

THE FUTILITY OF REGULATING SOCIAL MEDIA CONTENT IN A GLOBAL MEDIA ENVIRONMENT

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Social media reaches more people on the planet than any prior form of media and transmits more information world-wide than ever before. It is an empowering factor in establishing and growing communities, but at the same time, creates havoc and disseminates pernicious and perhaps dangerous speech. And so it has been with the media from the beginning of time. Throughout the media's history, efforts at regulation or control of media speech has been fraught with difficulty, ineffectiveness, discrimination, and failure. The use of technology can deceive the consumer of the information, and the social media companies as well. Both government attempts at regulation and actions of private actors, the media themselves, have failed, and this paper demonstrates those repeated failures. The nature of speech, especially political speech, is such that even the definition of what is good and bad, right and wrong, is elusive. Because the speech belongs to each speaker and no prior effort to moderate it has worked, and because modern technology thwarts the possibility of accurate assessment or control, this paper establishes that attempts at social media content regulation are futile.

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INTRODUCTION

The social media site Facebook is criticized by the Speaker of the House for not taking down an altered video of her; she says this is a sign that Facebook was cooperating with the Russians in 2016.¹ A deepfake² video of Mark Zuckerberg appears to show him talking about amassing power.³ YouTube attempts to remove thousands of videos pushing extreme views.⁴ The former President of the United States regularly criticizes Twitter.⁵ In times of crisis, there are claims for fake cures of the Coronavirus, or conflicting reports of who is responsible for the initial spread of the virus.⁶ The controversies surrounding speech on social or digital media arise almost daily, perhaps hourly, perhaps even more often.

Shouldn't something be done about the media that gets out of line? Shouldn't something be done to protect people? Shouldn't something be done to keep other countries from interfering with our elections? Perhaps. But while the law is good at regulating the flow of traffic on roadways, the enforcement of commercial contracts, determining what constitutes a crime, and numerous other more clearly defined subjects, it has largely been failed at adequately regulating speech—especially political speech.

The marketplace for speech is full of diverse actors not subject to government control and located worldwide. When a platform like

¹ Celia Kang, *Nancy Pelosi Criticizes Facebook for Handling of Altered Videos*, N. Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/technology/facebook-pelosi-video.html>.

² Robert Chesney & Danielle Citron, *Deepfakes and the New Disinformation War*, FOREIGN AFFS. (Jan.-Feb. 2019), <https://www.foreignaffairs.com/articles/world/2018-12-11/deepfakes-and-new-disinformation-war>. (A deepfake is a video or media that has been altered to produce a “fake” that is so convincing that “they are impossible to distinguish from the real thing.”); See also Robert Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753 (2019).

³ Lex Harris, *CBS News Asks Facebook to Remove “Deepfake” Video of Mark Zuckerberg With Unauthorized CBSN Trademark*, CBS NEWS (June 12, 2019, 11:01 PM), <https://www.cbsnews.com/news/cbs-news-asks-facebook-to-remove-deep-fake-video-of-mark-zuckerberg-with-unauthorized-cbsn-trademark/>.

⁴ Kevin Roose & Kate Conger, *YouTube to Remove Thousands of Videos Pushing Extreme Views*, N. Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/business/youtube-remove-extremist-videos.html>.

⁵ Reuters Staff, *Trump Criticizes Twitter in a Tweet, Urges ‘Fairer’ Social Media*, REUTERS (Apr. 23, 2019, 7:55 AM), <https://www.reuters.com/article/us-usa-trump-twitter/trump-criticizes-twitter-in-tweet-urges-fairer-social-media-idUSKCN1RZ171>.

⁶ Greg Nyilasy, *Fake News in the Age of COVID-19*, PURSUIT (Apr. 10, 2020), <https://pursuit.unimelb.edu.au/articles/fake-news-in-the-age-of-covid-19>; Philip Ball, *The Cure for Fake News: How to Read About the Coronavirus*, GUARDIAN (Apr. 11, 2020, 11:00 AM), <https://www.theguardian.com/world/2020/apr/11/the-cure-for-fake-news-how-to-read-about-the-coronavirus>; Jane Lytvynenko, *Here’s A Running List of the Latest Hoaxes Spreading About the Coronavirus*, BUZZFEED NEWS (Mar. 24, 2020, 11:52 AM), <https://www.buzzfeednews.com/article/janelytvynenko/coronavirus-fake-news-disinformation-rumors-hoaxes>.

Twitter bans the account of the President of the United States,⁷ it is taking independent action that is not subject to government control. What it is subject to, however, are the various market forces that affect speech, from the economic marketplace to the reputational marketplace. The impact of these factors, among others, is a sign that individuals and markets are good at adapting to change and that the government is not the appropriate regulator of twenty-first century speech.

But do social media platforms have too much power? When it comes to political speech, Mark Zuckerberg, President of Facebook, once said that Facebook will not police political speech, even when under fire from presidential candidates.⁸ During her presidential campaign, Elizabeth Warren criticized Facebook as being a “disinformation-for-profit machine” and accused Zuckerberg of using the First Amendment to protect his profit.⁹ Facebook eventually changed its mind about political speech, deciding that Trump’s speech should be limited or even banned altogether, as Twitter has now done.¹⁰ Many other platforms followed suit, without government regulation or rule. The former President has been banned on Twitter, Instagram, YouTube, Snapchat, and even Shopify.¹¹ More recently, Facebook chose to ban all news, from both local and international outlets, on the continent of Australia during a feud with the Australian government over legislation that would require platforms like Facebook to pay news publishers for their content.¹²

The pernicious speech is not just political. In 2019, Facebook was fined \$2.3 million for under-reporting complaints about hate speech.¹³ Major internet companies have been called upon to avoid the dissemination and promotion of this kind of material, whether direct hate speech,¹⁴ speech about alleged hate crimes, such as the shootings in

⁷ Kate Conger & Mike Issac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html>.

⁸ Cecilia Kang & Mike Issac, *Defiant Zuckerberg Says Facebook Won't Police Political Speech*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/17/business/zuckerberg-facebook-free-speech.html>.

⁹ *Id.*

¹⁰ Elizabeth Dvoskin, *Facebook Outsources its Decision to Ban Trump to Oversight Board*, WASH. POST. (Jan. 21, 2021), <https://www.washingtonpost.com/technology/2021/01/21/facebook-oversight-board-trump-ban/>.

¹¹ Hannah Denham, *These are the Platforms That Have Banned Trump and His Allies*, WASH. POST. (Jan 14, 2021), <https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media/>.

¹² Kerry Flynn, *Facebook Bans News in Australia as Fight With Government Escalates*, CNN BUS. (Feb. 19, 2021, 4:25 AM), <https://www.cnn.com/2021/02/17/media/facebook-australia-news-ban/index.html>.

¹³ Queenie Wong, *Facebook Fined \$2.3 Million for Violating Germany's Hate Speech Law*, CNET (July 2, 2019), <https://www.cnet.com/news/facebook-fined-2-3-million-for-violating-germanys-hate-speech-law/>.

¹⁴ Facebook's Objectionable Content Policies do not permit hate speech. See *Community Standards: Hate Speech*, FACEBOOK, https://www.facebook.com/communitystandards/hate_speech (last visited Jan. 29, 2021). But see, Ariana Tobin, Madeleine Varner & Julia Angwin, *Facebook's Uneven Enforcement of Hate Speech Rules Allows Vile Posts to Stay Up*, PROPUBLICA (Dec. 28, 2017, 5:53 PM), <https://www.propublica.org/article/facebook-enforcement-hate->

Christchurch, New Zealand and El Paso, Texas,¹⁵ or other speech that is problematic, graphic, or offensive. On the other hand, digital media, from Twitter to Facebook, has been key to the protests of those seeking civil rights from Iran to Hong Kong.¹⁶ Suppressing digital speech¹⁷ can have unintended collateral damage including stopping the ability of protesters to get messages out of their countries. How do you walk the line between beneficial regulation and the suppression of social dialogue? There is no easy answer. Even Mark Zuckerberg's stance on regulation eventually changed, and Facebook removed a Trump political advertisement when it used a particularly offensive image.¹⁸

What should be done about internet political speech gone awry? Or speech that is hateful or harmful? This article will argue that while some change might be possible, little can be done. That fact is proven by previous failed attempts to regulate speech across other media, especially because most media is easier to regulate than the wild, wild internet. More importantly, regulation of internet speech should be cautious, because the internet is a crucial communication tool of diverse interests and peoples throughout the world. This article will look back in time and support its arguments on years of tradition and precedent, and more importantly, on years of failed regulation. The position of speech as an inherent right and a protected human activity¹⁹ is a noble and righteous

speech-rules-mistakes; Sheila Deng & Katie Paul, *Facebook Frustrates Advertisers as Boycott Over Hate Speech Kicks Off*, REUTERS (July 1, 2020, 1:37 AM), <https://www.reuters.com/article/us-facebook-ads-boycott/facebook-frustrates-advertisers-as-boycott-over-hate-speech-kicks-off-idUSKBN2424GS>.

¹⁵ *Christchurch Attacks: Facebook Curbs Live Feature*, BBC NEWS (May 15, 2019), <https://www.bbc.com/news/technology-48276802>.

¹⁶ See Eric Li, *280 Characters to Change the World: Twitter in the Hong Kong Protests*, HARV. INT'L REV. (Apr. 1, 2020, 1:59 AM); Grace Shao, *Social Media Has Become a Battleground in Hong Kong's Protests*, CNBC (Aug 15, 2019), <https://www.cnbc.com/2019/08/16/social-media-has-become-a-battleground-in-hong-kongs-protests.html>; Tamara Abueish, *Social Media Joins Protests on the Ground in Iran Despite Internet Blackout*, ALARABIYA NEWS (May 20, 2020, 10:53 AM), <https://english.alarabiya.net/media/digital/2019/11/17/Social-media-joins-protests-on-the-ground-in-iran-despite-internet-blackout>.

¹⁷ Practically all communication from television to cellphone is now "digital" in its absolute nature and technology. Notwithstanding the engineering technology that has digitized everything, this paper will use "digital speech" to refer to internet-based speech.

¹⁸ Donie O'Sullivan, *Facebook Says it Took Down Trump Ads Because They Used Nazi Symbol*, CNN BUS. (June 19, 2020, 5:42 AM), <https://www.cnn.com/2020/06/18/tech/facebook-trump-ads-triangle-takedown/index.html>; Ben Collins & Brandy Zadrozny, *Facebook Removes Trump Ads for Violating 'Organized Hate' Policy*, NBC NEWS (June 18, 2020, 2:35 PM), <https://www.nbcnews.com/tech/tech-news/facebook-removes-trump-ads-violating-organized-hate-policy-n1231468>.

¹⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."); Human Rights Act 1998, c. 42 (Gr. Brit.) ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 10. [hereinafter European Convention on Human Rights] (entered into force Sept. 3, 1953) ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and

position, but it has been undermined by attempts to regulate individuals time and time again.

I. DIGITAL AND SOCIAL SPEECH

Prior to the 2020 election, digital media was preparing. YouTube was ready to sell ad space for the 2020 presidential race, and to make a fortune doing so.²⁰ And why not, when political advertising makes traditional media a fortune? Traditional broadcasters predicted that the 2020 campaign would set new records for political advertising.²¹ The value of political advertising inures to both digital platforms and traditional media; in the 2018 midterm elections, advertising on digital platforms increased 260% over 2014 to almost a billion dollars, and the total cost of political advertising on broadcast and cable was \$3.8 billion.²² One estimate between the 2016 presidential election year and the 2020 presidential race suggested that spending would increase to \$10 billion, up 59% from 2016.²³ Much is at stake for all of social media, and social media companies stand to gain more money in advertising and counter advertising; the bigger the controversies, the harder-fought the election, the more disagreement, the more that foreign interests want to buy ads during the election season, the more money that social media companies stand to make.

Many believe that Google, Twitter, and Facebook's advertising policies are bad for the country,²⁴ even though the three companies have completely different policies. Google and Facebook will permit political ads while Twitter bans them.²⁵ In an article for CNN, Ann Ravel criticized Twitter's policy, arguing that it might favor candidates who can afford traditional television advertising over the cheaper digital advertising and prejudice those who could not.²⁶ On the other side, she criticized Facebook's refusal to fact-check politicians in their posts.²⁷ This

regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."); U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.")

²⁰ Emily Glazer & Patience Haggin, *For Sale at YouTube: Political Ad Space in 2020*, WALL ST. J. (Oct 8, 2019, 5:24 PM), <https://www.wsj.com/articles/youtube-tries-to-wrest-campaign-ad-dollars-from-facebook-and-local-tv-11570527000>.

²¹ Andrew Edgecliffe-Johnson, *Broadcasters Forecast 2020 Political Advertising Bonanza*, FIN. TIMES (Mar 11, 2019), <https://www.ft.com/content/d041cd3e-41e2-11e9-b896-fe36ec32aece>.

²² Sara Fischer, *Political Ad Spending Hits New Record for 2018 Midterm Elections*, AXIOS (Nov. 6, 2018), <https://www.axios.com/record-midterm-ad-spend-explodes-money-was-no-object-1541450836-f92d1767-ad5f-4d85-99ee-96d9847e7691.html>.

²³ Brad Adgate, *The 2020 Elections Will Set (Another) Ad Spending Record*, FORBES (Sept 3, 2019, 9:44 AM), <https://www.forbes.com/sites/bradadgate/2019/09/03/the-2020-elections-will-set-another-ad-spending-record/?sh=31ebcdb21836>.

²⁴ Ann M. Ravel, *Facebook, Google, and Twitter's Political Ad Policies Are Bad for Democracy*, CNN (Dec. 18, 2019, 3:08 PM), <https://www.cnn.com/2019/12/18/perspectives/facebook-google-twitter-political-ads>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

perspective piece illustrates the heart of the problem: that there is no satisfactory way out for the social media companies. No matter what they do, what kind of line they draw, they will be criticized. The author makes an important point, saying: “Ultimately, social media companies like Facebook, Twitter, and Google shouldn’t be making sweeping decisions about political speech.”²⁸

Further, the laws for content vary worldwide, which changes the calculus for social networks. For example, Facebook was fined in Germany for not limiting hate speech.²⁹ Many social networks are being banned in countries like North Korea, Iran, and even China, an example of the conflicting viewpoints worldwide.³⁰ What might be perfectly permissible in one country might be illegal in another. Being global platforms, each company has had to decide what to do, and whether to change their content by country.

There has been plenty of effort to address these issues on the part of companies themselves. In 2018, Facebook committed to bringing in two advisors to perform an external audit of its policies in a civil rights audit and a political bias review.³¹ But as *Businessweek* noted a year later, the company “still runs on an ‘endless cycle of fury and apology.’”³² Facebook might unintentionally stir conflict by permitting posts that stir ethnic tensions in Sri Lanka, for example, or else other “terrible things like child exploitation, terrorism, and extortion.”³³ But it is not for lack of trying. Facebook employs or contracts for 15,000 people around the world to moderate content.³⁴ It is the responsibility of these moderators to review content for hate speech, violent attacks, and graphic pornography.³⁵ Keeping ahead of as many as two billion posts

²⁸ *Id.* (However, Ravel also suggests that speech could possibly be regulated by Congress or the FEC, and this author respectfully disagrees with that position, as argued in this article.)

²⁹ Thomas Escritt, *Germany Fines Facebook for Under-Reporting Complaints*, REUTERS (July 2, 2019, 8:10 AM), <https://www.reuters.com/article/us-facebook-germany-fine/germany-fines-facebook-for-under-reporting-complaints-idUSKCN1TX11C>.

³⁰ See Eric Talmadge, *North Korea Announces Blocks on Facebook, Twitter, and YouTube*, GUARDIAN (Apr. 1, 2016, 7:56 AM), <https://www.theguardian.com/world/2016/apr/01/north-korea-announces-blocks-on-facebook-twitter-and-youtube>; Sheera Frenkel, *Iranian Authorities Block Access to Social Media Tools*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/technology/iran-protests-social-media.html>; Li Yuan, *A Generation Grows Up in China Without Google, Facebook or Twitter*, N.Y. TIMES (Aug. 6, 2018), <https://www.nytimes.com/2018/08/06/technology/china-generation-blocked-internet.html>.

³¹ Sara Fischer, *Exclusive: Facebook Commits to Civil Rights Audit and Political Bias Review*, AXIOS (May 2, 2018), <https://www.axios.com/scoop-facebook-committing-to-internal-pobias-audit-1525187977-160aaa3a-3d10-4b28-a4bb-b81947bd03e4.html>.

³² Sarah Frier, *Facebook’s Crisis Management Algorithm Runs on Outrage*, BLOOMBERG BUSINESSWEEK (Mar. 14, 2019, 5:00 AM), <https://www.bloomberg.com/features/2019-facebook-neverending-crisis/>.

³³ *Id.*

³⁴ Casey Newton, *The Trauma Floor: The Secret Lives of Facebook Moderators in America*, VERGE (Feb. 25, 2019, 8:00 AM), <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona>.

³⁵ *Id.*

per day in a hundred languages is a challenge.³⁶ The futility of this can be seen in the adoption of the Telecommunications Act of 1996, Section 230³⁷—the section that gives immunity to internet Service Providers (ISPs) for the content of their users. The controversy surrounding Section 230 and its protections of social media was the subject of intense public debate during 2020.³⁸

The two cases that led to the origin of Section 230 are contradictory and clearly illustrate the problem caused by internet regulation and Congress's response in adopting Section 230. First, in *Stratton Oakmont v. Prodigy Services Company*, a post to an electronic bulletin board alleged a person had committed fraud, and the subject of the post sued the Prodigy, the owner of the website, for libel.³⁹ The court held that Prodigy was liable for the content posted on its website by a user.⁴⁰ Contrast that case with *Cubby, Inc. v. CompuServe Inc.*, where the court held that in the case of defamation, CompuServe could be held liable for a user post only if it knew about the content.⁴¹ These two very different outcomes, both in the state of New York, helped Congress to see that the internet was a unique forum. In response to the conflicting caselaw developing around the country, Congress enacted Section 230 of the Telecommunications Act of 1996.⁴² This section gave distributors of user-generated content on the internet immunity for the content posted by users. Someone was still liable for the pernicious content, but the burden shifted from the deep pockets of the companies to the person who posted the content.⁴³ This decision paralleled other defamation laws where the “speaker” is the one liable for bad speech.⁴⁴

Section 230 is not immutable. It has already been modified by the FOSTA-SESTA Act to remove immunity for civil or criminal liability related to sex trafficking.⁴⁵ In that Act, Congress aimed “to promote the continued development of the Internet and other interactive computer services and other interactive media,”⁴⁶ and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]”⁴⁷ To accomplish this, the Act ensured that no provider would be treated as a “speaker,”⁴⁸ but that if they did undertake to restrict material that was lewd, excessively violent, harassing, or otherwise

³⁶ Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook's Struggle to Moderate Two Billion People*, VICE (Aug 23, 2018, 1:15 PM), <https://www.vice.com/en/article/xwk9zd/how-facebook-content-moderation-works>.

³⁷ 47 U.S.C. § 230, Pub. L. No. 104-104 (1996).

³⁸ Salvador Rodriguez, *Facebook, Google, and Twitter CEOs to Testify Before Congress on Oct. 28*, CNBC (Oct 2, 2020, 7:51 PM), <https://www.cnbc.com/2020/10/02/facebook-google-and-twitter-ceos-to-testify-before-congress-oct-28.html>.

³⁹ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. May 24, 1995).

⁴⁰ *Id.* at *7.

⁴¹ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

⁴² 47 U.S.C. § 230, Pub. L. No. 104-104 (1996).

⁴³ *See, e.g., Hassell v. Bird*, 420 P.3d 776 (Cal. 2018).

⁴⁴ RESTATEMENT (SECOND) OF TORTS, § 558 (AM. LAW INST. 1965), et. seq. (definition of “defamation.”).

⁴⁵ Pub. L. No. 115-164 (2018).

⁴⁶ 47 U.S.C. § 230(b)(1).

⁴⁷ 47 U.S.C. § 230(b)(2).

⁴⁸ 47 U.S.C. § 230(c)(1).

harmful, they would not be held liable.⁴⁹ Congress itself created this permissive and protective framework to protect the internet from being diminished and perhaps shut down by people who disagreed either with some content or with the removal of content.

The one thing that can be agreed upon is that Section 230 provides extraordinary protection for one segment of the media over others. Only internet providers have the protection of Section 230, while other forms of media do not. The justification for this discrepancy is that internet providers are not the “speakers” but rather only the “providers” of the pathway, more or less a mere utility, closer to a phone company that just takes someone else’s speech and re-transmits it. And in many cases, that is true. That is, until governments want companies to begin sorting speech based on some criteria, or until the companies come under pressure to remove certain speech, or until the company itself finds a reason to remove content for whatever reason.

