

Regulating Social Media and the Internet of Everything: The Precedent of the Radio Act of 1927

Melody Fisher, Mississippi State University
Darvelle Hutchins, University of Missouri
*Mark Goodman, Mississippi State University**

People demand Congress act to regulate the Internet. They want Facebook or Google or Twitter regulated. They want to prevent the Russians from interfering in the 2020 election. Others believe hate speech or other consequences of free speech need to be controlled. We examine the precedence of the Radio Act of 1927, as well as other pertinent legal considerations. Our analysis of those issues demonstrates that there are significant First Amendment and broadcasting law roadblocks to any attempt to regulate the Internet of Everything.

One of the first practical applications for broadcasts on radio frequency AM was for ship-to-shore emergency communication. The Titanic disaster proved the need for a reliable system, leading to the U.S. Congress passing the Radio Act of 1912. American entry into World War I demonstrated the value of AM frequency for battlefield communication. In less than a decade after the war armistice, radio had evolved into a mass system of communication that could reach every American home instantly with news, educational and entertainment programming, and mass marketing and advertising. Anyone could broadcast a signal at any time at any frequency by sending a postcard to the Commerce Department requesting a license. The radio industry was growing quickly, and Secretary of Commerce Herbert Hoover called national radio conferences to bring experts together to figure out how to regulate this evolving industry.

In comparison, the Internet developed without any regulation. Now, the world is moving towards the Internet of Everything while lawmakers and regulators are trying to cope with

* *Dr. Melody Fisher is an Assistant Professor in the Department of Communication at Mississippi State University. S. Darvelle Hutchins is a doctoral student in the Department of Communication at University of Missouri. Dr. Mark Goodman is Professor Emeritus in the Department of Communication at Mississippi State University. Correspondence regarding this manuscript may be directed to Dr. Goodman, mg654460@gmail.com.*

worldwide havoc created through social media and viral content. Governmental legislation in countries across the globe need to not only solve existing problems but also anticipate new ones.

The medium may change, but many of the same issues that were raised when Congress wrote the Radio Act of 1927 today confront lawmakers and regulators considering laws to regulate social media or more broadly the Internet of Everything. What was true of AM radio is also true of digital media today: the development of new means of communication led to unanticipated harms. The solutions created by Congress in 1927 could be precedent for the regulation of social media and the internet. Or, that legislation may reveal that new regulation is needed. In comparing 1927 to 2019, we hope to provide insight into the legal miasma as Congress considers new Internet legislation.

In this article, we offer a review of the current climate for regulation of social media. We then discuss the legislative intent that led to the Radio Act of 1927 before demonstrating how the social issues of 1926 remain in 2019. One major point of differentiation between radio and Internet is significant. Both Congress and the U.S. Supreme Court assert that the airwaves, i.e. radio, television, and telephone, are owned by the federal government and leased to those who receive federal licenses. This system of ownership/licensee created in the Radio Act remains substantially in place today for broadcasters from television stations to cell phone users. However, both Congress and the Supreme Court consider the Internet to be private speech. Accordingly, our discussion points out U.S. Supreme Court decisions on First Amendment law may limit the ability of Congress to regulate Internet speech.

To summarize our thesis, in 1927 Congress tried to figure out how to regulate a new medium; today Congress seeks to write legislation to solve a new set of issues posed by the development of new media. The legislative situations are comparable in certain ways to one another. Perhaps the legislation of 1927 provides insight as our current legislators write new media law. In addition, a review of relevant literature on the radio act provides a discussion of what worked and what was ineffective after nearly 90 years of broadcasting under the Radio Act of 1927 and its permutations.

Calls for Regulation 2018

The 2016 United States presidential election served as a catalyst to scrutinize social media platforms. Since then, Internet giants Facebook, Twitter, and Google have been accused of spreading biased information and allowing foreign influence of voters. The United States Justice Department indicted the Russia Internet Research Agency for spreading propaganda about Democratic Presidential Candidate Hillary Clinton to over 150 million social media users, and two years later, Republican President Donald Trump accused the same platforms of thwarting conservative views.

The first executive to be summoned before members of Congress was Facebook founder Mark Zuckerberg (Romm, 2018a; “Transcript,” 2018), who appeared six months after his General Counsel, along with those of Twitter and Google, were questioned by a Senate judiciary subcommittee. As senators noted in opening remarks, the Senate’s Commerce and Judiciary Committees revealed egregious issues of data privacy and abuse of data through the use of third-party vendor, Cambridge Analytica. Zuckerberg told Congress: “I think the real question, as the Internet becomes more important in people’s lives, is *what* is the right regulation, not whether there should be [regulations] or not” (“Transcript,” 2018). When asked to suggest legislation, Zuckerberg noted three policy considerations: requiring “simple and practical” explanations to consumers on data use; providing consumers complete control of content; enabling company innovation. Three months later, Zuckerberg’s advice was echoed in Senate Intelligence Committee Vice Chair Mark Warner’s (2018) “Potential policy proposals for regulation of social media and technology firms.” There, Warner identifies three overarching areas for policy proposals: “Disinformation and Disinformation/ Exploitation of Technology”; “Privacy and Data Protection”; and “Competition.” In addition, Warner (2019) co-authored the “Honest Ads Act.” Warner, along with Senators John McCain and Amy Klobuchar, introduced the bipartisan act to regulate online advertising in the same way as advertisements on radio, print and television. Not only did the act receive support across the aisle, but also from the social media platforms. In posts on their respective sites, Facebook and Twitter expressed support for the bill. Zuckerberg (2018) wrote, “Election interference is a problem that’s bigger than any one platform, and that’s why we support the Honest Ads Act. This will help raise the bar for all political advertising online.” Twitter (2018) posted their Public Policy, stating “We believe the Honest

Ads Act provides an appropriate framework for such [transparent] ads and look toward to working with bill sponsors and others to continue to refine and advance this important proposal.”

