: Such regulation was largely dormant.² Statutes regulating content existed (although, with the episodic exception of indecency, they were interpreted narrowly). But regulations created by the FCC were either repealed (notably the fairness doctrine), never applied (e.g., the broadcast hoax rule), or applied so rarely and weakly as to be toothless (e.g., the broadcast news distortion policy).³

Broadcast television may seem like a relic of the past to some readers of this Article.⁴ But it garners more than 20% of all television viewing,⁵ and the legal issues it raises are important. The developments presented in this Article highlight important questions about the desirability of regulation and tell an instructive story about roads taken and not taken.

¹ See *infra* Part II.

² See *id.* One small indicator: I served at the FCC from 2009–2011 and 2014–2016 (the first stint full time), and my experience was that the content regulations that were not mandated by Congress were not invoked as possible forms of regulation and were widely regarded as relics of a regulatorily intrusive past.

³ See *infra* notes 84–135 and accompanying text.

⁴ Broadcasting is the sending out of a signal that can be received by anyone with a radio or television and an antenna (no subscription needed), traditionally one signal per allocated channel (which is a slice of the electromagnetic spectrum in a given area). Cable and satellite television are subscription services that send a set of signals to a particular location via wire or satellite. *Cable TV vs. Broadcast TV*, COMCAST ADVERT., <https://perma.cc/MUC5-T76J>; *What Is Satellite TV & How Does it Work?*, DIRECTV INSIDER (Apr. 7, 2025), <https://perma.cc/M6U5-S9MU>. And broadband internet is sent to paying customers via wire or wireless transmitter. *Broadband Internet: Definition and How it Works*, SPECTRUM, <https://perma.cc/9G8P-BL47>.

⁵ *The Gauge: TV Viewing Trends in the U.S.*, NIELSEN (2025), <https://perma.cc/MLK7-PCCZ>.

There are two key elements of the legal landscape for broadcasting. First, every license is for a term of years and then is subject to renewal under the statutory “public interest, convenience, and necessity” standard.⁶ The same public interest standard applies to any application to transfer a license from one entity to another, which means that any corporate merger or acquisition involving licenses requires the FCC finding that the transfer is consistent with the public interest.⁷ And, as judicial opinions and Commission practice make clear, the public interest standard extends well beyond concerns about competition.⁸

How can the FCC exercise such pervasive control over a means of communication? That implicates the second key element of the legal landscape—*Red Lion Broadcasting Co. v. FCC*⁹ and *FCC v. Pacifica Foundation*.¹⁰

Concerns about the public interest standard and *Red Lion/Pacifica* are not new. What, if anything, changed with the coming of the second Trump Administration?

First, the second Trump Administration has been more interested in regulating broadcast content than any of its predecessors since Reagan. FCC Chair Brendan Carr has explicitly rejected the Commission’s longstanding self-restraint with respect to the public interest standard, stating that licensees have “a unique obligation

⁶ See 47 U.S.C. § 301 (requiring a license for radio transmissions); *id.* § 307 (limiting license term length to eight years); *id.* § 309 (requiring a finding that “the public interest, convenience, and necessity will be served” before renewing a license). This was for many decades the standard applicable to the initial grant of all spectrum licenses, but Congress passed legislation providing that most initial licenses are auctioned. See *infra* note 51 and accompanying text.

⁷ See 47 U.S.C. § 310(d) (requiring a public interest finding before transfer of a license). The FCC has no general merger authority; its authority flows from its power over license transfers and thus does not apply to entities that do not need spectrum licenses (like cable television channels and websites). When, for example, AT&T and Time Warner (owner of, e.g., HBO and CNN) decided to merge, Time Warner sold its single broadcast television station to a much smaller company to avoid FCC review of the much bigger, and potentially more problematic, merger with AT&T. See David Lieberman, *FCC Approves Time Warner TV Station Sale, Likely Helping AT&T Deal*, DEADLINE (Apr. 17, 2017, at 11:22 ET), <https://perma.cc/LG4Z-7S4N> (noting that the sale meant that AT&T’s acquisition of Time Warner did not involve any license transfers, allowing the deal to bypass FCC review); Marguerite Reardon, *AT&T, Time Warner Plan to Skirt FCC Review of Megamerger*, CNET (Jan. 6, 2017, at 13:18 PT), <https://perma.cc/8UR7-L36E> (same).

⁸ See *infra* notes 55–61 and accompanying text.

⁹ 395 U.S. 367 (1969).

¹⁰ 438 U.S. 726 (1978).

to operate in the public interest. And over the years, the FCC walked away from enforcing that public interest obligation. I don't think we're better off as a country for it."¹¹ He has also flatly stated that "if [broadcasters] want to keep access to those valuable airwaves, I've been clear, we're reinvigorating the FCC's enforcement of public interest."¹²

Carr has demonstrated that this is not idle talk. He has relied on the public interest standard in opening an investigation into a broadcaster reporting on the location of Immigration and Customs Enforcement actions;¹³ responded to Comcast, which allegedly "impl[ied] that [Kilmar] Abrego Garcia was merely a law abiding U.S. citizen" and ignored facts about Garcia, by invoking the public interest standard and suggesting that Comcast had engaged in news distortion;¹⁴ suggested narrowing the category of bona fide news programs that are exempt from the equal

¹¹ *What to Know About Brendan Carr, the Head of the FCC*, PBS NEWS (Sept. 19, 2025, at 10:06 ET), <https://perma.cc/W8T7-VZ6L>; see also Steven Portnoy, *FCC Chair Brendan Carr Clashes with Democrats in Senate Hearing*, ABC NEWS (Dec. 17, 2025, at 15:05 ET), <https://perma.cc/B6FY-QGRJ> (quoting Carr: "If broadcasters understand, perhaps for the first time in years, that they're going to be held accountable to the public interest, to the broadcast hoax rule, to the news distortion policy, I think that's a good thing."); *Chairman Carr: FCC Needs to Help Strengthen Local Broadcasters*, INSIDERADIO (Feb. 28, 2025), <https://perma.cc/6R59-2288> (quoting Carr: "For a lot of years, the FCC walked away from enforcing that public interest obligation. One of the things you've seen over the last couple of weeks is that we're going to continue to enforce it.").

¹² CNBC TELEVISION, *Watch CNBC's Full Interview with FCC Chairman Brendan Carr*, at 7:01–7:09 (YouTube, Sept. 18, 2025), <https://www.youtube.com/watch?v=H6cOAI1qwYE>; see also Ted Johnson, *FCC Chairman Brendan Carr, Who Threatened ABC Over Jimmy Kimmel Comments, Once Railed Against Policing Speech "in the Name of the Public Interest"*, DEADLINE (Sept. 17, 2025, at 21:25 ET), <https://perma.cc/UE74-UKFZ> (quoting Carr: "We at the FCC are going to enforce the public interest obligation. If there's broadcasters out there that don't like it, they can turn their license into the FCC."); Brendan Carr (@BrendanCarrFCC), X (Nov. 23, 2024, at 19:18 ET), <https://perma.cc/TT7K-L686> ("Broadcast licenses are not sacred cows. These media companies are required by law to operate in the public interest. If they don't, they are going to be held accountable, as the Communications Act requires."); Brendan Carr (@BrendanCarrFCC), X (Nov. 18, 2024, at 00:57 ET), <https://perma.cc/9HVR-CAYV> ("[Broadcasters] are required by law to operate in the public interest. When the transition is complete, the FCC will enforce this public interest obligation.").

¹³ Juan Carlos Lara, *FCC Investigates SF Radio Station for ICE Reporting, Sparking Press Freedom Fears*, KQED (Feb. 6, 2025, at 16:41 PT), <https://perma.cc/45VF-S6RV> (quoting Carr as questioning how such reporting "could possibly be consistent with their public interest obligations").

¹⁴ See Brendan Carr (@BrendanCarrFCC), X (Apr. 16, 2025, at 18:58 ET), <https://perma.cc/>

time requirement;¹⁵ suggested that the splicing together of two different portions of Trump’s January 6, 2021 speech at the Ellipse may constitute news distortion and/or a broadcast hoax;¹⁶ and opened other news distortion investigations.¹⁷

Carr issued a particularly striking threat in March 2026. In response to a Wall Street Journal article¹⁸ reporting that, according to U.S. officials, an Iranian missile struck and damaged five Air Force refueling planes that were on the ground at a Saudi Arabia air base, Trump claimed that the Wall Street Journal’s reporting was inaccurate, as “[f]our of the five [planes] had virtually no damage” and “[o]ne had

ZA7Q-4HA9 (“Comcast outlets spent days misleading the American public—implying that Abrego Garcia was merely a law abiding U.S. citizen, just a regular ‘Maryland man.’ When the truth comes out, they ignore it. Comcast knows that federal law requires its licensed operations to serve the public interest. News distortion doesn’t cut it.”).

Aggressive application of the news distortion standard would be a major break with the application of the standard from Reagan through Biden. *See infra* notes 118–135 and accompanying text.

¹⁵ Before 2025, the FCC had consistently interpreted broadly the exemptions to the equal time requirement, ruling that *The Tonight Show*, *Politically Incorrect with Bill Maher*, and *The Howard Stern Show* could interview political candidates without having to offer airtime to their opponents. *See infra* note 95 and accompanying text. But the FCC under Carr issued a public notice stating that broadcasters could not rely on these precedents, and Carr announced that the FCC “has an enforcement action underway” against *The View* for possibly violating the equal time requirement, notwithstanding those precedents and the fact that it seems to fit into the news interview exemption at least as well as the programs noted above. Public Notice, FCC, FCC’s Media Bureau Provides Guidance on Political Equal Opportunities Requirement for Broadcast Television Stations (Jan. 21, 2026), <https://perma.cc/UUB2-8DJG>; Ted Johnson, *FCC Chairman Confirms “Enforcement Action” Underway Against ABC’s ‘The View’, Calls Stephen Colbert-James Talarico Incident a “Hoax”*, DEADLINE (Feb. 18, 2026, at 09:47 ET), <https://perma.cc/25GY-CDJ8>; *see also* William Earl, *Brendan Carr Confirms FCC Has Begun ‘Enforcement Proceedings’ Against ABC’s ‘The View’ Over Equal Time Issues*, VARIETY (Feb. 18, 2026, at 17:56 PT), <https://perma.cc/NW2F-DRTB> (quoting Carr as stating that “Disney and ‘The View’ have not established that that program is, in fact, bona fide news. We’ve started enforcement proceedings, taking a look at that. And, again, we’re going to hold broadcasters accountable.”).

¹⁶ *See* Letter from Brendan Carr, Chair, FCC, to BBC, NPR, and PBS (Nov. 19, 2025), <https://perma.cc/PMS3-8F9G> (stating that the splicing might implicate “prohibitions on news distortion and broadcast hoax”).

¹⁷ *CBS News to Comply with FCC Demand for “60 Minutes” Transcript and Video*, CBS NEWS (Jan. 31, 2025, at 19:06 ET), <https://perma.cc/D2KE-4X37> (noting that the FCC was investigating 60 Minutes for the editing of its interview with former Vice President Kamala Harris).

¹⁸ Laura Seligman & Shelby Holliday, *Five Air Force Refueling Planes Hit in Iranian Strike on Saudi Arabia*, WALL ST. J. (Mar. 14, 2026).

slightly more damage.” Trump used the occasion to attack the reporters involved as “truly sick and demented people.”¹⁹ Three hours later, Carr posted Trump’s statement on X and said in response: “Broadcasters that are running hoaxes and news distortions—also known as the fake news—have a chance now to correct course before their license renewals come up. The law is clear. Broadcasters must operate in the public interest, and they will lose their licenses if they do not.”²⁰ As Part II(D) indicates, it would be an unprecedented extension of the news distortion policy and the broadcast hoax rule to apply either of them to mistaken war reporting.²¹

Most famously, Carr suggested that Disney could be punished for engaging in news distortion based on Jimmy Kimmel’s monologue in which he said “[w]e hit some new lows over the weekend, with the MAGA gang desperately trying to characterize this kid who murdered Charlie Kirk as anything other than one of them and doing everything they can to score political points from it.”²² Carr’s threats

¹⁹ Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Mar. 14, 2026, at 9:35 ET), <https://perma.cc/8G6T-NDHQ>.

²⁰ Brendan Carr (@BrendanCarrFCC), X (Mar. 15, 2026, at 10:48 ET), <https://perma.cc/N9D2-JPYT>. In response, Trump wrote “I am so thrilled to see Brendan Carr, the Chairman of the Federal Communications Commission (FCC), looking at the licenses of some of these Corrupt and Highly Unpatriotic ‘News’ Organizations. They get Billions of Dollars of FREE American Airwaves, and use it to perpetuate LIES, both in News and almost all of their Shows” Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Mar. 15, 2026, at 19:48 ET), <https://perma.cc/2Q8D-EC6F>.

²¹ Note also that Trump mentioned only newspapers, but the First Amendment would prohibit government action against them for their reporting. Carr, in pivoting to broadcasters, highlighted the vast difference between the Supreme Court’s treatment of broadcasting and all other media, and the implications of that difference.

²² Anthony Robledo, *What Did Jimmy Kimmel Say About Charlie Kirk? Watch the Monologue*, USA TODAY (Sept. 18, 2025, at 18:12 ET), <https://perma.cc/2EBA-6W5M>.

From Carr’s remarks about Kimmel’s monologue:

[Local broadcasters] are entirely different than people that use other forms of communication. They have a license granted by us at the FCC, and that comes with it an obligation to operate in the public interest. . . . [W]e can do this the easy way or the hard way. These companies can find ways to change conduct and take action . . . on Kimmel or . . . there is going to be additional work for the FCC ahead. . . .

There’s calls for Kimmel to be fired. I think . . . you could certainly see a path forward for suspension over this. And again, you know, the FCC is gonna have remedies that we could look at. . . .

[Y]ou can't be engaging in a pattern of news distortion. We have a rule on the book[s] that interprets a public interest standard that says news distortion is something that is prohibited. . . .

[T]here's actions that we could take on licensed broadcasters. And frankly, I think that it's really sort of past time that a lot of these licensed broadcasters themselves push back on Comcast and Disney [which own NBC and ABC, respectively] and say, "Listen, we're going to preempt—we're not going to run—Kimmel anymore until you straighten this out, because we, we licensed broadcaster, are running the possibility of fines or license revocation from the FCC if we continue to run content that ends up being a pattern of news distortion." So I think, again, Disney needs to see some change here, but the individual licensed stations that are taking their content, it's time for them to step up and say this, you know, garbage, to the extent that that's what comes down the pipe in the future, isn't something that we think serves the needs of our local communities. But, but this sort of status quo is obviously not, not acceptable where we are. . . .

[The] FCC could make a strong argument that this is sort of an intentional effort to mislead the American people about a very core fundamental fact, a very important matter. . . . [T]his is a very, very serious issue right now for Disney.

THE BENNY SHOW: *Kash Patel Testifying Live Now on Charlie Kirk Assassin | Dark Texts with Trans Boyfriend Released . . . with Guests FCC Chairman Brendan Carr, Mike Davis and Rep. Eli Crane*, at 01:29:15–01:40:07 (Apple Podcasts, Sept. 17, 2025, at 14:17 ET).

A few hours after Carr's remarks, Nexstar, which owns multiple ABC local affiliates, announced that it would suspend carriage of Jimmy Kimmel Live, and minutes later ABC suspended Kimmel's show. See Keith Collins & Raj Saha, *What a Local TV Merger Has to Do With Jimmy Kimmel's Suspension*, N.Y. TIMES (Sept. 19, 2025).

In response to Kimmel's and Carr's comments, Trump said of broadcasters: "They give me only bad publicity or press. I mean, they're getting a license. I would think maybe their license should be taken away." Associated Press, *Listen: Trump Calls for Licenses of TV Networks That Give Him 'Bad Publicity' to Be Revoked*, PBS NEWS (Sept. 18, 2025, at 18:28 ET), <https://perma.cc/B2VD-WP6U>.

In November 2025, Trump posted: "NBC's Seth Meyers is suffering from an incurable case of Trump Derangement Syndrome (TDS). He was viewed last night in an uncontrollable rage, likely due to the fact that his "show" is a Ratings DISASTER. Aside from everything else, Meyers has no talent, and NBC should fire him, IMMEDIATELY!" Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Nov. 15, 2025, at 18:57 ET), <https://perma.cc/MJZ4-THER>. Carr reposted Trump's November comments. Elizabeth Blair, *President Trump Wants Seth Meyers Fired. The FCC Chair Amplified the Message*, NPR (Nov. 17, 2025, at 02:50 ET), <https://perma.cc/XQ2L-2ZEL>.

And in December 2025, Trump posted: "If Network NEWSCASTS, and their Late Night Shows, are almost 100% Negative to President Donald J. Trump, MAGA, and the Republican Party, shouldn't their very valuable Broadcast Licenses be terminated? I say, YES!" Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Dec. 24, 2025, at 00:36 ET), <https://perma.cc/HDY5-KZTC>.

against Disney and local broadcasters carrying Kimmel have no obvious precedent.²³ And, as I discuss below, application of the news distortion policy to Kimmel's statements would be unprecedented.²⁴

Trump himself has also been aggressive. He filed a weak defamation lawsuit against ABC for incorrectly stating that he had been found liable for rape (as opposed to sexual abuse, which the jury found Trump had committed), when the New York rape statute at the time did not cover Trump's conduct.²⁵ The judge in the defamation case against ABC declined to dismiss Trump's lawsuit notwithstanding the fact that the judge in the original sexual abuse case stated in a subsequent defamation suit against Trump that the rape accusation was "substantially true."²⁶ Trump filed an even weaker case against CBS for allegedly deceptively editing an interview with Kamala Harris, objecting to the truncation of one of her answers on one program (though that same answer was presented in full on another program, as networks often do).²⁷ CBS settled the lawsuit and shortly thereafter the FCC approved the transfer of CBS's broadcast stations to Paramount.²⁸

²³ Disney owns ABC. Harold L. Erickson, *American Broadcasting Company*, BRITANNICA, <https://perma.cc/832B-U4AV>. ABC is a national television network that acquires, schedules, and distributes programming to the actual licensees (local television stations); but, like all the major national networks, it also owns and operates local television licensees in some of the biggest media markets. Christopher Sterling, *The Electronic Media*, U.S. DEP'T OF STATE: INFOUSA, <https://perma.cc/FV2F-C3GY>. So Disney is both the distributor of ABC shows (like Kimmel's) and an FCC licensee that airs ABC shows to local viewers.

²⁴ See *infra* notes 118–135 and accompanying text.