Once the purity of the pathway is disturbed, the “utility” becomes a “content provider” and can be regulated like any other content provider. If it is protected by an immunity, it will be able to pick and choose viewpoints with impunity. It is perfectly alright to pick and choose viewpoints, as any editor of a newspaper might do, but the immunity causes problems. This country has recently been concerned about the government of Russia influencing our elections. What happens if the leading social media company is purchased by a Russian company?

One of the ultimate questions is: Why should some, the new media, be protected in a special way that the traditional media—the New York Times, the Washington Post, ABC, CBS, and NBC—are not? There is a place for possible immunity, or perhaps a very high bar to challenge some of the content of smaller internet providers, but the big providers who choose to enter the content fray as any other media should be treated the same. The view that Section 230 is fine as it was written, now twenty-four years ago, is no longer practical.

Professor Danielle Citron comments on Section 230, noting that the world of the internet has changed since the law was enacted in 1996, that it was “impossible to foresee the threat to speech imposed by cyber mobs and individual harassers”⁵⁰ Professors Citron and Witte argue that the immunity, while it helped the internet develop,⁵¹ now has been so broadly interpreted that it permits huge internet companies and others to be careless in letting sites that engage in potentially criminal behavior, potentially defamatory content, and other potentially dangerous activities.⁵² They argue for the modification of the Section 230 immunity to make it less absolute so the platforms will be more accountable for their content.⁵³ This view is supported by Professor Jeff Kossoff, who similarly argues that Section 230 was important to the development of the internet, but has expanded beyond this purpose.⁵⁴ In his opinion, Section 230 could be modified and improved.⁵⁵ Internet laws are not immutable,

⁴⁹ 47 U.S.C. § 230(2).

⁵⁰ Danielle K. Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO L. TECH. REV. 453, 463 (2018).

⁵¹ *Id.* at 464.

⁵² *Id.* at 466.

⁵³ *Id.* at 472.

⁵⁴ JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET, 280 (2019).

⁵⁵ *Id.*

even now through the tax relief that benefits internet merchants.⁵⁶ However, some argue that Section 230 is more relevant than ever, protecting Twitter in a way that it needed. In 2020, Michael Godwin argued that Twitter needed Section 230 or else it would have had to censor Trump entirely.⁵⁷ Of course, since this article was written, Trump has been removed from Twitter.⁵⁸

All sides have issues with the protections that Section 230 gives to internet companies.⁵⁹ The *New Yorker* reports that “as awareness of Silicon Valley’s largely unregulated power has grown, [Section 230] has come under intensified scrutiny and attack from both major political parties.”⁶⁰ The argument goes that “rather than freeing companies to moderate their content, the law has enabled them to do nothing and be accountable to no one.”⁶¹

A. *New Problems Are Old Problems*

New media is not so new. All types of media have given headaches to the government, no matter the time and place. In America, the government has had an uneasy relationship with the media from the beginning. In the early days of the United States, newspapers were often at odds with politicians.⁶² Even the venerated George Washington, elected unanimously as our first president, suffered newspaper attacks by the end of his first term.⁶³ Democrat Harry Truman called the press “prostitutes”⁶⁴ and once defended his daughter in the media, calling a reporter a “frustrated old man who wishes he could have been successful,” and his unflattering review of Truman’s daughter’s singing a “lousy review” and “poppy-cock.”⁶⁵ Truman went on to say that if he

⁵⁶ See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

⁵⁷ Mike Godwin, *The Trump-Twitter War Shows That Section 230 Can Work Beautifully*, SLATE (May 29, 2020, 5:37 PM), <https://slate.com/technology/2020/05/trump-twitter-section-230.html>.

⁵⁸ See TWITTER BLOG, *infra* note 195.

⁵⁹ Casey Newton, *Everything You Need to Know About Section 230*, VERGE (May 28, 2020 4:50 PM), <https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation>. (“In August 2019, President Donald Trump reportedly drafted an executive order that would require the Federal Communications Commissions to develop rules that would limit Section 230 protections. . . . In January 2020, former Vice President Joe Biden proposed revoking Section 230 completely.”); See also, Lauren Feiner, *Big Tech’s Favorite Law Is Under Fire*, CNBC (Feb 19, 2020, 9:22 AM), <https://www.cnbc.com/2020/02/19/what-is-section-230-and-why-do-some-people-want-to-change-it.html>.

⁶⁰ Anna Weiner, *Trump, Twitter, Facebook, and the Future of Online Speech*, NEW YORKER (July 6, 2020), <https://www.newyorker.com/news/letter-from-silicon-valley/trump-twitter-facebook-and-the-future-of-online-speech>.

⁶¹ *Id.*

⁶² See *eg.*, FRED W. FRIENDLY, MINNESOTA RAG (1981).

⁶³ Shannon Duffy, *Press Attacks*, MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/press-attacks/> (last visited Jan. 29, 2021).

⁶⁴ Linda Massarella, *Harry Truman Once Compared the Press to “Prostitutes”*, N.Y. POST (May 17, 2017), <https://nypost.com/2017/05/17/harry-truman-trashed-the-media-long-before-donald-trump/>.

⁶⁵ *Is the Letter on Display That Truman Wrote in Defense of His Daughter’s Singing?*, TRUMAN LIBRARY <https://www.trumanlibrary.gov/education/trivia/letter-truman-defends-daughter-singing> (last visited Jan. 29, 2021).

ever met the reporter, that he would “need a new nose.”⁶⁶ Richard Nixon had arguably the worst problems with the media, calling them names, keeping an “enemies list,” having their tax returns investigated, and perhaps trying to have their licenses revoked.⁶⁷

The traditional media is known as the “fourth estate,” a reference to the media as a fourth branch of government or a fourth influencer of public policy due to its ability to influence the framing of debates.⁶⁸ This framing is apparent in almost every public affairs program. Format and editorial choices can completely alter underlying material. Choices such as topic and guest selection, viewpoints represented, questions asked, and the nature and type of follow-up questions can radically change how an issue is communicated and presented to an audience.

The fourth estate argues that it is the “watchdog” of the government and, because of that, functions in the public interest.⁶⁹ Therefore, its activities should be afforded special protection. Media is certainly protected by the First Amendment.⁷⁰ It may also receive some special statutory protections such as a “journalist’s privilege” which is a limited privilege to shield sources from discovery.⁷¹ However, the traditional media is not protected from defamation of others; it is responsible for what it says.⁷²

Members of the traditional media helped the democracy at its birth by publishing the Federalist Papers.⁷³ They braved punishment by the government in revealing the difficult choices made during the

⁶⁶ *Id.*

⁶⁷ See John Aloysius Farrell, *When Nixon Met the Press*, POLITICO MAG. (Aug. 6, 2014), <https://www.politico.com/magazine/story/2014/08/nixon-and-the-media-109773/>. See also David Dykes, *Former IRS Chief Recalls Defying Nixon*, USA TODAY (May 26, 2013, 12:06 AM), <https://www.usatoday.com/story/news/nation/2013/05/26/irs-chief-defied-nixon/2360951/>; *Whitehead Asserts Nixon Bill Does Not Seek to Curtail Television Freedom*, N.Y. TIMES (Jan 11, 1973), <https://timesmachine.nytimes.com/timesmachine/1973/01/11/90912602.html?pageNumber=41>. (Nixon director of the White House Office of Telecommunication Policy: “Clay T. Whitehead . . . condemned ‘ideological plugola’ and ‘elitist gossip’ in network news programs and warned that ‘station managers and network officials who fail to correct the imbalance or consistent bias in the networks or who acquiesce by silence—can only be considered willing participants, to be held fully accountable ... at license renewal time.’”)

⁶⁸ T. BARTON CARTER, ET AL., *THE FIRST AMENDMENT AND THE FOURTH ESTATE* (2011); Delbert Tran, *The Fourth Estate as the Final Check*, CASE DISCLOSED (Nov. 22, 2016), <https://law.yale.edu/mfia/case-disclosed/fourth-estate-final-check>.

⁶⁹ Ken Auletta, *The Press’s Role as Watchdog on Government*, FRONTLINE (June 13, 2006), <https://www.pbs.org/wgbh/pages/frontline/newswar/tags/watchdog.html>.

⁷⁰ *Freedom of Press: Overview*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1_3_1/ (last visited Jan. 29, 2021).

⁷¹ Jonathan Peters, *Shield Laws and Journalist’s Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug 22, 2016). See also Isabel Farhi, *A Reporter by Any Other Name: Qualifying for Reporter’s Privilege in the Digital Age*, CASE DISCLOSED (Feb. 27, 2019), <https://law.yale.edu/mfia/case-disclosed/reporter-any-other-name-qualifying-reporters-privilege-digital-age>.

⁷² *Defamation*, DIGIT. MEDIA L. PROJECT, <https://www.dmlp.org/legal-guide/defamation> (last visited Jan. 29, 2021).

⁷³ *The Federalist Papers: Primary Documents in American History*, LIBR. OF CONG., <https://guides.loc.gov/federalist-papers/text-11-20> (last visited Jan. 29, 2021).

Vietnam War.⁷⁴ They covered numerous topics of the day, from the assignations of Lincoln,⁷⁵ Kennedy,⁷⁶ and Martin Luther King,⁷⁷ to the moon landing,⁷⁸ to various wars.⁷⁹ They helped advance the discussions of civil rights and LGBTQ+ rights,⁸⁰ albeit too slowly and haltingly. On the other hand, traditional media has not had a particular glorious history. Members of its ranks have been involved in numerous scandals⁸¹ and accused of being the gatekeepers that have held up important discussions of some of the very same topics they shed light upon.⁸² Contrast that with the newer media, which is not only dominant in reach, but immunized from liability. Google has 92% of the world's search market and Facebook has 70% of the social media market.⁸³ Twitter, founded in 2006,⁸⁴ may now be the world's single most powerful political network; it is used by

⁷⁴ Niraj Chokshi, *Behind the Race to Publish the Top-Secret Pentagon Papers*, N.Y. TIMES (Dec 20, 2017).

⁷⁵ Edwin M. Stanton, *President Lincoln Shot by an Assassin*, N.Y. TIMES (Apr. 15, 1865), <https://timesmachine.nytimes.com/timesmachine/1865/04/15/78996750.html?pagenumber=1>.

⁷⁶ Tom Wicker, *Kennedy Is Killed By Sniper As He Rides in Car in Dallas; Johnson is Sworn in on Plane*, N.Y. TIMES (Nov. 23, 1963), <https://archive.nytimes.com/www.nytimes.com/books/98/04/12/specials/johnson-kennedy.html>.

⁷⁷ Earl Caldwell, *Martin Luther King Is Slain in Memphis*, N.Y. TIMES (Apr. 5, 1968), <https://archive.nytimes.com/www.nytimes.com/learning/aol/onthisday/big/0404.html>.

⁷⁸ John Noble Wilford, *Men Walk on the Moon*, N.Y. TIMES (July 21, 1969), <https://www.nytimes.com/press/july-21-1969-men-walk-on-moon/>.

⁷⁹ See e.g., R.W. Apple, Jr., *Allied Forces Storm Iraq and Kuwait After Hussein Ignores U.S. Deadline; Bush Sees a Swift, Decisive Victory*, N.Y. TIMES (Feb. 24, 1991), <https://www.nytimes.com/1991/02/24/world/war-gulf-overview-allied-forces-storm-iraq-kuwait-after-hussein-ignores-us.html>; Raymond Daniel, *Allied Armies Land in France*, N.Y. TIMES, (June 6, 1944), <https://timesmachine.nytimes.com/timesmachine/1944/06/06/issue.html>.

⁸⁰ NPR Staff, *How TV Brought Gay People Into Our Homes*, NPR (May 12, 2012), <https://www.npr.org/2012/05/12/152578740/how-tv-brought-gay-people-into-our-homes>. (“In five separate studies, professor Edward Schiappa and his colleagues at the University of Minnesota have found that the presence of gay characters on television programs decreases prejudices among viewers.”); See also, Gabby Gonta, et al., *Changing Media and Changing Minds: Media Exposure and Viewer Attitudes Towards Homosexuality*, 5 PEPP. J. COMM’N RSCH. 22 (2017).

⁸¹ For example, a reporter for the New York Times was accused of making up news. See Margaret Sullivan, *Repairing the Credibility Cracks*, N.Y. TIMES (May 4, 2013), <https://www.nytimes.com/2013/05/05/public-editor/repairing-the-credibility-cracks-after-jayson-blair.html>. See also Mahita Gajanan, *CBS Adds New Sexual Harassment, Behavior Policies to Its Reality Show Survivor After ‘Inappropriate Touching’ Scandal*, TIME (Dec. 18, 2019), <https://time.com/5752011/survivor-cbs-guidelines-sexual-harassment/>; Natalie Robehmed, *Even After Sexual Misconduct Scandal, Les Moonves Walks Away From CBS With an \$800 Million Fortune*, FORBES (Sept. 11, 2018), <https://www.forbes.com/sites/natalierobehmed/2018/09/11/even-after-sexual-misconduct-scandal-les-moonves-walks-away-from-cbs-with-an-800-million-fortune/?sh=7792506d544e>.

⁸² See, e.g., Sidney Shapiro, *United Church of Christ v. FCC: Private Attorneys General and the Rule of Law*, 58 ADMIN. L. REV. 1, 2 (Fall 2006) (discussing a television station accused of racist coverage.).

⁸³ David Streitfeld, *To Take Down Big Tech, They First Need to Reinvent the Law*, N.Y. TIMES (June 20, 2019), <https://www.nytimes.com/2019/06/20/technology/tech-giants-antitrust-law.html>.

⁸⁴ Nick Bilton, *All is Fair in Love and Twitter*, N.Y. TIMES MAG. (Oct. 9, 2013), <https://www.nytimes.com/2013/10/13/magazine/all-is-fair-in-love-and-twitter.html>.

the President of the United States, now President Biden, and the leaders of most countries. With its recent removal of former President Trump, Twitter has shown that it is even willing to deplatform world leaders. Its response to the actions of former President Trump were faster than any law could have been passed, or any regulatory hearing convened. And there is now cross-over of media. The nightly newscasts of the established media often refer to the day's tweets as a substantial part of their news.

The new media is facing the same issues as the old media, but with a twist: they are protected from liability for almost anything they carry. For example, YouTube permitted noxious videos to be uploaded.⁸⁵ These pernicious forms of speech cause some people to want websites to remove objectionable content, but others are concerned that websites remove too much content for political reasons. One proposed bill would make websites liable if they perform "politically biased content moderation."⁸⁶

Twitter has taken a different approach, banning all political advertising.⁸⁷ That move has been criticized by the right as an attempt to silence their voices.⁸⁸ The *New York Times* observed that the policy would cause problems for the social network "as it tries to determine what ads count as political."⁸⁹ President Biden and others have criticized Facebook's opposite stand, to keep the advertising and refuse to censor it.⁹⁰ The online world is complicated because different social networks can make different calls on the same material. For example, the Trump campaign released an anti-impeachment video that criticized Joe Biden; Facebook permitted the commercial to run, but CNN refused to air the same ad.⁹¹ The Biden campaign and democratic candidate Elizabeth Warren both criticized Facebook for helping to spread false information.⁹²

Some scholars argue that a "Fifth Estate" exists, that being the more alternative news sources such as bloggers, Youtubers, and sites like Wikileaks.⁹³ Mark Zuckerberg has argued that Facebook is the current fifth estate.⁹⁴ These media, and all sorts of "pop-up" or amateur media, combine to give the government headaches in various ways, and also to support certain portions or interests of the government. The faction of

⁸⁵ Neima Jahromi, *The Fight for the Future of YouTube*, NEW YORKER (July 8, 2019), <https://www.newyorker.com/tech/annals-of-technology/the-fight-for-the-future-of-youtube>.

⁸⁶ See Christie-Lee McNally, *Opinion: Big Tech's Censorship of Conservative Users is Alive and Well*, HILL (July 14, 2018, 5:30 PM), <https://thehill.com/opinion/cybersecurity/397047-big-techs-censorship-of-conservative-users-is-alive-and-well>.

⁸⁷ Kate Conger, *Twitter Will Ban All Political Ads, CEO Jack Dorsey Says*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/2019/10/30/technology/twitter-political-ads-ban.html>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Cecilia Kang, *Facebook's Hands-Off Approach to Political Speech Gets Impeachment Test*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/08/technology/facebook-trump-biden-ad.html>.

⁹² *Id.*

⁹³ See, e.g., Roy Peter Clark, *Who is the Fifth Estate and What is Its Role in Journalism's Future?*, POYNTER (Apr. 28, 2009), <https://www.poynter.org/reporting-editing/2009/who-is-the-fifth-estate-and-what-is-its-role-in-journalisms-future/>.

⁹⁴ Kurt Wagner & Sarah Frier, *Mark Zuckerberg Touts Broad Power of Expression as 'Fifth Estate'*, BLOOMBERG (Oct. 17, 2019), <https://www.bnnbloomberg.ca/zuckerberg-touts-broad-power-of-expression-as-fifth-estate-1.1333166>. Mark Zuckerberg called the power of people on Facebook "a fifth estate alongside the other power structures in our society."

government supported depends, of course, on the viewpoint of the management of the particular media. As we will see later, the government has attempted with very limited success to regulate media to have some equanimity in viewpoint representation, but this government regulation ultimately failed. The viewpoints presented by each media outlet generally reflect the viewpoints of their ownership or management. That has always been the case and, so long as viewpoint regulation is futile, will continue to be the case.⁹⁵

In 2019, Google said that it would change its algorithm to favor more “original reporting.”⁹⁶ According to its reports, news organizations had been asking for this.⁹⁷ However, this change did not alter the fact that its algorithm would remain proprietary and would not be open for inspection.⁹⁸ Back in 2017, the company had made a similar promise, that it was changing its algorithm to combat “fake news.”⁹⁹ Some seem not too sure that Google should be trusted with its search algorithm making such decisions.¹⁰⁰ The current functioning of the media, whether old or new, whether fourth or fifth estate, includes presentation of both news and opinions and communication with the audiences that they assemble. Sometimes it is difficult to tell fact, opinion, truth, and lies apart.

B. Internationalization: A New Complicating Factor

The old media, from the time the Constitution was written to today, was balkanized to be mostly domestic. It was generally difficult for media voices to travel across national boundaries, until the invention of home satellite television that became accessible during the 1980s.¹⁰¹ Before that, there were certain international news sources, some radio, some telegraph, some television located near borders, and some newspapers and magazines that were flown in for distribution. But generally, the media was domestic. Acquisition of these international sources, pre-satellite, took some effort on the consumer’s part.¹⁰² They might have needed a shortwave radio receiver and enough of an antenna to receive an international station, or they might have needed to subscribe specially to an international newspaper or magazine that would be delivered or carried at a local newsstand. International news was a “pull” by the consumer rather than a “push” by the news source.

⁹⁵ See MARK COOPER, *MEDIA OWNERSHIP AND DEMOCRACY IN THE DIGITAL INFORMATION AGE* (2003).

⁹⁶ Catherine Thorbecke, *Google to Change Search Algorithm to Elevate ‘Original Reporting’*, ABC NEWS (Sept. 13, 2019, 4:12 PM) <https://abcnews.go.com/US/google-change-search-algorithm-elevate-original-reporting/story?id=65592422>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Jennifer Calfas, *Google is Changing Its Search Algorithm to Combat Fake News*, FORTUNE (Apr. 25, 2017, 12:30 PM), <https://fortune.com/2017/04/25/google-search-algorithm-fake-news/>.

¹⁰⁰ Kirsten Grind et al., *How Google Interferes With Its Search Algorithms and Changes Your Results*, WALL ST. J. (Nov 15, 2019, 8:15 AM), <https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753>.

¹⁰¹ Ernie Smith, *Deep Dish*, TEDIUM (Aug 27, 2015), <https://tedium.co/2015/08/27/early-satellite-dish-history/>.

¹⁰² For an excellent history of the development of international delivery of satellite television, see generally JAMES SCHWOCH, *GLOBAL TV: NEW MEDIA AND THE COLD WAR, 1946-1969* (2008).

However, once international satellite communication became reliable, instantaneous programming by foreign voices became available and more commonplace.¹⁰³ These voices grew with the ease of delivery and reception. Although in the early days, satellite antennae were big and cumbersome so people living in close urban proximity would have a difficult time finding room for them,¹⁰⁴ the urban cities were the most likely to have robust foreign newsstands or enough broadcast stations that at least some of the time there was international news and programming.