In another legislative investigation, members of the House Judiciary Committee and Attorney General Jeff Sessions investigated the major social media corporations on the grounds that media platforms censored the speech of conservative speakers (Timberg, Romm, Barrett, & Fung, 2018). Sessions also stated that he planned to investigate the corporations for violation of consumer protection laws and anti-trust legislation (Strohm, Jacobs, & McLaughlin, 2018). On July 17, 2018, representatives from Facebook, Twitter, and YouTube testified in the second hearing on social media filtering practices, with this hearing focused on a lack of transparency and potential bias in the filtering practices of social media companies (House Judiciary Committee, 2018). Conservative members of Congress accused the platforms of political bias. Google was targeted for censoring the word “Jesus” (Ducharme 2018) and Facebook was accused of deliberately censoring the website of Alex Jones (Lima, 2019). During this hearing the committee members often threatened to reduce Section 230 of the Communications Decency Act of 1996, a federal law that “shields online platforms from being held liable for the content posted by their users” (Romm, 2018a).

United States President Donald Trump agreed with his fellow party lawmakers. On his own Twitter page and in press conferences, Trump has criticized social media outlets for bias against conservative viewpoints. He directly accused Google of “suppressing conservative news outlets supportive of his administration” (Satariano, Wakabayashi, & Kang, 2018). The White House has not proposed any formal changes in media law, but Trump has expressed his willingness to work across the aisle to control social media content (Castillo, 2018).

Disapproval of social media has not been limited to the United States. Prince William delivered a scathing critique in the United Kingdom on fake news, privacy issues, and cyberbullying in the Kensington Palace official Twitter feed. As a member of the Cyberbullying Taskforce, Prince William assigned blame to media leaders, saying their “self-image is so grounded in their positive power for good that they seem unable to engage in constructive discussion about the social problems they are creating” (Reed, 2018). Responding to his original

tweet, Prince William also directed the leaders to “reject the false choice of profits over values. You can choose to do good and be successful” (Reed, 2018).

The Prince’s speech comes six months after the European Union (EU) enacted a new law governing the Internet. The General Data Protection Regulation (GDPR) recommended changes in privacy laws that would be applicable to all companies with an Internet presence, including social media platforms (2018 Reform, 2018; Shahani, 2018). The GDPR gives EU residents more control of data posted online. Citizens must explicitly give companies permission to collect their data and have the option of having data deleted. If companies do not follow this directive, they face steep penalties—approximately 4 percent of its global annual revenue for the preceding year.

The need for regulation of the content of the Internet became even more poignant upon release of "Report On the Investigation into Russian Interference in the 2016 Presidential Election" (Mueller, 2019). The report concluded that Russian social media accounts reached "large U.S. audiences" through a "divisive" disinformation campaign (Mueller, Volume I, p. 14). While the actions of the Russians violated federal law (52 U.S.C. § 30121), it was not illegal for U.S. citizens to interact with the material and spread its dissemination. And, if U.S. citizens had created the disinformation and spread it through social media, no current U.S. laws would have been violated.

Put simply, regulation of the information published on the Internet is attracting the attention of governments around the world. The question is not so much if regulation is necessary; the issue is figuring out what should be regulated and how to regulate the Internet. That is a question similar to one confronting Congress in the 1920s as AM radio evolved into consumer entertainment and news paid for through advertising dollars.

Calls for Regulation 1927

The use of radios, introduced in early 1920s, grew quickly. By the end of 1926, *The New York Times* reported that radio had become “beat notes, or howls, which sound like the whistle of the peanut stand, greet listeners at almost every turn of the dial” (Expect new radio law, 1926). The problem was that beats notes, howls, and whistles occurred when broadcasters used the same frequency in the same area at the same time. The only regulation in 1926 required

broadcasters to apply for a license by mailing in a postcard to the Department of Commerce. Broadcasters could broadcast at any frequency at any time and at any power. Accordingly, when two stations were on the same frequency, the radio transmission did not sound like music, but howls and whistles. Meanwhile, David Sarnoff created the National Broadcasting Company (NBC) with a vision of a national radio network that would provide quality entertainment to radio listeners across the country. To pay for the network, Sarnoff was going to sell advertising. No one wanted to buy time if the kid broadcasting down the street could turn the radio signal of the professional broadcasting station into whistles and howls.