²⁵ Graham Kates & Katrina Kaufman, *Trump Is Suing ABC News and George Stephanopoulos for Defamation. Here's What to Know About His Claim.*, CBS NEWS (Mar. 21, 2025, at 09:44 ET), <https://perma.cc/34QR-T4C5>.

²⁶ *Id.*

²⁷ Benjamin Mullin et al., *Paramount to Pay Trump \$16 Million to Settle '60 Minutes' Lawsuit*, N.Y. TIMES (July 2, 2025).

And in 2026, White House press secretary Karoline Leavitt quoted Trump to a CBS interviewer as saying that he wanted CBS to air the full interview, adding, "[Trump] said, 'If it's not out in full, we'll sue your ass off.'" Michael M. Grynbaum & Benjamin Mullin, *'We'll Sue': White House's Warning to CBS Is Sign of a New Media Status Quo*, N.Y. TIMES (Jan. 17, 2025).

²⁸ Benjamin Mullin, *F.C.C. Approves Skydance's \$8 Billion Merger with Paramount*, N.Y. TIMES (July 28, 2025).

As the first quotation above from Carr indicates, and as I will discuss below, this reinvigoration of the public interest standard stands in sharp contrast to the Commission's decades-long policy of construing the public interest standard narrowly, including in the first Trump Administration.²⁹ Indeed, Carr himself, as an FCC commissioner in the first Trump Administration, said “[s]hould the government censor speech it doesn't like? Of course not. The FCC does not have a roving mandate to police speech in the name of the ‘public interest.’”³⁰

Second, the Supreme Court's likely overruling of *Humphrey's Executor v. United States*³¹ will mean that “independent agencies” like the FCC are subject to presidential control.³² The key mechanism of presidential control is removal of

²⁹ See *infra* Part II.

³⁰ Brendan Carr (@BrendanCarrFCC), X (Feb. 14, 2019, at 10:05 ET), <https://perma.cc/HSA7-KEAD>; see also Brendan Carr (@BrendanCarrFCC), X (Apr 28, 2022, at 11:56 ET), <https://perma.cc/J397-XV4C> (“Free speech is not a threat to democracy—censoring it is.”); Brendan Carr (@BrendanCarrFCC), X (Dec. 30, 2023, at 14:11 ET), <https://perma.cc/L6A3-XABL> (“Free speech is the counterweight—it is the check on government control. That is why censorship is the authoritarian's dream.”); Brendan Carr (@BrendanCarrFCC), X (Feb. 3, 2019, at 17:13 ET), <https://perma.cc/RXN4-ACE2> (“Censoring lawful speech based on its content? I'm with the First Amendment. I'm a no.”); Brendan Carr (@BrendanCarrFCC), X (May 2, 2022, at 09:20 ET), <https://perma.cc/L2X4-JHYF> (“Political satire is one of the oldest and most important forms of free speech. It challenges those in power while using humor to draw more people in to the discussion. That's why people in influential positions have always targeted it for censorship.”).

³¹ 295 U.S. 602 (1935).

³² I use quotation marks to emphasize that the appellation will not meaningfully apply to what have been understood to be independent agencies.

Even before the overruling of *Humphrey's Executor*, Carr stated flatly in Senate testimony, in alignment with the Trump Administration's position, that the President could fire him for any reason and thus that “the FCC is not an independent agency, formally speaking.” C-SPAN, *FCC Chair Brendan Carr: “The FCC Is Not an Independent Agency Formally Speaking.”*, at 00:59–01:02 (YouTube, Dec. 17, 2025), <https://www.youtube.com/watch?v=mnOMyPbR7QY>; Scott Nover & Ian Duncan, *Brendan Carr Said the FCC Isn't Independent. Its Website Quickly Updated*, WASH. POST (Dec. 17, 2025). During his testimony, the FCC removed the word “independent” in describing the Commission. *Id.*

agency heads, and the key indicia of agency independence are protections from removal.³³ If heads of what have been regarded as independent agencies are removable at will, they are just as subject to presidential control as the heads of executive agencies and thus no longer independent.³⁴

Third, Trump has imposed more control over the executive branch than any President in at least a half century. One salient example is his executive order providing that his or the Attorney General's legal interpretations are binding

³³ See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1284 (2006) (arguing the First Congress believed “[a] President without removal authority might be seriously weakened . . . in ensuring that the laws were ‘faithfully executed’”); Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (“Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause. Such agencies are, by definition, independent agencies; all other agencies are not.”); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1168 (2013) (“[F]or-cause tenure protection is the sine qua non of agency independence.”).

The FCC was created after *Myers v. United States*, 272 U.S. 52 (1926), had invalidated limits on presidential removal and before *Humphrey’s Executor* was decided. Congress did not include for-cause removal protections for the FCC or for any other multi-member agencies that it created during this period, as such protections were assumed to be unconstitutional. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 546–47 (2010) (Breyer, J., dissenting) (noting that Congress created the FCC, the Securities and Exchange Commission (SEC), and the Federal Power Commission during this period, “at a time when, under this Court’s precedents, it would have been *unconstitutional* to make the Commissioners removable only for cause,” and thus did not include such protections). Thus there is a straightforward textual argument that FCC and SEC commissioners can be fired without cause. And yet the prevailing assumption has been that FCC and SEC commissioners have for-cause protections. Strikingly, the holding in *Free Enterprise Fund* (invalidating two layers of for-cause removal protections, one of which was such protections for SEC commissioners) necessarily presupposed that SEC commissioners had removal protections. The Court’s only discussion of this crucial element was its statement that “[t]he parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office,’ and we decide the case with that understanding.” 561 U.S. at 487.

³⁴ Note that if Presidents can freely remove independent agency heads, Presidents can remove any same-party commissioners who don’t toe their line and remove all the opposite-party commissioners. Depending on quorum requirements, a President could remove one same-party commissioner and two opposite-party commissioners and leave the Commission in the hands of two same-party commissioners who will do the President’s bidding without needing additional confirmations.

throughout the executive branch.³⁵ The combination of such orders with the overruling of *Humphrey's Executor* indicates that the President will direct policy at agencies like the FCC that have traditionally been treated as independent. Presidents have always been able to influence independent agencies via their choice of the chair and the fact that the President's party usually has a majority of commissioners early in his term.³⁶ But those agencies have had a measure of insulation from political control, because the President could not remove commissioners whose votes did not align with his policies and because of norms against exerting direct control.³⁷ With the demise of both constraints, what have been treated as independent agencies will have no insulation from presidential control. And the second Trump Administration has made clear that it is ready and willing to use every tool available to implement Trump's objectives.³⁸

³⁵ From a February 2025 Executive Order entitled Ensuring Accountability for All Agencies:

Rules of Conduct Guiding Federal Employees' Interpretation of the Law. The President and the Attorney General, subject to the President's supervision and control, shall provide authoritative interpretations of law for the executive branch. The President and the Attorney General's opinions on questions of law are controlling on all employees in the conduct of their official duties. No employee of the executive branch acting in their official capacity may advance an interpretation of the law as the position of the United States that contravenes the President or the Attorney General's opinion on a matter of law, including but not limited to the issuance of regulations, guidance, and positions advanced in litigation, unless authorized to do so by the President or in writing by the Attorney General.

Exec. Order No. 14215, 90 Fed. Reg. 10447, 10448–49 (Feb. 18, 2025).

³⁶ The main exception is the Federal Election Commission, which is always evenly split between the two major political parties and has been characterized by political deadlock. Natalie R. Schmidt, *Chaney Step Zero: Judicial Review of FEC Deadlock Dismissals*, 85 OHIO ST. L.J. 307, 309, 316 (2024).

³⁷ Most of the independent agencies have been multimember commissions or boards. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1135, 1137 (2000) (noting that “the Act to Regulate Commerce of 1887 set out the basic organizational model for the modern multi-member independent agency” and that all sixteen agencies the Paperwork Reduction Act listed as independent were multi-member).

³⁸ See, e.g., Jack Goldsmith, *Interim Orders, the Presidency, and Judicial Supremacy*, 139 HARV. L. REV. 86, 86 (2025) (“President Trump has issued a historically large number of executive orders and engaged in other executive actions premised on a very broad conception of executive power.”); Jack Goldsmith, *Trump's Continuing Illegal Refusal to Enforce the TikTok Ban*, EXEC. FUNCTIONS (June 19, 2025), <https://perma.cc/5NX5-WHL3> (“It has never been clear where the line is between the president's broad permissible enforcement discretion and a president's illegal refusal to enforce

The FCC's self-restraint on content regulation of broadcasting from Reagan through the Biden Administration could have been rejected at any time. One question is why the second Trump Administration has been more aggressive than its predecessors in pressuring broadcasters. Another is why its predecessors (including the first Trump Administration) did not make similar choices. There is of course no easy answer to either question, or to the related question of the role played by regulatory philosophy, political considerations, powerful interests, and the like in producing the restraint from Reagan through Biden or the apparent waning of such restraint in the second Trump Administration.

Broadcasting is just one application of those questions. They can be posed with respect both to the various kinds of continuity that existed in the administrations preceding the second Trump Administration and to the ways in which the second Trump Administration has self-consciously rejected some of those forms of continuity.

As with other areas where the Trump Administration scrambles ideological battle lines (e.g., tariffs), its moves to ramp up broadcast regulation raise the question of how, if at all, the political valence of speech regulation will change. Broadcasting is the best test case. Any attempts at regulating the content of other media would likely be quickly enjoined on First Amendment grounds in light of the difficulty of satisfying strict scrutiny,³⁹ so there is limited scope for dramatic differences between the political parties in the regulations they can implement. Because of the capaciousness of the public interest standard, however, the differences in regulatory

the law. . . . But wherever that line is, and there is a line, the refusal to enforce the TikTok ban crosses it.”); Cecilia Vega, *U.S. Sent 238 Migrants to Salvadoran Mega-Prison; Documents Indicate Most Have No Apparent Criminal Records*, CBS NEWS (Apr. 6, 2025, at 19:00 ET), <https://perma.cc/LZY6-75S3> (“Three weeks ago, 238 Venezuelan migrants were flown from Texas to a maximum security prison in El Salvador. . . . [T]he Trump administration used a law not invoked since World War II to send them—claiming they are all terrorists and violent gang members.”); Jeremy W. Peters, *Here Is What Happened When President Johnson Bypassed a Governor to Deploy the National Guard.*, N.Y. TIMES (June 10, 2025) (“Before Saturday, [March 1965] was the last time a president used his limited executive authority to bypass a state governor and dispatch that state’s National Guard himself to deal with civil unrest.”); U.S. Secretary of State Marco Rubio, *Making Foreign Aid Great Again*, SUBSTACK (July 1, 2025), <https://perma.cc/SDD5-BTRM> (“As of July 1st, USAID will officially cease to implement foreign assistance.”); Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Aug. 25, 2025, at 20:02 ET), <https://perma.cc/L5CX-L2V6> (firing Federal Reserve Governor Lisa Cook).

³⁹ See *infra* note 200 and accompanying text.

approaches to broadcasting can be vast, and thus there is more room for ideological contestation.

Although the story of broadcast content regulation from Reagan through Biden was largely one of continuity, outside of indecency regulation the biggest supporters of a broad and flexible application of the public interest standard have generally been on the political left, and the biggest detractors have generally been on the political right.⁴⁰ Thus a question going forward is whether the second Trump Administration has discredited, or will discredit, broad governmental power for those on the political left—particularly with respect to speech—and has led, or will lead, those on the political right to be more supportive of such power.

The breadth and scope of the government’s authority over broadcasting makes it a special case. But for one important element of independence—resisting government efforts to suppress the speech that media companies carry—the difference between broadcasting and other media companies may not be as large as it might seem at first blush. There are no equivalents of *Red Lion*, *Pacifica*, or the public interest standard that relies on them for any other medium of communication. But the government still has powerful tools it can use against other companies—for

⁴⁰ See, e.g., Milton Mueller, *Interview with Mark S. Fowler*, REASON (Nov. 1981), <https://perma.cc/4GSZ-RME3> (quoting Reagan’s FCC Chair: “We believe the public interest will be more surely reflected by letting people choose, through the marketplace, what they want to hear, rather than letting four people out of seven on a commission tamper with programs and issue guidelines, policies, and rules that control what broadcasters shall broadcast.”); Harold Furchtgott-Roth, Comm’r, FCC, Comments at the Federalist Society of Pittsburgh: Regulation and the FCC (Apr. 20, 2000) (“[A]t the FCC we do things to erode the edges of property rights. We issue licenses . . . and yet we restrict the use of those licenses. . . . We also erode property rights . . . by imposing public interest standards which are not codified anywhere. Even worse, the public interest standards vary depending on the identity of the party and the type of service providing, sometimes even within the same service.”); Charter Commc’ns, Inc., 31 FCC Rcd. 6327, 6669 (2016) (Pai, Cmm’r, dissenting) (complaining that FCC merger review is “fact-free, dilatory, politically motivated, non-transparent decision-making”).

This is not to suggest that most of those on the political left supported aggressive regulation and most of those on the right strongly opposed it, but rather that the strongest supporters of aggressive regulation could be found on the left and the strongest opponents generally could be found on the right. (As I discuss in Part II, indecency is the exception to this pattern.) The relative consistency of broadcast content regulation from Reagan through Biden indicates that the group that wanted more aggressive regulation was never sufficiently numerous or powerful to get its policy preferences instantiated (with the episodic exception of indecency).

example, the government can launch investigations that harm companies regardless of the outcome and can oppose proposed mergers, which can impose delay costs even if antitrust doctrines (which constrain regulators' discretion much more than the public interest standard does) ultimately thwart the government. And media companies, notably social media platforms, may have limited incentives to resist government pressure to suppress the speech of one moderately popular content creator or show, because the costs of that suppression will fall heavily on the speaker rather than on the social media company, for which the content creator or show is just one of many.⁴¹

Broadcasters likely have more incentive to resist government pressure to suppress the speech of a given national broadcast program or performer than a social media platform does with respect to one of its shows or content creators. The suppression of the speech of a broadcast program or performer will have a greater impact on the broadcaster. Each broadcaster airs one show at any given time, so each program will have a larger impact on the owner's bottom line.⁴²

Broadcasters' potentially greater incentive to challenge government pressure goes only so far: The gap between the government's many levers against broadcasters and its fewer levers against other media seems much more important. If the government can impose significant costs on any company, a presidential administration that is willing to use maximum force will be more able to impose its will on broadcasters than on social media companies. But the difference may be smaller than the public interest standard, *Red Lion*, and *Pacifica* would seem to suggest.

This Article is thus a case study of the easiest form of communication for a presidential administration to effectively exert some control over, but broadcasting is not the only medium an administration can influence. In this way, this Article implicates broader questions about regulation: What, if any, forms of content regulation are normatively desirable? How meaningful are speech protections in a world where the government can exert unseen pressure? How effective can laws be in constraining presidential administrations that maximally exercise the levers of power available to them?

Part I lays out the FCC's strikingly broad statutory authority over broadcasting and the Commission's early history of aggressive content regulation. Part II focuses

⁴¹ See *infra* notes 238–241 and accompanying text.

⁴² See *id.*

on the FCC's curtailment of its regulations. This curtailment began in the Reagan Administration, and many commentators expected it to be reversed under a Democratic President. But, with the exception of indecency regulation in 1987 and the early 2000s, the light-touch regulation initiated under Reagan largely persisted through Biden. Part III turns to the question of how this regulatory regime can be consistent with the First Amendment. The answer lies in the reasoning and holdings of *Red Lion* and *Pacifica*. Those cases could have been generative, but the Supreme Court has limited their application to broadcasting. Part IV notes that not only can a new presidential administration revive old doctrines but it also can create new ones, because administrative law doctrines allow it to do so. These administrative law doctrines, combined with the public interest standard, thus greatly empower the government. Part V considers possible ways of preventing or limiting a reinvigoration of content regulation of broadcasting. Overruling *Red Lion* and *Pacifica* or repealing the public interest standard are obvious options, but other options are available—notably lawsuits to stop jawboning. Part VI, however, highlights the limits on these options. A President who makes it clear that he will impose maximum costs on those he dislikes by berating them can effectively achieve the results of jawboning without having to issue any threats; his targets will know that failing to do the President's bidding will lead to costly castigation. This highlights an important point that transcends broadcasting: Norms do a tremendous amount of work, so a breakdown in norms has massive implications.

I. THE FIRST DECADES OF BROADCASTING REGULATION

A. *Statutory Authority and Constraints*

The earliest days of broadcasting (the early 1920s) entailed very little government regulation. Secretary of Commerce Herbert Hoover thought that the government needed to control the airwaves, and a 1926 court decision limiting his authority to prevent stations from changing the frequencies on which they transmitted provided him, and members of Congress, with the impetus for legislation.⁴³ The result was the Federal Radio Act of 1927, which became the basis for the Communications Act of 1934.⁴⁴ 47 U.S.C. § 301 states that

⁴³ See THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 7–12 (1994) (describing the earliest days of broadcasting).

⁴⁴ Because the 1934 Act has been the central telecommunications statute since its passage, I cite to its provisions, even though most I quote were originally in the 1927 Act.

[i]t is the purpose of this Act . . . to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority. . . .⁴⁵

This was crucial, because it put the government in control of a means of communication. Other provisions instructed the FCC to grant and renew licenses, and to approve license transfers, if the Commission determined that doing so was consistent with “the public interest, convenience, and necessity”⁴⁶—a term that the first general counsel of the Federal Radio Commission (the predecessor to the FCC) candidly and accurately described as “mean[ing] about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.”⁴⁷

The FCC chose licensees for initial grants through comparative hearings that focused on the applicants and the substance of the programming they would offer.⁴⁸ That said, the Commission imposed some modest limits on itself by providing a set of criteria it would use in choosing which applicant it would grant a license to.⁴⁹ And the Supreme Court rejected a nondelegation challenge to the FCC’s broad authority to choose licensees, holding that 47 U.S.C. § 307 entailed some limits on Commission discretion.⁵⁰ Eventually Congress ended comparative hearings, replacing them with lotteries in 1982, and then with auctions, which were authorized

⁴⁵ 47 U.S.C. § 301.

⁴⁶ *Id.* §§ 307, 309, 310.

⁴⁷ Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930); see also LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 61 (1987) (quoting the Senator who crafted the 1927 and 1934 acts as stating that the public interest standard “covers just about everything”).

⁴⁸ See Olivier Sylvain, *A New Telecommunications Act: Prioritizing Consumer Protection and Equality*, 37 BERKELEY TECH. L.J. 281, 285 (2022).