Internationalization is furthered by the internet, which was invented by the military research arm known as DARPA in a project started in 1973.¹⁰⁵ The first website appearance was on the sixth of August, 1991,¹⁰⁶ only about thirty years prior to the publication of this paper. Even though the internet was available, it took the release of a commercially viable internet browser in 1993 for it to take off.¹⁰⁷ The internet is inherently international. It is also an inherently “robust” network, meaning that component failures will not affect the overall network, and the data will find its way around a failure.¹⁰⁸ That means that it is likely to continue to deliver those international messages unless there is an extreme intervention by a government. And with the shrinking of technology, instead of needing a large computer system that might take up racks of space, the internet is delivered to a personal device in the palm of your hand. The combination of satellites and international cable making up the internet means that there is a robust international communication system, accessible by many people world-wide, and that is difficult for governments to control.¹⁰⁹ Yes, there are ways that a government with a lot of advanced planning¹¹⁰ can arrange to shut down the terrestrial internet at its borders.¹¹¹ But there are also other methods of communicating, such as satellites, radio frequencies, light waves, and

¹⁰³ *See id.*

¹⁰⁴ Smith, *supra* note 101.

¹⁰⁵ Vint Cerf, *A Brief History of the Internet & Related Networks*, INTERNET

SOC'Y

<https://www.internetsociety.org/internet/history-internet/brief-history-internet-related-networks> (last visited Jan. 29, 2021).

¹⁰⁶ *August 6, 1991: The WWW Debut*, CNN (Mar. 10, 2003, 3:21 PM),

<https://www.cnn.com/2003/US/03/10/sprj.80.1991.www/>.

¹⁰⁷ Michael Calore, *April 22, 1993: Mosaic Browser Lights Up Web With Color, Creativity*, WIRED (Apr. 22, 2010, 12:00 AM),

<https://www.wired.com/2010/04/0422mosaic-web-browser/>.

¹⁰⁸ John C. Doyle, et al., *The “Robust Yet Fragile” Nature of the Internet*, 102 PNAS 14497 (Oct. 11, 2005).

¹⁰⁹ Chris Moss, *The Last Places on Earth With No Internet*, TELEGRAPH (Sept. 9, 2019), <https://www.telegraph.co.uk/travel/lists/the-last-places-on-earth-with-no-internet/>, (describing the several countries and destinations where Internet access is difficult.).

¹¹⁰ Zak Doffman, *Putin Signs ‘Russian Internet Law’ to Disconnect Russia from The World Wide Web*, FORBES (May 1, 2019, 5:02 PM), <https://www.forbes.com/sites/zakdoffman/2019/05/01/putin-signs-russian-internet-law-to-disconnect-the-country-from-the-world-wide-web/?sh=278d54bf1bf1>.

¹¹¹ Delia Paunescu, *Why Did Iran Shut Off the Internet for the Entire Country?*, VOX (Nov. 21, 2019, 7:40 PM), <https://www.vox.com/recode/2019/11/21/20975920/iran-internet-protests-reset-podcast>. *See also End Internet Shutdowns to Manage COVID-19*, HUM. RTS. WATCH (Mar. 31, 2020, 12:01 AM), <https://www.hrw.org/news/2020/03/31/end-internet-shutdowns-manage-covid-19>. 33 countries had 213 shutdowns in 2019.

private fiber networks that make it extremely difficult to fully isolate a country even though most communication can be shut down.¹¹²

C. Changing Demographics

Children spend much of their time on the internet.¹¹³ Even among adults, the shift in what kind of screen time a person consumes is dramatic. An adult 18-34 watches one hour and thirty-seven minutes of television per day while “those aged 50 and older spend close to six (ages 50-64) and more than seven hours (ages 65+) in front of the tube[.]”¹¹⁴ But children spend most of their time on the internet. The percentage of children ages 8-12 who watch online videos every day is 56%, and 69% for those ages 13-18.¹¹⁵ But the use of traditional television has fallen to 50% for the younger group and only 33% for the older group.¹¹⁶ And this is not a U.S.-only phenomenon: in 2016, researchers in the UK determined for the first time that UK children spend more time on the internet than watching television.¹¹⁷ Similarly, that same year, researchers in Australia found that Australian children were spending more time online than in front of the television.¹¹⁸ The United Kingdom’s Office of Communication, has found that UK children’s favorite streaming media website is YouTube.¹¹⁹ While the current numbers show that the decline in television viewing has in recent years promoted the internet to first place, the trend is clear: youth, and if they carry these habits forward, future adults, prefer streaming on demand to the curated television of the traditional networks.¹²⁰ The internet wins the contest for attention, but the old media gives us the lessons for what media consumption really means.

Old-style media, simplified for discussion to radio and television, was “a uniquely pervasive presence in the lives of all Americans.”¹²¹ By

¹¹² See Natilie Wolcholver, *How Do You Shut Down the Internet in a Whole Country?*, LIVESCIENCE (Jan 28, 2011), <https://www.livescience.com/32965-how-do-you-shut-down-the-internet-whole-country.html>; Brad Plumer, *How Easy Is It to Shut Off a Country’s Internet?*, WASH. POST (Dec 1, 2012, 12:05 PM), <https://www.washingtonpost.com/news/wonk/wp/2012/12/01/how-easy-is-it-to-shut-off-a-countrys-internet/>.

¹¹³ See generally Larry Downes, *For Streaming Services, Navigating Generational Differences is Key*, HARV. BUS. REV. (Nov 29, 2019).

¹¹⁴ Felix Richter, *The Generation Gap in TV Consumption*, STATISTA (Nov. 20, 2020) <https://www.statista.com/chart/15224/daily-tv-consumption-by-us-adults/>.

¹¹⁵ Edward C. Baig, *Too Much YouTube? Online Video Usage Among Teens is Going Through the Roof, Survey Says*, USA TODAY (Oct. 30, 2019, 12:06 PM), <https://www.usatoday.com/story/tech/2019/10/29/youtube-screen-time-overload-among-teens-and-tweens/2490553001/>.

¹¹⁶ *Id.*

¹¹⁷ Jasper Jackson, *Children Spending More Time Online Than Watching TV for the First Time*, GUARDIAN (Jan. 26, 2016, 2:23 AM), <https://www.theguardian.com/media/2016/jan/26/children-time-online-watching-tv>.

¹¹⁸ Amanda Hoh, *Kids Now Spending More Time Online Than Watching Television, Survey Shows*, ABC NEWS AUSTRALIA (Feb. 14, 2017, 10:08 PM), <https://www.abc.net.au/news/2017-02-15/children-now-spend-more-time-online-than-watching-tv/8272708>.

¹¹⁹ *Life on the Small Screen: What Children are Watching and Why*, OFCOM (Jan. 29, 2019), https://www.ofcom.org.uk/__data/assets/pdf_file/0021/134832/Ofcom-childrens-content-review-Publish.pdf.

¹²⁰ See Rick G. Morris, *The End of the Networks*, 2 F.I.U. L. REV. 55 (2007) (arguing that the networks have been preparing for this circumstance for decades.).

¹²¹ *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

1976, 97% of the public owned televisions.¹²² Some of the media was portable—a radio could follow a person to the beach or into the car, and television could be similarly portable, but with a little more effort. For the most part, the old media was free to receive over-the-air signals and the appliances that they were received on were not expensive. However, new media was different. It was less “pervasive” and more “invited,”¹²³ because accessing content required more effort in the form of costs, such as expensive computers or cell phones and monthly payments for an internet connection.

Another difference between old and new media is the curation factor. The old media would assemble programming in a fixed order that the consumer would have to watch as it was set in order by the producing organization. This curation or “editorial function” applied to both entertainment and to news stories.¹²⁴ In the old media, a person did not receive “news” until it had been shot, edited, reviewed, approved, scheduled, played and archived. Each step involved at least some supervision of the content, and the old media was liable for the content it presented.¹²⁵ Several articles by media researchers postulated that the programming curation added to the physicality of peoples’ lives, theorizing that having time available to watch television led to something called “situational determinism”¹²⁶ or “structural determinism.”¹²⁷

The programmers at the networks had but one channel, so they would attempt to program it to maximize audience entertainment at each segment of the day, a strategy called “dayparting.”¹²⁸ The AM daypart would be news, traffic, and weather, the things a business commuter would need. Later in the day, the programming would shift to soap operas in order to entertain stay-at-home family members while the children were in school, and later, after dinner, there would be a half hour of the day’s news followed by “prime time” programming aimed at the family audience. This programming was progressively aging; the first hour was called the family hour and had certain strictures, and each hour after that would appeal to a more mature and older audience until the

¹²² CHRISTOPHER H. STERLING & JOHN MICHAEL KITROSS, *STAY TUNED: A HISTORY OF AMERICAN BROADCASTING* 455 (3rd ed. 2002).

¹²³ *Cnty. Television of Utah Inc. v. Wilkinson*, 611 F. Supp. 1099, 1113 (D. Utah 1985) (“[C]able television is not an uninvited intruder. As the FCC observed in its amicus curiae brief submitted to this court: ‘First, cable is a subscriber medium, generally only available if the person who views it has affirmatively contacted the cable system and asked that a wire be brought into his home and attached to the television set. Without that voluntary act, there is no cable programming.’”). *See also Sable Commc’ns of Cal, Inc. v. F.C.C.*, 492 U.S. 115 (1989) (telephones are also delivered by a wire medium, and therefore not uninvited.).

¹²⁴ *Media: What is Their Function?*, LUMEN, <https://courses.lumenlearning.com/americangovernment/chapter/what-is-the-media/> (last visited Jan. 29, 2021).

¹²⁵ *See, e.g. Broadcasting False Information*, FED. COMM’N COMM’N (Jan. 8, 2021).

¹²⁶ Harash Taneja & Vijay Viswanthan, *Still Glued to the Box? Television Viewing Explained in a Multi-Platform Age Integrating Individual and Situational Predictors*, 8 INTL J. OF COMM. 2134, 2136 (2014).

¹²⁷ James G. Webster & Ting-Yu Wang, *Structural Determinants of Exposure to Television: The Case of Repeat Viewing*, 36 J. BROAD. & ELECT. MEDIA 125 (1992).

¹²⁸ *The Ultimate Guide to Dayparting*, KUUSOFT MKTG. (Mar. 1, 2019), https://www.kuusoft.com/blogs/guide-to-dayparting/?utm_term=__pvX1_1ecX0_2ecX0_fv20210221_undefined.

evening newscast started.¹²⁹

Watching television was a social event, and people would negotiate about which show to watch.¹³⁰ This curated day was highly competitive between networks. Just a few points difference in ratings could determine which network “won” the season, and winning the ratings war would mean many millions of dollars of additional revenue. The competition often meant a lack of experimentation and diversity of people and topics in prime-time programming, although when a network dared to confront topic straight-on it could advertise that fact and build a bigger audience for a more special viewing experience that everyone would be talking about the next day.¹³¹ People would develop loyalty to a program and watch it week after week.¹³²

But nothing lasts forever. The new media is a self-serve, easy-to-access format that is apparently un-curated, but the consumer can still be fed the content that some “producer,” whether of human intelligence or pre-programmed algorithm, wants them to watch. Recent research has found that time spent on the internet substitutes for time spent on television and thereby decreases television time.¹³³ And the producers, rather than being human news producers located in New York City, are usually algorithms of the social media giants.¹³⁴ The ease of receiving the old media gave it that characteristic of being uniquely accessible. Anyone from a very young age could manipulate the radio or television to receive programming. Since the operating cost was free, there were essentially no barriers.

Further, once a channel or station was selected, the viewer did not have to do anything else. The programming had been pre-curated and streamed forth. Many people put the television on in the background for noise while they worked or did chores or other activities. The media outlet would select the playlist for the consumer, and while the consumer did not have as much control as they have on a click-per-view channel like YouTube or Hulu, there was a certain charm of that feature. Television was not by click, but by appointment, because the consumer would show up at the time the network played the program.¹³⁵ News was inserted into the program playlist on both a short “update” basis and a long form “newscast” basis, and more in-depth programming, sometimes in the form of documentaries.

Certain social mores have been broken and advanced on the mass media; it has helped to break color barriers, race barriers, and advance

¹²⁹ See generally SUSAN TYLER EASTMAN & DOUGLAS A. FERGUSON, BROADCAST/CABLE PROGRAMMING (5th ed. 1996).

¹³⁰ Taneja & Viswanthan, *supra* note 126 at 2136.

¹³¹ See generally, LYNN SPIGEL, MAKE ROOM FOR TV: TELEVISION AND THE FAMILY IDEAL IN POSTWAR AMERICA, (1st ed. Univ. of Chi. Press 1992).

¹³² Webster & Wang, *supra* note 127 at 126.

¹³³ Taneja & Viswanthan, *supra* note 126 at 2154.

¹³⁴ Stuart Dredge, *How Does Facebook Decide What to Show in My News Feed?*, GUARDIAN (June 30, 2014), <https://www.theguardian.com/technology/2014/jun/30/facebook-news-feed-filters-emotion-study> (for news); Louise Matsakis, *Facebook's Targeted Ads Are More Complex Than It Lets On*, WIRED (Apr. 25, 2018, 4:04 PM), <https://bit.ly/3vc9gVD> (for advertisements).

¹³⁵ T.J. Billard, *Experimental Evidence for Differences in the Prosocial Effects of Binge-Watched Versus Appointment-Viewed Television Programs*, 96 J. & MASS COMM' M Q. 1025 (2019).

discussion of important topics.¹³⁶ It demonstrated that all was fine if a person of a different race moved in next door, or all would be fine if your child married someone of a different race.¹³⁷ It televised both the strife and the progress. While progress in civil and individual rights took many different forms, such as protests, marches, and action, and media played a role.¹³⁸ Virtually all television viewing at the time was concentrated on the three networks,¹³⁹ and everyone watched and discussed the ideas presented. Each day the media would deliver news and political information, cover political conventions, have public affairs shows to create forums for community discussion. Even in the face of criticism,¹⁴⁰ the traditional media was a place of dialogue. But that dialogue was fraught with difficulty. Who should control the discussion? Whose views should be heard? What if some views were left out? Even within a slice of the opinion spectrum, there can be differences of which speech should take priority. As Owen Fiss observed, “liberals’ commitment to free speech is strong . . . but [that commitment] is being tested by exercises of state power on behalf of another of liberalism’s defining goals—equality.”¹⁴¹

For many years, the Federal Communications Commission (FCC) attempted to encourage diversity in programming.¹⁴² In *In re Mayflower Broadcasting*,¹⁴³ the FCC banned editorializing by broadcasters, requiring them to stay neutral and the “communication of information and exchange of ideas [to be] fairly and objectively presented.”¹⁴⁴ Then beginning in 1949, the Commission adopted the Fairness Doctrine, which still required the presentation of all sides of an issue, but now permitted broadcasters to editorialize and include their own opinions.¹⁴⁵ The diversity of programming did include diverse voices, and it also included corporate diversity, a concept of “anyone but the networks,” where programming that did not originate from the networks themselves was more valuable. This can be seen in the Financial Interest and Syndication Rules, which prohibited the networks from providing programming for their own networks for most of the prime-time hours.¹⁴⁶ These content rules, however, were eventually overturned on the basis that there was

¹³⁶ See NPR Staff, *supra* note 80. See also *Programs Breaking Barriers*, PBS, <https://www.pbs.org/wnet/pioneers-of-television/pioneering-programs/breaking-barriers/> (last visited Jan. 29, 2021).

¹³⁷ See PBS, *supra* note 136.

¹³⁸ *Id.*

¹³⁹ See generally Don Robert Fitzpatrick, *The Survival of the Three Original U.S. Television Networks Into the Twenty-First Century as Diverse Broadcast Programming Sources*, BUTLER UNIV. GRADUATE THESIS COLLECTION (Jan. 19, 1995).

¹⁴⁰ NEWTON MINOW, *TELEVISION AND THE PUBLIC INTEREST (1961)*; NICHOLAS JOHNSON, *HOW TO TALK BACK TO YOUR TELEVISION SET* (1st ed. Little Brown 1970).

¹⁴¹ OWEN M. FISS, *THE IRONY OF FREE SPEECH* 10 (Harv. Univ. Press 1996).

¹⁴² THOMAS G. KRATTENMAKER & LUCAS A. POWE JR., *REGULATING BROADCAST PROGRAMMING* 59 (MIT Press 1994).

¹⁴³ *In re Mayflower Broadcasting Co.*, 8 F.C.C. 333 (1940).

¹⁴⁴ *Id.* at 340.

¹⁴⁵ KRATTENMAKER & POWE, *supra* note 142 at 62.

¹⁴⁶ See *The Financial Interest and Syndication Rule Reporting Requirements Effective: December 29, 1993*, FED. COMM’N COMM’N, <https://www.fcc.gov/document/financial-interest-and-syndication-rule-reporting-requirements-effective-0> (last visited Jan. 29, 2021). *The Financial Interest and Syndication Rules*, MUSEUM BROAD. COMM’N, <http://people.stern.nyu.edu/wgreene/entertainmentandmedia/FIN-SYN-RULES.pdf> (last visited Jan. 29, 2021).

no good reason provided by the FCC for compromising the speech of the networks—and because the networks represented the largest and best funded establishment voices, certainly not marginalized speech.¹⁴⁷

Rather than truly encouraging broad participation by diverse voices, the content rules mostly shifted program production from the rich networks on the East Coast to rich movie studios and well-positioned independent producers on the West Coast.¹⁴⁸ The concept of truly diverse and interesting non-traditional voices were not a part of this mandated diversification. The court recognized this, and the FCC rules intended to create at least some diversity of voices were overturned. So even the most banal of attempts at speech regulation have failed. The courts have been unable to find a way to help the FCC to even encourage diverse voices.

The media was omnipresent in the lives of families. The television was a single-purpose instrument. When the power switch was activated, programming appeared. There was no choice of doing word processing or watching Hulu. Besides the power switch, the other two important controls were the volume control, which was set for comfortable listening, and the channel dial, which had as few as three active choices and in the largest markets, perhaps fewer than twenty choices of which just a few attracted the vast majority of all viewing. As of 1970, the viewing of the three major networks was 90% of the audience.¹⁴⁹ Children of just a few years of age were able to fully operate all of these functions. No entry of a password was needed, only the ability to turn on the power switch and turn a couple of knobs. This aspect, that of being uniquely accessible to young people, justified special regulation, including restrictions on bad language and affirmative requirements of programming to further the educational and informational needs of children.

And the Supreme Court upheld these regulations: protection of children was found to be a legitimate governmental interest.¹⁵⁰ In *Federal Communications Commission v. Pacifica Foundation*, the Supreme Court held that protection of children during the hours that children were likely to be awake was perfectly fine, but they also balanced that with permission to air programs more suitable for an adult-aged audience after the children went to bed.¹⁵¹ Numerous cases went back and forth, and legislation as well as FCC regulatory action attempted for many years to determine, essentially, what time the “national bedtime” for children should be, after which time more adult-themed programs could be aired.¹⁵² The controversy was to protect children, and perhaps the public in general, from mostly language and brief nudity in the cases that went to the FCC.¹⁵³

Television producers performed the functions of what, in today's terms, would be called “influencers.” They were few in number, easy to spot, and distributed their product by fixed channels in the television or

¹⁴⁷ Schurz Commc'n, Inc. v. F.C.C. 982 F.2d 1043 (7th Cir. 1992).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1046.

¹⁵⁰ F.C.C. v. Pacifica Found., 438 U.S. 726 (1978).

¹⁵¹ *Id.* at 749-50.

¹⁵² For an overview of the post-*Pacifica* landscape, see Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy Over Broadcast Indecency*, 63 FED. COMM'N L. J. 195 (2010).

¹⁵³ See, *Action for Children's Television v. F.C.C.*, 11 F. 3d 170 (D.C. Cir 1993); *F.C.C. v. Fox Television Stations, Inc.*, 567 US 239 (2012).

radio spectrum. In addition to the ease of the audience to tune in to the product and programming, it was also easy for the government to monitor the networks for anything untoward. Those things might be bad language, or an unfair and unbalanced newscast, but content regulation was relatively easy when compared to the volume and range of sources on the internet. Even at that, the government failed. For while in *Pacifica* the Supreme Court protected the ears of children from the language of George Carlin during a mid-day broadcast, a few years later in *Fed. Commc'n Comm'n v. Fox Television Stations*, the same Court said it was acceptable to expose the eyes of children to nudity on mid-day television.¹⁵⁴ The rationales in the cases were good, but the disparate outcomes demonstrate that the same children might or might not be protected, so the government cannot really decide on consistent speech regulation.