The Radio Act of 1927 replaced the Radio Act of 1912, which was passed after the Titanic disaster. The Communications Act of 1934 added television under the regulatory purview of the FCC; essentially, the 1934 law incorporated the language of the Radio Act of 1927. Then the Telecommunications Act of 1996 amended the language of the Communications Act to provide for more competition in the telephone industry and to give FCC authority over some aspects of the Internet. Essentially, the core of media regulation in 2018 is built on the language of the Radio Act of 1927.

Comparing Issues 1927 v. 2019

In 1927 as Congress prepared to vote on the Radio Act, the congressmen faced a wide range of issues that required new law because these were issues created by the evolution of AM radio from a hobby into the first broadcasting mass media. As we reviewed those issues from 1927, we found many of them remained relevant as the broadcasting medium evolved into the Internet of Everything. Each of the issues discussed in this section were subjects of public and Congressional debate in 1927 and are subjects of public and Congressional debate in 2019.

Congress does not understand the technology. Two members of U.S. Congress wrote the Radio Act of 1927, Wallace H. White, Jr., (Maine's representative in the U.S. House of Representatives) and Clarence Dill (Washington senator). They met for weeks in the summer of 1927 seeking a bill that could gain the support needed to pass both houses of Congress and to gain the approval of Secretary of Commerce Herbert Hoover. White had worked for years with Hoover and with radio industry leaders to craft legislation. Dill, however, represented the Progressives in the Senate, and Dill found White's original legislation inadequate. Dill described

White as "able and capable" and himself as "I was a one-eyed man among the blind; I could see a little bit" (Thayer, 1967). Hoover laid out the issues at the fourth radio conference, which was called to bring experts together to discuss the nature of radio legislation. "Four years ago we were dealing with a scientific toy; to-day we are dealing a vital force in American life," pointed out Hoover (Hoover's opening remarks, 1925).

The vital force in American life today is social media; according to Statista (2019), about 80% of all Americans have a social media profile. Limited vision into a new medium was not just limited to Dill. In testimony before the U.S. Senate (Testimony, 2018), Mark Zuckerberg, the creator of Facebook, admitted that his company did not anticipate that the Russians would use Facebook as a means of interfering in the 2016 presidential election. Facebook can be used for good, Zuckerberg told the senators, but the company did not anticipate how Facebook tools could be used by bad agents. "But it's clear now that we didn't do enough to prevent these tools from being used for harm, as well," Zuckerberg said. "And that goes for fake news, for foreign interference in elections, and hate speech, as well as developers and data privacy."

Senator Diane Feinstein (Testimony, 2018) pointed out that the Senate learned about the election influence of Aleksandra Kogan of Cambridge Analytica after the harm had been done. A statement by Feinstein indicated how much the public was uninformed:

Professor Kogan is said to have taken data from over 70 million Americans. It has also been reported that he sold this data to Cambridge Analytica for \$800,000 dollars. Cambridge Analytica then took this data and created a psychological warfare tool to influence United States elections.

The Senator's testimony indicates that both the Congress and the technology industry are reacting to some serious problems *after* the harm occurred. Who knows enough about the evolution of the Internet of Everything to anticipate all of the possible harms?

The Federal Radio Commission (FRC). White, Dill, and Hoover agreed on many aspects of radio legislature. The sticking point was the Federal Radio Commission (Benjamin, 1998, 1987; Goodman, 1999). White and Hoover wanted authority over radio to remain in the Commerce Department. *The New York Times* reported that President Calvin Coolidge opposed creating more independent commissions because commissions limit the actions of the President (Coolidge opposes, 1926).

The concept of an independent commission was first suggested in a 1926 bill introduced by Progressive senate leader William Borah. Borah and fellow Progressive George Norris convinced Dill to hold out for a commission (Irish, 1994, p. 145). Dill (1970) explained his support for the Federal Radio Commission in a book about his political career. "Hoover would have the authority under the White bill but not the time," wrote Dill. "What was needed was work 'by divisions of experts' to solve radio's technical problems" (p. 109).

The Federal Radio Commission (Section 3, Radio Act of 1927, 69th Congress, Session II) became the Federal Communication Commission in the 1934 revision of the Radio Act. The ultimate compromise reached between White and Dill was for a one-year commission. The new commission would issue the new broadcasting licenses, which required broadcasters to operate in the public interest, convenience, and necessity (Sections 4, 4f, 9, 11, 21, 24). Also, under the new law, the airwaves were owned by the federal government (Section 5), which issued a license giving a broadcaster the right to broadcast on a given frequency, at a stated power, and during specified hours (Section 4).

Currently, government regulation is heavy on some communication industries and nonexistent on other aspects of the electronic media. Cell phone companies are regulated by the FCC because they use the broadcasting spectrum, which Congress claimed as under federal control in the Radio Act. However, private corporations own the cable lines and about 1000 communication satellites that connect the world's computers. Federal regulation is limited. The FCC claimed the authority to require Internet providers to follow net neutrality, which basically said that the FCC wanted all information on the Internet to flow equally without reference to the source, the size, or profit. In 2017, the FCC dropped the net neutrality requirement (Reardon, 2018). During Senate hearings, discussions included laws to provide consumer privacy, data security, and political campaigning. But, as Zuckerberg pointed out, Facebook is free because it is supported by advertisers who want quality consumer leads in return for supporting the Facebook structure (Testimony, 2018).