⁴⁹ See Compar. Broad. Hearings, 1 F.C.C.2d 393 (1965) (setting out factors to weigh in comparative broadcast hearings, such as “[d]iversification of control of the media mass communications” and “[f]ull-time participation in station operation by owners”).

⁵⁰ *NBC v. United States*, 319 U.S. 190, 216 (1943) (concluding that “the public interest, convenience, or necessity [is] a criterion which is as concrete as the complicated factors for judgment in such a field of delegated authority permit” and that the terms do not convey unlimited powers to the FCC, as they indicate that the FCC should be guided by, for example, “the ability of the licensee

in 1993 and mandated in 1997.⁵¹ Congress thus effectively ended the role of the public interest standard in the granting of new licenses.

But the public interest standard still applies to license renewal and transfer,⁵² and those are the two key levers the FCC uses to control licensees. The granting of an initial license does not empower the Commission to penalize the licensee for perceived post-grant misbehavior, but the ability to deny renewal or block a transfer does. A licensee really wants to be able to renew its license and to have the option of selling it to someone else who will then be able to renew it; otherwise, a buyer will not pay much for the license. The prospect of Commission delays in reviewing a proposed transfer—and the speed of that review is up to the FCC—can, like any indefinite delay in a transaction, be fatal to the deal.⁵³ And denial of renewal is the nuclear option from the standpoint of the licensee. Even if a licensee thinks there is only a small chance of its license not being renewed or a transfer being blocked, the potential cost to the licensee of such an action is huge. The value of a license, as reflected in the prices paid in auctions, is in the millions of dollars, and the cost of

to render the best practicable service to the community reached by his broadcasts” (citations and internal quotation marks omitted) (first quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940); then quoting *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940)).

⁵¹ On lotteries, see Communications Amendment Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1087, 1094–95 (codified at 47 U.S.C. § 309(i)(1)) (authorizing lotteries). On auctions, see Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387–97 (codified as amended at 47 U.S.C. § 309(j)) (authorizing auctions); 47 U.S.C. § 309(i)–(j) (requiring auctions); see generally STUART MINOR BENJAMIN, BARAK D. RICHMAN & JAMES B. SPETA, *INTERNET AND TELECOMMUNICATIONS REGULATION* 497–99 (2d ed. 2023) (discussing the transition from hearings to lotteries then auctions).

⁵² See 47 U.S.C. § 309(k) (allowing the FCC to grant renewal only if it finds “the station has served the public interest, convenience, and necessity”); *id.* § 310(d) (“No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”).

⁵³ See, e.g., Gilad Edelman, *The ‘Easy Way’ to Crush the Mainstream Media: FCC Chair Brendan Carr Is on a Crusade to Trumpify the Airwaves*, ATLANTIC (Nov. 17, 2025, at 15:22 ET), <https://perma.cc/2QY2-3AWE> (noting that the threat of Carr’s interference with Charlie Ergen’s deal with Sprint was enough to coerce Ergen to make a deal with Elon Musk because, if Carr had interfered, suing “would have taken years, by which time [Ergen] would have long gone bankrupt”).

the equipment necessary to provide service (with, of course, no guarantee that a successor licensee would want to buy it) is millions more.⁵⁴

From the outset, the FCC interpreted “public interest, convenience, and necessity” to encompass a wide range of considerations well beyond antitrust or competition concerns. Most notably, the Commission, in its regulation of local broadcast-

⁵⁴ See, e.g., *Auctions Summary*, FCC (Sept. 14, 2022), <https://perma.cc/FUL7-8L3A> (showing license auction results); FCC, CATALOG OF POTENTIAL EXPENSES AND ESTIMATED COSTS FOR LOW POWER TELEVISION (LPTV) STATIONS, FM STATIONS, AND TV TRANSLATORS app. A (2018) (listing potential expenses); Asset Purchase Agreement by and Among Mediaco Holding Inc. et al. § 2.2 (Apr. 17, 2024), <https://perma.cc/9P4T-VMG9> (broadcaster purchasing another broadcaster and excluding the seller’s broadcasting equipment, transmitter, and antennae from the purchase).

ers, focused on localism and diversity (defined to include five different kinds of diversity) along with competition,⁵⁵ and it often brought in many other considerations that were not tied to competition or antitrust concerns.⁵⁶ And courts approved the FCC's broad focus, emphasizing that the public interest standard was not limited to competition or antitrust concerns.⁵⁷

⁵⁵ See, e.g., Broad. Localism, 19 FCC Rcd. 12425, 12425 (2004) (“As with competition and diversity, localism has been a cornerstone of broadcast regulation for decades.”); 2002 Biennial Regul. Rev., 18 FCC Rcd. 13620, 13623, 13627, 13631–32, 13633, 13634–35 (2003) (again emphasizing localism, diversity, and competition, and discussing the five different types of diversity the FCC has identified and utilized in regulating—(1) viewpoint diversity (“the availability of media content reflecting a variety of perspectives”); (2) program diversity (a variety of program formats); (3) outlet diversity (“in a given market, there are multiple independently-owned firms”); (4) source diversity (“the availability of media content from a variety of content producers”); and (5) minority and female ownership diversity).

⁵⁶ See Comcast Corp., 26 FCC Rcd. 4238, 4249 (2011) (“[U]nlike the role of antitrust enforcement authorities, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits.”); Christopher S. Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, 45 REV. INDUS. ORG. 295, 299 (2014) (“[T]he FCC has made clear that its public interest mandate includes considerations that fall outside the scope of traditional competition policy, such as diversity of content, universal service, localism, spectrum efficiency, national security, and the agency’s continued ability to regulate in other areas.”); KRATTENMAKER & POWE, *supra* note 43, at 143–73 (discussing the FCC’s implementation of its public interest standard, encompassing a wide range of non-economic goals).

The FCC’s longstanding practices were summarized by a recent FCC general counsel:

[T]he “public interest” standard is not limited to purely economic outcomes. It necessarily encompasses the “broad aims of the Communications Act,” which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest. Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. The leading examples may come from broadcast transactions, where the Commission has long applied the congressional admonition to promote localism in programming, and especially news programming, available to communities.

Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FCC BLOG (Aug. 12, 2014, at 12:39 ET), <https://perma.cc/V3YS-HF99>.

The first half-century or so of broadcasting regulation was filled with regulations that relied on the FCC's renewal and transfer authority. The 1927 Act provided, and the 1934 Act currently provides, that

[n]othing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.⁵⁸

CBS v. Democratic National Committee,⁵⁹ immediately after quoting this provision and one providing that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier," stated that

[f]rom these provisions it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public ob-

⁵⁷ See *United States v. FCC*, 652 F.2d 72, 82 (D.C. Cir. 1980) ("We do not agree with the suggestion of some petitioners that the (Federal Communications) Commission must demonstrate that the means it has chosen have the least impact on competition consistent with achievement of the Commission's purposes. . . . Anticompetitive factors are also only one of a number of factors to be considered under the Communications Act." (quoting *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 40 n.67 (D.C. Cir. 1977))); *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 722 (9th Cir. 1981) ("Free competition is not irrelevant to the objectives of utility regulation, but determinations of whether a company's practices are in the public interest as defined by the Act require FCC consideration of factors other than competition. Such factors include network safety and efficiency, the need of the public for reliable service at reasonable rates, the proper allocation of the rate burden, the financial integrity of the carriers, and the future needs of both users and carriers."); *GTE Serv. Corp. v. FCC*, No. 91-1507, 1994 WL 478527, at *2 (D.C. Cir. Aug. 23, 1994) ("Even if the FCC's decision is anticompetitive, the LECs have not . . . timely countered the FCC's assertion that its decision is in the public interest based on its network control and IXC/customer relationship concerns."); *NBC v. United States*, 319 U.S. 190, 194 (1943) (noting, in upholding the FCC's chain broadcasting rules, that FCC implementation of its public interest standard included "the nature of the program service rendered by stations licensed to network; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; [and] the nature and extent of network program duplication by stations serving the same area").

⁵⁸ 47 U.S.C. § 326.

⁵⁹ 412 U.S. 94 (1973).

ligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act.⁶⁰

Thus, according to the Court, Congress wanted wide journalistic freedom but also public interest limits on that freedom. In any event, from the beginning content played a role. For instance, the Federal Radio Commission issued a statement in 1928 that notwithstanding the statutory provision prohibiting censorship, it had to evaluate programming:

Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the [C]ommission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster. . . .⁶¹

B. Early Instances of Content Regulation

In some of its earliest decisions the FRC attacked stations it disfavored. One category was “propaganda stations”⁶² like WEVD (a socialist station named for Eugene V. Debs). The FRC admonished it to “operate with due regard for the opinions of others.”⁶³ And the FRC later stated that there was

not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting stations, its mouthpiece in the ether. If franchises are extended to some, it gives them an unfair advantage over others, and results in a corresponding cutting down of general public-service stations.⁶⁴

Perhaps more remarkable was its non-renewal of the license owned by a minister (“Fighting” Bob Shuler) who hosted one of the most popular shows in the Los

⁶⁰ *Id.* at 110.

⁶¹ *Statement Made by the Commission on August 23, 1928, Relative to Public Interest, Convenience, or Necessity, reproduced in* FED. RADIO COMM’N, SECOND ANNUAL REPORT 166, 170 (1928).

⁶² FED. RADIO COMM’N, THIRD ANNUAL REPORT 34 (1929).

⁶³ FED. RADIO COMM’N, SECOND ANNUAL REPORT, *supra* note 61, at 155.

⁶⁴ FED. RADIO COMM’N, THIRD ANNUAL REPORT, *supra* note 62, at 32. The FRC used similar language in denying a request of the radio station run by the Chicago Federation of Labor (WCFL) to increase its power, stating that “there is no place for a station catering to any group [A]ll stations should cater to the general public and serve public interest.” *Id.* at 36.

Angeles market. The grounds for the non-renewal were that he had used the station to make attacks on public officials

which have not only been bitter and personal in their nature, but often times based upon ignorance of fact for which little effort has been made to ascertain the truth thereof . . . [Shuler] has vigorously attacked by name . . . public officials and individuals whom he has conceived to be moral enemies of society or foes of the proper enforcement of the law.⁶⁵

Shuler appealed the non-renewal on First Amendment grounds, which the D.C. Circuit rejected, stating that the non-renewal

is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise. Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.⁶⁶

The D.C. Circuit (and in 1943 the Supreme Court)⁶⁷ accepted the legitimacy of the government controlling the radio spectrum⁶⁸ and giving out licenses, rather

⁶⁵ KRATTENMAKER & POWE, *supra* note 43, at 25; *see also* Louis Caldwell, *Freedom of Speech and Radio Broadcasting*, 177 ANNALS AM. ACAD. POL. & SOC. SCI. 179, 201–02 (1935).

⁶⁶ *Trinity Methodist Church v. Fed. Radio Comm'n*, 62 F.2d 850, 853 (D.C. Cir. 1932). The court also stated that

[e]veryone interested in radio legislation approved the principle of limiting the number of broadcasting stations, or, perhaps, it would be more nearly correct to say, recognized the inevitable necessity. In these circumstances Congress intervened and asserted its paramount authority, and, if it be admitted, as we think it must be, that, in the present condition of the science with its limited facilities, the regulatory provisions of the Radio Act are a reasonable exercise by Congress of its powers, the exercise of these powers is no more restricted by the First Amendment than are the police powers of the States under the Fourteenth Amendment. In either case the answer depends upon whether the statute is a reasonable exercise of governmental control for the public good.

Id. at 852 (internal citation omitted).

⁶⁷ *See* *NBC v. United States*, 319 U.S. 190, 213 (1943); *infra* notes 153–154 (discussing and quoting *NBC* on these points).

⁶⁸ Usually simply called “the spectrum,” the radio spectrum is the range frequencies on the electromagnetic spectrum suitable for wireless communication.

than property rights. As I will discuss in Part III, that judicial acceptance has had major consequences.

II. REAGAN THROUGH BIDEN—RESTRAINING REGULATION

In the 1960s and 1970s there was a welter of broadcast regulations. Some were imposed by statute, but most were FCC regulations promulgated pursuant to the public interest standard. Approximately 900 Commission rules governed broadcasting, regulating almost every aspect of broadcasting, including content.⁶⁹

The most important statutory provisions relating to content were a requirement of equal access to broadcasters for political candidates and a prohibition on “any obscene, indecent, or profane language by means of radio communication.”⁷⁰ To these, Congress added a statute on children’s television in 1990.⁷¹ The most important of the FCC’s regulations of broadcast content was the fairness doctrine.⁷²

There were critics of the broadcast regulatory regime in the 1970s, but the big shift started with Ronald Reagan’s election in 1980. Mark Fowler,⁷³ FCC chair from 1981 to 1987, coauthored a 1982 law review article with his top aide that made his views clear: “[B]roadcasting is just one of many information delivery systems,” FCC “regulatory processes have infringed the first amendment rights of broadcasters,” and “[s]o long as program review is part of the licensing process—and, under

⁶⁹ *The Bittersweet Chairmanship of Mark S. Fowler*, 108 BROAD. 39, 39 (Feb. 18, 1985), <https://perma.cc/6UR4-DVHN> (noting the approximately 900 broadcasting rules). For a sense of how regulated broadcasting was at the time, see, for example, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076 (1984) (discussing and repealing, inter alia, FCC standards for minimum amounts of non-entertainment programming, informational programming, and local programming, for commercialization, and ascertainment of community needs); *Amendments to Delegations of Authority*, 59 F.C.C.2d 491 (1976) (creating many of these standards); Heidi R. Young, *The Deregulation of Commercial Television*, 13 FORDHAM URB. L.J. 373 (1985) (discussing FCC broadcasting regulations and the 1984 order repealing many).

⁷⁰ 18 U.S.C. § 1464; see *infra* notes 84–98, 136–152 and accompanying text.

⁷¹ See *infra* notes 99–104 and accompanying text.

⁷² See *infra* Part III(C).

⁷³ He was called, among other things, the “Mad Monk of Deregulation.” Jeanne Sadler, *The Rule Slashers: In Rush to Deregulate, FCC Outpaces Others, Pleasing the Industry*, WALL ST. J., Dec. 7, 1983, at A1.

the [*NBC v. United States*] formulation of public interest, it will remain so—first amendment problems will persist.”⁷⁴ They argued that

the Commission should rely on the broadcasters’ ability to determine the wants of their audiences through the normal mechanisms of the marketplace. The public’s interest, then, defines the public interest. And in light of the first amendment’s heavy presumption against content control, the Commission should refrain from insinuating itself into program decisions made by licensees.⁷⁵

Under Fowler, the FCC moved away from broad and flexible broadcasting regulations, modifying or repealing 89 percent of the agency’s approximately 900 broadcasting rules.⁷⁶ The most important Commission rules governing content were abandoned.⁷⁷ Content-based doctrines that were not embodied in rulemaking but instead arose through adjudication were interpreted narrowly and with guardrails.⁷⁸ And the FCC implemented federal statutes narrowly.⁷⁹ The result was a broadcasting regulatory regime with less scope and more self-imposed constraints on the regulators.

The central exception was the FCC’s implementation of the statutory ban on broadcast indecency—the one area of broadcast regulation that conservatives have

⁷⁴ Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209, 219 (1982).

⁷⁵ *Id.* at 209–10. Fowler’s vision was quite controversial. Among the many negative reactions, a fellow FCC commissioner, who agreed with Fowler on many issues, flatly stated that with regard to broadcasting, “Because Fowler believes that the print model should govern (or in his words, ‘television is just a toaster with pictures’), he has acted in a disgraceful fashion in this area.” Henry Geller, *The FCC Under Mark Fowler: A Mixed Bag*, 10 HASTINGS COMM’N. & ENT. L.J. 521, 530 (1987) (internal citation omitted).

⁷⁶ *The Bittersweet Chairmanship of Mark S. Fowler*, *supra* note 69, at 39; *see also* Elimination of Unnecessary Broad. Reguls., 50 Fed. Reg. 5583 (Feb. 11, 1985) (eliminating FCC regulations); Revision of Programming and Commercialization Pol’y, Ascertainment Reqs., and Program Log Reqs. for Com. Television Stations, 98 F.C.C.2d 1076 (1984) (same).

⁷⁷ *See, e.g.*, Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM’NS L.J. 51, 55 (1994) (noting the abandonment of the Fairness Doctrine).

⁷⁸ *See, e.g.*, Joel Timmer, *Potential FCC Actions Against “Fake News”: The News Distortion Policy and the Broadcast Hoax Rule*, 24 COMM’N L. & POL’Y 1, 8–18 (2019) (describing guardrails the FCC implemented around the News Distortion Policy).

⁷⁹ *See, e.g.*, ABC, Inc., 15 FCC Rcd. 1355 (1999) (concluding that Politically Incorrect with Bill Maher is a *bona fide* news interview program and thus statutorily exempt from the equal time requirement); *see infra* note 95 and accompanying text.

supported more than liberals have. As I shall discuss, the Commission was, in 1987 and the early 2000s, reasonably aggressive in penalizing indecency.⁸⁰

Perhaps the most interesting element of the FCC's pullback on content regulations is the dog that didn't bark: Unlike some aspects of FCC regulation,⁸¹ the Commission did not significantly change course on its content regulations from Reagan through Biden. The FCC's effective abandonment of broadcast content regulations not required by statute has been a bipartisan affair.⁸²

Unsurprisingly, the curtailing of content regulation coincided with the Commission very rarely denying a renewal or a transfer. And when the FCC did so, it was almost always for non-content reasons (such as revoking an amateur radio license because the licensee had lied about his fraud conviction).⁸³

⁸⁰ See *infra* Part II.E.

⁸¹ A notable example is rules regulating broadband internet access as a telecommunications service under net neutrality regulations, which were imposed in 2015, repealed in 2017, and reinstated in 2024. David Hamilton, *Net Neutrality Restored as FCC Votes to Regulate Internet Providers*, ASSOCIATED PRESS (May 8, 2024, at 18:17 ET), <https://perma.cc/KR6W-GT2V>.

⁸² One example of this continuity is the longstanding statement on the FCC's webpage titled "The FCC and Speech":

[T]he FCC has long held that "the public interest is best served by permitting free expression of views." Rather than suppress speech, communications law and policy seeks to encourage responsive "counter-speech" from others. Following this principle ensures that the most diverse and opposing opinions will be expressed, even though some views or expressions may be highly offensive.

The FCC and Speech, FCC, <https://perma.cc/W3KH-2ZGV>.

⁸³ BENJAMIN ET AL., *supra* note 51, at 495–96. For the licensee who lied about his fraud conviction, see *Herbert L. Schoenbohm*, 13 FCC Rcd. 23774 (1998), *aff'd sub. nom.*, *Schoenbohm v. FCC*, 204 F.3d 243 (D.C. Cir. 2000).