II. CALLS FOR NEW SOLUTIONS

The United States has attempted to regulate “fairness” of broadcasts.¹⁵⁵ At first, many cities only had four main channels—the three main commercial networks plus PBS.¹⁵⁶ Sure, some cities had independent stations and there were claims of unfairness against these stations, but the big claims were against the networks. Each of the three main networks had approximately 200 affiliate stations and reached most of the country, so that is where the power was and what the government was interested in regulating.¹⁵⁷

The reason that the government could regulate radio and television at all was the license that these stations operated under, which is issued by the federal government.¹⁵⁸ The stations broadcast over the air on something called “spectrum.”¹⁵⁹ This spectrum was allocated by international treaty and each national government was in charge of issuing the licenses and authorizations to use the spectrum within its boundaries and also in charge of removing those who did not use the spectrum in accordance with the treaty.¹⁶⁰ If a station misused its spectrum allocation, it could cause interference to other stations, including those in other countries. In the interest of international order, the FCC regulated the spectrum for commercial, non-governmental stations in the United States, and concomitant organizations around the world regulated the spectrum for their own countries.¹⁶¹ In this

¹⁵⁴ 567 US 239 (2012).

¹⁵⁵ See KRATTENMAKER & POWE, *supra* note 142 at 62.

¹⁵⁶ See Fitzpatrick, *supra* note 139. See also Elizabeth Jensen, *PBS Showed TV the Future. But What Does Its Own Look Like?*, N.Y. TIMES (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/arts/television/pbs-future.html>. There were also independent television stations, but their impact was local.

¹⁵⁷ *Schurz Commc'ns, Inc. v. F.C.C.*, 982 F.2d 1043 (7th Cir. 1992).

¹⁵⁸ *Licensing*, FED. COMM'C'N COMM'N, <https://www.fcc.gov/licensing> (last visited Jan. 29, 2021).

¹⁵⁹ *Id.*

¹⁶⁰ See ITU-R: *Managing the Radio-Frequency Spectrum for the World*, ITU (Dec. 2019), <https://www.itu.int/en/mediacentre/backgrounders/Pages/itu-r-managing-the-radio-frequency-spectrum-for-the-world.aspx>.

¹⁶¹ *International*, NAT'L TELECOMM. INFO. ADMIN. <https://www.ntia.doc.gov/category/international> (last visited Jan. 29, 2021).

overarching structure, the FCC allocated the non-governmental uses of spectrum in the United States and provided regulations for its fair and efficient use.¹⁶² At least, that was the theory. As one can imagine, between the ideas for broadcasting, satellites, telephone, wireless internet, medical, scientific, research, and many, many other uses, the allocation of spectrum is competitive and causes lag, a situation described as “spectrum scarcity.”¹⁶³ Although there are technological solutions for spectrum scarcity, the users are slow to change, so the lag time in changing uses and the costs in changing the technology and the rapid development of new technology that demand new spectrum lead to a continuing stress on access to the spectrum.¹⁶⁴

Pursuant to public policy and regulations promulgated by Congress, the FCC was authorized to make these allocations domestically and also to provide regulations for the orderly use of the licenses.¹⁶⁵ Some of these regulations involved the regulation of the speech and content on the radio and television stations, often at Congress’ insistence.¹⁶⁶ The United States Supreme court has upheld these regulations, both structural and content-related, on the basis of the FCC’s licensing authority which was in turn grounded in the spectrum scarcity.¹⁶⁷

Perhaps the most major speech regulation attempt in the history of the United States government was the Fairness Doctrine. Many books and articles have been written about the Fairness Doctrine, which was the key to FCC and governmental regulation of the content of media programming.¹⁶⁸ There were two basic parts to the “issues” portion of the doctrine: First, licensees had “an affirmative obligation to provide coverage of ‘vitaly important controversial issues of interest in the community served by the broadcaster.’”¹⁶⁹ Second, the broadcaster

¹⁶² F.C.C., SECOND MEMORANDUM OPINION AND ORDER NO. 96-86, THE DEVELOPMENT OF OPERATIONAL, TECHNICAL, AND SPECTRUM REQUIREMENTS FOR MEETING FEDERAL, STATE AND LOCAL PUBLIC SAFETY AGENCY COMMUNICATION REQUIREMENTS THROUGH YEAR 2010, ESTABLISHMENT OF RULES AND REQUIREMENTS OF PRIORITY ACCESS SERVICE (2000).

¹⁶³ See Murray J. Rossini, *The Spectrum Scarcity Doctrine: A Constitutional Anachronism*, 39 Sw. L. J. 827 (1985).

¹⁶⁴ An example of this phenomenon is the strain on the internet from the COVID-19 pandemic. See Cecilia Kang, et al., *Surging Traffic Is Slowing Down Our Internet*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/business/coronavirus-internet-traffic-speed.html>.

¹⁶⁵ F.C.C. SPECTRUM POLICY TASK FORCE, REPORT OF THE SPECTRUM EFFICIENCY WORKING GROUP (2002) at 8.

¹⁶⁶ See e.g., Children’s Televisions Act of 1990, Pub. L. 101-437 (101st Cong. 1990).

¹⁶⁷ *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

¹⁶⁸ See eg. FRED FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING, (Random House 1976); DOM CARISTI, EXPANDING FREE EXPRESSION IN THE MARKETPLACE: BROADCASTING AND THE PUBLIC FORUM, (Routledge 1992); KATHLEEN ANN RUANE, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES, (Congressional Research Service 2011); STEPHEN J. SIMMONS, FAIRNESS DOCTRINE AND THE MEDIA, (1978); DONALD J. JUNG, THE FEDERAL COMMUNICATIONS COMMISSION, THE BROADCAST INDUSTRY, AND THE FAIRNESS DOCTRINE 1981-1987, (Univ. Press 1996); Donald P. Mullally, *The Fairness Doctrine: Benefits and Costs*, 4 PUB. OP. Q. 33 (1969-70).

¹⁶⁹ Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine A ‘Chilling Effect’? Evidence from the Postderegulation Radio Market*, 26 J. L. STUD., 279, 280 (1997).

needed to provide equal access for contrasting viewpoints.¹⁷⁰ However, the Fairness Doctrine was ultimately struck down, showing that government attempts to shape even the presentation of speech were a failure.¹⁷¹

In 2005, during the George W. Bush administration, the conflicts were similar to those of today. According to Eric Umland, the Democrats were critical of Fox news and talk radio and the Republicans were critical of the “liberal press” and NPR.¹⁷² There were proposals in Congress to once again regulate the viewpoints expressed via the media.¹⁷³ But regulation had not been successful in the past, so no new regulation was adopted.

When the government decided that it needed to get out of the business of regulating “fairness” it took some time, but eventually, the FCC decided to end the Fairness Doctrine, which it did in 1987.¹⁷⁴ It was just too unwieldy for the federal government to be the arbiter of what was a “fair” presentation of issues, and what were “sufficient” opposing viewpoints. Whatever the station decided, there was always someone in the marketplace who could second guess the programming decision and file a complaint with the FCC. The FCC would often take years to resolve fairness complaints, and that would vitiate the process.

The problems involved with the enforcement of the Fairness Doctrine, overuse of complaints, and delay-in-the-system, have been described by Bob Mulholland, former president of NBC News:

When I was at NBC, we broadcast “Holocaust,” a much-acclaimed fictional mini-series based on fact. A group complained, saying the Holocaust never happened. It wanted air time to say so. We refused. A fairness complaint was filed against the network with the FCC, which judged the program fair. The group appealed in court. Three years later, we were upheld. An NBC news documentary, “Pensions: The Broken Promises,” reported that some people, to their surprise upon retirement, found they had no pension. A group said not all pension plans were bad, and even though we said that in the program, the FCC ruled against us. We went to court and again, after three years of litigation, won. How many smaller broadcasters could have spent the money to support their belief?¹⁷⁵

The direct overload of the system caused the FCC to throw up their hands and eliminate the fairness doctrine, and once they did so, the AM stations saw the rise of opinion radio and the daytime talk shows.¹⁷⁶ These

¹⁷⁰ *Id.*

¹⁷¹ See Dylan Matthews, *Everything You Need to Know About the Fairness Doctrine in One Post*, WASH. POST (Aug. 23, 2011), https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ_blog.html.

¹⁷² See, Eric Umland, *The Fairness Doctrine Redux: Media Bias and the Rights of Broadcasters*, 7 MINN. L. J. SCI. & TECH. 301 (2005).

¹⁷³ See *id.* at 301-303.

¹⁷⁴ Matthews, *supra* note 171.

¹⁷⁵ Robert Mulholland, *The Fairness Doctrine is Unfair to the Public*, CHI. TRIB. (May 30, 1989), <https://www.chicagotribune.com/news/ct-xpm-1989-05-30-8902050312-story.html>.

¹⁷⁶ Kevin M. Kruse & Julian Zelizer, *How Policy Decisions Spawned Today's Hyperpolarized Media*, WASH. POST (Jan. 17, 2019),

shows attracted much larger audiences than the traditional fare of AM stations and since they were a talk-based format, they were not at the same disadvantage as the music formats. Music on AM radio would lose out to the FM stations because the AM stations could only air a fraction of the sound quality, and were therefore destined to be overtaken by the high-quality musical sounds of FM. However, talk-based broadcasts such as sports, news, and opinion radio shows succeeded on these stations and became the bread and butter of AM radio. Ever since the abolition of the fairness doctrine, we have been able to have one-sided opinion in the media. Many who oppose a resurrection of the doctrine, but some believe it would resume more thoughtful debate rather than partisan ranting and raving.¹⁷⁷ And some even say that the abolishment of the Fairness Doctrine thirty-some years earlier led to the election of former President Trump.¹⁷⁸

In the Fairness Doctrine's heyday, Henry Geller wrote an analysis for Rand that noted the complexities of enforcement of the doctrine.¹⁷⁹ The FCC would need to determine how many viewpoints were enough. Two? Three? More? Then it would need to determine which viewpoint each moment of a broadcast held, whether "for," "against," or "neutral," and dictate the amount of time devoted to each viewpoint.¹⁸⁰ Imagine a regime where government employees are attempting to make such determinations for each article posted to the internet. There are currently a total of 21,684 broadcast radio and television stations located across the country of all power levels, from those that reach a few blocks to the major metropolitan stations, but even with these thousands of stations broadcasting, they have limited capacity.¹⁸¹ Compare that to just one social media platform, YouTube, that has five billion videos, with five hundred new videos uploaded every minute.¹⁸² The difference in scale of potential enforcement is enormous.

And whether or not the Fairness Doctrine were to raise its head again—and it has been discussed in recent years¹⁸³—many have called for the regulation of social media. During the 2020 election, Vice President Kamala Harris suggested that Twitter deactivate former President

<https://www.washingtonpost.com/outlook/2019/01/17/how-policy-decisions-spawned-todays-hyperpolarized-media/>.

¹⁷⁷ Nancy Graham Holm, *Bring Back the Fairness Doctrine: I'd Rather Have Debate Than Ranting-and-Raving Journalism*, HUFFPOST (Feb. 13, 2014 at 11:43AM), https://www.huffpost.com/entry/bring-back-the-fairness-d_1_b_4775492.

¹⁷⁸ Fred Lundgren, *Did The Demise Of The Fairness Doctrine Lead To Trump's Election?*, HUFFPOST (Feb. 26, 2017), https://www.huffpost.com/entry/what-lead-to-the-demise-of-respectful-political-discourse_b_58b33175e4b0658fc20f96f6.

¹⁷⁹ HENRY GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING: PROBLEMS AND SUGGESTED COURSES OF ACTION* (1973).

¹⁸⁰ *Id.* at vi.

¹⁸¹ Federal Communications Commission, *Broadcast Station Totals as of March 31, 2020*, FCC DOCUMENT 363515A1 (Apr. 6, 2020), <https://www.fcc.gov/document/broadcast-station-totals-march-31-2020>. (Excludes "translators" that repeat a station's signal.)

¹⁸² *YouTube By the Numbers: Stats, Demographics, & Fun Facts*, OMNICORE (Feb 10, 2020), <https://www.omnicoreagency.com/youtube-statistics/>.

¹⁸³ KATHLEEN ANN RUANE, *FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES* (2011).

Trump's account,¹⁸⁴ a rallying cry that was ultimately heard.¹⁸⁵ Mark Zuckerberg, president of Facebook, has been called to testify before Congress about how Facebook handles political speech.¹⁸⁶ Almost anything that the public views in any media, the public can complain about, creating havoc within any system for thoughtful review. Shakira and J.Lo performed the 2020 Super Bowl halftime show and the FCC received more than 1300 complaints that there was too much sexuality in the show and that it was not appropriate for children.¹⁸⁷ That was not the first Super Bowl halftime show to receive numerous FCC complaints. In 2004, the FCC received over 200,000 complaints about the halftime show featuring Janet Jackson and Justin Timberlake.¹⁸⁸ If the public differs so much over the content of a football halftime show, the regulation of billions and billions of pieces of internet media information will easily overwhelm government and company alike.

The Fairness Doctrine permitted both sides of interest to use regulation against free speech:

[T]he DNC seized upon the Fairness Doctrine as a way to counter the "radical right" in their battle to pass the treaty. The Citizens Committee for a Nuclear Test Ban Treaty, which was established and funded by the Democrats, orchestrated a very effective protest campaign against hostile radio editorials, demanding free reply time under the Fairness Doctrine whenever a conservative broadcaster denounced the treaty.¹⁸⁹

Similarly, it worked as well for the other side. When Nixon became President, his staff used the Fairness Doctrine and threats against the licenses to chill the speech of broadcasters in a sophisticated and programmed manner. The Fairness Doctrine was escalated by both sides to interfere with the free speech of the other side, depending on who was in the White House. The Fairness Doctrine is an equal opportunity discriminator against speech.¹⁹⁰

So the FCC began deregulating radio, moving away from viewpoint regulation, and eventually eliminating the Fairness Doctrine and its biggest headache.¹⁹¹ With all of the diverse media outlets in the internet age, why would we need to control viewpoints on just a few media

¹⁸⁴ Zohreen Shah & Armando Garcia, *2020 Candidate Sen. Kamala Harris Calls on Twitter to Suspend President Trump's Account*, ABC NEWS (Oct. 3, 2019, 1:38 AM), <https://abcnews.go.com/Politics/2020-candidate-sen-kamala-harris-calls-twitter-suspend/story?id=66010391>.

¹⁸⁵ *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html.

¹⁸⁶ Camila Domonoske, *Mark Zuckerberg Tells Senate: Election Security is an 'Arms Race'*, NPR (Apr. 10, 2018, 2:30 PM), <https://www.npr.org/sections/thetwo-way/2018/04/10/599808766/i-m-responsible-for-what-happens-at-facebook-mark-zuckerberg-will-tell-senate>.

¹⁸⁷ Aala Essar, *Over 1,300 Complaints Were Sent to the FCC About Shakira and J.Lo's Super Bowl Halftime Show*, CNN (Feb. 26, 2020, 12:57 AM), <https://www.cnn.com/2020/02/25/us/shakira-jlo-super-bowl-halftime-show-fcc-complaints-trnd/index.html>.

¹⁸⁸ *FCC Acknowledges Hundreds of Thousands Who Have Complained About Super Bowl Halftime Show*, FCC (Feb. 6, 2004), <https://www.fcc.gov/document/fcc-acknowledges-hundreds-thousands-who-have-complained-about-super-bowl>.

¹⁸⁹ Hazlett & Sosa, *supra* note 169.

¹⁹⁰ Roscoe L. Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L. J. 659, 660 (1975).

¹⁹¹ *In re Deregulation of Radio*, 84 F.C.C.2d 968 (1981).

companies? Facebook has already proven that it will still have the same problem—one of quantity as it attempts to moderate speech. The website’s new “speech review” group was only able to handle five cases in its first attempt at providing content review.¹⁹²

III. THE FUTILITY OF PAST REGULATION

A. *Compelled and Restricted Speech*

In addition to attempts to regulate the “fairness” of speech by broadcasters, a form of passive-observatory regulation, there has also been a more pro-active type of regulation—one that “compelled” speech.¹⁹³ There have been numerous regulations to “compel” speech, which occurs when a media entity is forced to provide speech or programming that it would not otherwise air. Two major examples are public affairs programming¹⁹⁴ and children’s television programming.¹⁹⁵ Both have noble reasons for their existence. One is to create a public debate on issues of importance and the other is to provide educational and informational programming to children. However, when faced with the demand to provide these types of programs, the media responded by putting the public affairs programming in the least-watched time segment that it could get away with, that being Sunday mornings.¹⁹⁶

As for children’s television, there are many meritorious children’s programs, and certainly some were prodded by the rules and regulations, but the media who did not want to provide children’s television did things like offering up the *Flintstones* cartoon as a show that helped fulfill its children’s educational television obligation.¹⁹⁷ The motivated media company can often find ways around the best-intentioned rules. Compelled speech is a futile method of attempting to resolve a social problem, the person or media compelled to speak may not share the same motivations and sensibilities and those compelling the speech. The simple attempts to regulate children’s television on a limited and identifiable number of broadcast stations and cable outlets have run up against regulatory disfavor and the FCC would like to eliminate those rules.¹⁹⁸ If we cannot regulate children’s television, what speech can we

¹⁹² Dylan Byers, *Facebook’s ‘Oversight Board’ Overturns Four Cases in First Rulings*, NBC NEWS (Jan. 28, 2021, 9:00 AM), <https://www.nbcnews.com/tech/tech-news/facebook-s-first-oversight-board-rulings-overturn-four-five-cases-n1255960>.

¹⁹³ See, e.g. Tony Schwartz, *Some Say This is America’s Best TV Station*, N.Y. TIMES (Feb. 15, 1981) <https://www.nytimes.com/1981/02/15/arts/some-say-this-is-america-s-best-tv-station.html>.

¹⁹⁴ *The Public Interest Standard in Televisions Broadcasting*, CURRENT (Dec. 18, 1998), <https://current.org/1998/12/the-public-interest-standard-in-television-broadcasting/>.

¹⁹⁵ See generally Clay Calvert, *The First Amendment, Compelled Speech & Minors: Jettisoning the FCC Mandate for Children’s Television Programming*, 107 KY. L. J. 35 (2018).

¹⁹⁶ *Public Affairs (Broadcasting)*, EPFLGRAPH (Feb. 1, 2021, 7:41 AM), [https://graphsearch.epfl.ch/concept/8045210/Public-affairs-\(broadcasting\)](https://graphsearch.epfl.ch/concept/8045210/Public-affairs-(broadcasting)).

¹⁹⁷ Edmund L. Andrews, *‘Flintstones’ and Programs Like it Aren’t Educational, F.C.C. Says*, N.Y. TIMES (Mar. 4, 1993).

¹⁹⁸ Ted Johnson, *FCC Takes First Step Toward Easing Children’s Television Mandates on Broadcasters*, VARIETY (July 12, 2018, 11:02 AM),

regulate?

The government has been able to censor media speech during times of war.¹⁹⁹ Is that not a sign that regulation is possible? The speech that the government was able to censor included the recognized magazines and broadcasters; the government knew where all of these media sources were.²⁰⁰ But technology today presents a much bigger challenge. The internet is a redundant network. It is composed of complex networks of computers that find ways around blockages. We now have several global wireless networks like satellites and cellular telephones that find ways out of even protected countries.²⁰¹ Other technologies such as Virtual Private Networks (VPNs) and Tor software can also work to get around internet blockades.²⁰² But the difficulty with controlling internet speech can be shown best through failures to control pernicious speech such as terrorist speech. There are active attempts to censor such speech and recommendations for further action.²⁰³ But as long as the internet is open access, it is difficult to truly censor or stop anything.

Twitter and Facebook have reported that China has adopted some tactics used by the Russians²⁰⁴ in the conflict over the autonomy of the Hong Kong province.²⁰⁵ Facebook and Twitter have not been blocked in Hong Kong.²⁰⁶ The Chinese government requested user information for account holders in Hong Kong, and the social media giants refused to give that data over after controversial new security law was applied to Hong Kong.²⁰⁷ In some cases, these companies become arbiters of social order; Twitter gave the Chinese a month before they would deactivate accounts from their platform.²⁰⁸

Twitter allegedly prohibited dissenting voices in the Egypt protests in 2019,²⁰⁹ and was reported as having suspended accounts

<https://variety.com/2018/politics/news/fcc-childrens-television-broadcasters-1202871448/>.