"Destructive propaganda." George Lockwood (1926) of *National Republic* magazine warned Hoover that "radical elements" in the U.S. would use radio to spread "destructive propaganda." Hoover made a similar point when discussing radio legislation with Coolidge, noting that radio lent itself to slander, lies, and propaganda (Hoover, 1952, p. 145).

As we noted previously, the Mueller Report identified the use of social media as a means of spreading destructive propaganda. Zuckerberg during his Senate testimony indicated that the Internet Research Agency owned by the Russian government spent \$100,000 on Facebook ads. He also indicated that Facebook had removed propaganda posted by terrorist organizations (Testimony, 2018). In addition, the United States, Canada, France, the United Kingdom, Argentina, Belgium, Ireland, Latvia, and Singapore met together to discuss the impact of propaganda on their democratic processes (Romm, 2018b).

RCA, AT&T, NBC: The Radio Monopoly. After World War I, the corporations that owned the different radio patents merged into the Radio Corporation of America (RCA). As an executive at RCA, David Sarnoff proposed the creation of NBC. The company would use the telephone lines of AT&T to connect the NBC studios in New York City with radio broadcasters across the United States, thus forming the NBC radio network.

White and Hoover sought to write radio legislation that would help RCA create the NBC network. White asked to meet with L.S. Baker, Managing Director of the National Association of Broadcasters for his views on radio legislation (2 December 1927); with Lloyd Espenschied, Development and Research, American Telephone and Telegraph Company (White 18 December 1926); with H. G. Harbord, president of RCA (White 22 September, 1926); and with Paul B. Klugh, ex-chairman of the National Association of Broadcasters (White 2 September 1926). Hoover warned Coolidge that RCA could be harmed by anti-monopoly language in the radio act. If RCA was convicted of being a monopoly, then the effects would be devastating on the corporation since it would lose all of its stations' broadcasting licenses. "This itself is a very drastic provision since the denial of a license is equivalent of the denial of the right of the concern to do business," wrote Hoover (1926).

The communication network monopolies of 2019 dwarf the radio monopoly of 1926. In 1985 General Electric acquired RCA for \$6.28 billion, effectively ending RCA as an independent corporation (Vise, 1985). In comparison, Amazon, Apple, and Microsoft have each reached a valuation of \$1 trillion (Streitfeld, 2018; Layne, 2019). The Federal Trade Commission held conferences to discuss the power of the tech giants Google and Facebook (Fung, 2018). Galloway has written that Apple, Google, Amazon, and Facebook have more impact on the world economic than all countries except the U.S. and China (cited in O'Brien, 2017). In an interview,

Galloway explained, "I've studied these companies, they've all been brought together not to create comité of man, not to solve world hunger, they've been brought together simply to sell another fucking Nissan." Continued Galloway: "The reasons we break them up is because we are capitalists," he said. "These markets are no longer competitive. They can no longer resist abusing their market power." In 2019, one of the co-founders of Facebook, Chris Hughes (9 May 2019, *The New York Times*) called for an end to the Facebook monopoly. Hughes argued that Facebook is a monopoly controlled by Zuckerberg, who also owns WhatsApp and Instagram. Hughes points out that "Mark's influence is staggering, far beyond that of anyone else in the private sector or in government." The time to limit the influence of a single individual to dominate access to communication and uses of communication is now, Hughes writes. Only the government can fix the problem, concludes Hughes, not Facebook.

Who should be broadcasting. Part of Hoover's concern over radio was the crucial role he saw the medium would play in the future. In 1922, Hoover spoke to the radio conference of 1922. "We are indeed today upon the threshold of a new means of widespread communication of intelligence that has the most profound importance from the point the view of public education and public welfare," Hoover (1952, p. 140) told the experts gathered to discuss the need for radio legislation. Hoover called for radio to be operated in the public interest. "This material must be limited to news, to education, and to entertainment, and the communication of such commercial matters as are of importance to large groups of the community at the same time," suggested Hoover. These concerns meant that the big question to be answered in the radio legislation was: "who is to do the broadcasting" (Hoover, 1952, p. 140).

The Association for Computing Machinery (ACM) is a worldwide organization of computing professionals. The ACM released a statement (James A. Hendler, 2018) outlining nine guidelines that corporations should follow to protect consumer privacy. The statement also included ten principles that professionals should follow to protect privacy. The summary expresses the goal: "It is hoped and intended that the principles and practices set out in this Statement will provide a basis for building data privacy into modern technological systems." Without covering all 19 points in the statement, essentially the ACM laid out a principle of who should be broadcasting. The people with the forum should be the speakers who recognize that the first and foremost responsibility of broadcasters is to put the safety of the users first.

Both the ACM and Hoover made similar points. The people doing the broadcasting over AM radio or over the Internet are the people who hold the welfare on the public in their hands. The public welfare will be sacrificed if commercial interests sacrifice the public for revenues.