The most significant case not based on objective factors highlights the additional leverage that the tight timing of transactions can give to the Commission. It also involved behavior that was pretty egregious: In 2007 radio station KDND, owned by Entercom, held a "Hold Your Wee for a Wii" contest, despite many warnings of possible harms to contestants, that in fact led to the death of one of the contestants. Entercom License, 31 FCC Rcd. 12196, 12212, 12215–16 (2016). The FCC did not deny renewal but instead sent the matter to its administrative law judge. *Id.* at 12197. Before the hearing, Entercom announced both its intent to acquire CBS Radio and that it would surrender KDND's license because it had "determined it is in the company's best interests to voluntarily turn in the KDND license to facilitate the timely FCC approvals for the planned combination with CBS Radio." Mark Glover, *It's the End of The End 107.9; Format Will Move Down the Dial Ahead of*

In the following sections I discuss the most significant forms of broadcast content regulation.

A. *Political Advertising*

There are two key statutes governing political advertising: the access requirements of 47 U.S.C. § 312(a)(7) and the equal time provisions of 47 U.S.C. § 315.

Section 312(a)(7) is not written as a requirement. It simply says that the FCC “may revoke any station license . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.”⁸⁴ As I have noted, however, the costs of losing a license are sufficiently great that § 312(a)(7) is effectively a requirement.⁸⁵

The Supreme Court has emphasized the narrowness of this requirement:

Section 312(a)(7) creates a *limited* right to “reasonable” access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced. The Commission has stated that, in enforcing the statute, it will “provide leeway to broadcasters and not merely attempt de novo to determine the reasonableness of their judgments” If broadcasters have considered the relevant factors in good faith, the Commission will uphold their decisions.⁸⁶

Section 315(b) provides that broadcasters must offer their lowest advertising unit charge in the days before an election to “any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for

Planned Merger, SACRAMENTO BEE (Feb. 5, 2017, at 11:13 PT), <https://perma.cc/U37X-YVA8>. The then-chief of the FCC’s enforcement division agreed with this characterization, stating that Entercom’s motive was the pending merger with CBS Radio. Dan Morain, *Sue from Fiddletown Took a Stand in the Public Interest*, SACRAMENTO BEE (Apr. 4, 2017, at 13:28 PT), <https://perma.cc/WBH2-XWGR>. The acquisition of CBS Radio required the transfer of its stations, and Entercom determined that smoothing its path toward those transfers was worth surrendering the license (which it valued at \$13.5 million, but that pales in comparison to the \$1.6 billion value of the merger). Adam Jacobson, *Entercom Q1: Revenue Surge Seen, but EPS Narrowly Falls Short*, RADIO & TELEVISION BUS. REP. (May 8, 2017), <https://perma.cc/9C6H-N5HQ>.

⁸⁴ 47 U.S.C. § 312(a).

⁸⁵ See *supra* note 54 and accompanying text.

⁸⁶ *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (alteration in original) (quoting Carter-Mondale Presidential Comm., 74 F.C.C.2d 657, 672 (1979)).

election, or election, to such office.”⁸⁷ Note that this provision applies only to candidates, and not to other entities like political parties and political action committees (and the FCC has understandably not attempted to include such entities in the coverage of § 315(b)). This has been particularly significant because the Supreme Court, starting with *Buckley v. Valeo*,⁸⁸ has rejected limits on independent political expenditures but allowed limits on contributions to candidates’ campaign committees,⁸⁹ and those committees’ campaign spending is significantly lower than that by political parties and PACs.⁹⁰ So the cost to broadcasters of § 315(b) is much more modest than it would be in a world in which they were required to provide their lowest unit rate to political parties and PACs.⁹¹

⁸⁷ 47 U.S.C. § 315(b); *see also* 78 AM. JUR. PROOF OF FACTS 3d 1, *Equal Opportunity for Broadcast Time for Political Candidates* § 8 (2004) (“Because of the limited time before the elections, candidates tend to want to purchase non-preemptible time. That will be the most expensive time, but the statute and rules are designed to give candidates at least an equal opportunity to purchase the time that might otherwise go to commercial advertisers. There is evidence that many candidates are paying the non-preemptible time rather than the lowest unit cost.”).

⁸⁸ 424 U.S. 1 (1976).

⁸⁹ *Id.* at 143; *see also* *Citizens United v. FEC*, 558 U.S. 310 (2010) (extending *Buckley* to corporations).

⁹⁰ *See* Press Release, FEC, Statistical Summary of 24-Month Campaign Activity of the 2023–2024 Election Cycle (Apr. 23, 2025), <https://perma.cc/N8QK-RT8T> (noting that candidate campaign committee spending in the 2023–2024 election cycle combined to spend \$5.5 billion, while parties and PACs combined to spend \$18.3 billion); *see also generally* *Tracking 2024 Election Contributions and Spending*, USA FACTS (Aug. 2, 2024), <https://perma.cc/RP3Y-4DXQ> (“A majority of funding for the 2024 election—over 65%, or nearly \$5.6 billion—comes from political action committees . . .”).

⁹¹ Interestingly, the Supreme Court may change this regime by allowing the spending of unlimited amounts of money in coordination with candidates such that PACs’ spending would qualify for the lowest unit charge under § 315(b). *See* Brief for Intervenor-Respondents at 48, *Nat’l Republican Senatorial Comm. v. FEC*, No. 24-621, 2025 WL 2808706 (U.S. Dec. 5, 2025) (noting section 315(b)’s limitation to candidates and adding that “[i]f limits on coordinated party expenditures are eliminated, however, then Congress’s scheme is upended. Broadcasters across the country will face significant increases in advertisements that purport to qualify for lowest unit rates, thereby inflicting a substantial financial strain upon them.”); Abbie VanSickle & Shane Goldmacher, *Supreme Court Grapples with Whether to Lift Campaign Finance Limits*, N.Y. TIMES (Dec. 9, 2025) (“If the court decides to allow unlimited spending by the parties in coordination with the candidates, party committees could suddenly have access to those cheaper rates.”).

Section 315(a), meanwhile, provides that if a broadcaster allows a political candidate to “use” its station, it shall afford “equal opportunities” to all the other candidates for that office.⁹² But it specifies that no broadcaster is required to allow any use in the first place.⁹³ In addition, it provides that “use” of a station does not include any “bona fide newscast, bona fide news interview, bona fide news documentary, or on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).”⁹⁴

Because the equal time requirement is statutory, the FCC cannot repeal it. But starting in the Reagan Administration the FCC interpreted the equal time exemptions very broadly, thereby dramatically limiting the scope of the equal time requirement. Thus the Donahue talk show, the Jerry Springer tabloid show, Politically Incorrect with Bill Maher, and interviews with political candidates on The Tonight Show and The Howard Stern Show were granted exemptions from the equal time requirement as bona fide news interview programs.⁹⁵

This would of course be a reduction in the regulation of spending on campaigns, but an effective increase in the regulation of broadcasters. So, perhaps ironically, an increase in broadcasting regulation could come at the hands not of the Commission but of a deregulatory decision by the Supreme Court.

⁹² 47 U.S.C. § 315(a).

⁹³ See *id.* (“No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.”).

⁹⁴ *Id.*

⁹⁵ See *Multimedia Ent., Inc.*, 56 Rad. Reg. 2d (P & F) 143, 146 (1984) (exempting The Phil Donahue Show from the equal time requirement); *Multimedia Ent., Inc.*, 9 FCC Rcd. 2811, 2811 (1994) (same as to The Jerry Springer Show); *ABC, Inc.*, 15 FCC Rcd. 1355 (1999) (same as to Politically Incorrect with Bill Maher); *Angelides for Governor Campaign*, 21 FCC Rcd. 11919, 11919 (2006) (same as to news interviews with political candidates on The Tonight Show); *Infinity Broad. Operations Inc.*, 18 FCC Rcd. 18603, 18604 (2003) (same as to news interviews with political candidates on The Howard Stern Show). For a pointed response to one of these FCC decisions, see Gary Susman, *FCC Rules That Howard Stern Is a Newsmen*, ENT. WKLY. (Sept. 10, 2003, at 04:00 ET), <https://perma.cc/5CU4-2H97> (quoting a media lawyer objecting to the FCC’s conclusion, stating that “[w]hen guests are selected by the size of their bust, it is not bona fide news programming”). As to my characterization of The Jerry Springer Show as a tabloid show: Representative episodes, “featuring physical brawls and fights on stage,” are “High Class Hookers Tell All” and “Holiday Hell with My Feuding Family.” “Throughout the show, some women in the audience would sometimes flash their breasts in exchange for ‘Jerry Beads’ (Mardi Gras-style beads with the show logo). . . . [S]erious questions were typically mocked by the crowd with chants of ‘Go to Oprah!’” *The Jerry Springer*

And in 2014 the FCC formally abandoned an election rule it had created known as the Zapple doctrine.⁹⁶ The Zapple doctrine applied the fairness doctrine to situations in which supporters of a political candidate purchased broadcast air time to support the candidate—the doctrine required the broadcaster to sell comparable air time to supporters of opposing candidates.⁹⁷ In 2014, in response to a complaint, the Commission (through the chief of its Media Bureau, to whom the commissioners delegated such responses) stated in relevant part that

we have no basis to enforce the Zapple doctrine. The doctrine was based on an interpretation of the fairness doctrine, which the FCC abrogated in *Syracuse Peace Council*. . . . Given the fact that the Zapple doctrine was based on an interpretation of the fairness doctrine, which has no current legal effect, we conclude that the Zapple doctrine similarly has no current legal effect.⁹⁸

B. Children's Television

Until 1984 the FCC had limited the number of commercials that broadcasters could air per hour, but in that year it eliminated such limits (giving rise to, *inter alia*, the infomercial).⁹⁹ And in 1983 it declined to require broadcasters to air programming aimed at children, stating that there was a broad range of sources (not limited to broadcasting) providing children's programming and that "selection of programming is a matter that should be decided by station licensees and by the audience through its viewing pattern voting."¹⁰⁰ Congress responded by reinstating commercial limits for children's programming (but not for other programming) and requiring that, when considering any broadcaster's license renewal, the FCC

Show, WIKIPEDIA, <https://perma.cc/SL7C-CGP2>.

The FCC under Brendan Carr has told broadcasters that they should not rely on these precedents and has opened an investigation of *The View*, a show whose format is similar to that of *Politically Incorrect with Bill Maher* and seems to more obviously fit into the "news interview" category than *The Tonight Show*, *Jerry Springer*, or *The Howard Stern Show*. See *supra* note 15 and accompanying text.

⁹⁶ 29 FCC Rcd. 5010, 5012 (2014).

⁹⁷ Nicholas Zapple, 23 F.C.C.2d 707 (1970).

⁹⁸ 29 FCC Rcd. at 5012.

⁹⁹ *Congress Restricts Ads During Children's TV*, CQ ALMANAC ONLINE EDITION (1990), <https://perma.cc/3SV4-RAQL>.

¹⁰⁰ *Children's Television Programming and Advert. Pracs.*, 96 F.C.C.2d 634, 636, 651 (1983).

“consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs.”¹⁰¹

The FCC’s regulations implementing the statute have not been particularly onerous, to put it mildly. It implemented the required advertising restrictions and stated that broadcasters should air at least 26 hours per quarter of weekly children’s television programs.¹⁰² And in 2019 the Commission passed a rule providing that only a majority of a broadcaster’s children’s programming needs to be regularly scheduled and aired on the broadcast channel that is available to ordinary televisions and garners the vast majority of a broadcaster’s viewership—what viewers see when they turn on their local CBS affiliate. Up to half of its children’s programming can be aired on more obscure separate streams available to those with more advanced receivers.¹⁰³ Thus the rules allow each broadcaster to air less than one hour a month of children’s programming on its main channel.¹⁰⁴ And there the matter has lain—under Biden, the FCC with a Democratic majority did not strengthen the rules and instead left these very modest rules in place.

C. *The Fairness Doctrine*

Probably the most significant, and intrusive, FCC content regulation was the fairness doctrine, which was not required by statute but instead was a creation of the Commission. The doctrine required broadcasters to devote airtime to discussing controversial matters of public interest and to air contrasting views regarding those matters.¹⁰⁵

¹⁰¹ Children’s Television Act of 1990, Pub. L. No. 101-437, § 102–03, 104 Stat. 996, 996–97 (codified at 47 U.S.C. §§ 303a & 303b).

¹⁰² Pol’y & Rules Concerning Children’s Television Programming, 11 FCC Rcd. 10660, 10661 (1996).

¹⁰³ Children’s Television Programming Rules Modernization of Media Regul. Initiative, 34 FCC Rcd. 5822, 5823, 5824 (2019).

¹⁰⁴ *Id.* at 5895 (Starks, Comm’r, dissenting) (noting that “our new rules will allow broadcasters to air less than one hour of regularly scheduled children’s programming per month on their most widely viewed primary stream”).

¹⁰⁵ See Handling of Pub. Issues Under the Fairness Doctrine & the Pub. Int. Standards of the Commc’ns Act, 48 F.C.C.2d 1, 7 (1974) (“[T]he fairness doctrine involves a two-fold duty: (1) the broadcaster must devote a reasonable percentage of this broadcast time to the coverage of public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity

The FCC promulgated it in 1949, explaining that

[i]f, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities.¹⁰⁶

The pre-Reagan FCC considered it vital, saying in 1970 “we regard strict adherence to the fairness doctrine as the single most important requirement of operation in the public interest—the ‘sine qua non’ for grant of a renewal of license.”¹⁰⁷

The fairness doctrine was upheld in *Red Lion*, which relied on the scarcity of radio frequencies and tied that scarcity to a suggestion that the First Amendment helped to justify the regulation:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. “(S)peech concerning public affairs is more than self-expression; it is the essence of self-government.” 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. That right may not constitutionally be abridged either by Congress or by the FCC.¹⁰⁸

for the presentation of contrasting points of view.”). The FCC promulgated rules requiring airtime for responses to “personal attacks” and “political editorials” as an element of the fairness doctrine. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 370–71 (1969). *Red Lion* involved an invocation of the personal attack rules, but the Court’s opinion, treating those rules as part of the fairness doctrine, addressed the constitutionality of the fairness doctrine more generally. *See id.* at 370 (“The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the [fairness] doctrine and component rules.”); *infra* note 115 and accompanying text.

¹⁰⁶ Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1251 (1949).

¹⁰⁷ Comm. for the Fair Broad. of Controversial Issues, 25 F.C.C.2d 283, 292 (1970).

¹⁰⁸ *Red Lion*, 395 U.S. at 390 (internal citations omitted) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

Because the fairness doctrine, unlike the equal time requirement, was a creation of the FCC, it could repeal that doctrine. And in 1987 it did so.¹⁰⁹ In so deciding, it stated that “the fairness doctrine in operation disserves both the public’s right to diverse sources of information and the broadcaster’s interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists.”¹¹⁰

The order then went on to articulate the FCC’s preferred First Amendment approach, stating in part:

We believe that the role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint. Accordingly, the reasons for proscribing government intrusion into the editorial discretion of print journalists provide the same basis for proscribing such interference into the editorial discretion of broadcast journalists. The First Amendment was adopted to protect the people not from journalists, but from government. It gives the people the right to receive ideas that are unfettered by government interference. We fail to see how that right changes when individuals choose to receive ideas from the electronic media instead of the print media.¹¹¹

Repeal of the fairness doctrine was part of Reagan’s deregulatory agenda, and in 1987 Congress passed legislation to codify the fairness doctrine (which Reagan

¹⁰⁹ *Syracuse Peace Council*, 2 FCC Rcd. 5043, 5043 (1987). The D.C. Circuit affirmed the FCC’s repeal of the fairness doctrine without reaching the constitutional grounds, instead finding the FCC’s public interest determination to be sufficient. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656 (D.C. Cir. 1989).

¹¹⁰ *Syracuse Peace Council*, 2 FCC Rcd. at 5052.

¹¹¹ *Id.* at 5057. The order added:

There is no doubt that the electronic media is powerful and that broadcasters can abuse their freedom of speech. But the framers of the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press. We concur. We therefore believe that full First Amendment protections against content regulation should apply equally to the electronic and the printed press.

Id.

vetoed).¹¹² This led some commentators to suggest that a Democratic President/FCC would seek to reinstate it.¹¹³ That never happened. Indeed, no Democratic (or Republican) President since Reagan even expressed support for reinstating it.¹¹⁴ The concerns that underlay the repeal of the fairness doctrine became the consensus.¹¹⁵

¹¹² Message from the President of the United States Returning Without Approval S. 742, the Fairness in Broadcasting Act of 1987, S. DOC. NO. 100-10 (1987).

¹¹³ See, e.g., Cronauer, *supra* note 77, at 63 n.69 (quoting Thomas Hazlett as stating that “[t]he presumption has been since 1987 that the next time we get a Democratic president, there is going to be a Fairness Doctrine”); JOSH SILVER & MARVIN AMMORI, *THE FAIRNESS DOCTRINE DISTRACTION* 3 (2009), <https://perma.cc/GB5X-65MU> (“[S]ome conservative pundits and politicians have asserted that the Obama administration and the new Congress plan to reinstate the Fairness Doctrine . . .”).

¹¹⁴ SILVER & AMMORI, *supra* note 113, at 3–4 (“It is true that a small handful of Democratic legislators have publicly entertained the idea of bringing back the [Fairness] Doctrine. However, no legislation has been introduced to do so since the party retook the majority in Congress. Furthermore, President Barack Obama has stated unequivocally—and repeatedly—that he does not support restoring the Fairness Doctrine . . .”).