¹⁹⁹ David L. Hudson, Jr., *Free Speech During Wartime*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1597/free-speech-during-wartime> (last visited Jan. 29, 2021).

²⁰⁰ See U.S. GOVERNMENT OFFICE OF CENSORSHIP, A REPORT ON THE OFFICE OF CENSORSHIP (Nov. 15, 1945).

²⁰¹ See Diane Macedo, *Egyptians Use Low-Tech Gadgets to Get Around Communications Block*, FOX NEWS (Jan. 28, 2011), <https://www.foxnews.com/science/egyptians-use-low-tech-gadgets-to-get-around-communications-block>.

²⁰² Reem Nasr, *How to Get Around Government Curbs on the Internet*, CNBC (Apr. 16, 2015), <https://cnb.cx/3bFcrGB>.

²⁰³ See, Melissa J. Morgans, *Freedom of Speech, the War on Terror, and What's YouTube Got to Do With It: American Censorship During Times of Military Conflict*, 69 FED. COMM'N L. J. 145 (2017).

²⁰⁴ Kate Conger, *Facebook and Twitter Say China is Spreading Disinformation in Hong Kong*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/technology/hong-kong-protests-china-disinformation-facebook-twitter.html>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Hadas Gold, *Facebook, Google and Twitter Won't Give Hong Kong Authorities User Data for Now*, CNN BUS. (July 7, 2020, 5:59 AM), <https://www.cnn.com/2020/07/06/tech/whatsapp-facebook-hong-kong/index.html>.

²⁰⁸ *Id.*

²⁰⁹ Megha Rajagopalan, *Twitter "Silenced" Dissenting Voices During Anti-Government Protests in Egypt*, BUZZFEED (Oct. 25, 2019, 2:29 PM),

critical of the Egyptian president.²¹⁰ But Twitter can also be an important route of getting information about protests. In the Iranian protests of 2009, western media received reports from protesters via Twitter, email, and text.²¹¹ Twitter has been used for planning and organizing protests.²¹² It has also been used in the Arab Spring, London Riots, Thailand Protests, Occupy Wall Street, and Occupy Oakland.²¹³

B. Counterspeech

How about providing for “more” speech—funding organizations who will be fairer arbiters of speech? “More speech” or “counterspeech” is the presenting of contrary, hopefully truthful views to counteract other speech. This approach does offer up a choice of speech that people get to make up their own minds about. To the extent that distribution is equal, there is something to be said about counterspeech. But Professor Philip Napoli, who teaches at Duke’s Sanford School of Public Policy, and others are beginning to criticize counterspeech as not the solution that it used to be.²¹⁴ Their arguments are good in light of current technologies. Napoli, for example, critiques counterspeech on a number of grounds: First, that the doctrine is based on the assumption that the marketplace of ideas has the ability to distinguish between truth and falsity; second, that the marketplace places a greater value on true news over false information; third, that there is no such thing as too much speech; and fourth, that there are a sufficient number of people who were exposed to the false information that will also be “exposed to the countervailing true information.”²¹⁵ He notes that inherent in the internet, there is diminished reliance on gatekeepers such as broadcast stations, cable stations, and newspapers for information, and therefore, via the open internet the opportunities to distribute news have increased.²¹⁶ Further, he notes that even gatekeeping related to ad dollars is no longer within human control, but rather “increasingly handled by algorithmically-driven ad placement networks.”²¹⁷ Finally, he points out that in the conditions of the modern “news ecosystem,” counterspeech is likely to be false speech.²¹⁸

Others disagree with Professor Napoli. In a recent article, Nadine Strossen, professor and former president of the ACLU, and author of *Hate: Why We Should Resist It with Free Speech, Not Censorship*,²¹⁹

<https://www.buzzfeednews.com/article/meghara/twitter-egypt-protests-accounts-suspended>.

²¹⁰ *Id.*

²¹¹ Jared Keller, *Evaluating Iran’s Twitter Revolution*, ATLANTIC (June 18, 2010), <https://www.theatlantic.com/technology/archive/2010/06/evaluating-irans-twitter-revolution/58337/>.

²¹² Mohsen Bahrami, et al., *Twitter Reveals: Using Twitter Analytics to Predict Public Protests*, ARXIV (May 1, 2018), <https://arxiv.org/abs/1805.00358>.

²¹³ *Id.* at 3.

²¹⁴ See Philip M. Napoli, *What if More Speech is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM’N L. J. 55 (2017).

²¹⁵ *Id.* at 61.

²¹⁶ *Id.* at 71.

²¹⁷ *Id.* at 71.

²¹⁸ *Id.* at 74.

²¹⁹ NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* xxiii (May 1, 2018).

argues in favor of the doctrine of counterspeech, saying that hate speech, which is the most difficult of the types of speech, “has no single legal definition, and in our popular discourse it has been used loosely to demonize a wide array of disfavored views.”²²⁰ The counterspeech doctrine was first promulgated in “Justice Louis Brandeis’ concurring opinion in *Whitney v. California* (1927) in which he wrote that the preferred remedy to harmful expression is ‘more speech, not enforced silence.’”²²¹

Counterspeech is as effective as anything else. To the extent it is true, counterspeech is helpful. However, in the present world where regulation is becoming ineffective, counterspeech may also be growing to be useless. It is now easy to fake sources, to fake pictures, and to fake all of the essence of the news. Everything about news is no longer something that a viewer can take at face value. This goes beyond clever, even deceptive editing: all of the video world can be fake, words can now literally be put into people’s mouths with no discernable artifacts. For example, a group of researchers at MIT created a video in 2020, one that never existed, of former (and deceased) President Nixon making a speech that the astronauts who landed on the moon in 1969 had died and would not be returning to earth.²²² “Fake news” because of viewpoint criticism can now be literally fake news due to technology. Once people can no longer believe their eyes, regulation of fake news is futile.

Professors Chesney and Citron’s groundbreaking work on “deepfakes” tells us that there is no image that might not be faked.²²³ The use of powerful computers and artificial intelligence can create any image, and a believable image at that.²²⁴ This is more than a mere politician’s allegation of “fake news” regarding a perspective that may be unfavorable to that politician; this is the actual creation of truly fake news, truly fake images, truly fake words, fake images that the best Hollywood movie producer would be proud of. Technology that permits the user to manipulate the images that people rely on exists and is accessible to many. Chesney and Citron call it the “hyper-realistic digital falsification of images, video, and audio.”²²⁵

One of the ways of evaluating the truthfulness of speech is to be able to identify its source. A source with a good reputation is more trustworthy. A phenomena of the current time is “Cloaked Speech,” speech that has no discernable source,²²⁶ or even a source listed that is

²²⁰ David Hudson, Jr., *Free Speech or Censorship? Social Media Litigation is a Hot Legal Battleground*, ABA J. (Apr. 1, 2019).

²²¹ *Id.*

²²² Jeffery DelViscio, *A Nixon Deepfake, a ‘Moon Disaster’ Speech and an Information Ecosystem at Risk*, SCI. AM. (July 20, 2020), <https://www.scientificamerican.com/article/a-nixon-deepfake-a-moon-disaster-speech-and-an-information-ecosystem-at-risk1/>; *Tackling the Misinformation Epidemic with “In Event of Moon Disaster”*, MIT NEWS (July 20, 2020), <https://news.mit.edu/2020/mit-tackles-misinformation-in-event-of-moon-disaster-0720>.

²²³ See generally Chesney & Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, *supra* note 2.

²²⁴ *Id.* at 1756.

²²⁵ *Id.* at 1757.

²²⁶ Johan Farkas & Christina Neumayer, *Disguised Propaganda from Digital to Social Media*, in SECOND INTERNATIONAL HANDBOOK OF INTERNET RESEARCH (J. Hunsinger et al. eds., 2018).

fake, deceptive, or nonexistent.²²⁷ The FCC was never able to deal with “fake news” during the heyday of the Fairness Doctrine. One of the most exhaustive studies of the Fairness Doctrine was performed by Henry Geller of the Rand Corporation who characterized the FCC’s handling of complaints about news:

Increasingly, the FCC has received complaints that some news presentations were deliberately slanted or staged. The Commission has held that it is not the national arbiter of the “truth,” and that therefore it will not intervene in the news process where there is no extrinsic indication of slanting or staging.²²⁸

The FCC, the government itself, refused to be the arbiter of truth when it came to news. Geller also recognized that government enforcement itself can affect the desire and ability of people to speak: “This raises obvious problems of ‘chilling’ investigative or robust programming in this most sensitive news area.”²²⁹ If a company knows that the government is going to be ready to post-judge its speech, it could curb its interest to speak boldly, or to advance or permit others to speak to advance controversial issues. Why take a chance, especially on someone else’s speech?

C. Regulation of the Internet

Regulation of the internet has already been attempted by the US Government—and it failed. The easiest type of content to regulate should be indecency or obscenity. There would, at first thought, seem to be little to no grey areas. But even in this almost-binary consideration of pernicious speech, the Supreme Court has found that Congress’s major move to regulate internet speech was too broad.²³⁰ Several problems accumulated in the world of internet regulation. One of them was the plenary availability of pornography. This led to the passage of the Communications Decency Act (CDA) as part of the Telecommunications Act of 1996.²³¹ A case addressing the constitutionality of the CDA, *Reno v. American Civil Liberties Union*, went all the way up to the Supreme Court, where in a seven to two decision, the Court held the regulation of indecent speech on the internet was unconstitutional.²³² In this case, the Court considered a lesser restriction, age verification, as an alternative to banning content,²³³ but ultimately found that there is no reliable way of determining either the identity or the age of the person using the internet.²³⁴ The Court further observed:

Moreover, even if it were technologically feasible to block minors’ access to newsgroups and chat rooms containing discussions of art, politics, or other subjects that potentially elicit “indecent” or “patently

²²⁷ See generally Jessie Daniels, *Race, Civil Rights, and Hate Speech in the Digital Era*, in *LEARNING RACE AND ETHNICITY: YOUTH AND DIGITAL MEDIA* 129-154 (Anna Everett ed., MIT Press 2008).

²²⁸ HENRY GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING: PROBLEMS AND SUGGESTED COURSES OF ACTION* 13 (Dec. 1973).

²²⁹ *Id.* at 13.

²³⁰ See *Reno v. ACLU*, 521 U.S. 844 (1987).

²³¹ Pub. L. No. 104-104 (1996).

²³² See *Reno*, *supra* note 230..

²³³ *Id.* at 855.

²³⁴ *Id.*

offensive" contributions, it would not be possible to block their access to that material and "still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent."²³⁵

The Court noted that the Act would prohibit many indecent but not obscene things, and cited to *Pacifica*, where it faced a similar challenge to indecent material on broadcast stations.²³⁶ The determination of what is indecent is not a simple matter.

Finally, the Supreme Court's jurisprudence in the area of obscenity, an area that should be simple and straightforward when compared to the complexities of political speech, is summed up by Justice Potter Stewart in his concurring opinion in *Jacobellis v. Ohio*, where he noted that obscenity is difficult to define, but he knows it when he sees it.²³⁷ If the Supreme Court wrestles with what should be a simple concept like obscenity, how can there be any hope for clear definitions that companies can follow on political speech? What are the lines for political speech? And how do you determine that some speech has crossed over those lines?

The Court in *Reno* overturned the basic internet obscenity regulation, finding that: "We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech."²³⁸ The imprecision of the law was its downfall.²³⁹ But if one cannot—after many years of attempting, from the first generation of consideration in *Jacobellis* to the internet-generation consideration in *Reno*—define obscene speech, how can we expect to have any success at setting up a rubric of what constitutes acceptable political speech?

The Court has taken on the murky question of political speech many times, most recently is in *Citizens United v. Federal Election Commission*²⁴⁰ in which the Court interpreted the Bipartisan Campaign Reform Act of 2002. The Act prohibited corporations and unions from spending money on "electioneering communications" or for speech that advocates election or defeat of a candidate.²⁴¹ The Court ruled that although the government may "regulate corporate political speech through disclaimer and disclosure requirements . . . it may not suppress that speech altogether."²⁴² *Citizens United* is a non-profit that engages in advocacy. Some of its funding comes from corporations, and in 2008, it released a film entitled *Hillary: The Movie*, a 90-minute documentary about Hillary Clinton, who was a candidate for President at the time.²⁴³

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by

²³⁵ *Id.* at 856.

²³⁶ *Id.* at 845.

²³⁷ 378 U.S. 184, 197 (1964).

²³⁸ *Reno*, 521 U.S. at 874.

²³⁹ "The regulated subject matter includes any of the seven 'dirty words' used in the *Pacifica* monologue, the use of which the Government's expert acknowledged could constitute a felony. . . . It may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library." *Id.* at 878.

²⁴⁰ 588 U.S. 310 (2010).

²⁴¹ *Id.* at 319.

²⁴² *Id.* at 311.

²⁴³ *Id.* at 312.

restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”²⁴⁴

The Supreme Court described the attributes of political speech as a special type of speech prized above all others because it goes to the heart of the democracy. Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.²⁴⁵ The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”²⁴⁶

The Supreme Court further noted that the First Amendment protects against viewpoint discrimination as well as “restrictions distinguishing among different speakers, allowing speech by some but not others.”²⁴⁷ The Court struck down entirely the regulation against corporations and unions participating in elections. This inherently gives permission to a full spectrum of viewpoints being injected into the election cycle, whether it might be international opinion from corporations or unions with international ownership or viewpoints. There was no “citizenship test” in *Citizens United* for the corporations or unions whose voices were fully enfranchised by the decision.²⁴⁸

D. *Speech of Private Actors and Forums*

While we should use our experience with the Fairness Doctrine, protecting children, required public affairs programming, attempts to diversify voices, and all of the other prior attempts to regulate speech, we must also understand that speech is like sand or water: it flows uncontrollably, it moves to fill in gaps wherever there is the slightest room, to occupy and convince. Our prior attempts to use private actors like the private media has been abysmal. It is impossible to delegate choice, taste, and judgment and get the desired outcome. A private actor will make their own choices.

Facebook has instituted a review of posts,²⁴⁹ as has Twitter.²⁵⁰ But if social networks are to monitor content, who decides what should be taken down? A human who carries personal biases and uses human judgement? And what of corporate policy? Even in the purest of worlds,

²⁴⁴ *Id.* at 339 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1978)).

²⁴⁵ *See Buckley*, 424 U.S. at 14-15 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”).

²⁴⁶ *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)); *see Buckley*, 424 U.S. at 14.

²⁴⁷ *Citizens United v. Fed. Election Comm’n*, 588 U.S. 310, 340 (2010).

²⁴⁸ *See generally id.*

²⁴⁹ *See Amy Fesenhues, Facebook’s Content Review Policy: How it Works, the Teams & Tech Behind the Reviews & the Results So Far*, MKTG. LAND (Aug. 9, 2018, 10:00 AM), <https://marketingland.com/facebooks-content-review-policy-how-it-works-the-teams-tech-behind-the-reviews-the-results-so-far-245630>.

²⁵⁰ *See Sensitive Media Policy*, TWITTER HELP CTR. (Nov. 2019), <https://help.twitter.com/en/rules-and-policies/media-policy>.

corporate policy can be influenced by profit motives. Will Twitter really shut down an account that has 70 million followers and that millions of people retweet, that millions comment upon and that generates lots of traffic?²⁵¹ Further, a good controversy gets shots of a tweet put on the screen of every Sunday talk show on several networks, and if it is really controversial, it will show up on every nightly newscast plus the weekend shows and be discussed by the nighttime comedy shows. Imagine the free publicity the Twitter bird logo gets every time there is a tweet of controversy. There are fiscal motivations that can enter into the judgment calls. Frank Fagan observes that social media and government have very different motivations:

Social media platforms such as Facebook, YouTube, and Twitter pursue managerial interests, which include profit, corporate image, long-term viability, good citizenship, and friendly regulatory environments. These stand in contrast to gubernatorial interests, which are pursued by governments, and include the promotion of free speech, the development of e-commerce, counter terrorism initiatives, and the discouragement of hate speech.²⁵²

For instance, take the hypothetical of YouTube considering the removal of a terrorist recruitment video; it is considering a speech question and also exercising a quasi-judicial-like power. It is obvious that managerial and governmental interests can overlap, especially in an instance like this. YouTube's profitability, corporate image, long-term viability, and capacity to avoid regulation depend on satisfactory operation of its quasi-judicial function. If YouTube fails to remove the video, its corporate image may decline, its users may go elsewhere, and the state may impose costly regulations. Inasmuch as managerial and governmental interests strongly converge, there exists a good case for self-regulation.²⁵³

As Harvard Law Professor Yochi Benkler observes, the internet is not as egalitarian as it has been suggested.²⁵⁴ He notes a concentration of power in the pipelines and basic tools of communication as well as the high degree of attention paid to a few top sites.²⁵⁵ Is regulation of just a few sites permissible? Is it justifiable? Would it meet equal protection standards? If you target regulation toward a few sites, what keeps new sites that avoid the regulation from arising? In a world of fake speech and alternate cryptocurrencies, is there no regulation that technology cannot avoid?

In a speech at Georgetown University, Mark Zuckerberg recognized the traditions of free speech and the difficulties that arise in a

²⁵¹ Twitter currently ranks at number 17 among the social networks with 353 million users. Facebook is number one with over 2.4 billion users. *See Most Popular Social Networks Worldwide as of January 2020, Ranked By Number of Active Users*, STATISTA (Jan. 2021), <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>

²⁵² Frank Fagan, *Social Media Regulation*, 16 DUKE L. & TECH. REV. 393, 396 (2018).

²⁵³ *Id.* at 434.

²⁵⁴ YOCHI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 235 (Yale Univ. Press 2006).

²⁵⁵ *Id.*

free society with free discussion:

We're at another cross-roads. We can continue to stand for free expression, understanding its messiness, but believing that the long journey towards greater progress requires confronting ideas that challenge us. Or we can decide the cost is simply too great. I'm here today because I believe we must continue to stand for free expression.²⁵⁶

Zuckerberg stated that in his world of internet-based media, many more people have a voice—he claims about half of the world.²⁵⁷ And if Facebook is active in removing some content, he believes that they are able to remove 99% of terrorist content before anyone sees it:

This raises a larger question about the future of the global Internet. China is building its own internet focused on very different values, and is now exporting their vision of the internet to other countries. Until recently, the Internet in almost every country outside China has been defined by American platforms with strong free expression values. There's no guarantee these values will win out. A decade ago, almost all of the major internet platforms were American. Today, six of the top ten are Chinese.²⁵⁸

After Twitter imposed a note on two of former President Trump's tweets giving an alternative source of "facts" that would dispute the content of his tweets, the former President criticized all large social media companies.²⁵⁹ Mark Zuckerberg responded by reiterating that Facebook is not an "arbiter of truth" and vowing to protect political speech.²⁶⁰ The former President then signed an executive order limiting protection for companies such as Facebook through Section 230 of the Communications Decency Act.²⁶¹ Former Attorney General Barr endorsed the principal, claiming that the Section 230 protections have "been stretched way beyond its original intention."²⁶² Twitter defended its fact footnotes.²⁶³ The back-and-forth high-stakes political wrestling over the Section 230 protections has begun. Even towards the end of his presidency, Trump was still concerned about Section 230.²⁶⁴ And at the

²⁵⁶ *Mark Zuckerberg: Standing for Voice and Free Expression*, WASH. POST (Oct. 17, 2019), <https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression/>.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Lauren Hirsch & Kevin Breuninger, *Trump Targets Social Media Companies With Executive Order After Twitter Fact-Checks His Tweets*, CNBC (May 28, 2020), <https://www.cnbc.com/2020/05/28/trump-targets-social-media-with-executive-order-after-twitter-fact-checks-him.html>.

²⁶⁰ MacKenzie Sigalos at al., *Zuckerberg Defends Facebook From Trump's Social Media Crackdown and Everything Else You Missed in Business News*, CNBC AFTER HOURS (May 28, 2020, 5:57 PM), <https://www.cnbc.com/2020/05/28/zuckerberg-defends-facebook-from-trump-plus-the-latest-on-coronavirus.html>.

²⁶¹ 47 U.S.C. §230.

²⁶² Hirsch & Breuninger, *surpa* note 256.