Malice, slander, obscenity, and free speech. Dill was opposed to making radio a common carrier because then radical political parties could purchase access (Irish, 1994, p. 163). In an interview in 1924 Dill explained what freedom of speech should mean to broadcasters. Censorship is not appealing, Dill told *The Literary Digest*, but radio should not appeal to "vulgarity" or "morbid affairs." The power of one man through a broadcasting station must be curbed if that man persists in affronting the sensibilities of a large or a small part of the population, argued Dill. "Broadcasters should be businessmen of the highest class." Radio can remain "clean and fit for the home consumption" if each station will personally censor itself (Radio censorship, 1924). White agreed, telling *The Literary Digest*, "The right to broadcast is to be based not upon the right of the individual, not upon the selfish desire of the individual, but upon a public interest to be served by the granting of these licenses" (Unscrambling the ether, 1927).

In comparison, the Internet includes many speakers who are willing to affront sensibilities. Christopher Blair, unable to find a permanent job, made \$17,000 weekly making up ridiculous stories and posting them on Facebook during the 2016 presidential election. "The more extreme we become, the more people believe it," Blair told *The Washington Post* (Saslow, 2018). Advertisers paid Blair for space on his web site. In one post, Blair identified Trump aides Hope Hicks and Omarosa Newman as Chelsea Clinton and Michelle Obama. The description read that the two women had flipped off the president during a ceremony.

Advertising empire. The Radio Act of 1927 created the legal framework on which national marketing and advertising were built. NBC provided the entertainment and delivered it to a nationwide audience. That audience attracted advertisers who wanted to reach the majority of people in America. To reach that audience with advertisements, corporations paid NBC for access. As Streeter (1996) points out, broadcasting law is "not just an occasional constraint on the behavior of broadcasting, it *creates* broadcasting" (p. 8). "The American system of broadcasting is almost seventy years old," argues Streeter. "As we will see, the basic structures developed in

the 1920s at commercial broadcasting's birth—advertising, the network system, government licensing in the public interest—remain in place today" (p. 4). The culture changed because of the broadcasting/advertising combination, argues Hilmes: "American radio became a cultural form that incorporated advertising into its very substance more thoroughly and intrinsically than any other medium of expression" (2007, p. 21).

This system of corporate broadcasting brought with it self-imposed regulation. "Both sides thus agreed that radio was to be cordoned off and controlled by an alliance of corporations and the government," writes Streeter (1996, p. 83). "The only concern was the relative degree of control to be delegated to each side." Even though the radio act assigned the federal government all control over access to the airwaves, Dill explained that the law expected that the public would be the "controlling consideration" when it came to programming content (1938, p. 85). Radio stations would remain a private business that would be funded through advertising and not tax dollars.

In 2018, there were more than three billion people in the world using social media; advertisers spent \$51.3 billion to reach those people (Cooper, 2018). To protect their financial interests, Apple, Amazon, Facebook, Google, and Microsoft spent \$64 million to lobby Congress (Romm, 2019, January 23). As with radio in 1927, social media and the Internet are driven by advertising revenues, which pay for delivering entertainment to consumers. While advertising drives the business, the goal is no longer to reach millions of people at one time in hopes some of them will make a purchase later. The business model requires finding ready buyers. As a *Washington Post* (Bensinger, 2019) article pointed out, 85% of Google's revenue comes from advertising dollars. Quoted in the article, Brad Bender, advertising product manager for Google, said, "When you can understand what a consumer is looking for and then show her a personalized ad in the moment she's ready to discover something new, that's a win-win."

Universal access. In 1928, Congress renewed the radio act with the addition of the Davis Amendment, named for Representative Edwin Davis of Texas. The Amendment guaranteed that local stations in rural America would remain in the hands of local people; therefore, they would broadcast local programming and not just the network feeds of NBC (Smulyan, 1994, p. 60).

The Davis Amendment guaranteed that radio was also a local and regional medium. As Messere (2005) explains, "The outcome of the FRC's work between 1927 and 1933 and the legacy of the Davis Amendment can be seen in the creation of a local/regional broadcasting service that relied heavily on a system of large and small broadcast stations that carried network-provided, commercially oriented radio programs designed primarily for commercial entertainment" (p. 35). The radio was not seen as a national or international medium with universal access to all people.

Universal access to the Internet comes at a price. Zuckerberg told Congress that advertising is what makes social media accessible to everyone (Testimony, 2018). As he explained, "We think offering an ad-supported service is the most aligned with our mission of trying to help connect everyone in the world, because we want to offer a free service that everyone can afford."

Public Interest Standard. McChesney (1994) points out that the public interest standard created a shared system of responsibility for the quality of programming on the radio. The FRC had the power to fine a station or pull its license after the licensee failed to act responsibly. However, the FRC wanted its power to be a last resort. As explains McChesney, the FRC convinced "networks to establish 'advisory boards' of prominent citizens to monitor their public affairs programming" (p. 29). Broadcasters feared the FRC and were guided by citizen committees. Self censorship by broadcasters kept the citizen boards and the FRC happy and precluded federal censorship. This shared authority among broadcasters, citizens, and the government worked for the FRC, points out Godfrey (1977), because the "public interest" standard created the illusion of significant FRC authority (p. 78), which in reality was rarely used.