¹¹⁵ As I noted above, the facts underlying *Red Lion* involved not the fairness doctrine generally but instead the specific rules mandating that broadcasters provide airtime for responses to any broadcast personal attacks or political editorials, which rules were treated as an element of the fairness doctrine. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 370 (1969); *supra* note 105. The FCC’s decision in *Syracuse Peace Council* repealed the fairness doctrine, but did not repeal the rules on personal attacks and political editorials. *Syracuse Peace Council*, 2 FCC Rcd. at 5043. Broadcasters filed a petition at the FCC in 1980 requesting repeal of those rules. See *Radio-Television News Directors Ass’n v. FCC*, 229 F.3d 269, 270 (D.C. Cir. 2000) (noting the “1980 petition to vacate the rules”). After years of inaction at the FCC (despite broadcasters’ prodding), broadcasters filed a petition in the D.C. Circuit for a writ of mandamus to order the FCC to act on the petition to eliminate the rules, which the D.C. Circuit denied “without prejudice to its renewal should the Federal Communications Commission fail to make significant progress, within the next six months, toward the possible repeal or modification of the personal attack and political editorial rules.” *In re Radio-Television News Directors Ass’n*, No. 96-1338, 1997 WL 150084, at *1 (D.C. Cir. Feb. 7, 1997). The FCC deadlocked, and then with a new set of commissioners deadlocked again. (The first deadlock arose because the FCC had an open seat and the second because the FCC chair recused himself.) *Radio-Television News Directors Ass’n v. FCC*, 184 F.3d 872, 878 (D.C. Cir. 1999). After another D.C. Circuit order to resolve the matter, the chair unrecused himself and a majority of Commissioners voted to suspend but not eliminate the rules. Ian Heath Gershengorn, *The Fall of the FCC’s Personal Attack and Political Editorial Rules*, 18 *COMM’NS LAW*. 7, 10–11 (2001), <https://perma.cc/99TD-8X8V>. The D.C. Circuit rebuffed the FCC’s planned suspension and issued a writ of mandamus directing it to immediately repeal the personal attack and political editorial rules. *Id.* at 11. The court did not reach the question of whether the rules were consistent with the First Amendment,

D. News Distortion and Broadcast Hoaxes

In the 1960s, the FCC developed a set of standards that it referred to as its news distortion policy.¹¹⁶ As with the fairness doctrine, its implementation of its news distortion standards depended on its broad authority under 47 U.S.C. § 309.¹¹⁷ And as with its implementation of the equal time requirement, the Commission came to interpret its authority under these standards narrowly. Whereas constraining its authority with respect to equal time meant finding a wide range of programs to be “news interview” programs, for news distortion such constraints meant limiting that policy’s application to programs that were devoted to delivering the news, most commonly local nightly news programs.¹¹⁸ A broad definition of “news interview” in one context and a narrow definition of “news” in the other might seem inconsistent, but the commonality was avoiding free speech concerns that would arise from punishing licensees for their content decisions. Thus the through line is leaving choices up to broadcasters and reducing any role for the FCC.¹¹⁹

Not only did the Commission apply its news distortion policy only to programs devoted to news, but it also created additional guardrails. As it stated in rejecting a news distortion complaint against a Fox broadcast television station in 2007:

In evaluating whether an allegation of news distortion impacts the licensee’s ability to serve the public interest, the Commission analyzes both the “substantiality” and “materiality” of the allegation. An allegation is “material” only if the licensee itself is said to have participated in, directed, or at least acquiesced in a pattern of news distortion.

instead basing its decision on the FCC’s response (or lack thereof) to the court’s orders. *See Radio-Television News Directors Ass’n*, 229 F.3d at 272 (noting that the court had not decided whether “consistent with constitutional constraints, the public interest requires the personal attack and political editorial rules”).

¹¹⁶ CBS Program “Hunger in America”, 20 F.C.C.2d 143 (1969); Lili Levi, *Reporting the Official Truth: The Revival of the FCC’s News Distortion Policy*, 78 WASH. UNIV. L. REV. Q. 1005, 1016–17 (2000).

¹¹⁷ *See, e.g.*, WBBM-TV, 18 F.C.C.2d 124, 138 (1969) (“In short, we hold that where investigation is called for in this type of situation—in order to deny a charge of impropriety or to report to the Commission—that investigation must encompass contact with the participants, and reliance upon a promise of anonymity is impermissible in light of the licensee’s public interest responsibility.”).

¹¹⁸ Aaron Mak, *The Obscure FCC Rule Driving the Kimmel Argument*, POLITICO (Sept. 23, 2025, at 16:32 ET), <https://perma.cc/BK7R-5BBC>.

¹¹⁹ *Id.*

An allegation of news distortion is “substantial” if it meets two conditions: it is deliberately intended to slant or mislead; and it involves a significant event and not merely a minor or incidental aspect of the news report. It is sufficient for a petitioner to raise a “substantial and material question of fact” as to intent, and the Commission cannot require a petitioner to demonstrate “intent.” However, the Commission determines in the first instance whether the evidence submitted raises a substantial question of fact.

Section 326 of the Act prohibits the Commission from censoring radio communications, and the First Amendment to the Constitution strictly limits the Commission’s authority to interfere with the programming decisions of licensees. In light of these limitations, and because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment’s Free Press guarantee, “the Commission’s policy makes its investigation of an allegation of news distortion ‘extremely limited in scope.’” In showing an intent to distort, “[i]t is not enough to dispute the accuracy of a news report. . . or to question the legitimate editorial decisions of the broadcaster.” Allegations of deliberate distortion must be supported by extrinsic evidence “such as written or oral instructions from station management, outtakes, or evidence of bribery.” With respect to a report’s accuracy in particular, the Commission has stated that it possesses “neither the expertise nor the desire to look over the shoulder of broadcast journalists and inquire why a particular piece of information was reported or not reported.” To do otherwise “would involve the Commission deeply and improperly in the journalistic functions of broadcasters.”¹²⁰

Significantly, the FCC found distortion in seven cases between 1969 and 1982 and just one after 1982.¹²¹ In none of those cases did it revoke the license based on the distortion. The only finding of news distortion after 1982 resulted in a “letter of admonishment” from the Commission that had no impact on the licensee (and proved to have no impact on its future renewals) despite the fact that Dateline NBC, in attempting to show the susceptibility of the gas tank on a GM truck model to explode, staged a test crash that it had rigged by attaching incendiary devices to the truck’s gas tank.¹²²

The most recent attempts at news distortion actions were (A) a claim, piggy-backing on the state court determination in Dominion Voting System’s suit against

¹²⁰ TTV License, Inc., 22 FCC Rcd. 13591, 13595–96 (2007).

¹²¹ Chad Raphael, *The FCC’s Broadcast News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM’N L. & POL’Y 485, 501 (2001); Timmer, *supra* note 78, at 20.

¹²² Raphael, *supra* note 121, at 503.

the Fox News cable channel, that a Fox broadcast television station disseminated false statements about Dominion,¹²³ and (B) claims that CBS News distorted the news by airing different footage of Kamala Harris’s response to the same question on 60 Minutes and Face the Nation.¹²⁴ The FCC rejected all these challenges shortly before President Trump took office in 2025 without holding any hearings,¹²⁵ stating:

The freedom of speech and the press is enshrined in the First Amendment of the United States Constitution, and is necessary to promote the vigorous dialogue necessary in a representative democracy. When the government—including Congress, the Courts, and the Executive Branch (and States and local government)—seeks to curtail the freedom of expression on “matters of valid public interest,” doing so implicates the very heart of speech that the First Amendment is meant to protect. Accordingly, for nearly a century since the Commission’s inception in 1934, the Communications Act has expressly prohibited the Commission from engaging in the “power of censorship,” or issuing regulations or conditions that “interfere with the right of free speech.” It has instead plainly recognized that “[b]roadcasters—not the FCC or any other government agency—are responsible for selecting the material they air” and that “our role in overseeing program content is very limited.” Moreover, “the Commission does not—and cannot and will not—act as a self-appointed, free-roving arbiter of truth in journalism.”¹²⁶

¹²³ WTXF-TV, Phila., MB No. 23-293, 2025 WL 238065 (FCC Jan. 16, 2025). As I noted above, the FCC’s public interest authority is tied to its spectrum licensing power, and the FCC grants spectrum to broadcasters but not to cable channels or websites. So the FCC can regulate a local broadcaster affiliated with a broadcast television network (like Fox affiliate WTXF) under its public interest authority, but it has no such authority over a cable channel (like Fox News).

¹²⁴ Suhr, GN No. 25-11, 2025 WL 238072 (FCC Jan. 16, 2025).

¹²⁵ See *id.* at *2 (“The allegations in the Complaint fall short . . . [T]he Commission cannot—and will not—manufacture a rationale here to depart from its longstanding precedent and applicable law.”); *WTXF-TV, Phila.*, 2025 WL 238065, at *5 (“To the extent the Petitioners and Objectors allege that the Station engaged in ‘news distortion,’ they fail to establish a prima facie case that the Station ever disseminated false information.”).

¹²⁶ *WTXF-TV, Phila.*, 2025 WL 238065, at *1 (most citations omitted). The last quotation is from a 2020 order rejecting a challenge to the airing of allegedly false statements about Covid-19 by Trump and others. González, 35 FCC Rcd. 3032, 3033 (2020). The order rejecting the complaint about the 60 Minutes interview did not include the penultimate sentence of the quoted language but added language from a 2021 statement by then-Commissioner Brendan Carr that “[a] newsroom’s decision about what stories to cover and how to frame them should be beyond the reach of any government official, not targeted by them.” *Suhr*, 2025 WL 238072, at *1 (quoting Press Release, FCC, FCC Commissioner Carr Responds to Democrats’ Efforts to Censor Newsrooms (Feb. 22,

The bottom line, as one commentator put it, is that the news distortion policy “is effectively dormant.”¹²⁷ As Brendan Carr acknowledged in 2024, “the news distortion rule is a very, very narrow rule at the FCC. In almost every case, it doesn’t apply because it could get into sort of editorial decisions that are protected by the First Amendment.”¹²⁸

A related regulation is the broadcast hoax rule, which prohibits the broadcast of “false information concerning a crime or a catastrophe if: a. The licensee knows this information is false; b. It is foreseeable that broadcast of the information will cause substantial public harm, and c. Broadcast of the information does in fact directly cause substantial public harm.”¹²⁹ The rule interprets each of its elements narrowly:

For purposes of this rule, “public harm” must begin immediately, and cause direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties. The public harm will be deemed foreseeable if the licensee could expect with a significant degree of certainty that public harm would occur. A “crime” is any act or omission that makes the offender subject to criminal punishment by law. A “catastrophe” is a disaster or imminent disaster involving violent or sudden event affecting the public.¹³⁰

These constraints have made it very difficult for the FCC to satisfy all of them. And in fact the Commission has never found a violation of this rule, though a handful of complaints have been filed (often by public interest groups).¹³¹ The closest the FCC has come to finding a violation of this rule involved a radio station falsely claiming that the Lincoln Tunnel was flooding.¹³² The Commission rejected the allegation as based on hearsay, lacking specificity, and, most importantly, “failing to

2021), <https://perma.cc/SQ6J-9KNQ>).

¹²⁷ Charles L. Bonani, *Weapons of Mass Distortion: Applying the Principles of the FCC’s News Distortion Doctrine to Undisclosed Financial Conflicts of Interest in Corporate News Media’s Military Coverage*, 27 WASH. & LEE J. CIV. RTS. & SOC. JUST. 231, 238 (2020).

¹²⁸ Kristen Altus, *FCC Commissioner Urges CBS to Release the Transcript from Harris’ ‘60 Minutes’ Interview*, FOX BUS. (Oct. 22, 2024, at 15:00 ET), <https://perma.cc/L4WU-6LZF>.

¹²⁹ 47 C.F.R. § 73.1217(a).

¹³⁰ *Id.* § 73.1217(c).

¹³¹ Timmer, *supra* note 78, at 30–31.

¹³² WSKQ Licensing, Inc., 32 FCC Rcd. 2766 (2017).

show a violation of [the broadcast hoax rule] even if the hearsay were credited.”¹³³ After those challenging the station’s license renewal filed a petition for rehearing, the broadcaster agreed to a consent decree for a modest \$10,000 to resolve this complaint and the challenger’s indecency complaint¹³⁴ (so this was one of the six post-2008 indecency consent decrees noted in the next section).¹³⁵ Presumably the broadcaster decided that \$10,000 was a small price to pay to avoid more proceedings.

So the broadcast hoax rule is on the books, but in theory and practice the FCC has limited its application. The constraints the Commission placed on itself have resulted in a rule that is a paper tiger.

E. Indecency

As I noted above, indecency was the rare example, before the second Trump Administration, of ideological conservatives wanting more regulation and ideological liberals wanting less. And it had a different history from all the other content regulations, with periods in which the FCC aggressively enforced the broadcast indecency statute.

After *Pacifica* (which I discuss in Part III) was decided in 1978, the Commission stated that it believed the decision applied only to the repeated use, solely for shock value, of the words Carlin employed, when broadcast before 10:00 p.m.¹³⁶ It brought no further indecency cases until, on a single day in 1987, it issued three indecency opinions and announced that it was broadening its interpretation of indecency.¹³⁷ It interpreted 18 U.S.C. § 1464 to extend beyond “the seven specific

¹³³ *Id.* at 2771 n.5.

¹³⁴ *Id.* at 2766.

¹³⁵ See *infra* note 149 and accompanying text.

¹³⁶ *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1336 (D.C. Cir. 1988); see also James C. Hsiung, *Indecent Broadcast: An Assessment of Pacifica’s Impact*, COMMC’NS & THE L., Feb. 1987, at 41, 42 (noting that Chairman Charles Ferris’s responded to concerns about *Pacifica* by stating “the particular set of circumstances in the *Pacifica* case is about as likely to occur again as Halley’s Comet”).

¹³⁷ See generally *Pacifica Found.*, 2 FCC Rcd. 2698 (1987) (finding indecency when *Pacifica* aired a song with the words “eat shit,” “mother-fucker,” and “fuck the U.S.A.”); *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705 (1987) (finding indecency for various comments made by Howard Stern); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703 (1987) (finding indecency for airing a song

words” that George Carlin’s monologue had identified.¹³⁸ The Commission then said that “speech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium.”¹³⁹ It later stated that the key factors were the explicitness or graphic nature of the language, whether the material dwelled on or repeated at length indecent language, and whether the material was designed to titillate or for its shock value.¹⁴⁰

In 2004, the FCC changed course, issuing an order declaring that “[w]hile prior Commission and staff action have indicated that isolated or fleeting broadcasts of the ‘F-Word’ such as that here are not indecent or would not be acted upon, . . . we conclude that any such interpretation is no longer good law.”¹⁴¹ And it concluded that fleeting expletives on two broadcast award shows—Cher saying “fuck ‘em” and Nicole Richie saying “[h]ave you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple”—were indecent, though it did not impose any penalties.¹⁴² The indecency findings resulted in two Supreme Court opinions, neither of which reached the First Amendment issues. The first, discussed in Part IV, held that as a matter of administrative law the FCC could change its policies.¹⁴³ The second held that the Commission violated the Due Process Clause by failing to give

called “Makin’ Bacon”). To avoid any doubt on this score, the FCC also issued a public notice summarizing the three orders released that day and “put[ting] all broadcast and amateur radio licensees on notice as to new standards that the Commission will apply in enforcing the prohibition against obscene and indecent transmissions.” *New Indecency Enf’t Standards to be Applied to All Broad. & Amateur Radio Licensees*, 2 FCC Rcd. 2726, 2726 (1987).

¹³⁸ *Pacifica Found.*, 2 FCC Rcd. at 2699. In case you are wondering, the words that Carlin said you couldn’t say on broadcasting were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. See Appendix to *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (reprinting Carlin’s monologue).

¹³⁹ *Pacifica Found.*, 2 FCC Rcd. at 2699.

¹⁴⁰ *Indus. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 and Enf’t Pol’y’s Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 8003 (2001).

¹⁴¹ “Golden Globe Awards” Program, 19 FCC Rcd. 4975, 4890 (2004); *see also id.* at 4975, 4976 n.4 (reversing an order finding Bono’s utterance “[t]his is really, really fucking brilliant” upon receiving a Golden Globe Award not indecent, and instead finding the utterance actionably indecent).

¹⁴² Various Television Broads. (*Television Broads. II*), 21 FCC. Rcd. 13299, 13321–22, 13323, 13325, 13326, 13300, 13314 (2006).

¹⁴³ *See FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502, 529 (2009) (declining to reach

the broadcasters notice that fleeting expletives could be found indecent.¹⁴⁴ Thus the FCC's handling of the indecent language resulted in two Supreme Court opinions that had no holding on, or even substantive discussion of, *Pacifica* and the First Amendment issues raised by the Commission's change of policy on fleeting expletives.

But in 2006 the FCC again emphasized the importance of the explicitness or graphic nature of the language, whether the material dwelled on or repeated at length indecent language, and whether the material was designed to titillate or for its shock value, and it articulated and implemented constraints on its indecency regime with respect to news and public affairs programming.¹⁴⁵ And it also exempted non-titillating profanity, such as repeated use of the word "fuck" in *Saving Private Ryan*.¹⁴⁶

The FCC never formally rejected its fleeting expletives policy, but in 2013 it dismissed more than one million indecency complaints and stated that it would focus on egregious indecency.¹⁴⁷ And since 2008 the FCC has issued only one fine for indecency, which involved graphic nudity, not expletives.¹⁴⁸ During that time the Commission has also entered into six consent decrees, three of which involved

the constitutionality of the FCC's order and "find[ing] the [FCC's] orders neither arbitrary nor capricious").

¹⁴⁴ FCC v. Fox Television Stations, Inc. (*Fox II*), 567 U.S. 239, 258 (2012).

¹⁴⁵ Television Broads. (*Television Broads. I*), 21 FCC Rcd. 2664, 2668 (2006); see also *Television Broads. II*, 21 FCC Rcd. at 13328 (declining to punish an expletive on The Early Show because "regardless of whether such language would be actionable in the context of an entertainment program," it was "neither actionably indecent nor profane in this context").

¹⁴⁶ "Saving Private Ryan", 20 FCC Rcd. 4507, 4512 (2005) (noting that "in context, the dialogue, including the complained-of material, is neither gratuitous nor in any way intended or used to pander, titillate or shock").

¹⁴⁷ FCC Reduces Backlog of Broad. Indecency Compls. by 70% (More than One Million Complaints), 28 FCC Rcd. 4082, 4082 (2013).

¹⁴⁸ See WDBJ Television, Inc., 30 FCC Rcd. 3024, 3024 (2015) (penalizing a broadcaster for a 6:00pm broadcast that included "extremely graphic and explicit sexual material"—a hand stroking an erect penis).