²⁶³ *Id.*

²⁶⁴ Jenni Fink, *Trump Vetoes Defense Bill over Section 230, Calls it a 'Gift to China and Russia'*, NEWSWEEK (Dec. 23, 2020, 3:44 PM), <https://www.newsweek.com/trump-vetoes-defense-bill-over-section-230-calls-it-gift-china-russia-1557061>.

beginning of his presidency, so was President Biden.²⁶⁵

Section 230 was enacted in 1996 to protect the nascent internet industry from being sued into oblivion by dissatisfied people who felt they were slandered or defamed on a website.²⁶⁶ It was an action by Congress to resolve a developing split amongst courts as to whether a website is responsible²⁶⁷ or not responsible for the content posted by users.²⁶⁸ There was an honest split among the courts, so Congress stepped in to resolve the issue by giving internet companies protection from liability for the content posted by users.²⁶⁹ This protection has been upheld by the Supreme Court.²⁷⁰

Not regulating social media speech would not be new or novel. It is embedded in decades of Supreme Court jurisprudence. In *Associated Press v. United States*²⁷¹ in 1945, Justice Black said that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”²⁷² Attempting to impose regulatory rules on social media is futile. Their own internal processes might not comport with the imagination of the framers of the regulation and the self-interests, including promotional, circulation, cross-media appearances, and monetary just militate against censoring product that attracts traffic. In the media world, traffic is the coin of the business, and whether it is generated from good news or bad news is often not relevant.

Once social networks are allowed to make judgements on their own, someone will disagree with their judgement. Did they unfairly discriminate against one side? Did they shut down discussion on a topic that some thought important? As there are infinite viewpoints on any topic, there is infinite criticism and infinite second-guessing of the media’s judgment. A simple thing like a recruitment video for the Alaska Department of Public Safety seeking applicants to be state troopers, featuring an appearance by the Governor of the state encouraging potential applicants, was taken down by Google and YouTube as being “too political.”²⁷³ The advertisement was subsequently restored, but the simplicity of the problem of misidentification of purpose illustrates how

²⁶⁵ Rachel Lerman, *Social Media Liability Law is Likely to be Reviewed Under Biden*, WASH. POST (Jan. 18, 2021, 8:00 AM), <https://www.washingtonpost.com/politics/2021/01/18/biden-section-230/>.

²⁶⁶ Daisuke Wakabayashi, *Legal Shield for Social Media is Targeted by Trump*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html>; See also Valerie C. Brannon, *Liability for Content Hosts: An Overview of the Communication Decency Act’s Section 230*, CONG. RES. SERV. (June 6, 2019), <https://fas.org/sgp/crs/misc/LSB10306.pdf>.

²⁶⁷ *Stratton-Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. S. Ct. May 24, 1995) (website was responsible for content posted by users.).

²⁶⁸ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (website was not responsible for content posted by users.).

²⁶⁹ *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

²⁷⁰ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

²⁷¹ 326 U.S. 1 (1945).

²⁷² *Id.* at 20.

²⁷³ Associated Press, *Google Removes Alaska Trooper Ad in ‘Misunderstanding’*, ALASKA PUB. MEDIA (July 19, 2020), <https://www.alaskapublic.org/2020/07/19/google-removes-alaska-trooper-ad-in-misunderstanding/>.

deep it might run. The Fairness Doctrine collapsed under its own weight of attempting to look out for the public good, and so would regulation of social media content. Regulation of social media is futile.

What about using artificial intelligence to screen for issues? We see on television that AI can screen images for certain types of content. What about taking the screening choice away from the private actors and moving it to an unfeeling product, one that cannot be swayed by current events? An interesting thought, but then you run into algorithm bias, an important concept that says that an algorithm, the computer code that would decide whether something was true or untrue, fair or unfair, can be flawed itself.²⁷⁴ Algorithm bias is the coding of a program to favor one outcome over another. There is significant research demonstrating the difficulty of the problem.²⁷⁵

Scholars Lilian Edwards and Michael Veale look at European regulation, which at one time favored the use of machine language and now is not so certain. They find failures of the algorithms:

Algorithmic systems trained on past biased data without careful consideration are inherently likely to recreate or even exacerbate discrimination seen in past decision-making. For example, a CV or résumé filtering system based only on past success rates for job applicants will likely encode and replicate some of the biases exhibited by those filtering CVs or awarding positions manually in the past.²⁷⁶

Therefore, “algorithms that learn” can learn from past and even current biases. If the information and data that the algorithm draws upon is from current repositories and it contains current and past biases, those biases can be reflected in the new AI learning and incorporated in future decision-making. Further, there are simple questions that an algorithm might not be able to answer, such as how far in the past should I look for the precedent that I am basing my current decision on?²⁷⁷

Imagine the results of an algorithm that draws upon one of the world’s great libraries to learn a response. The algorithm would be tainted by centuries of war, discrimination, and biases that favored violence and other behavior that we are trying to move forward from. In this case, history can cause us to move backward rather than providing an enlightening lesson. Defective Artificial Intelligence can even deprive you of your freedom. A Detroit man was arrested based on faulty identification by bad facial recognition software.²⁷⁸ Filmmaker Shalini Kantayya’s recent documentary *Coded Bias* attempts to show that the biases of the group that is inventing artificial intelligence are embedded

²⁷⁴ Charles Towers-Clark, *Is Facebook Doing Enough to Stop Racial Bias in AI?*, FORBES (Aug 5, 2020, 12:10 PM), <https://www.forbes.com/sites/charlestowersclark/2020/08/05/is-facebook-doing-enough-to-stop-racial-bias-in-ai/?sh=2207a0ce1d66>.

²⁷⁵ Karen Hao, *This Is How AI Bias Really Happens—And Why It’s So Hard to Fix*, MIT TECH. REV. (Feb 4, 2019), <https://www.technologyreview.com/2019/02/04/137602/this-is-how-ai-bias-really-happens-and-why-its-so-hard-to-fix/>.

²⁷⁶ Lilian Edwards & Michael Veale, *Slave to the Algorithm? Why a ‘Right to an Explanation’ Is Probably Not the Remedy You are Looking For*, 16 DUKE L. & TECH. REV. 18, 28 (2017).

²⁷⁷ *Id.* at 31.

²⁷⁸ Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html>.

in the code.²⁷⁹ Kantayya follows research at MIT that shows facial recognition is racially biased.²⁸⁰ MIT Researcher Joy Buolamwini, founder of the *Algorithmic Justice League* in the MIT Media Lab, discusses her research which shows not only an inability to decode race and gender but also a high error rate in general.²⁸¹

What kind of damage can bad artificial intelligence do? Ruha Benjamin, a sociologist at Princeton, takes a look at what the automation of racial discrimination might mean. From healthcare to economic justice, equality of outcomes is not currently part of the design of artificial intelligence.²⁸² The current state of artificial intelligence cannot even make nuanced choices amongst mere words, let alone more complicated analysis of faces or actions. Paleontologists in a virtual paleontology session were prevented from using the words bone, public, or stream in searches—they were caught in the word filter.²⁸³

A problem more insidious than algorithm bias can be flawed underlying data. Writing for *Harvard Business Review*, Thomas Redman states that in order “to properly train a predictive model, historical data must meet exceptionally broad and high-quality standards. First the data must be right; It must be correct, properly labeled, deduped, and so forth.”²⁸⁴ He goes on to say that you must have the right data, including unbiased data.²⁸⁵ So the underlying material has to be clean and unbiased before one starts, and then the algorithms need to be constructed in an unbiased way. The complexities of trying to automate this process are immense. Like many other things that will ultimately be automated, it is not set forever, but at this time and for the foreseeable future, the construction of accurate, clean, and unbiased historical data sets layered with accurate and unbiased algorithm decisional structures means that creating an automated method of determining what is and is not acceptable speech is presumably a long way off. It is currently difficult to program a self-driving car or an automatic pilot in an airplane to be perfectly accurate without human intervention, and those activities are concretely data reliant with less need for judgment than interpreting the context and meaning of speech.

²⁷⁹ KC Ifeanyi, *The ‘Coded Bias’ Documentary Is ‘An Inconvenient Truth’ for Big Tech Algorithms*, FAST CO. (Dec. 3, 2020), <https://www.fastcompany.com/90574012/the-coded-bias-documentary-is-an-inconvenient-truth-for-big-tech-algorithms>.

²⁸⁰ *Id.*

²⁸¹ *Our Mission*, ALGORITHMIC JUST. LEAGUE, <https://www.ajl.org/about> (last visited Jan. 25, 2021); See also Bloomberg Live, *The Coded Gaze: Bias in Artificial Intelligence / Equality Summit*, YOUTUBE (Mar. 29, 2019), <https://www.youtube.com/watch?v=eRUEVYndh9c>.

²⁸² Ruha Benjamin, *Assessing Risk, Automating Racism*, SCIENCE (Oct 25, 2019), <https://science.sciencemag.org/content/366/6464/421>.

²⁸³ Poppy Noor, *Overzealous Profanity Filter Bans Paleontologists From Talking About Bones*, GUARDIAN (Oct. 16, 2020, 1:34 PM), <https://www.theguardian.com/science/2020/oct/16/profanity-filter-bones-paleontologists-conference>.

²⁸⁴ Thomas C. Redman, *If Your Data Is Bad, Your Machine Learning Tools Are Useless*, HARV. BUS. REV. (Apr. 2, 2018), <https://hbr.org/2018/04/if-your-data-is-bad-your-machine-learning-tools-are-useless>.

²⁸⁵ *Id.*

IV. OTHER PROPOSED SOLUTIONS

Alexandra Andorfer has prepared a list of some of the proposals to regulate “fake news” as one of the current internet problems.²⁸⁶ They are definite attempts, and some proposals by the tech giants are interesting. Facebook, for example, has created a “flag” system where users can flag fake news which is then referred out to a third party fact-checking service to verify whether posts flagged by users are actually fake.²⁸⁷ But, of course, there is the question of the selection of the outside fact-checking organizations and whether there is bias of those checkers.²⁸⁸ A second method is to take the human factor out of the decision and to use artificial intelligence algorithms.²⁸⁹ However, as stated earlier in this article, AI or artificial intelligence is not an unbiased method that removes the human factor, it just shifts the human bias to the person who programs the algorithm.²⁹⁰

YouTube, owned by Google, has recently tried a similar approach: flagging news that comes from a source that receives government funding. PBS has protested that move, saying that this lumps PBS and the BBC in together with the Chinese service CCTV and the Russian service RT.²⁹¹ YouTube has actually implemented such an informational notice under the videos of all of those services.²⁹²

Computerized algorithms can not only contain the inherent biases of their creators, but they can also be affirmatively fooled, and not just by well-financed state actors. Even a lone artist and a little red wagon can fool Google’s sophisticated computer algorithms. German artist Simon Weckert loaded a wagon with ninety-nine cellphones and pulled them around the streets of Berlin to trick Google Maps into thinking there was a traffic jam.²⁹³ The result was as he wished, that Google gave out traffic jam alerts for the streets he was walking along. “Weckert added that his work highlights the ‘blindness’ which arises when people think of data as ‘objective, unambiguous and interpretation free.’”²⁹⁴

MIT researchers have fooled Google’s image classifier to think a picture of a dog is really a picture of guacamole.²⁹⁵ Similarly, researchers at Auburn University fooled Google’s image recognition into thinking a

²⁸⁶ Alexandra Andorfer, Note, *Spreading Like Wildfire: Solutions for Abating the Fake News Problem on Social Media via Technology Controls and Government Regulation*, 69 HASTINGS L. J. 1409 (2018).

²⁸⁷ *Id.* at 1413.

²⁸⁸ *Id.* at 1416.

²⁸⁹ *Id.* at 1417.

²⁹⁰ See Hao, *supra* note 275.

²⁹¹ Madhulika Sikka, *Dear YouTube*, PBS PUB. ED. (Feb. 6, 2018), <https://publiceditor.bento-live.pbs.org/publiceditor/blogs/pbs-public-editor/dear-youtube/>.

²⁹² Hadas Gold, *YouTube to Start Labeling Videos Posted by State-funded Media*, CNN (Feb. 3, 2018), <https://money.cnn.com/2018/02/02/media/youtube-state-funded-media-label/index.html>.

²⁹³ Rory Sullivan, *Artist Uses 99 Phones to Trick Google Into Traffic Jam Alert*, CNN (Feb. 4, 2020, 1:44 PM), <https://www.wired.com/story/99-phones-fake-google-maps-traffic-jam/>.

²⁹⁴ *Id.*

²⁹⁵ Katherine Schwab, *How MIT Students Fooled a Google Algorithm*, FAST CO. (Dec. 20, 2017), <https://www.fastcompany.com/90155089/how-mit-students-fooled-a-google-algorithm>.

fire truck was a school bus or a bobsled.²⁹⁶ Chinese researchers have reportedly been able to confuse the artificial intelligence that runs Tesla's autonomous driving system in their electric cars.²⁹⁷ If these artists and researchers are able to fool AI, there is no reasonable way to rely on the algorithms used. Even in 2020, a bug in Instagram's algorithm shielded former President Trump's posts from negative hashtags, but not his opponent, Joe Biden.²⁹⁸

The idea of the artificial intelligence having failings of its own, having faulty algorithms, and even of harming its creators, has been the subject of modern fictional literature for years. Whether it is the Hal 9000 in *2001: A Space Odyssey*,²⁹⁹ the NORAD WOPR computer in *WarGames*,³⁰⁰ or Skynet in *The Terminator*,³⁰¹ putting machine intelligence, or self-learning algorithms in charge has long been recognized as perilous. The examples above tell us that the current real science is so far showing that the fiction writers have not been wrong.

What is the definition of any particular law, or even word? If a former President of the United States famously said, "it depends on what the meaning of the word 'is' is"³⁰² or the Supreme Court Justice who states that he does not know how to phrase the definition of obscenity, but he "know[s] it when [he] see[s] it,"³⁰³ how are we ever to expect a private company to regulate speech as the government would like? Even within the government, there are large differences of opinion on what kind of speech might violate any given policy. That is the subject of decades of indecency court cases, of which there are numerous, that just take one slice of speech—whether something has gone too far toward obscenity—and interpret that single slice. Regulation of speech that offends, or is inaccurate, is a Pandora's box that will consume the media companies. Some regulation might be necessary, like removing direct terroristic videos or particularly violent videos, but attempting to keep all political lies off a social media site, for example, is beyond a super-human task.

Not only has the Supreme Court removed many of the boundaries of political speech,³⁰⁴ but the private actors have announced how they will

²⁹⁶ Tierman Ray, *Google's Image Recognition AI Fooled By New Tricks*, ZDNET (Nov 30, 2018, 9:18 AM), <https://www.zdnet.com/article/googles-best-image-recognition-system-flummoxed-by-fakes/>.

²⁹⁷ Will Knight, *Military Artificial Intelligence Can Be Easily and Dangerously Fooled*, MIT TECH. REV. (Oct. 21, 2019), <https://www.technologyreview.com/2019/10/21/132277/military-artificial-intelligence-can-be-easily-and-dangerously-fooled/>.

²⁹⁸ Oliver Efron, *Instagram's Algorithm Blocked Negative Coverage of Trump, But Not Biden*, CNN BUS. (Aug 6, 2020, 11:49 PM), <https://www.cnn.com/2020/08/06/business/instagram-biden-trump-algorithm/index.html>.

²⁹⁹ Daniel C. Dennet, *Did HAL Commit Murder?*, MIT PRESS READER (Jan. 9, 2020), <https://thereader.mitpress.mit.edu/when-hal-kills-computer-ethics/>.

³⁰⁰ Rita Kempley, *'WarGames': Tense and Suspenseful*, WASH. POST (June 3, 1983), <https://www.washingtonpost.com/archive/lifestyle/1983/06/03/wargames-tense-and-suspenseful/3f923d8c-d719-42b2-81f2-de8f71d0c230/>.

³⁰¹ THE TERMINATOR (Hemdale Pac. W. Prods. 1984).

³⁰² *Clinton's Grand Jury Testimony, Part 4*, WASH. POST, https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/bctest092198_4.htm#TOP (last visited Jan. 29, 2021).

³⁰³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 n. 2 (1964) (5-3 decision) (Stewart, J., concurring).

³⁰⁴ See, *Citizens United v. Fed. Election Commission*, 588 U.S. 310 (2010).

treat their own election speech. As soon as Michael Bloomberg, a former mayor of New York City and billionaire-owner of Bloomberg Media, announced his campaign for President in 2020, his media organization announced that it would not investigate its owner, Michael Bloomberg, or his democratic opponents, but would continue to investigate the now former President.³⁰⁵ Further, Forbes magazine states that of the fifteen billionaires who are significant in American media, one is Carlos Slim Helu, a Mexican billionaire who owns a large percentage of the *New York Times*,³⁰⁶ and another is Viktor Vekselberg, a Russian billionaire who owned a portion of the website *Gawker*,³⁰⁷ now bankrupt and sold.³⁰⁸ It has been said that Fox News represents Republican views³⁰⁹ and that other news organizations are aligned with Democratic views.³¹⁰ Ownership can be a factor in media.

As long as private companies get to determine the content of their sites, they will be the first line of censors; and there is nothing inherently wrong with this. Companies can be interested in “protecting” their users. However, Robert Epstein states that Google “maintains at least nine different blacklists that impact our lives, generally without input or authority from any outside advisory group, industry association or government agency.”³¹¹ In 2011 Google blocked the domain “co.cc,” which contained 11 million websites, claiming they were “spammy.”³¹² While none of this is particularly surprising, it is worth noting that even with the best of intentions, and in a drive to deliver a good customer experience, a commercial entity will follow its own interests.

If we are expecting social media’s self-help to be accurate, we will be disappointed. Facebook, right before July 4th, 2018, classified the publication of the Declaration of Independence as “hate speech.”³¹³ Just weeks later, it went on to defend its decision to permit Holocaust denial

³⁰⁵ Michael Caldrone, *Bloomberg News: We Won't Investigate Mike During Presidential Campaign*, POLITICO (Nov. 24, 2019, 1:02 PM), <https://www.politico.com/news/2019/11/24/bloomberg-news-investigate-mike-2020-073369>.

³⁰⁶ Kate Vinton, *These 15 Billionaires Own America's News Media Companies*, FORBES (June 1, 2016, 2:26 PM), <https://www.forbes.com/sites/katevinton/2016/06/01/these-15-billionaires-own-americas-news-media-companies/?sh=2688319d660a>.

³⁰⁷ Mathew Ingram, *Gawker Gets its First Outside Investment Ever, From a Russian Oligarch*, FORTUNE (Jan. 20, 2016, 5:33 PM), <https://fortune.com/2016/01/20/gawker-funding/>.

³⁰⁸ Tom Kludt & Brian Stetler, *Gawker Files for Bankruptcy and Puts Itself Up for Auction*, CNN BUS. (June 10, 2016, 4:19 PM), <https://money.cnn.com/2016/06/10/media/gawker-media-bankruptcy/index.html>.

³⁰⁹ See e.g. John Ray, *The Fox News Bubble*, DATA FOR PROGRESS (Mar. 24, 2019), <https://www.dataforprogress.org/blog/2019/3/23/the-fox-news-bubble>.

³¹⁰ See e.g. David Harsanyi, *Opinion: CNN's Bias Is Now Beyond Laughable*, N.Y. POST (Jan. 16, 2020, 8:11 PM), <https://nypost.com/2020/01/16/cnns-bias-is-now-beyond-laughable/>.

³¹¹ Robert Epstein, *The New Censorship*, U.S. NEWS (June 22, 2016, 9:00 AM), <https://www.usnews.com/opinion/articles/2016-06-22/google-is-the-worlds-biggest-censor-and-its-power-must-be-regulated>. See also Andorfer, *supra* note 286 at 1420. (Epstein’s nine blacklists maintained by Google are: The autocomplete blacklist; The Google Maps blacklist; The YouTube blacklist; The Google account blacklist; The Google News blacklist; The Google Ad words blacklist; The Google AdSense blacklist; The search engine blacklist; The quarantine blacklist.).

³¹² Epstein, *supra* note 311.

³¹³ Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 DUKE L. & TECH. REV. 26, 27-28 (2018).

speech.³¹⁴ The contrast is stark, the time periods are close, and the judgements of Facebook are confusing and perhaps inconsistent.