McChesney contends that public interest mitigated the criticism that radio was just an advertising medium. "In the early 1930s, it was simply not acceptable for anyone to posit that the sole purpose of broadcasting was to serve as an engine for profit-making and that programming should be determined exclusively by market criteria" (1994, p. 115). To Rowland (1997), the public might not have supported a broadcasting system built on advertising, but the public interest standard hides the dollars paying for the expenses of broadcasting by making it appear that the public were the real benefactors of broadcasting (p. 324).

“Public Interest, Convenience, and Necessity” is not defined in the Radio Act, which meant it became the responsibility of the FRC to define what the term meant on a case-by-case basis when the FRC disciplined a licensee (Ford, 1991; Rowland, 1997). The public interest language was borrowed from the Interstate Commerce Commission and regulation of railroads (Dill, 1970, p. 109). To Dill, “[t]he words, ‘public interest’ were agreed upon as the protection to the public against the abuse of the privilege to use a frequency and were not a violation of the rights under the First Amendment. The public interest demands the protection of the listeners.” The language gave the commission statutory language that could be applied as conditions changed (p. 110). White agreed with regulatory flexibility. The government agency, explained White, needed “authority to deal with these technical matters as changing conditions seem to require” (Letter to Frank H. Foss, 1926).

A public interest standard may have a place in Internet regulation. One piece of legislation introduced in Congress would, in effect, apply a public interest standard to political ads by informing the public who paid for a political ad. The Honest Ads Act (2017) would require Internet companies to identify the source that purchased political ads, which is already required for radio and television advertising under the Campaign Finance Law of 1971. An amendment to that law would add language covering Internet and digital communication. There would be exemptions for news, editorials, or commentary.

The Facebook terms of service are akin to a public interest standard. For example, Facebook promises to make its services feel safe. The terms of service state (2018):

We employ dedicated teams around the world and develop advanced technical systems to detect misuse of our Products, harmful conduct towards others, and situations where we may be able to help support or protect our community.

Facebook has used its terms of service to protect the public. Alex Jones runs the web site newswars.com, which promotes itself as “battling tyranny worldwide.” He has been accused of spreading hate speech and misinformation, even making up facts, to support a platform that will attract an audience (Timberg, 2018). Timberg noted that Facebook removed Jones’s page (infowars) in 2018. Facebook indicates that it did so to protect its community standards (Facebook newsroom, 2018). In May 2019 Facebook removed 265 Facebook and Instagram accounts that violated its policies on “misrepresentation” and “engaging in coordinated

inauthentic behavior” (Gleicher, 2019). In effect, Facebook chose to operate in what the corporation viewed as the public interest.

Censorship. Section 29 states that radio broadcasts cannot be censored by the federal government prior to broadcast. While the government could not practice prior censorship in 1927, the FRC could use "friendly persuasion" to direct the programming of broadcasters (Hilliard & Keith, 2005, p. 31). The issue was not censorship by the federal government but limiting the marketplace of ideas by the corporations that control the media (Douglas, 1989). "Major corporations control both broadcasting technology an access to the spectrum, and they shape what kinds of messages we get and the range of ideas to which we are exposed in the public sphere," Douglas explains.

The FRC may not have censored content, but many stations not in the NBC network system lost their licenses. McChesney indicates that there were 100 fewer stations within a year after the radio act went into effect (p. 26). The FRC disliked "propaganda stations," which meant broadcasters not affiliated with a network and privately owned, he explains (p. 27).

Under current law, political content created by a foreign source can already be censored. Current law does not permit foreign nationals to contribute to political campaigns (Who can and can't contribute, 2019). Russian interference was illegal in the 2016 presidential election, but the perpetrators were outside the reach of the United States justice system. As Jamieson (2018) has noted, the Russians disguised the original source of the propaganda that made it appear that the speakers were United States citizens:

[T]he Russian Internet trolls of interest here assumed guises that shielded their true identity as they marauded about in cyberspace creating the illusion that they were grassroots activists while posting provocative, often inflammatory content (p. 5).

Diversity of voices. In the 1920s and 1930s radio united the country, allowed a speaker to reach the entire nation and "created new forms of community," writes Hilmes (1997, p. 7). However, by reducing the number of stations, the Radio Act of 1927 reduced the voices heard on the radio. In 1949, there were four radio stations who tried to appeal to black consumers (Hilmes, 1997, p. 273). For example, in 1948, WDIA of Memphis, TN became the first white owned radio station to appeal to a Black audience, which was revolutionary as it created a space for minority voices that were historically excluded from radio (Cantor, 1992). Shortly thereafter,

WERD, the first Black owned and programmed radio station based in Atlanta, Georgia was purchased in 1949 by Jesse B. Clayton Sr. (Barlow, 1999). Together, WDIA and WERD offered urban music and discourse related to Black life that could not be found elsewhere on the radio. Although the number of radio stations that centered toward minority audiences increased over time, few radio stations were owned by Blacks, which meant information being disseminated through radio consumption was and remains largely influenced by Eurocentric political beliefs, as whites maintain dominant control of radio space.