In 2010 the Commission imposed a \$25,000 fine on a broadcaster for its failure to respond to a letter of inquiry about indecency. Fox Television Stations, Inc., 25 FCC Rcd. 7074, 7081 (2010).

multiple allegations against a broadcaster.¹⁴⁹ Five of these consent decrees were between 2009 and 2017, but by far the largest was in the summer of 2025: Tegna agreed to pay a \$225,000 “voluntary contribution” to resolve an indecency complaint involving the apparently unintentional playing of a pornographic video on a television screen behind a weatherperson.¹⁵⁰ I think it is not a coincidence that Tegna made clear after Trump’s reelection that it intended to be a buyer or seller of local stations—and, in fact, Nexstar’s acquisition of Tegna (necessitating license transfers requiring FCC approval) was announced a month after the consent decree.¹⁵¹ The consent decree eliminated one possible source of friction with the FCC.¹⁵²

¹⁴⁹ See Tegna Inc., No. 25-573, 2025 WL 2709226, at *1, *3 (FCC July 10, 2025) (entering a consent decree over an alleged violation); WSKQ Licensing, Inc., 32 FCC Rcd. 2766, 2766, 2770 (2017) (same over alleged repeated violations); Liberman Broad., Inc., 28 FCC Rcd. 15397, 15397, 15401 (2013) (same over alleged repeated violations); Border Media Bus. Tr., 29 FCC Rcd. 9488, 9488, 9491 (2014) (same over an alleged violation); KRXA, LLC, 29 FCC Rcd. 3483, 3481, 3485–86 (2014) (same over alleged repeated violations); Bela TV, LLC, 25 FCC Rcd. 400, 400, 401 (2010) (same over an alleged violation).

¹⁵⁰ Tegna Inc., 2025 WL 2709226, at *1, *3.

¹⁵¹ See Alex Weprin, *Trump May Usher in Massive TV Station Land Grab*, HOLLYWOOD REP. (Nov. 13, 2024), <https://perma.cc/2PZZ-R7F9> (reporting that, in the wake of Trump’s 2024 re-election, Tegna’s and Sinclair’s CEOs said they intended to be buyers or sellers of local stations); *Nexstar Media Group, Inc. Enters into Definitive Agreement to Acquire TEGNA Inc. for \$6.2 Billion in Accretive Transaction*, NEXSTAR MEDIA GRP., INC. (Aug. 19, 2025), <https://perma.cc/F3W8-UACM> (announcing the acquisition of Tegna on August 19, 2025, after the July 10, 2025 consent decree); Tegna, Inc., MB No. 25-331 (FCC Mar. 19, 2026) (approving the merger).

¹⁵² The Nexstar/Tegna transaction also involves ownership limits. Rather than rely on antitrust laws, Congress and the FCC have imposed limits on horizontal concentration, vertical integration, and cross-ownership. See BENJAMIN ET AL., *supra* note 51, at 509. The possibility of relaxing ownership limits is a potential source of FCC power. The FCC’s control over license transfers entails power over the particular entity seeking the transfer, whereas ownership limits apply across the board. But in rare situations a particular transaction may require a change in ownership limits and have no obvious relevance to other transactions, such that a change in ownership limits effectively applies to one transaction.

The Nexstar/Tegna transaction is a notable example. The national broadcast television ownership limit was 39% of households when Nexstar announced its proposed acquisition of Tegna, and Nexstar noted that with the additional stations it would reach 80% of households. See Scott Nover, *U.S. Approves \$6.2 Billion Merger Set to Reshape Local TV*, WASH. POST (Mar. 19, 2026). This was the only proposed transaction that would exceed the limit. The FCC granted a waiver for this specific transaction, which blew past the previous 39% limit. See *Tegna, Inc.*, MB No. 25-331, at 2 (stating

The result is an awkward *modus vivendi* in which the Commission has not abandoned its policy on fleeting expletives but in practice focuses on egregious cases, creating a regime in which broadcasters largely know how to avoid indecency fines.

That said, indecency is the exception to the FCC's otherwise fairly consistent pattern from Reagan through Biden of eliminating or curtailing broadcast content regulation. The Commission was not consistently restrained in dealing with indecency, and in 1987 and the early 2000s it was reasonably aggressive. The FCC did not engage in sustained regulation of indecency, but it was less consistent in restraining itself than it was for virtually every other form of content regulation.

III. THE CONSTITUTIONAL PICTURE

How can the FCC regulate the content of a communications medium without running afoul of the First Amendment? The short answer is that key Supreme Court decisions have treated the spectrum, and broadcasting in particular, as unique.

In the Court's earliest case addressing the government's control over the spectrum, *NBC v. United States*,¹⁵³ the Court emphasized that spectrum is subject to interference and thus scarce, and stated that this justified government control of the spectrum.¹⁵⁴ But every rivalrous resource is subject to interference and thus scarce. Saying that wireless frequencies are scarce because of interference does not distinguish them from virtually any other good. And almost all resources are scarce

that the FCC "has authority to waive the [national television ownership] rule, and we take that step here today in the context of this specific transaction"). And it may not be coincidental that Nexstar was the first broadcaster to announce that it was suspending Jimmy Kimmel Live. *See supra* note 22.

¹⁵³ 319 U.S. 190 (1943).

¹⁵⁴ The Court stated that

[there are] certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

Id. at 213.

in that (A) if given away at no charge, people would request more of them than is available; and (B) if we could create more of them, that additional increment could also be put to productive use.¹⁵⁵ So the way in which wireless frequencies are scarce fails to distinguish them from virtually every other good, most of which are not allocated by the government.¹⁵⁶

Then there is the follow-on assertion that scarcity justifies government control. But to say that spectrum is scarce is only to say that the use of spectrum must be allocated among those who desire it. Use of any scarce resource must be allocated. In the U.S. economy, this allocation is usually accomplished by prices set in open markets. It is unsatisfying, then, to say that administrative allocation of spectrum is necessary because of spectrum scarcity. The real issue is whether spectrum is scarce in some special way (unlike, say, wires or land) that peculiarly requires a nonmarket allocation mechanism.¹⁵⁷

¹⁵⁵ BENJAMIN, ET AL., *supra* note 51, at 450.

¹⁵⁶ One might want to argue that wireless frequencies are different from other resources in that the frequencies are finite, and most other resources are not. But the throughput of spectrum has increased by a factor of more than 100 over the years—the equivalent, in terms of land, of adding many new earths. Improvements in technology have greatly increased the range of usable spectrum, as higher and higher frequencies can be used to send data. And technology has also enabled us to send more and more data over the same block of frequencies (through, for example, digital compression). Besides, at any given point there are only so many trees in the world, so many pounds of steel, and so on. Just as we could expend more resources to get more throughput through existing wires and to produce more wires, we could expend more resources to increase the communications capacity of the spectrum. *Id.* at 450–51.

¹⁵⁷ See Ronald Coase, *Testimony Before the FCC, Why Not Use the Pricing System in the Broadcast Industry?* (Dec. 11, 1959), in FREEMAN, July 1961, at 52, 53:

All resources used in the economic system are limited in amount and are scarce in that people want to use more of them than exists. This is so whether we think of labor, land, or capital. However, we do not ordinarily consider that this situation calls for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resources. But the usual way of handling this problem in the American economic system is to employ the pricing mechanism, and this allocates resources to users without the need for government regulation.

See also KRATTENMAKER & POWE, *supra* note 43, at 207 (“To prevent chaos (interference) in broadcasting or publishing . . . requires not a commission, but a system of property rights. It follows . . . that if one decides to create a commission, it need do no more than define and protect property rights (that is, allocate spectrum among certain users and define and punish interference).”).

This discussion helps to tee up *Red Lion*. Recall that the quotation above from *Red Lion* begins with the statement “[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”¹⁵⁸ The “because” does not follow. One could replace “radio frequencies” with “land,” but if the government had decided to convey land to settlers in the form of leases rather than ownership in fee simple, the Supreme Court should, and I presume would, not have held that the government could require lessees to allow unwanted speech on their land. Similarly, the Supreme Court should, and I presume would, not have held that speech generators (all of whom presumably use some land) could be subject to regulation because of their license.

Red Lion did not hold that the licensing regime means that regulation of licensees is subject to diminished or no First Amendment scrutiny. Instead, the Court’s reasoning was that the licensing regime justifies regulations that require licensees to carry others’ “views and voices.”¹⁵⁹

Relatedly, *Red Lion* does not support laws aimed at reducing speech deemed harmful. Indeed, because its focus was on increasing the views and voices on the airwaves to ensure that a wide range of both were heard, nothing in *Red Lion* offers any support for limiting content.¹⁶⁰ By contrast, *Pacifica*’s reasoning is broader. *Pacifica* focused on indecency regulation and thus on speech that was considered harmful. In the course of upholding indecency regulations, the Court stated that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection,” and identified two aspects of broadcasting that justified regulation of indecency:

First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves

¹⁵⁸ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (emphasis added).

¹⁵⁹ *See id.* at 389 (“[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.”).

¹⁶⁰ *See id.*

confronts the citizen, not only in public, but also in the privacy of the home. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. . . .

Second, broadcasting is uniquely accessible to children, even those too young to read.¹⁶¹

Just as *Red Lion*'s scarcity rationale has been subject to powerful criticisms,¹⁶² *Pacifica*'s reasoning was sharply criticized when it was decided.¹⁶³ And its reasoning has become difficult if not impossible to defend in the years since. Broadcasting is not uniquely pervasive and accessible to children today, and has not been for decades.¹⁶⁴

Red Lion and *Pacifica* could have been generative, but both stand as outliers. Just five years after *Red Lion*, the Court in *Miami Herald Publishing Co. v. Tornillo*¹⁶⁵ adopted a dramatically different approach to very similar rules, this time

¹⁶¹ FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

¹⁶² See, e.g., Jim Chen, *Conduit-Based Regulation of Speech*, 45 DUKE L.J. 1359, 1403 (2005) (“No one besides the Supreme Court actually believes the scarcity rationale.”).

¹⁶³ See, e.g., C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 JEFFREY S. MOORAD SPORTS L.J. 45, 45 (1996) (“*FCC v. Pacifica Foundation* has been described as possibly the worst of the Supreme Court’s First Amendment decisions. I have no interest in disagreeing.” (footnotes omitted)).

¹⁶⁴ The Supreme Court has not had occasion to reconsider either opinion, but ramping up content regulation would make a challenge more likely. And many commentators, myself included, believe that the Supreme Court should and would overrule both. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007) (“[I]t is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.”), *rev’d and remanded sub nom., Fox I*, 556 U.S. 502 (2009); *Fox I*, 556 U.S. at 530 (Thomas, J., concurring) (“*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity. The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so in these cases.” (internal quotation marks omitted) (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in judgment in part and dissenting in part))); L.A. Powe, Jr., *Red Lion and Pacifica: Are They Relics?*, 36 PEPPERDINE L. REV. 445, 458 (2009) (arguing that the revival of the Fairness Doctrine “would be a huge plus because it would give the Supreme Court a chance to overrule *Red Lion* and officially bring broadcasting under the First Amendment”); Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51, 52 (2010) (“It is time for *Red Lion* to rest in peace.”).

¹⁶⁵ 418 U.S. 241 (1974).

applied to newspapers. The relevant law required newspapers that criticized a political candidate's personal character or political record to print the candidate's reply.¹⁶⁶ No Justice in *Tornillo* disputed that newspapers' choice of what to publish was covered by the Free Speech Clause,¹⁶⁷ but the Court went far beyond that. It unanimously held that the law violated the Free Speech Clause, stating that it interfered with the newspaper's right to choose what to publish. The Court also emphasized that its analysis did not depend on the newspaper's limited printing space.¹⁶⁸

Tornillo marked a doctrinal turning point by holding that a right-of-reply statute was a flatly unconstitutional speech compulsion. Strikingly, *Tornillo* did not cite *Red Lion*.¹⁶⁹ More significantly, no majority opinion has invoked *Red Lion*'s language about the rights of viewers or the public's right to receive access to ideas for more than 35 years—and even then, only in what the Court treated as the unique context of broadcasting due to spectrum scarcity.¹⁷⁰ The same is true for invocations of *Red Lion*'s concern about private entities monopolizing speech. And the Court has never held that the First Amendment justifies any regulation, much less that it empowers legislatures. Simply stated, *Red Lion*'s reasoning ended up as an outlier confined to the narrow context of broadcasting regulation.¹⁷¹

¹⁶⁶ *Id.* at 244.

¹⁶⁷ *Id.* at 258. And application of the Free Speech Clause to speech compulsions was not new. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court famously invalidated a law requiring students to recite the Pledge of Allegiance and salute the flag.

¹⁶⁸ *Tornillo*, 418 U.S. at 258.

¹⁶⁹ BENJAMIN ET AL., *supra* note 51, at 560.

¹⁷⁰ See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566–67 (1990) (relying on *Red Lion*'s scarcity rationale in upholding FCC minority preferences for broadcasters), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377–78, 402 (1984) (invoking *Red Lion*'s scarcity rationale but still invalidating on First Amendment grounds a ban on public broadcasters editorializing); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973) (relying on *Red Lion* in invoking the unique scarcity of the broadcast spectrum).

¹⁷¹ *Red Lion* has had academic supporters, perhaps most notably Owen Fiss, who both celebrated its invocation of the rights of viewers and listeners and lamented it having been so limited by later cases that it had shriveled into “a precedent of little force,” OWEN M. FISS, *THE IRONY OF FREE SPEECH* 65 (1996), and “something of a freak,” OWEN M. FISS, *LIBERALISM DIVIDED* 20 (1996).

As for *Pacifica*, the federal government has regulated indecency on every major medium of electronic communication since it was decided—telephones, cable television, and the internet. In each of those situations, the government’s main argument was that under *Pacifica*’s reasoning the medium was regulable because it was just as pervasive and accessible to children as broadcasting was. And in none of these cases did the Supreme Court hold that *Pacifica* applied.¹⁷²

Red Lion and *Pacifica* thus stand as outliers whose reasoning is difficult to defend.

IV. INSTABILITY

Importantly, the FCC can always rewrite its rules and, even more easily (because notice and comment would not be required), expand its interpretation of its adjudicatory precedents (e.g., with respect to news distortion).¹⁷³ An agency’s policy decisions must not be arbitrary and capricious under 5 U.S.C. § 706(2)(A), which (as the Supreme Court stated in a case involving the FCC) requires that an agency’s policy decision be “reasonable and reasonably explained.”¹⁷⁴ In the parlance of administrative law, an agency must take a hard look at the arguments against its decision and explain why it rejected alternatives and chose its preferred course of action.¹⁷⁵

This has proven to be a fairly low hurdle for FCC content regulations. Indeed, one of the leading cases applying § 706(2)(A) not only involved Commission content regulations but also involved a change in policy (as I am positing here). That case, *FCC v. Fox Television Stations*, involved the Commission’s 2004 indecency

¹⁷² See *Reno v. ACLU*, 521 U.S. 844 (1997) (internet); *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803 (2000) (cable television); *Sable Comms. of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (telephony). *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), was a near miss, in that a plurality relied on *Pacifica*, while the other members of the Court did not.

¹⁷³ See *Fox I*, 556 U.S. 502, 515 (2009) (explaining that an agency may change its policy); 5 U.S.C. § 553 (applying notice and comment procedures only to rulemaking).

¹⁷⁴ *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

¹⁷⁵ See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’ In reviewing that explanation, we must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” (internal citations omitted)).

policy reversal noted above, under which it punished broadcasters for fleeting expletives.¹⁷⁶

The Court began by noting that an agency has no greater burden in justifying a change in policy than in adopting a policy in the first place.¹⁷⁷ The Court stated that an agency can change its policy so long as the new policy is permissible under the statute, the agency has good reasons for the change, and it “display[s] awareness” that it is changing position.¹⁷⁸

With respect to such changes, an agency can be required to provide a more detailed justification if “its prior policy has engendered serious reliance interests,”¹⁷⁹ but the Court recently addressed what constitutes a serious reliance interest and said its cases “require[e], for example, ‘decades of industry reliance on [an agency’s] prior policy.’”¹⁸⁰ And even when there are serious reliance interests, that merely requires that the agency provide more justification; it does not prevent the agency from changing its position.

Returning to *Fox*, the Court found the § 706(2)(A) issue easy, holding that the FCC’s policy reversal was not arbitrary and capricious because the agency’s reasons for finding even isolated uses of “fuck” and “shit” indecent “were entirely rational.”¹⁸¹ The Commission identified no empirical or other evidence to show that exposure to profanity harmed children in any way, and Justice Breyer in dissent noted a meta-review concluding that “it is unlikely that vulgarities have any negative effect” on children.¹⁸² The majority responded that “[t]here are some propositions for which scant empirical evidence can be marshaled,” and this was one of them: “One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.”¹⁸³ The Court concluded that

¹⁷⁶ *Fox I*, 556 U.S. at 510; see also *supra* notes 141–144 and accompanying text.

¹⁷⁷ *Fox I*, 556 U.S. at 514.

¹⁷⁸ *Id.* at 515.

¹⁷⁹ *Id.*

¹⁸⁰ *FDA v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 585 (2025) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016)).

¹⁸¹ *Fox I*, 556 U.S. at 517.

¹⁸² *Id.* at 564.

¹⁸³ *Id.* at 519.

the FCC was not required to produce any empirical evidence in support of its decision.¹⁸⁴ The Court could of course limit *Fox* to indecency, but *Fox*'s reasoning would seem to apply to most, if not all, of the content-based regulations that the FCC might reinvigorate. Just as it is difficult to conduct controlled studies of the effects of indecency, it is difficult to do controlled studies of exposure to news distortions, contrasting opinions, and the like, and *Fox* suggests that the Commission would not need to rely on such studies.

In rejecting the § 706(2)(A) challenge, the Court did not even mention reliance, presumably because it is hard to identify any serious reliance interests in that context. The central case in which the Court did find serious reliance interests is also illuminating, as there the Court focused on the fact that employers had structured their compensation agreements with categories of employees that were premised on the rule the agency revised.¹⁸⁵ It seems quite unlikely that broadcasters would have similar binding obligations that presuppose the weakness of a particular FCC content regulation. And, again, even if they did, that would merely require the Commission to provide a more robust justification than would otherwise be necessary.

The only other hurdle for the FCC in creating a new rule or adjudicatory standard is the very capacious public interest standard, and that hurdle also seems pretty low. For agencies governed by more specific statutory language than “the public interest, convenience, and necessity,” the shift from *Chevron*¹⁸⁶ to *Loper Bright*¹⁸⁷

¹⁸⁴ See *id.* (“It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.”).

¹⁸⁵ See *Encino Motorcars*, 579 U.S. at 222–23 (“Dealerships and service advisors negotiated and structured their compensation plans against this background understanding. Requiring dealerships to adapt to the Department’s new position could necessitate systemic, significant changes to the dealerships’ compensation arrangements.”).

¹⁸⁶ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁸⁷ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

likely means much greater scrutiny of their interpretations of that statutory language.¹⁸⁸ But because the renewal and transfer of broadcasting licenses are governed by the capacious public interest standard,¹⁸⁹ with or without *Chevron* the Commission has wide latitude. In the pre-*Chevron* regime the public interest standard was interpreted to confer enormous authority on the FCC, and there is no reason for the post-*Chevron* regime to be any different.