In *Prager University v. Google*, Google was accused of censoring Prager University on its YouTube channels.³¹⁵ The trial court held that notwithstanding the appearance of being a public forum, YouTube “remains a private forum, not a public forum subject to judicial scrutiny.”³¹⁶ YouTube has also started a “restricted mode” that is activated by a user or business which restricts age-inappropriate content.³¹⁷ This mode is used to restrict videos that cover topics related to terrorism, war, crime, and political conflicts.³¹⁸ A video can be tagged as restricted either by an automated algorithm or by a user.³¹⁹ YouTube tagged some of PragerU’s videos as restricted and also demonetized some videos so no advertisements would appear.³²⁰ The court cites case after case including *Freedom Watch v. Google*,³²¹ *Green v. YouTube, LLC*,³²² and *Nyabwa v. Facebook*³²³ stand for the proposition that social media is not subject to regulation, because social networks are not government actors.³²⁴

YouTube has also been sued for censoring LGBTQ+ speech.³²⁵ A 2019 lawsuit alleges that both the machine moderation “and human reviewers unfairly target channels that have words such as ‘gay,’ ‘bisexual,’ or ‘transgender’ in the title.”³²⁶ YouTube has also been accused of discriminating based on race.³²⁷ Further, the Department of Housing and Urban Development sued Facebook for allowing advertisers to restrict who is able to see ads on the platform based on race, religion and national origin.³²⁸

³¹⁴ *Id.* at 28–29.

³¹⁵ *Prager Univ. v. Google*, 951 F.3d 991 (9th Cir. 2020).

³¹⁶ *Id.* at 4.

³¹⁷ *Id.* at 7.

³¹⁸ *Id.* at 7.

³¹⁹ *Id.* at 7.

³²⁰ *Id.* at 7.

³²¹ 368 F. Supp. 3d 30 (D.C. Cir. 2019).

³²² *Green v. YouTube, LLC*, 2019 WL 1428890, Civ. No. 18-cv-203-PB (D.N.H. Mar. 13, 2019).

³²³ *Nyabwa v. Facebook*, 2018 WL 585467 (S.D. Tex. Jan. 26, 2018).

³²⁴ *Prager Univ.*, 951 F.3d at 7, n. 3.

³²⁵ EJ Dickson, *Inside LGBTQ Vloggers’ Class-Action ‘Censorship’ Suit Against YouTube*, ROLLING STONE (Nov. 14, 2019, 1:54 PM), <https://www.rollingstone.com/culture/culture-features/lgbtq-youtube-lawsuit-censorship-877919/>.

³²⁶ Julia Alexander, *LGBTQ YouTubers Are Suing YouTube Over Alleged Discrimination*, VERGE (Aug 14, 2019, 9:16 AM), <https://www.theverge.com/2019/8/14/20805283/lgbtq-youtuber-lawsuit-discrimination-alleged-video-recommendations-demonetization>; Greg Bensinger & Reed Albergotti, *YouTube Discriminates Against LGBT Content By Unfairly Culling It, Suit Alleges*, WASH. POST, (Aug. 14, 2019, 4:21 PM), <https://www.washingtonpost.com/technology/2019/08/14/youtube-discriminates-against-lgbt-content-by-unfairly-culling-it-suit-alleges/>.

³²⁷ Wendy Davis, *Black YouTube Users Accuse Google Of Restricting Videos Based on Race*, DIGIT. NEWS DAILY (June 21, 2020), <https://www.mediapost.com/publications/article/352808/black-youtube-users-accuse-google-of-restricting-v.html>.

³²⁸ Katie Benner, Glenn Thrush & Mike Isaac, *Facebook Engages in Housing Discrimination With Its Ad Practices, U.S. Says*, N.Y. TIMES (Mar 28, 2019), <https://www.nytimes.com/2019/03/28/us/politics/facebook-housing-discrimination.html>.

For all the criticism it receives, Twitter has announced some of the more progressive speech policies among social networks, banning hate speech based on age, disability, or disease.³²⁹ Twitter also banned a user for “misgendering” a transgender woman, and won a Section 230 case on the matter.³³⁰ Twitter also won a case brought by a Republican Congressperson alleging that Twitter permitted defamatory posts against him.³³¹ The court upheld Twitter’s right to control its own content under Section 230.³³² However, since the courts have affirmed that Twitter has control over its speech, it is the implementation of the rules that filter that speech, whether by machine algorithm or human reviewer that counts. A major publication asked Twitter for a copy of its rules and training manuals on moderation policies, and the company did not respond.³³³ The same publication states that social media companies have also refused to release data on the demographics of their content reviewers.³³⁴

A website’s own interests, perhaps economic interests, might be a factor in censoring or limiting speech. For example, Google had a project to create a limited version of its search engine for China.³³⁵ Google had withdrawn from China years before, but was considering re-entering the Chinese market, and that would take a search engine that could meet China’s censorship requirements.³³⁶ Google has now abandoned that project.³³⁷ Facebook also was willing to limit its own site to get back into China.³³⁸ While Facebook would not suppress posts itself, it would offer a tool to suppress content to a partner company in China.³³⁹ It has also restricted content in other countries before, the New York Times reports, such as Pakistan, Russia, and Turkey.³⁴⁰ A website’s self-censorship, or “chilling” of speech might not only be for their own benefit, but perhaps

³²⁹ Jay Peters, *Twitter Now Bans Dehumanizing Remarks Based on Age, Disability, and Disease*, VERGE (Mar 5, 2020, 6:01 PM) <https://www.theverge.com/2020/3/5/21166940/twitter-hate-speech-ban-age-disability-disease-dehumanize>.

³³⁰ *Murphy v. Twitter*, No. CGC-19-573712 (Cal. June 12, 2019), *aff’d* 60 Cal. App. 5th (Cal. Ct. App. 2021).

³³¹ Bryan Pietsch, *Devin Nunes Can’t Sue Twitter Over Cow and Mom Parodies*, *Judge Says*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/us/politics/devin-nunes-cow-tweets.html>.

³³² *Id.*

³³³ Kalev Leetaru, *Is Twitter Really Censoring Free Speech?*, FORBES (Jan 12, 2018, 5:06 PM), <https://www.forbes.com/sites/kalevleetaru/2018/01/12/is-twitter-really-censoring-free-speech/?sh=174383fa65f5>.

³³⁴ *Id.*

³³⁵ Kate Conger & Daisuke Wakabayashi, *Google Employees Protest Secret Work on Censored Search Engine for China*, N.Y. TIMES (Aug 16, 2018), <https://www.nytimes.com/2018/08/16/technology/google-employees-protest-search-censored-china.html>.

³³⁶ *Id.*

³³⁷ Jeb Su, *Confirmed: Google Terminated Project Dragonfly, Its Censored Chinese Search Engine*, FORBES (July 19, 2019, 4:31 AM), <https://www.forbes.com/sites/jeanbaptiste/2019/07/19/confirmed-google-terminated-project-dragonfly-its-censored-chinese-search-engine/?sh=bc551e47e843>.

³³⁸ Mike Isaac, *Facebook Said to Create Censorship Tool to Get Back Into China*, N.Y. TIMES (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/technology/facebook-censorship-tool-china.html>.

³³⁹ *Id.*

³⁴⁰ *Id.*

also for their users. Sometimes use of some media can be life-endangering or freedom-endangering. For Twitter users in China, where Twitter is formally blocked, it has been reported that those who find their way through to Twitter can be jailed.³⁴¹ LinkedIn is one of the few American platforms allowed in China, and according to the *New York Times*, the website has “long bowed to the country’s censors.”³⁴²

Ownership of the media has long been a topic of discussion and attempted regulation. During the heyday of their power and reach, broadcast stations were regulated so no foreign interest could own more than 25 percent.³⁴³ The FCC has recently approved a 100% foreign ownership transfer of broadcast stations to two Australian citizens.³⁴⁴ The FCC will consider requests on a case-by-case basis. The ownership of terrestrial media like broadcasters has been a point of paranoia and concern since World War II and the Cold War. During World War II, a censorship board was created so that speech was only the most patriotic and cautious that helped the war effort.³⁴⁵ Concern about international meddling in a country’s internal affairs is not a new idea that sprang forth when Facebook and Twitter were created; it existed from the beginning of the democracy.³⁴⁶

Now that the internet is the dominant media force, the rule for broadcasters has been changed to up to 100% foreign ownership.³⁴⁷ But for many years, the percentage of ownership by foreign interests was a hot topic of debate. Further, the diversity of voices who owned the media has been deemed important. When applying for a broadcast station, a person who represented a “minority interest” would receive an extra credit during the review and that could often be determinative.³⁴⁸ Research has shown time after time that minority ownership led to a different balance in the content of the broadcast stations toward minority programming.³⁴⁹ In short, ownership of a voice counts towards its actual content. When it comes to speech, ownership is material.

³⁴¹ Paul Mozur, *Twitter Users in China Face Detention and Threats in New Beijing Crackdown*, N.Y. TIMES (Jan 10, 2019), <https://www.nytimes.com/2019/01/10/business/china-twitter-censorship-online.html>.

³⁴² *Id.*

³⁴³ 47 U.S.C. § 310(b)(4).

³⁴⁴ *In re Frontier Media*, Declaratory Ruling, DA 17-190, 2017 WL 735659 ``3 (MB Feb. 23, 2017) (“[W]e find that grant of the Petition would: (1) increase the likelihood of continued service to small communities by authorizing investment by individuals who are ready, willing, and able to operate the stations based on their extensive experience operating them to date; (2) facilitate foreign investment in the U.S. broadcast radio market; and (3) potentially encourage reciprocal investment opportunities for U.S. companies in foreign markets. For these reasons, we find that grant of the Petition will serve the public interest.”).

³⁴⁵ See REPORT ON THE OFFICE OF CENSORSHIP, *supra* note 200.

³⁴⁶ See *Washington’s Farewell Address 1796*, YALE AVALON PROJECT, <http://avalon.law.yale.edu> (last visited Jan. 25, 2021) (Sometimes known as the “avoid entangling alliances” speech. Although President Washington did not use that exact phrase, he was concerned with foreign influence and control within the then newly formed United States.).

³⁴⁷ *In re Frontier Media*, Declaratory Ruling, DA 17-190, 2017 WL 735659 ``3 (MB Feb. 23, 2017).

³⁴⁸ Dana A. Scherer, *The FCC’s Rules and Policies Regarding Media Ownership, Attribution, and Ownership Diversity*, CONG. RSCH. SERV. (Dec. 16, 2016), <https://fas.org/sgp/crs/misc/R43936.pdf>.

³⁴⁹ *In re 2014 Quadrennial Reg. Rev.*, 32 F.C.C.R. 9802, 2017 WL 5623028 (F.C.C. 2017), (FCC adopts disadvantaged voices incubator program.).

Government regulation is not the solution: the government cannot even agree on its own definitions nor directions. Government regulation can also suppress the voices for change. When the government is in charge of reviewing voices for change, we get cases like *Walker v. City of Birmingham*,³⁵⁰ where a city told Rev. Martin Luther King Jr. that he would never get his needed parade permit because of his views, and the Supreme Court *upheld the conviction of the protesters*.³⁵¹ Or you have cities in current times attempting to pass restrictive ordinance to outlaw even peaceful protests.³⁵² Such restrictions happen world-wide, including recently in Hong Kong.³⁵³

Even in the U.S., the government has had a hand in creating a voice that it subsidized: public broadcasting. In the interest of promoting public education and information and expanding children's television, the U.S. government has subsidized public broadcasting in this country. But even when the government itself subsidizes speech, that same government cannot agree on its speech.³⁵⁴ In the 1990s, members of our own government wanted to cut government funded broadcasting. Newt Gingrich, Speaker of the House, wanted to cut public broadcasting funding,³⁵⁵ as have Presidents Reagan, Nixon, and George W. Bush.³⁵⁶

A social media site has numerous anonymous users. These users are not known to the social media site beyond the self-identification information that they supply. And the topics are numerous and posted by a legion of users that far exceeds the number of employees that the social media site will ever be able to employ as screeners. Are there any existing allegories?

Yes, perhaps libraries are similar. Libraries are full of books, magazines, and other writings, and very few of them are actually read by the librarians. Rather, they are "posted" in the library for patrons, often anonymous walk-in patrons, to read and make their own judgments. There are some things libraries can do. They can purchase materials from trusted publishers or buy from recommended lists and best-seller lists, but certainly much of the library's materials are not screened. And that is part of the risk our free society has taken. In the case of libraries, some materials which are later discovered to be inappropriate get removed.

One move that some social networks have taken is to provide verification to certain accounts that are in the public interest, such as celebrities. The verification process does not stop verified accounts from sharing posts by unverified users, but the disclosures that verification provides may be a step in the right direction. This article posits that news

³⁵⁰ 388 U.S. 307 (1967).

³⁵¹ *Id.* at 321.

³⁵² Nora Benavidez, *First Amendment Rights If You Agree With the President*, ATLANTIC (June 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/first-amendment-rights-if-you-agree-with-the-president/612211/> (noting an increase in anti-protest laws.).

³⁵³ Iain Marlow, Fion Li & Stephen Tan, *Hong Kong Police Deny Saturday Protest Permit After Violence*, BLOOMBERG (July 25, 2019), <https://www.bloomberg.com/news/articles/2019-07-25/hong-kong-police-deny-permit-for-saturday-protest-after-violence>.

³⁵⁴ Patricia M. Chuh, *The Fate of Public Broadcasting in the Face of Federal Funding Cuts*, 3 COMM'LAW CONSPECTUS 207 (1995).

³⁵⁵ Keach Hagey, *Defunding NPR? It's Not That Easy*, POLITICO (Oct 23, 2010, 7:12 AM), <https://www.politico.com/story/2010/10/defunding-npr-its-not-that-easy-044056>.

³⁵⁶ *Id.*

sources gather a reputation and by that reputation gain veracity. If the source is verified, at least the audience knows the reputation and track record of the source. Much as the many disclosures from food labels to movie ratings help consumers, verification of the source could be a good way of helping consumers decide who to believe. Harvard Professor Cass Sunstein calls it “sunlight as disinfectant”³⁵⁷ or the use of disclosure policies to help the consumers of information sort out the good from the bad. However, in practice, disclosure has three failings. The first is the failings of the even the best organizations to be ever honest; the second is the existence of dishonest actors to lie or cover their tracks; and the third is that the social media’s method of enforcing disclosure or identifying reliable sources can be flawed. The platforms can stop curating and propagating unverified material. As identified by Sofia Grafanaki, social media platforms curate material and promulgate it to people who are likely to be interested.³⁵⁸ If the social media platforms perform a basic “self-editing” function of knowing what they speak about, it could reduce some of the circulation of untrue material. Note that this does not infringe anyone’s speech because nothing is deleted, it just reduces the circulation.

Even the most steadfast of the news organizations can self-jeopardize their reputation. The New York Times claimed the title of “All the News That’s Fit to Print” and claimed a good reputation for accuracy, but it has been plagued by stories of news fabrication.³⁵⁹ Once consumers are informed about the source, filtering inaccurate information and editing for improved accuracy becomes the problem of the news organization and not the consumer. The source identification could be called an “information trademark.” Much as a consumer can identify better quality clothing from the trademarks, so could consumers identify news with a strong reputation for accuracy. In election interference, the foreign countries might post fake stories on Facebook, but they also have to hide behind fake identities.³⁶⁰

Of course, all products protected by trademarks are subject to impersonation.³⁶¹ Every bit of clothing with a valuable trademark has probably had pirated goods that they needed to compete against. Similarly, cyber hacking could lead to spoofing of an information trademark. But the concept of a verified source moves the onus for control of speech from the social media site back to the originator of the content, where it belongs. Those who speak the speech should be responsible for the content.

But inevitably, questions arise: who will set the standards for verification? Can verification be done online? Does it require a physical presence? If it, for example, requires a brick-and-mortar presence, will verification discriminate against small but perhaps effective reporters,

³⁵⁷ CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 218 (Princeton Univ. Press 2017).

³⁵⁸ Sofia Garfanki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111 (2018).

³⁵⁹ See Sullivan, *supra* note 81.

³⁶⁰ Young Mie Kim, *Analysis: New Evidence Shows How Russia’s Election Interference Has Gotten More Brazen*, BRENNEN CTR. JUST. (Mar. 5, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-evidence-shows-how-russias-election-interference-has-gotten-more>.

³⁶¹ Rebecca Tushnet *What’s the Harm of Trademark Infringement?*, 49 UNIV. AKRON L. REV. 627 (2016).

bloggers and marginalized voices striving to be heard? Can an individual be accredited? What about the differences of verification processes and effectiveness across countries? Will there be different standards for different locations? In other words, we once again begin approaching the “algorithm problem” with questions of who determines the algorithm used to approve the certified speakers. And will the approval process vary from platform to platform? Will Facebook’s “verified source” be as accountable as Twitter’s “verified source”? Or does that just introduce two layers of possible inaccuracy and consumer deception?

If some sort of governmental regulation needs to be enacted, the easiest and most effective regulation will be that which applies to in-state actors.³⁶² It is often impossible to reach cross-border to punish individual actors, so the regulation of speech will need to be mostly against domestic corporations and domestic speakers. The patent unfairness in a global speech marketplace is immediately obvious.

There are islands of experimenting around the world isolating the internet from the rest of the world, and the separating and segregation national internets is sometimes called the *Splinternet*.³⁶³ Most famous is the “Great Firewall of China” which creates a complete regulation of internet traffic in and out of China.³⁶⁴ But so far, most of the world has a generally open internet.³⁶⁵ An open internet facilitates international commerce and international exchange of ideas and news and assists in the regular functioning of a global civilization. However, the government of China is not bashful about its own efforts to sway world opinion.³⁶⁶

In the world of commercial speech, even basketball teams are not immune for the commercial reality of chilling speech to avoid governmental consequences. The National Basketball Association (NBA) gave direction to its players after a tweet offended China, a country with which the NBA is trying to do business.³⁶⁷ After a general manager for one of its teams expressed support for the protesters in Hong Kong via a tweet, the tweet was deleted and

³⁶² For purposes of this article, the domestic state is the United States, but the principle is universal.

³⁶³ Arjun Kharpal, *The ‘Splinternet’: How China and the US could Divide the Internet for the Rest of the World*, CNBC (Feb. 3, 2019), <https://www.cnbc.com/2019/02/04/the-splinternet-an-internet-half-owned-by-china-and-the-us.html>.

³⁶⁴ Paul Mozur, *China Presses Its Internet Censorship Efforts Across the Globe*, N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/technology/china-technology-censorship-borders-expansion.html>.

³⁶⁵ Anton Trojanovski, *China Censors the Internet, So Why Doesn’t Russia?*, N.Y. TIMES (Feb. 21, 2021), <https://www.nytimes.com/2021/02/21/world/europe/russia-internet-censorship.html>.

³⁶⁶ Catherine Shu, *Twitter is Blocked in China, but its State News Agency is Buying Promoted Tweets to Portray Hong Kong Protestors as Violent*, TECHCRUNCH (Aug. 19, 2019, 8:15 AM), <https://techcrunch.com/2019/08/19/twitter-is-blocked-in-china-but-its-state-news-agency-is-buying-promoted-tweets-to-portray-hong-kong-protestors-as-violent/>. See also, Emily Stewart, *How China used Facebook, Twitter, and YouTube to Spread Disinformation About the Hong Kong Protests*, RECODE (Aug 23, 2019), <https://www.vox.com/recode/2019/8/20/20813660/china-facebook-twitter-hong-kong-protests-social-media>.

³⁶⁷ Adi Robinson, *The NBA is Afraid of Offending China - and so are Online Platforms*, VERGE (Oct. 7, 2019), <https://www.theverge.com/2019/10/7/20902947/nba-rockets-daryl-morey-hong-kong-protests-tweet-internet-speech-censorship-china>.

an apology posted.³⁶⁸ Chinese companies pulled sponsorships from the NBA and Adi Robertson of The Verge reports that the general manager's employers considered firing him.³⁶⁹ Robertson further reports that LinkedIn is owned by Microsoft and that they censor anti-government material in China,³⁷⁰ and Apple has removed pro-democracy songs by Hong Kong singers.³⁷¹ Some refuse to be affected by China. Google left China years ago, even though they seem to want to re-start if it even becomes possible.³⁷² The creators of the show *South Park* were fine after China banned their show for an episode called "Band in China" that "took aim at what it portrayed as a tendency in U.S. culture to adjust content to accommodate Chinese censorship laws."³⁷³

Countries are sensitive to how they are portrayed. Professor Kate Klonick examines through empirical research the new arbiters of taste and speech among the major platforms,³⁷⁴ and she has found incidences where individual countries like Thailand and Turkey approached YouTube to remove videos.³⁷⁵ Her research and interviews show that the rules the companies used developed over time as their content volume increased were difficult to articulate consistently to workforces located in various countries around the world, and were subject to cultural interpretation, among other issues that created great inconsistencies in implementation.³⁷⁶

In the world of an open internet, information flows freely unless stopped by governments. It is possible to use technology to create a mostly-sealed information border on the internet since the vast majority of internet traffic arrives via high speed wires, coaxial cables, and fiber optics.³⁷⁷ Each of these need to be "landed" at a point on the way into the country and that gives an opportunity for governments to place censorship hardware at these landings.³⁷⁸ Once the government can control the incoming and outgoing data, it is possible to have fairly good government control of data. The control may not be absolute because of radio-frequency communication and its ability to bypass the landed entry points. Satellites and terrestrial radio can get data past those points. And so, while governmental control may be "effective" or "effective enough," it may not be perfect. Similarly, there are ways of using encryption to

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² Li Yuan & Daisuke Wakabayashi, *Google, Seeking a Return to China, Is Said to Be Building a Censored Search Engine*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/technology/china-google-censored-search-engine.html>.