Similar to radio, social media has become a communication medium that is deeply ingrained in people's everyday socialization and a site where issues of race and power persists. Beyond the fact that popular social media websites, such as Facebook, Instagram, Twitter, Pinterest, and LinkedIn, are all owned by white Americans and businesses, social media is a public space where Blacks continue to experience erasure and invisibility of race by dominant social groups. One prime example is the #MeToo movement. Although Tarana Burke founded the phrase "Me Too" in 2006 as a way to empower survivors of sexual assault to not feel alone in their healing processes, it was not until October of 2017 when the movement was made popular by Alyssa Milano, a white and affluent actress (Sayej, 2018). The popularity behind Milano's adoption of the #MeToo movement began to emphasize the experiences of white women while disregarding those of Black women in ways that white-washed the movement into an entirely different agenda.

Beyond the #MeToo movement, Black people experienced a rhetorical attack against the #BlackLivesMatter movement that took to social media. The #BlackLivesMatter movement sought to address systematic racism in America by speaking out against police killings and unfair treatment of people of color who are targeted, incarcerated, and killed at rates vastly disproportionate to their white counterparts who commit the same offenses (Dolan, 2018). Many whites felt attacked by the #BlackLivesMatter movement which demonstrated, for many Blacks, a lack of acknowledgement that people of color have historically always mattered less in America. Whites organized their own movements of "All Lives Matter," which communicated a valuation for all people, along with "Blue Lives Matter," signifying the importance and necessity of police officers who enforce the law. By shifting the focus away from pertinent systemic issues faced by Black people, the use of social media by many whites indeed remains a space where the erasure

of race and the enactment of power are evident. Thus, social media and radio presents many of the same challenges with regard to which voices are heard.

Many of the same issues confronting Congress in 1927 are similar to ones challenging Congress today. In 1927 White, Dill, Hoover, and Coolidge wrote the legislation that created a mass medium. It was driven by advertising dollars that provided entertainment, news, and politics to the white, middle class listening public. They sought to mitigate effects of monopolies, propaganda, and divisive speech by creating a federal agency to oversee the broadcasters and to protect the public interest.

In 2019 Congress has to regulate multiple platform mass media driven by advertisers, entertainment demands, shopping options, and a battle between news and propaganda. The platforms are owned by monopolies that provide systems to wake people up in the morning, turn on the heat, and start the coffee while the smart speaker waits for the first commands. Congress will have to write legislation that decides who gets to communicate and who loses the privilege. And, the legislation will likely require a federal agency to write regulations to carry out the intent of the law.

Discussion

In 2019 the regulation of the Internet and social media regulation can come from three obvious sources: self regulation, state regulation, or federal regulation. Self regulation worked in 1927 because the economic, social, and political framework of 1927 put constraints on the behaviors of broadcasters. In fact, in 1923 the radio broadcasters created the National Association of Broadcasters, which created standards for members. In theory, self-regulation exists today because each web or social media master can self regulate, i.e., each user of the site signs a user agreement.

If state governments were to implement social media regulations, they would likely be ruled unconstitutional in a court of law. In *Reno v. ACLU* (1997) the U.S. Supreme Court ruled that the Communication Decency Act was unconstitutional. The court argued that what would be indecent in one community might not be considered indecent in another. Internet providers have a wide range of local standards to meet and, therefore, the law suffered from vagueness and was ruled unconstitutional (878). Extending the logic of *Reno*, if Internet providers had to

conform to 50 different sets of state laws regulating content, this would place a burden on free speech and also be ruled unconstitutional.

Federal laws brings its own set of complications and limitations since any regulation by the federal government would have to meet the free speech standards of the First Amendment. In *Whitney vs. California* (1927), Justice Brandeis spelled out the right to free speech, "The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights. These may not be denied or abridged" (373). However, Brandeis noted the First Amendment was not an absolute right. Rights could be denied when speech threatened political, moral, or economic harm to the social order, wrote Brandeis. *Whitney* would make it difficult for Congress to write legislation that stopped or limited hate speech, on line bullying, the creation of fake news or other speech that could threaten the social order, particularly in light of court decisions that strengthened the right to free speech.

In *Cohen v. California* (1971), the court noted that since *Whitney*, the Supreme Court had upheld the right of citizens to participate in public discourse. Justice Harlan for the majority (403 U.S. 24) wrote:

It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen seems to preclude any legislation that would interfere with the public discussion, even if that speech created social disorder.

The U.S. Supreme Court has ruled in several instances that political speech has a high level of constitutional protection. In *Times v. Sullivan* (1964), the court noted that speech which "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern" (376 U.S. 266). The court refused to "shackle" the dissemination of information valuable to public debate. Justice Brennan in his decision specifically stated the First Amendment argument:

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials (376 U.S. 270).

The *Sullivan* decision extended the high level of constitutional speech to speech that might be false. The court ruled that false statements of fact have constitutional protection unless the speech is made with malice, which was defined as “with knowledge that it was false or with reckless disregard of whether it was false or not” (376 U.S. 280). If false statements have First Amendment protection during political debate, the only speech that Congress could regulate would be speech made with malice and made with the intent of damaging a person's reputation.