V. POSSIBLE RESPONSES

Unless the FCC's broad public interest authority over broadcasters is constrained, a more aggressive regulatory approach to broadcasters, including reviving long-dormant regulations—perhaps in unprecedented ways—is always a possibility.

That does not necessarily mean, of course, that the Commission's authority should be cabined. Some scholars have argued for fairly vigorous application of the public interest standard not only to broadcasting but also to other forms of communication, notably including the internet.¹⁹⁰ Applying the public interest standard solely to broadcasting is more problematic in a world in which broadcasting is merely one medium of communication among many, but some have argued that broadcasting warrants special treatment.¹⁹¹ The desirability of the public interest

¹⁸⁸ Compare *Chevron*, 467 U.S. at 842–43 (deferring to agencies when a statute is ambiguous), with *Loper Bright*, 603 U.S. at 412 (requiring courts to answer statutory questions independently).

¹⁸⁹ See *supra* notes 6–8 and accompanying text.

¹⁹⁰ See, e.g., Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 8–10 (2009) (arguing for the development of a public interest standard applicable to broadband internet); Ronald J. Krotoszynski, Jr., *The Irrelevant Wasteland: An Exploration of Why Red Lion Doesn't Matter (Much) in 2008, the Crucial Importance of the Information Revolution, and the Continuing Relevance of the Public Interest Standard in Regulating Access to Spectrum*, 60 ADMIN. L. REV. 911, 941 (2008) (arguing for application of a public interest standard that would “empower parents to better facilitate their children’s education with access to age-appropriate educational, cultural, and informational programming on cable, DBS, and the Web”); PHILIP M. NAPOLI, SOCIAL MEDIA AND THE PUBLIC INTEREST: MEDIA REGULATION IN THE DISINFORMATION AGE 193–98 (2019) (arguing for public interest regulation of the internet, and social media in particular); see also Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES IN L. 487, 490 (2015) (arguing for treating internet platforms as intermediaries, which “opens up new opportunities for regulation in the public interest. . .”).

¹⁹¹ Support for spectrum scarcity as justifying different treatment of broadcasting is rare.

standard can be—and has been—the subject of book-length treatments, and I will not rehash that debate in this Article.¹⁹²

Instead, I will address a question that has received relatively little attention: If one believes, as I do, that the possible reinvigoration of the broadcasting regulations discussed in this Article would be undesirable, what current or new legal tools might prevent or at least mitigate such reinvigoration?

I am not assuming that ratcheting up broadcasting regulations would be disastrous and thus calls for radical action in response. My view is that such a possible reinvigoration sharpens and modestly heightens concerns about the longstanding regime. The analysis in this Article highlights the possibility of a much more aggressive regulatory approach and its stakes, but I do not believe that it radically alters the costs and benefits of the longstanding regime. That said, I do think that increased content regulation of broadcasters would do more harm than good, for reasons that largely track the FCC's arguments in repealing the fairness doctrine. Those judgments inform the analysis below.

A. *Broadcast-Specific Doctrines*

1. Doctrines that currently exist

The Supreme Court has allowed content-based regulation of broadcasters,¹⁹³ but it has never confronted a broadcasting regulation that on its face or as applied was viewpoint-based, and nothing in its opinions suggests that the government may impose viewpoint-based restrictions on broadcasters. And the Court has

Among the few examples is NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* 135 (1995) (“This scarcity . . . is the ‘unique characteristic’ that has always supported, and still supports, the Communication Act’s public-interest standard.”). Others have invoked other rationales. *See, e.g.*, Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CALIF. L. REV. 1687, 1689–91 (1997) (relying on public forum precedents to justify treating broadcast differently and justifying those precedents on a government-empowering vision of the First Amendment, or as a *quid pro quo* for having been granted monopolies on spectrum); Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 3 (1976) (arguing that broadcast should be treated differently because it is beneficial to permit access regulation in one, restricted, segment of media).

¹⁹² *See generally, e.g.*, KRATTENMAKER & POWE, *supra* note 43 (proposing a new system of broadcast regulation).

¹⁹³ *See supra* Part III.

sharply distinguished between content-based and viewpoint-based regulation. Notably, the Court has stated that whereas content-based regulations are subject to strict scrutiny, viewpoint-based regulations are categorically prohibited.¹⁹⁴

In light of this, there is a strong argument that a viewpoint-based decision to punish a broadcaster would violate the First Amendment. If a regulation is implemented in a viewpoint-based manner (as would seem to be true with respect to punishing Kimmel for his monologue),¹⁹⁵ it is treated as viewpoint-based.¹⁹⁶

And the unconstitutional conditions doctrine could play a role. A straightforward implication of that doctrine is that the government cannot condition renewal or transfer on a licensee doing something that the government cannot directly compel.¹⁹⁷ Assuming, as I do, that even under *Red Lion* and *Pacifica* the government could not require broadcasters to carry, or prohibit them from carrying, speech defined by viewpoint, the unconstitutional conditions doctrine would presumably prevent the FCC from conditioning licensing on broadcasters doing so.

¹⁹⁴ See *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (“In a traditional public forum . . . restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.” (citation omitted)); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (“[R]estrictions based on viewpoint are prohibited.” (citation omitted)). The test for limited public fora distinguishes even more sharply: Content-based restrictions are subject only to a reasonableness test, whereas viewpoint-based restrictions are flatly impermissible. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (stating that in a limited public forum “[t]he State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum,’ nor may it discriminate against speech on the basis of its viewpoint” (citations omitted)).

¹⁹⁵ See Carr’s remarks about Kimmel’s monologue, *supra* note 22.

¹⁹⁶ See *Rosenberger*, 515 U.S. at 829 (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (reversing a conviction for using a park without a permit because “[t]he conclusion is inescapable that the use of the park was denied because of the City Council’s dislike for or disagreement with the Witnesses or their views”).

¹⁹⁷ See *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 59 (2006) (“[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.’ Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.” (quoting *United States v. Am. Libr. Assn.*, 539 U.S. 194, 210 (2003))).

2. Changes to existing doctrines

Two obvious possible changes would be the overruling of *Red Lion* and *Pacifica*. This would effectively neuter the public interest standard with respect to content regulation.¹⁹⁸ Congress could grant any regulatory authority it wished (just as it could with respect to newspapers or the internet), but any content regulation would need to satisfy the same strict scrutiny applicable to other forms of communication¹⁹⁹—a tall order, to put it mildly.²⁰⁰ And Congress could achieve the same result (without litigation) by eliminating the public interest standard.

Carr’s efforts to reinvigorate public interest regulation, by underscoring the potential for abuse inherent in the government’s capacious authority over broadcast content, reinforce the arguments for overruling *Red Lion* and *Pacifica* or repealing the public interest standard. More importantly for purposes of this Article, overruling those cases or repealing the public interest standard, by subjecting broadcast content regulation to strict scrutiny, directly responds to the concerns identified in this Article.

Congress could go further: It could grant full property rights in spectrum, either free of government control or subject to content-neutral rules designed to prevent interference and maximize the value of the spectrum (the zoning approach Ronald Coase suggested in 1959).²⁰¹

¹⁹⁸ Note that the major questions doctrine and nondelegation in their current forms are not limits on the public interest standard. A broad “public interest” standard is what Congress wanted, so there probably is no major questions problem. *See, e.g., NBC v. United States*, 319 U.S. 190, 219 (1943) (noting that the Communications Act of 1934 had “large public aims”); *see also* POWE, *supra* note 47, at 61 (same). Meanwhile, the Court has held that 47 U.S.C. § 309 did not create a nondelegation problem, *see NBC*, 319 U.S. at 225–26, and reaching a different conclusion would require a much more robust nondelegation doctrine.

¹⁹⁹ *See Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015) (“[S]trict scrutiny applies . . . when a law is content based . . .”); *Moody v. NetChoice*, 603 U.S. 707, 726–34 (2024) (stating that the same strict scrutiny applies to content regulation of newspapers and social media companies).

²⁰⁰ *See, e.g., Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (stating that a court will uphold a content-based speech regulation only if it is the least restrictive means of furthering a compelling government interest).

²⁰¹ *See Coase, supra* note 157, at 53 (arguing for property rights in wireless frequencies, which “would require a delimitation of the property rights acquired, and there would almost certainly also have to be some general regulation of a technical character. But such regulation would not preclude the existence of private rights in frequencies, just as zoning and other regulations do not preclude

Overruling *Red Lion* and *Pacifica* or repealing the public interest standard but retaining a licensing regime would leave the FCC with the ability to impose content-neutral regulations on broadcasters. This is also true of property regimes (governments can, for example, impose significant costs on property transfers), but because FCC licenses must be renewed, they provide an additional point of leverage.²⁰² An FCC hostile to broadcasting could create significant renewal costs, e.g., by dramatically increasing the amount of information broadcast licensees must submit. But the requirement of content neutrality would make it difficult for the government to single out particular broadcasters for content- or viewpoint-based punishment (just as, under a property regime, a broadcaster would have a ready argument against a property transfer cost imposed only upon it). Accordingly, the concerns about content- or viewpoint-based penalties on particular broadcasters that motivate this Article are similar under both property and licensing regimes.²⁰³ Thus property rights in spectrum are not meaningfully responsive to the concerns raised in this Article.

B. Executive Authority More Generally

So far I have focused on the federal government's—specifically the FCC's—power over broadcasting (far greater than for any other medium of communication), and with good reason: Limiting government power over broadcasters would almost certainly have major consequences. Providing broadcasters with the First Amendment protections that cable, satellite, and internet video providers enjoy would very likely lead to broadcast programming that more closely resembles that

the existence of private property in houses”).

²⁰² Congress has already reduced that leverage. Notably, the Telecommunications Act of 1996, Pub. L. No. 104-104, § 204(a), 110 Stat. 56, 113, extended license terms and provided that at renewal “the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.” 47 U.S.C. § 309(k)(4).

²⁰³ The concerns may not be identical because there is some possibility of a judge mistakenly treating a content- or viewpoint-based penalty as content neutral. The renewal authority for licenses but not property thus gives the government as licensor an additional chance at imposing a content- or viewpoint-based penalty that the judge fails to recognize. But the difference is presumably small both because a judge is likely to be sensitive to the singling out a particular broadcaster in a content-neutral regime and because the government has the ability to threaten a content- or viewpoint-based penalty disguised as a content-neutral penalty in both a property and a license regime, and in both cases the prospect of hurdles to transfer reduces the value of the underlying property/license.

of those other providers. As I noted above, even a small chance of losing, or not being able to transfer, a valuable license has a powerful inhibiting impact on a broadcaster, so the removal of that risk will have a similarly powerful impact in the opposite direction.²⁰⁴

But of course the executive branch more generally has significant powers that apply to all companies, broadcast and otherwise. A presidential administration committed to using maximum pressure against a company can impose costs beyond medium-specific or speech-specific regulation. A President could, for example, pressure the IRS to audit a company's taxes, or the Treasury Department or the SEC to closely scrutinize its financial relationships.²⁰⁵ The simplest, and most visible, way to attack a company is via the bully pulpit.

Shareholder value is a key (if not the only)²⁰⁶ consideration for companies, so a company that understands itself to have a choice between a retaliatory presidential action with an expected cost to the company of X and a company action with an expected benefit to the company of Y will presumably choose to forgo the company action if X is greater than Y. Thus a President who is perceived to be ready to engage in particularly damaging actions or statements about a company can induce that

²⁰⁴ See *supra* notes 52–54 and accompanying text.

²⁰⁵ See, e.g., Jonathan Nuechterlein, *Delete, Delete, Insert? New Regulatory Contradictions at the FCC*, TECH. POL'Y INST. (Mar. 20, 2025), <https://perma.cc/K5DB-PK4P> (“A jawboning target cannot simply call the FCC’s bluff because the Commission, and the Administration as a whole, enjoy great discretion to kneecap any disobedient company down the road in unrelated contexts, ranging from merger-approval proceedings to litigation settlements to the award of government benefits.”).

²⁰⁶ Compare Adolph A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (“[A]ll powers granted to a corporation or to the management of a corporation, or to any group within the corporation . . . [are] exercisable only for the ratable benefit of all the shareholders as their interest appears.”), and MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (40th Anniversary ed. 2002) (“[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits. . . .”), with E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (“[A] business corporation [is an] economic institution which has a social service as well as a profit-making function”), and LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 14 (2012) (arguing that the idea that corporations exist only to maximize shareholder value is a “problem”).

company to make a decision accommodating the President's desires that it would reject in the absence of such pressure.²⁰⁷

The more effective a presidential administration's actions are in inducing media companies to bow to its will, the less significant a relaxation of Commission regulation and/or heightened scrutiny of broadcast regulation will be. The difference will probably still be significant—it seems unlikely that cable or internet video providers will be cowed into doing a presidential administration's bidding, as no federal entity has authority over the continued operation of their businesses (although in 2025 Brendan Carr suggested that the FCC could somehow apply a statute preventing cable and satellite television operators from discriminating against programmers they did not own to YouTube TV's alleged discrimination against faith-based programming, notwithstanding the First Amendment strictures against viewpoint-based regulation).²⁰⁸ But the gap will not be as large as it would be without these non-broadcast-specific governmental actions or threats of actions. Instead of broadcasters moving closer to what have been the prevailing practices of cable, satellite, and internet video providers, such providers would move away from those practices and toward broadcasters' more compliant approach.

What doctrinal changes would limit (if not prevent) presidential administrations' exercise of such power over media companies, and are they desirable?

²⁰⁷ For example, after Trump stated that Lip-Bu Tan, the CEO of Intel, should be fired, Intel stock fell rapidly. Fred Imbert, *Intel Shares Drop After Trump Calls for CEO to Resign Immediately*, CNBC (Aug. 7, 2025, at 17:53 ET), <https://perma.cc/YDJ8-2SQY>. After an Oval Office meeting between Tan and Trump, the U.S. received a 10% interest in Intel. Aditya Soni, David Shepardson, Andrea Shalal & Max A. Cherney, *US to Take 10% Equity Stake in Intel, in Trump's Latest Corporate Move*, REUTERS (Aug. 22, 2025, at 20:19 ET), <https://perma.cc/TU65-G66M>.

²⁰⁸ See Letter from Brendan Carr, Chair, FCC, to Sundar Pichai, Chief Exec. Officer, Alphabet, and Neil Mohan, Chief Exec. Officer, Google LLC (Mar. 7, 2025), <https://perma.cc/8DJ8-XF2G> ("In Section 616 of the Communications Act, Congress delegated authority to the FCC to address certain discriminatory practices in the negotiation of carriage agreements between traditional multichannel video programming distributors (MVPDs) and video programming vendors. Over the last several years, the FCC and Congress have been encouraged by a diverse group of stakeholders to expand the Commission's existing rules and to apply the same or a similar framework to virtual MVPDs like YouTube TV."). For a criticism of Carr's argument, see Nuechterlein, *supra* note 205 ("Chairman Carr's notional case against YouTube TV is trebly flawed: (1) a virtual MVPD service is not subject to the program carriage regime; (2) that regime would not apply to 'discrimination against faith-based programming' anyway; and (3) misapplying the regime to combat such 'discrimination' would violate the First Amendment.").

1. Eliminating executive branch discretion

Some possibilities would apply well beyond media companies. Notably, Congress could attempt to eliminate, or at least dramatically curtail, executive branch discretion such that no broadcaster (or anyone else) would need to fear mistreatment at the hands of a presidential administration. This is well-trod ground in administrative law, so I will be brief.

Consider prosecutorial discretion, a particularly potent form of executive authority. The Supreme Court has repeatedly stated that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”²⁰⁹ and that decisions of federal prosecutors not to indict have “long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”²¹⁰

There is scholarly disagreement about how far this goes. Tara Leigh Grove has argued that the Take Care Clause requires broad executive branch prosecutorial discretion,²¹¹ whereas Zachary Price has argued that “Congress may enact statutory guidelines for enforcement discretion, or it might even specify conditions under which prosecution would be mandatory, provided the executive branch believed a provable legal violation occurred.”²¹² But Price’s formulation leaves the executive branch with the discretion to determine that a violation occurred, and I am not aware of any scholar who has argued that Congress can eliminate executive branch prosecutorial discretion entirely.

Indeed, what statutory language would eliminate any discretion? If the statute required the prosecution of anyone who committed, say, fraud, a prosecutor would still have to decide that she believed someone’s action was in fact fraudulent. Same for a statute requiring prosecution if someone credibly accuses another of fraud—

²⁰⁹ *E.g.*, *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Greenlaw v. United States*, 554 U.S. 237, 246 (2008) (quoting this language).

²¹⁰ *E.g.*, *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 17 (2020) (quoting this language in part).

²¹¹ See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 782 (2009) (arguing that “a considerable degree of discretionary enforcement authority” is required).

²¹² Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 712 (2014).

the prosecutor would have to determine what constitutes a credible accusation. Even a requirement of prosecution whenever there is *any* accusation of fraud (a terrible idea in terms of the incentives it creates) would still require a prosecutor to determine that the alleged activity would constitute fraud.

2. Jawboning

There are existing constraints on the executive branch that are more directly targeted at speech concerns. The central one limits jawboning.

The central case laying out the standard is *NRA v. Vullo*,²¹³ involving an insurance regulator who allegedly threatened enforcement actions against insurance companies that continued to do business with the National Rifle Association.²¹⁴ The Supreme Court unanimously ruled that the NRA had successfully alleged a First Amendment violation, stating that “a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf.”²¹⁵ And actual coercion is not required: “Government officials cannot *attempt* to coerce private parties in order to punish or suppress views that the government disfavors.”²¹⁶ As the Court’s opinion makes clear, a government official violates the First Amendment if she “convey[s] a threat of adverse government action in order to punish or suppress the plaintiff’s speech.”²¹⁷

Vullo notes that the conveyance of a threat will depend not only on what the government official says but also on the official’s power: “Generally speaking, the greater and more direct the government official’s authority, the less likely a person

²¹³ Nat’l Rifle Ass’n of Am. v. Vullo, 602 U.S. 175 (2024).

²¹⁴ *Id.* at 180.

²¹⁵ *Id.* at 190.

²¹⁶ *Id.* at 180 (emphasis added); *see also id.* at 191 (“Considerations like who said what and how, and what reaction followed, are just helpful guideposts in answering the question whether an official seeks to persuade or, instead, to coerce.”).

²¹⁷ *Id.* at 191; *see also id.* at 194 (“[T]he complaint . . . plausibly alleges that Vullo threatened to wield her power against those refusing to aid her campaign to punish the NRA’s gun-promotion advocacy. If true, that violates the First Amendment.”).