³⁷³ Stephanie Convery & Yang Tian, *'We Good Now China?' South Park Creators Issue Mock Apology After Ban*, GUARDIAN (Oct. 8, 2019, 6:18 AM), <https://www.theguardian.com/tv-and-radio/2019/oct/08/we-good-now-china-south-park-creators-issue-mock-apology-after-show-reportedly-censored>.

³⁷⁴ Kate Klonick, *The New Governors: The People, Rules, And Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

³⁷⁵ *Id.* at 1623, 1624.

³⁷⁶ *Id.* at 1642, 1643.

³⁷⁷ See, Jeffrey (Chien-Fei) Li, *Internet Control or Internet Censorship? Comparing the Control Models of China, Singapore, and the United States to Guide Taiwan's Choice*, 14 PITT. J. OF TECH. L. & POL. 1 (Fall 2013).

³⁷⁸ Nikhil Sonnad & Keith Collins, *How Countries Like China and Russia are Able to Control the Internet*, QUARTZ (Oct. 5, 2016).

“smuggle” in data via the regular landed entry points.³⁷⁹ Encryption is a method of encoding data so it is unreadable.³⁸⁰ Sometimes the encrypted information is in a file that can be readily discerned, and sometimes it might be hidden in something else like a picture file.³⁸¹ Finally, there has always been direct smuggling of information. The Cold War literature is full of stories of information being smuggled cross-border, so nothing says a motivated person will not find a way of getting some data drives across a border. Attempting to seal the information border is futile.

V. INSURMOUNTABLE BARRIERS TO REGULATION

Most countries have faced questions of media content ownership. In many countries, media outlets need to be owned by a majority of national citizens.³⁸² However quaint this is, in the internet age when media companies are available worldwide, national limits on media ownership are ineffective. Sure, Facebook can create country- and language-specific websites like facebook.fr for French-language sites directed towards France, which also makes it easier to comply with individual quirks of French law. But overall, these websites are reachable by anyone, anywhere, unless a government splits its internet from the rest of the world. Speaking French is not a perquisite to being on the French version of Facebook.

Facebook is owned by the shareholders who own the stock. Mark Zuckerberg owns the majority, an investment firm owns the second most, Zuckerberg’s college roommate owns some, and even a Russian investment firm owns a nice percentage.³⁸³ In modern times, ownership is not balkanized by citizenship; it is determined by finances. Since social media is owned and managed by individuals, it can have its own biases. While it probably surprises few that former President Trump has alleged viewpoint discrimination by certain social media and search platforms including Facebook and Google, it has also been alleged by the other side that some social media platforms have discriminated against the democratic candidates including Elizabeth Warren³⁸⁴ and Tulsi Gabbard.³⁸⁵ No matter who you are, you might not feel treated fairly by

³⁷⁹ See, e.g., Phil Muncaster, *Hackers Used Online Video Site to Smuggle Data Out of Firm*, INFO. SEC. MAG. (Oct. 28, 2014), <https://www.infosecurity-magazine.com/news/hackers-video-site-smuggle-data/>.

³⁸⁰ Ryan Polk & April Froncek, *Your Day With Encryption*, INTERNET SOC’Y (Oct. 22, 2019), <https://www.internetsociety.org/blog/2019/10/your-day-with-encryption/>.

³⁸¹ Lily May Newman, *Hacker Lexicon: What is Steganography?*, WIRED (June 26, 2017, 5:10 PM), <https://www.wired.com/story/steganography-hacker-lexicon/>.

³⁸² See generally Simeon Djankov et al., *Who Owns the Media?*, 46 J. L. & ECON. 341 (Oct. 2003).

³⁸³ Jesse Drucker, *Kremlin Cash Behind Billionaire’s Twitter and Facebook Investments*, N.Y. TIMES (Nov 5, 2017), <https://www.nytimes.com/2017/11/05/world/yuri-milner-facebook-twitter-russia.html>.

³⁸⁴ Allan Smith, *Elizabeth Warren Ramps Up Battle With Facebook*, NBC NEWS (Oct 13, 2019), <https://www.nbcnews.com/politics/2020-election/elizabeth-warren-ramps-battle-facebook-n1065571>.

³⁸⁵ Daisuke Wakabayashi, *Tulsi Gabbard, Presidential Candidate, Sues Google for \$50 Million*, N.Y. TIMES (July 25, 2019),

social media, because others are making decisions about your content. Professor Klonick has also looked at the motivation of social media companies, asking why, if the companies are immune under Section 230, they would bother to spend a lot of money and effort to self-regulate and moderate speech.³⁸⁶ Her answer is that they are economically motivated to do so, because they need to create a hospitable environment for their customers.³⁸⁷

Online media companies are huge by comparison to traditional media companies. Vox lists the June 2019 market cap of Amazon at \$943B, and Google at \$773B.³⁸⁸ Apple is now approaching a market cap of nearly \$2,000B.³⁸⁹ Contrast that with other large media companies like Disney at \$254B, ATT/Warner Media at \$237B, Verizon at \$237B, Netflix at \$158B, Comcast/NBC at \$198B and CBS at \$19B.³⁹⁰ The big online media and search companies control the dialogue and dominate the traditional media, perhaps with an even greater reach because they are inherently worldwide.

Social media, despite being called “new media” is now the media establishment. Social networks are accountable to shareholders and have billions and billions of dollars of market capital; as of the time of this article, for example, Facebook is a publicly traded company with a \$755B market capitalization.³⁹¹ This accountability to shareholders drives their behavior toward their speech. While many have argued for or implemented speech controls³⁹² for social media, it is the open and free internet that permits voices to thrive without interference. We have seen that YouTube has filtered out videos with the word “gay” in them,³⁹³ and while one important change is for social media to be friendly to all voices, there should also be room for alternate distribution. Professor A.J. Christian’s work has established an entire media production mechanism for voices that may intersect with social media at some points, but may also use their own distribution paths.³⁹⁴ These alternate paths are important in light of discrimination by the big social media conglomerates.

And some of those decisions, especially in a heated political race, are time sensitive. Not being able to make your argument today might be as devastating as not being able to make your

<https://www.nytimes.com/2020/03/04/technology/google-tulsi-gabbard-lawsuit.html> (alleging Google infringed on her speech by suspending her account.).

³⁸⁶ Kate Klonick, *The New Governors: The People, the Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 159, 1601 (Apt. 10, 2018).

³⁸⁷ *Id.* at 1615.

³⁸⁸ Rani Molla & Peter Kafka, *Here’s Who Owns Everything in Big Media Today*, Vox (Jan. 11, 2021, 1:29 PM), <https://www.vox.com/2018/1/23/16905844/media-landscape-verizon-amazon-comcast-disney-fox-relationships-chart>.

³⁸⁹ Eric J. Savitz, *Apple’s Market Cap Nears \$2 Trillion. Here’s Why That’s Not Insane.*, BARRON’S (Aug 4, 2020, 2:46 PM), <https://www.barrons.com/articles/apples-market-cap-nears-2-trillion-heres-why-thats-not-insane-51596566804>.

³⁹⁰ *Id.*

³⁹¹ *Facebook, Inc.*, YAHOO! FIN., <https://finance.yahoo.com/quote/FB?p=FB> (last visited Jan. 29, 2021).

³⁹² James Griffiths, *Analysis: Governments are Rushing to Regulate the Internet. Users Could End Up Paying the Price*, CNN (Apr. 8, 2019, 2:22 AM), <https://www.cnn.com/2019/04/08/uk/internet-regulation-uk-australia-intl-gbr>.

³⁹³ See Dickson, *supra* note 325.

³⁹⁴ AMYAR JEAN CHRISTIAN, *OPEN TV: INNOVATION BEYOND HOLLYWOOD AND THE RISE OF WEB TELEVISION* (2018).

argument at all. So even if there is a review process or an appeal process, the fact that a private company makes a viewpoint decision can be devastating. It can also be devastating if they do not stop some allegations, but in a free speech environment, the truth should rise to the top over lies by additional speech. Will that work if some speech is banned?

This also brings up the question of how to punish bad actors. The pragmatics of punishing people who speak against an interest politically is interesting. From the beginning of time, it depends on who is not getting what they want as to who will protest. But the people who determine whether the speech was valid or not are likely to also have political ties. Whether to the current administration, to the last administration, or to an unelected candidate, or just to an idea, how are the viewpoints to be fairly discerned? If they cannot be fairly discerned, should they be ruled upon at all? For example, in addition to political party, what effect does political donations have upon the determinations? Does a large donor to a party receive more leeway? If so, why? Shouldn't everyone be treated the same? If so, how would that happen?

Big donors or wealth interests affect the dialogue in many countries. There are several public interest groups that watch who legislators receive donations from and posit that their vote might be influenced by these donations, and that therefore, the electing public and the regulated public deserve to know who the duly elected receive money from in case there seems to be a direct influence.³⁹⁵ Also, there are numerous public laws on the books that regulate what a legislator can do in accepting campaign donations, and some candidates who vow to not accept big donations. Each of these are actions showing that people have been concerned about the influence of donations on the decisions that lawmakers make. Similarly, lawmakers are likely to go easy on regulating the business of big donors, whether they might be news organizations, publishers, newspapers, websites, or other media.

In *Citizens United*, the Supreme Court ruled that private individuals may donate as much as they want to political campaigns. Because campaign donations are a form of political speech and political speech should be protected, wealthy individuals cannot be restricted from massive donations, even if the donations might be to elect those who are favorable to their views. A British publication followed the 2018 midterm elections and found that the top donors in the US campaigns were Sheldon Adelson at \$113 million, Thomas Steyer at \$50 million,³⁹⁶ Richard and Elizabeth Uihlein at \$39 million, Michael Bloomberg at \$38 million,³⁹⁷ Donald Sussman at \$22.8 million, James Simons at \$18.9 million, and George Soros \$17 million.³⁹⁸ These are large donations and are intended to sway the results of elections and of society after the elected assume office.

Along with individuals, corporations can also conduct lobbying.

³⁹⁵ See generally OPENSECRETS, [opensecrets.org](https://www.opensecrets.org) (last visited Jan. 29, 2021); CHARITYWATCH, [charitywatch.org](https://www.charitywatch.org) (last visited Jan. 29, 2021); FOLLOWTHEMONEY, [followthemoney.org](https://www.followthemoney.org) (last visited Jan. 29, 2021).

³⁹⁶ He was later a candidate for president himself.

³⁹⁷ Also a subsequent candidate for president.

³⁹⁸ Natalie Jones, *Midterm Big Spenders: The Top 20 Political Donors This Election*, *Guardian* (Nov 2, 2018), <https://www.theguardian.com/us-news/2018/nov/02/midterm-spending-top-political-donors-sheldon-adelson>.

In 2018, for example, Open Secrets, a website that tracks lobbying spending, recorded that among the highest lobbying expenditures were firms and groups interested in healthcare, such as the Pharmaceutical Research and Manufacturers of America, American Hospital Association, Blue Cross/Blue Shield, and the American Medical Association.³⁹⁹ Similarly, communication was a big issue, and in 2019 among the largest internet donors were Amazon (owner of streaming and publication services), Twitter, Alphabet/Google, Alibaba, and Facebook.⁴⁰⁰ The amount they spend on lobbying projects their messages to lawmakers so those lawmakers know which issues the companies would like addressed and which they would like delayed.

Once political campaigns spent millions and millions of dollars of campaign advertising on traditional television, and one of the most powerful lobbies in Washington, D.C. was an industry group known as the National Association of Broadcasters (NAB). Why were the broadcasters a powerful lobby listened to by the legislators? Because it did not matter if you were running for a governmental office in New York City, or in small-town Oregon, you needed the media from the networks to the local television and radio stations to get your word out. You needed to advertise on their stations. You needed their newscasts to cover you. You needed to be invited to appear on their talk shows and in their candidate debates. Legislators did not aggressively regulate those they relied upon. Regulation was around the edges, and each year that other media developed, it became more and more lax.

Now the legislators need Google and its ad-words for advertising. They need Twitter to get the word of their deeds out daily, and they need other media such as Facebook to post enduring information and to host live streams. Is there any chance that the legislators will get tough with the media that they need to get elected? Their own path to re-election depends on the media—the new media, the old media, all media. They might be reluctant to disturb the operating paradigms maintained by media ownership. Having elected officials as the guardians or even the regulators of the media has been, and will continue to be, an exercise in futility.

Although regulating viewpoints on social media is generally difficult, bordering on impossible, there are some things that might be done. These things depend on the big “brick and mortar” companies, those that are large enough to have physical presences that are easy for the government to interact with. There will always be small voices and small websites, but unless a government attempts to control all content on the internet within its country, those sources will just go uncontrolled.

The companies and sources that a government could deal with are Facebook, Google, major news companies such as the “big three,” PBS, and Fox, Amazon, Yahoo, Netflix, and others with a major US infrastructure presence. Some of these companies may come and go over the years—think Myspace, Prodigy, CompuServe, or an old broadcasting

³⁹⁹ *Health: Top Contributors to Federal Candidates, Parties, and Outside*, OPENSECRETS, <https://www.opensecrets.org/industries/contrib.php?ind=H&Bkdn=Source&cycle=2018> (last visited Jan. 29, 2021).

⁴⁰⁰ *Industry Profile: Internet*, OPENSECRETS, <https://www.opensecrets.org/federal-lobbying/industries/summary?id=B13&cycle=2019> (last visited Jan. 29, 2021).

networks—but the idea that a company needs to be reasonably stable, identifiable, and present for a government to regulate it is a constant.

Getting some sort of disclosure and identification from some sources can be done, especially if the government were to regulate advertisers. Governmental regulation on disclosure of political advertising has a long history, including in both broadcast and cable. The unique thing about advertising that makes it more easily subject to disclosure is the purchase transaction to buy advertising time, ads, or clicks. If there is enough information needed to establish billing and commerce, so far there might be the possibility to track.⁴⁰¹ So at the time of purchasing advertising, the media company can require sufficient identification that they disclose who the source is. And of course, if the source is not identifiable and traceable, the media company should not take the advertisement. With disclosure comes at least the appearance of some transparency. And disclosure is usually enforceable; the Supreme Court has routinely upheld the validity of campaign disclosure laws.⁴⁰² However, there are perfectly legal ways of currently foiling disclosure, like companies hiding behind supposed public interest groups, the members of which are not consumers or grass-roots groups, but rather other companies much like themselves.

CONCLUSION

The regulation of political speech content is the most difficult of all. One person's deeply held values are totally opposed by others with equal fervor. And what exactly is political speech? Even the definition of what constitutes political speech is evasive. Therefore, the slicing of political speech and the determination of what is valuable and what is offensive is difficult at best and impossible at worst. Further, the private media companies themselves have interests in the outcome, whether they need a favor from the government, or they want to gain favor with a particular candidate or social group, or whether they are seeking financial benefits. It does not matter; the result is the same. Online media has demonstrated enough power that it has been able to shut down a sitting President and stop all news on a platform to a continent, so they have the power and authority to remove at least some pernicious material, they just need to exercise it. The media consumer will be the judge of the quality of the results, and ultimately the quality of the platform.

Content regulation is difficult even in the best of circumstances; it is difficult for all speech, and it is especially difficult when the topic is the murky world of political speech. Even determining the origin of the speech for identification of the source is extremely problematical in the interconnected internet world, one where anonymous accounts and deepfakes are possible. Even the usual good practice of informing a consumer and letting them make their own choice is difficult, and with the quantity of speech on the internet media, deceptive technology, and the difficulty of building unbiased algorithms, mere regulation without

⁴⁰¹ This may not be the case in the future with the use of cyber currencies which are not traceable like Bitcoin and others.

⁴⁰² Millicent Usoro, *A Medium-Specific First Amendment Analysis on Compelled Campaign Finance Disclosure on the Internet*, 71 FED. COMM'NS. L. J. 299, 303 (2018-19).

more is likely to follow the path of past failed attempts at regulating speech. The consumer needs to take agency of their own information. For years, universities have been teaching courses in media literacy to empower people to be better and more critical consumers of media. Finland has recognized this as a cultural and perhaps safety imperative and are now teaching their population what deepfakes are, how to identify bots, how to identify stock photos, and whether they have been “trolled” by “the Russian Army.”⁴⁰³

The real mantra is “information consumer beware.” Election outcomes might be swayed by targeted speech, but that has always been the case. In fact, the purpose of an election is for all parties to try to sway opinion. It is the purpose of the candidates, of their parties, of their constituents, of the opinion media, of every individual in the street with an opinion, to sway the opinion of others. In the 2020 election, there was even an internal opposition group within the President’s own party attempting to sway voter opinion away from the President.⁴⁰⁴ It is impossible to take away the essence of the political process—that of convincing people of the right path for the election, the proper candidate or issue to be supported—via a regulation that is ultimately supervised by someone who has their own opinion. Biases are built into the processes.

The real place to protect American elections is at the polls. As long as the electorate gets to vote and their votes are counted, then the work of an election has been done. The fact that a voter might have been bombarded with a huge amount of information containing both truths and lies is part of the process and has been the way of politics since the first U.S. election. The 2020 election proved that the election process is resilient, with sixty-two court challenges and sixty-one rulings against the former President, including by some judges that he had appointed.⁴⁰⁵

The encouragement of speech is the value to protect. The ascertaining of source is also a good value, insofar as it is possible. And the encouragement of competing sources so an informed public does not depend on the concentration of information from Facebook, Twitter, and Google is also a good practice, as more and more diverse voices has always been our value. That is what we should be protecting. Even those who are criticizing the diverse voices theorem acknowledge that it has worked for many decades. Consumer beware applies to everything from shopping transactions to financial transactions, to email phishing scams, to telemarketing telephone calls, and now to the most important transaction a person will make: casting a vote.

Those who are on the internet will also eventually be able to find value in reputation. If a source has a reputation for unbiased accuracy, it is likely to be the first place that info consumers will access. The

⁴⁰³ Eliza Mackintosh & Edward Kierman, *Finland is Winning the War on Fake News. What It’s Learned May Be Crucial to Western Democracy*, CNN (Dec. 30, 2020), <https://edition.cnn.com/interactive/2019/05/europe/finland-fake-news-intl/>

⁴⁰⁴ Lincoln Mitchell, *How the Lincoln Project’s Brutal Anti-Trump Ads Could Remake US Politics*, CNN OP. (July 23, 2020), <https://www.cnn.com/2020/07/23/opinions/lincoln-project-anti-trump-ads-remake-politics-mitchell/index.html>.

⁴⁰⁵ William Cummings, Joey Garrison & Jim Sargent, *By the Numbers: President Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

reputation for reporting will become more and more important. A reputation for opinion is also alright, but that source will not necessarily be a go-to for those interested in veracity. Finally, an ease-of-access for competing and new voices will encourage the competition and the diversity that will contribute to the formulation of truth in the marketplace of ideas. There is nothing wrong with leaving the social media alone to make their own determinations. What is difficult, and perhaps impossible, is to police is the judgment they use to make those determinations. Each person should be free to choose the social media that works best for them. They should be free to move from older social media to newer social media as information venues that suit their needs develop. They should be free to “change channels” as their interests suit them. Social networks develop their own reputations for the service and content they offer. One merely needs to think about how many social networks have come and gone to understand how fleeting consumer tastes are.⁴⁰⁶

Regulation of the social media is futile: it is futile because history has proven we cannot regulate speech; it is futile for technological reasons—the technology of fakery and stealth is so good that the truth cannot be determined; it is futile for global reasons—there is always a different regulatory regime that will let the material pass; and it is futile for viewpoint reasons—who is to make the determination? Even a robotic intelligence has shown that it cannot be fair. Encouraging good practices and providing regulation that encourages competition and speech will create a free exchange of ideas and encourage a well-functioning information marketplace.

⁴⁰⁶ Paige Leskin, *These are 13 of the Most Popular Social Networks a Decade Ago That Have Died or Faded Into Obscurity*, INSIDER (Dec. 23, 2019, 4:44 PM), <https://www.businessinsider.com/aim-myspace-club-penguin-social-apps-popular-2010-decade-2019-11>.