In *Virginia State Board of Pharmacy v. Virginia Citizens Council* (1976), the Supreme Court did rule that commercial speech did not have full First Amendment protection; specifically, false and misleading advertising is not protected speech (425 U.S. 771). Conceivably, the Supreme Court could rule that political propaganda, since it is a form of political advertising, could be akin to commercial speech and, therefore, false and misleading statements could be regulated. In *FEC v. Massachusetts Citizens For Life, Inc.* (1986), the Court noted that corporate participation in the election process raises concerns because of “the potential for unfair deployment of wealth for political purposes” (479 U.S. 259). Because of the potential that wealthy political groups could flood the marketplace with misinformation, by extension of the logic in *FEC*, perhaps the Supreme Court would allow regulation of intentionally false statements made by political action committees. However, in *Citizens United v. FEC* (2010) the Supreme Court noted that speech is of “primary importance” to the “integrity of the election process.” Any attempt to regulate political propaganda would require the development of whole new areas of law. However, if political propaganda is protected by the First Amendment, only voters who seek to remain highly informed could limit the impact of malicious actors to influence election results with false information.

The interference of the Russians in the 2018 election challenged the validity of Brandeis' argument in *Whitney* (1927), because the marketplace of ideas in 2019 includes propagandists from around the world seeking to influence American elections, public opinion, and spark social

confrontations. Literally, the harm can be done before the FBI could even identify the perpetrators. And, if the propagandist speech is shared by the voice of American citizens, then First Amendment rights comes into play. Oliver Wendell Holmes stated that yelling fire (249 U.S. 52) in a crowded theatre was an abuse of free speech; that analogy today means social media conflagrations could occur in hundreds, maybe thousands, of crowded marketplace of ideas across the United States.

The point is clear. The Internet and social media are too dynamic for any single government to regulate before the harm occurs. It seems unlikely that government regulation can either prevent election interference or have an effective means by which the results of the harm could be mitigated. If federal government regulation is not the solution, then are elections simply the playground where propaganda machines duel it out for supremacy? Perhaps the Radio Act offers a solution by addressing public interest, convenience, and necessity.

When applying a public interest standard to the internet, the question is not whether that legal language worked in the case of broadcasting. The question is whether the broad parameters of the language as applied in practice could provide a means to regulate the content of the internet-social media without invoking First Amendment considerations. The premise of the public issue standard was that the broadcasters would operate to serve the general public and would place the interests of the listening public over the interests of the broadcasters, particularly economic concerns. Much of the compliance was voluntary, even if fear of FCC sanctions kept broadcasters generally aware that the FCC could act on a case-by-case basis.

As companies headquartered in the United States, the platforms of Amazon, Google, Apple, Facebook, and social media could be expected—maybe even required by Congress—to act in the public’s best interest, convenience, and necessity. They could censor themselves and censor political propaganda that does not serve the political marketplace of ideas because its intent is divisive and its information is generally false or misleading. There is no constitutional right for a speaker to invoke free speech on Facebook or YouTube or other outlets because the rights to free speech are held by the corporations that own the forum. The corporations allow speech to occur at their discretion (*Citizens United v. Federal Election Committee*, 2010).

The Radio Act, once again, is a valuable resource. The original purpose of the FRC was to serve one year for the purposes of sorting out the chaos over the radio airwaves. The first five commissioners included two military officers, William H.G. Bullard and John F. Dillon. Eugene O. Sykes, a judge on the Mississippi Supreme Court, brought a legal background to the commission. Orestes Hampton Caldwell was an electrical engineer. Henry Adams Bellows was the manager of a radio station in Minneapolis. They worked with the industry to establish a national system of radio broadcasting.

Similarly, an Internet advisory commission could work with social media and Internet corporations to identify threats to the election process by working with the advisory commission experts to identify the bad actors and then publishing information about their actions. A hypothetical example: Facebook would identify Hacker Institute as the source of information seeking to create racial conflict. Facebook informs the Internet commission. Commission staff investigate and then publishes a report on the web. This would allow the general public to see what Hacker Institute is up to, and efforts at creating racial conflict are blunted through additional information without the need for censorship.

Conclusion

Many of the issues challenging Congress in 1927 as it sought to regulate a new medium confronts members of Congress again in 2019 as they try to figure out how to legislate controls on social medium and what has become the Internet of Everything. Of course, the problems may be compared conceptually, but the contemporary problems different greatly in magnitude and complexity. The ideas that Dill, White, and Hoover came up in the Radio Act about ninety years ago still provide ways of thinking about legislative approaches today. Hoover never imagined that the intent of public interest legislation might be to provide a means for keeping Russian fingers out of American elections by working with media corporations to practice censorship. But, Hoover's hope of corporate responsibility with a federal watchdog could offer a solution.

Along with the public interest issues, the American people should consider how much monopoly control they want over their communication devices, particularly when those monopolies are using their power to drive an advertising/sales economy built around insight into

the private lives of consumers. Are advertisers dominating the marketplace of ideas, pushing aside the voices of people without social or economic power? Are legislators as reliant on the expertise of Amazon, Facebook, and Google executives today to draft legislation in a manner similar to how Hoover and White looked to the leaders of AT&T, RCA, and NBC?

Ultimately, any discussion of digital media legislation should consider how the Radio Act of 1927, the Communications Act of 1934, and the Telecommunications Act of 1996 have served the social, political, security, and economic needs of the United States. In 1927, there was no precedent. Today, there is.

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