Murthy v. Missouri, 603 U.S. 43 (2024), highlights the standing hurdles that jawboning claims face, a topic to which I return below.

will feel free to disregard a directive from the official.”²¹⁸ This makes sense: An official without meaningful authority can’t make much of a credible threat, whereas one with direct and substantial authority can.

The statements about Jimmy Kimmel by Brendan Carr (who before Trump’s second term denounced jawboning)²¹⁹ seem to fit the definition of jawboning: He is the chair of (and controls the agenda of) the commission that regulates broadcasters, and he stated flatly that “we can do this the easy way or the hard way. These companies [i.e., local broadcasters] can find ways to change conduct and take action . . . on Kimmel or . . . there is going to be additional work for the FCC ahead.”²²⁰ He then followed that up with arguably more explicit language (not that more explicit language seems necessary in order to establish the threat).²²¹

²¹⁸ *Vullo*, 602 U.S. at 191–92.

²¹⁹ See Brendan Carr (@BrendanCarrFCC), X (Oct. 2, 2024, at 21:27 ET), <https://perma.cc/K64G-ES2D> (“Pressuring social media companies into censoring the constitutionally protected speech of everyday Americans is not how you protect democracy. Quite the opposite. Free speech is essential to democratic self-government. We all benefit from the robust, wide open exchange of ideas on the digital town square. Indeed, as the Supreme Court has made clear, the First Amendment prohibits government officials from coercing private parties into suppressing protected speech.”); Brendan Carr (@BrendanCarrFCC), X (Aug. 22, 2022, at 20:40 ET), <https://perma.cc/33YW-7H32> (“The government does not evade the First Amendment’s restraints on censoring political speech by jawboning a company into suppressing it—rather, that conduct runs headlong into those constitutional restrictions.”).

²²⁰ THE BENNY SHOW, *supra* note 22, at 01:29:36–01:29:47. The chair effectively runs the FCC because she controls the staff, is the only person who can put items on the agenda, and is always in the partisan majority; a chair has been on the losing side of an FCC vote only twice in the last 40 years. See 47 C.F.R. § 0.211 (“The responsibility for the general administration of internal affairs of the Commission is delegated to the Chairperson of the Commission.”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-1046, TELECOMMUNICATIONS: FCC SHOULD TAKE STEPS TO ENSURE EQUAL ACCESS TO RULEMAKING INFORMATION 3 (2007) (“The FCC chairman controls the commission’s agenda”); PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV., R45699, THE FEDERAL COMMUNICATIONS COMMISSION: CURRENT STRUCTURE AND ITS ROLE IN THE CHANGING TELECOMMUNICATIONS LANDSCAPE 2 (2021) (“The President designates one of the commissioners as chairperson [and t]hree [of the five] commissioners may be members of the same political party as the President”); Eugénie Larson, *Powell Loses FCC Vote*, LIGHT READING (Feb. 20, 2003, at 15:00 ET), <https://perma.cc/9NQE-K623> (noting that it had been 15 years since a chair had lost a vote).

²²¹ From Carr’s remarks:

[T]here’s actions that we could take on licensed broadcasters. And frankly, I think that it’s really sort of past time that a lot of these licensed broadcasters themselves push back on

But how much work can, and should, the jawboning doctrine do?

Vullo made clear that its reasoning applies broadly.²²² Regulation of non-expressive activity is still coercive if such regulation is aimed at indirectly suppressing speech.²²³ The fact that a regulated party breaks the law justifies punishment, but a government official cannot threaten to punish such violations in order to suppress speech.²²⁴ And coercion is not limited to threats. The majority stated that, “[a]s *Vullo* concedes, the ‘threat need not be explicit,’ and as the Solicitor General explains, ‘[t]he Constitution does not distinguish between “comply or I’ll prosecute” and “comply and I’ll look the other way.”’ So, whether analyzed as a threat or as an inducement, the conclusion is the same.”²²⁵

All that said, there are legal and practical obstacles to the application of *Vullo*. The biggest legal obstacle is standing. *Murthy v. Missouri*,²²⁶ which like *Vullo* was decided in 2024, held that social-media users and states who sought an injunction to prevent federal government officials from pressuring social media companies to

Comcast and Disney [which own NBC and ABC, respectively] and say, “Listen, we’re going to preempt—we’re not going to run—Kimmel anymore until you straighten this out, because we, we licensed broadcaster, are running the possibility of fines or license revocation from the FCC if we continue to run content that ends up being a pattern of news distortion.” So I think, again, Disney needs to see some change here, but the individual licensed stations that are taking their content, it’s time for them to step up and say this, you know, garbage, to the extent that that’s what comes down the pipe in the future, isn’t something that we think serves the needs of our local communities. But, but this sort of status quo is obviously not, not acceptable where we are.

THE BENNY SHOW, *supra* note 22, at 01:34:30–01:35:20.

²²² See Genevieve Lakier, *Enforcing the First Amendment in an Era of Jawboning*, 93 U. CHI. L. REV. (forthcoming 2026) (manuscript at 3), <https://perma.cc/VV7T-VENC> (explaining that *Vullo*’s rule was “categorical in its reach”).

²²³ See *Vullo*, 602 U.S. at 196 (rejecting the argument that the “case does not involve unconstitutional coercion because her challenged actions in fact targeted business practices and relationships, which qualify as ‘nonexpressive activity[.]’” (citation omitted)).

²²⁴ See *id.* at 196 (“[T]he conceded illegality of the NRA-endorsed insurance programs does not insulate *Vullo* from First Amendment scrutiny. . . . [A]lthough *Vullo* can pursue violations of state insurance law, she cannot do so in order to punish or suppress the NRA’s protected expression.”).

²²⁵ *Id.* at 193 (citations omitted).

²²⁶ 603 U.S. 43 (2024).

ensor their speech lacked standing.²²⁷ *Murthy* referred to this as a “one-step-removed, anticipatory” lawsuit—the former because the plaintiffs were suing for an injury resulting from the actions of social media companies who were not defendants, and the latter because forward-looking relief requires a real threat of future injury.²²⁸ “Putting these requirements together, the plaintiffs must show a substantial risk that, in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant.”²²⁹ *Murthy* concluded that the plaintiffs had failed to show that their past injuries were traceable to the government officials’ actions.²³⁰ The Court found that there was insufficient evidence of causation with respect to any instances of content moderation, and that the social media companies had independent interests in moderating content.²³¹ (It did not help that many of the district court’s findings “appear[ed] to be clearly erroneous.”²³²)

As *Murthy* noted, if the plaintiffs had sought damages, the standing analysis would have been quite different.²³³ But 42 U.S.C. § 1983 authorizes damages only for state officials’ violations of constitutional rights,²³⁴ and the Supreme Court has not applied *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*²³⁵ to First Amendment violations.²³⁶ Absent a federal statute authorizing damages when federal officials violate First Amendment rights, standing will present a significant hurdle to lawsuits brought by a speaker who believes that the government pressured an intermediary to suppress her speech.²³⁷

²²⁷ *Id.* at 76.

²²⁸ *Id.* at 57–58.

²²⁹ *Id.* at 58.

²³⁰ *Id.* at 59–60.

²³¹ *Id.*

²³² *Id.* at 60 n.4.

²³³ *Id.* at 59.

²³⁴ See 42 U.S.C. § 1983 (applying to those who violate constitutional rights “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia”).

²³⁵ 403 U.S. 388 (1971) (implying, under the Constitution, a cause of action for damages against federal officials who allegedly violated the Constitution).

²³⁶ *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012).

²³⁷ Separate from a federal statute, the Supreme Court could loosen its standing requirements

a. Diminished incentives for intermediaries to sue

The discussion above relates to a practical consideration that applies to many intermediaries—though somewhat less so in the broadcasting context. First, to state the problem: The intermediaries that are coerced will often have little incentive to sue, and the speakers whose speech the government officials attempted to suppress not only may lack standing but also may not even know what the government officials did. Consider a government official who tells a CEO that, if she doesn't suppress the speech of some third party, the government will penalize the CEO's company. All the costs of the penalty will fall on the company, but the company will receive only a portion of the benefits that would come from resisting the government official.

This is connected to the fact that speech can be a public good, benefiting not only the speaker but also the audience. So a speaker who faces possible government punishment bears all the costs of her speech (the punishment) but reaps only some of the benefits (because she does not capture the audience's benefits).²³⁸ The Supreme Court has recognized this public goods problem, and its uniqueness in the free speech context, and responded accordingly.²³⁹

and thereby make it easier for speakers to bring lawsuits challenging government officials' jawboning. But changing standing rules in order to more robustly allow for jawboning claims would be the tail wagging the dog—such a change would be sufficiently far-reaching that jawboning should play a very small role in the argument for it.

²³⁸ See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 570 (1991) ("Speech is more likely to be chilled than other activities because most of its benefits are not captured by the speaker.").

²³⁹ I think overbreadth is the best example. As the Supreme Court has explained,

the overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied.

We have justified this doctrine on the ground that it provides breathing room for free expression. Overbroad laws "may deter or 'chill' constitutionally protected speech," and if would-be speakers remain silent, society will lose their contributions to the "marketplace of ideas." To guard against those harms, the overbreadth doctrine allows a litigant (even an undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak.

United States v. Hansen, 599 U.S. 762, 769–70 (2023) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

With intermediaries, the benefits of speech become further divided—among the intermediary, the speaker, and the audience. If YouTube, TikTok, or Netflix removes a moderately popular content creator or show, the company hosts so many streams that the impact on the company will likely be small, but the impact on the host of the show or content creator may be huge. If a government official pressures the company to block the content creator or show and the company calculates that the expected cost of possible punishment for failing to censor is greater than the expected cost of censoring, then a company that focuses on shareholder value will censor the content creator or show. The harm to the content creator or host of the show will not be part of the company's calculation. And the company will not bring a lawsuit challenging the government's coercion absent the availability of nontrivial damages.

It is thus not surprising that in *Murthy* the social media companies subject to government pressure did not bring any legal actions, and instead the lawsuit was brought by states and users who believed they were censored as a result of such pressure.²⁴⁰ And *Murthy*'s standing analysis would have come out differently if social media companies had been among the plaintiffs, because the government (allegedly) coerced them into taking actions (censorship) that they otherwise would not have taken. So the social media companies' disinterest in bringing a lawsuit effectively meant that no one would be able to challenge the alleged government coercion.

b. Broadcasters' greater incentives to sue

Interestingly, this problem is mitigated with respect to broadcasting. Unlike social media and streaming platforms, which make thousands of videos available at any given moment, any given broadcast stream is airing one program at any given time, and any given program lasts at least 30 minutes on television (and usually

²⁴⁰ A similar dynamic occurred with respect to ICEBlock, an app allowing people to share the locations of Immigration and Customs Enforcement agents. In September 2025 Attorney General Bondi announced that “[w]e reached out to Apple today demanding they remove the ICEBlock app from their App Store—and Apple did so.” Chris Cameron, *Apple Takes Down ICE Tracking Apps in Response to Trump Pressure Campaign*, N.Y. TIMES (Oct. 2, 2025). Indeed, Apple did remove ICEBlock, and it did not bring a lawsuit over the government's pressure. Apple did not bear the harm to the content creator or the general public. Instead, it was ICEBlock's creator who brought suit. See Complaint, Aaron v. Bondi, No. 1:25-cv-4250 (D.D.C. Dec. 8, 2025).

longer on the radio). The result is that for a broadcaster, any one moderately popular show is a much larger percentage of its income than one moderately popular show or content creator would be for a social media platform or streaming service.

That said, most broadcast stations are owned by companies that own multiple stations, so pressure to suppress the speech of the host of a local show will likely have a small impact on the company's overall bottom line, and the problem noted above about intermediaries' incentives will exist.

But attacks on a national broadcast television show are different, because a company owning multiple television stations would carry that show on all its stations. The removal or muzzling of a prominent person on a national show will have a greater impact on the station owner, because that one show will have a bigger effect on the owner's bottom line.²⁴¹

The limited number of broadcast shows makes broadcasting an obvious target for government officials' wrath: Getting rid of one show, or one key figure on a show, can have a big impact. But that same dynamic also increases the alignment between the broadcaster and that key figure: Because of that large impact on the broadcaster, the harm to the broadcaster of punishing that figure is much greater than the harm to a social media platform or streaming service of punishing a moderately popular content creator or show.

VI. THE VALUE OF GOVERNMENT SPEECH, THE ROLE OF NORMS, AND THE LIMITS OF LAW

A government official's penalizing of a company imposes a cost, and thus the threat of a penalty has an expected cost (the cost of the penalty multiplied by the probability it will be imposed). The same is true when a government official damages a company's interests via statements that do not threaten a formal penalty but instead sharply criticize the company. The expected cost that flows from the threat or reality of such criticism can be assessed alongside the expected cost of the threat or reality of a formal penalty. If the expected costs are the same, they will be equally effective. Estimating those costs entails some guesswork, but that is true for many formal government actions (e.g., filing a lawsuit).

²⁴¹ This assumes that the broadcasters believe that the program they are carrying is more popular than whatever might replace it, but that is implicit in the broadcasters' decision to carry the program in the first place.

There are no Free Speech Clause constraints on government speech as such.²⁴² The target of the criticism may be able to sue for, e.g., defamation, but of course they can also sue private parties for defamation, and the hurdles to suing government officials are higher.²⁴³ Moreover, voters elect representatives in part based on the politicians' stated views, and voters reasonably expect them to express those views, particularly when a person or entity is perceived as undermining them. Finding a First Amendment violation when a government official is truly attempting to persuade, without any explicit or implicit threat of punishment, would disallow a wide range of potentially valuable speech.²⁴⁴

Vullo spells out some of the implications of these points. As I noted above, *Vullo* construes jawboning broadly.²⁴⁵ But it also makes clear that jawboning does not encompass exhortation or public criticism delivered from the bully pulpit:

A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she cannot do, however, is use the power of the state to punish or suppress disfavored expression.²⁴⁶

Thus a government official may impose substantial costs on an entity through public criticism alone, and neither jawboning nor any other First Amendment doctrine would open the door to the criticized entity bringing a lawsuit. As I noted, the

²⁴² See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.* 576 U.S. 200, 207 (2015) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”).

²⁴³ For instance, the Speech or Debate Clause immunizes members of Congress from liability for statements made in congressional debates. See *Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979) (“A speech by Proxmire in the Senate would be wholly immune . . .”). And *Nixon v. Fitzgerald* held that a President “is entitled to absolute immunity from damages liability predicated on his official acts.” 457 U.S. 731, 749 (1982).

²⁴⁴ See Eugene Volokh, *The Future of Government Pressure on Social Media Platforms*, 6 J. FREE SPEECH L. 403, 416–17 (2024) (“Law enforcement officials might reasonably and permissibly tell a newspaper or broadcaster, ‘If you run this story right now, you’ll tip off the criminals we’re investigating/jeopardize witnesses. Don’t you want us to fight crime effectively?’ The newspaper might say yes or no, assuming there’s no context to make the statement coercive. I’m skeptical that this request would violate the First Amendment.”).

²⁴⁵ See *supra* note 222 and accompanying text.

²⁴⁶ *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 188 (2024).

threat of a public lambasting has an expected cost, just as the threat of a formal penalty does. So, from a company's standpoint, the prospect of a government official threatening to lambaste it is comparable to the prospect of a threat of official government action, but for good First Amendment reasons only the latter is prohibited.

This underscores a problem for those criticized, or potentially criticized, by a powerful government figure, particularly the most powerful one: the President. Once it becomes clear that the President can and will lambaste any person or firm he disagrees with, the threat is implicit and need never be articulated. Any intermediary (or anyone else) knows that if it does something the President dislikes—including airing the views of someone he dislikes—he may well use the bully pulpit to impose costs on it. Just as a person with a reputation as a violent bully may never need to threaten anyone in order to get what he wants, a President known to be willing to attack and impose huge costs on those he dislikes may never need to issue any threat in order to achieve his desired results.

Insofar as companies can rely on a norm that Presidents will not lash out at and reduce the value of companies they dislike, this problem will not arise: A company can, say, air the speech of someone the President dislikes without fear of presidential retaliation. But if that norm does not exist, the companies have a strong incentive to accommodate the President's preference without any need for him to issue a single threat of punishment or public attacks.

Once we accept that Presidents can use the bully pulpit in ways that diminish companies' value, there is no doctrinal way to avoid this problem: A President who makes it clear that he will berate companies in ways that harm their bottom line if they do something he dislikes can achieve all the leverage of jawboning without ever issuing an explicit threat.

There is only so much the law can, and should, do.

CONCLUSION

This Article is a case study of one object of content regulation—broadcasting—that has not been especially important in recent decades, partly because broadcasting's market share has declined and partly because the FCC has done relatively little regulating. Under a presidential administration eager to assert regulatory authority, however, broadcasting becomes quite consequential. For media other than broadcasting, content regulation is highly circumscribed by strict scru-

tiny and the absence of anything comparable to the broad statutory power the government has over broadcasting. Broadcast content regulation, by contrast, is subject to much more lenient judicial review and rests on sweeping statutory authority, making broadcasting the easiest target for an administration intent on regulating media content.

The FCC used that discretion sparingly from the Reagan Administration through Biden's, aside from periodic foci on indecency. The breadth of the FCC's authority has now come to the fore, and both public officials and citizens are confronted with questions about government control over content that have been largely dormant for decades.

Regulating broadcast content raises a fundamental question with real stakes: What regulatory system would you prefer if the First Amendment imposed only minimal limits? Under *Red Lion* and *Pacifica*, the current legal regime is not far from one in which the First Amendment constrains broadcast content regulation no more than it constrains ordinary economic regulation. In such a world, what regulatory scheme would you want? How concerned would you be about government overreach versus government passivity? Is your answer today different from what it would have been between 1981²⁴⁷ and 2024?

Presidential administrations can wield enormous power, and if they want to maximally use that power, some speakers will likely capitulate rather than bear the costs of resistance. And the more a President can and will impose costs on those he dislikes via public criticism, the less the law matters. The broad legal authority provided by the public interest standard, *Red Lion*, and *Pacifica*, as compared to the much more rigorous scrutiny of regulations of other media, would still make a difference. But in contrast to the Reagan–Biden period in which regulatory restraint pushed broadcasting's treatment closer to that of other, more protected, media, a President committed to using the bully pulpit to maximum effect may move government influence over other media closer to the broadcast regulation model that Reagan rejected. The history of broadcast regulation may thus hold more lessons for the future than most anyone would have imagined only a few years ago.

²⁴⁷ Or whenever you first would have been old enough to consider such questions.