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Tech Tyranny:
Assessing a Regulatory Regime for Today's Online World

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Abstract

This article is about power and the law's ability to regulate and channel it. It is about the power of contemporary technologies, and the Big Tech companies that use these technologies, to influence individual behavior and perceptions. Today, the platform providers exert great influence in shaping news and information to which platform users are exposed. While the focus of the article is on social media companies and their impact on politics, the issues raised go far beyond politics.

The current debate about content moderation is a subset of a broader debate about the appropriate role of government on issues as varied as trade, the economy, and national security. At present, most people are more wary of government power than private, corporate power. Yet, in the present context unregulated corporations control most of the ways people interact with each other and receive information. The ability of corporations to influence information people receive has changed and evolved in ways previously unimagined. The result is growth in corporate power in the information sector. Social media reflect this reality. Social media have become part of daily life for one-third of the world's population, something unthinkable just a generation ago.

Now, allegations of political bias, manipulation, and narrative control by the largest platforms have made people look at social media in a different light. While conservatives and liberals alike have concluded that the major platforms display overt biases towards one political affiliation or the other, no consensus has emerged about how to define the policy issues much less address them. Conservatives cry foul the most often; some point to Twitter's and Facebook's banning of the President of the United States as evidence of the problem. On the other side, arguments are advanced based on what every private citizen confronts by way of Twitter and Facebook content standards and on the fact the President of the United States is not dependent on any media to publicize his or her views.

This article analyzes the place of multi-media platform providers in contemporary life, the power such platform providers have acquired over the ways in which ordinary citizens communicate and learn, and the relevancy of public policy tools, including the Sherman and Clayton Anti-trust Acts, developed in a different technological context, as possible ways being considered to hold the platform providers accountable for their content moderation practices and potential legislative measures that could empower users online. The article then offers suggestions for questions to answer prior to taking the plunge in one or another policy direction. Accountability of course is one of the issues. Another are present debates about amendments to Section 230 of the Communications Decency Act.

Before new policies on content moderation and accountability of the platforms can be developed, a more robust factual record, as opposed to anecdotal data, is needed which will require serious, independent research and far more transparency from the platforms about how and why they moderate content and the limitations and possibilities for human-based and automated moderation. The United States, unlike many other countries, does not dictate what can be published on the Internet and by whom. This has allowed the Internet and technology companies to flourish and a diversity of voices to reach widespread audiences. How this diversity will endure remains a matter of concern.

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I. Introduction

This article is about power and the law's ability to regulate and channel it. It is about the power of contemporary technologies, and the Big Tech companies that develop and deploy these technologies, to influence markets, individual behavior, and people's views. Today, these technologies and the companies behind them exert great influence on many aspects of daily life including shaping news and information that are exposed to through their platforms. The focus of the article is on social media companies and their impact on politics. The issues it raises, however, go far beyond politics.

In many ways, the current debate about social media's role in content moderation for the Internet is a subset of a broader debate about the appropriate role of government on issues as varied as trade, the economy, and national security. At present, most people are more wary of government power than private, corporate power. Yet, in the present technological context, a relatively small number of private, unregulated corporations control most of the ways people interact and receive information and thus are able to influence the messages they receive in ways that were previously unimaginable. Government does not regulate these corporate activities in the social media space which now affect the daily lives of one-third of the world's population. This phenomenon was unthinkable just a generation ago.

Unlike a number of other governments, the U.S. government does not dictate what can be published on the Internet and who can publish. This policy path allowed the Internet and technology companies to flourish and a diversity of voices to reach distant audiences. Yet the character and rise of social media in society have brought allegations of political bias, manipulation, and narrative control by the largest social media platforms. Conservatives and liberals alike have concluded that substantial media outlets display overt political biases. According to the recent House Judiciary Committee minority report, *The Third Way*, all groups with political ideologies experience censorship by the platforms, but such censorship "is most notably realized through tech platforms exerting overt bias against conservative outlets and personalities."[1] By suggesting possible paths, the authors hope to provide a starting point for analysis of ways to ensure that platforms are held accountable for their content practices and potential legislative measures that could empower users online.

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[1] Rep. Ken Buck, *The Third Way* (House Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law, October 2020), p. 6. This report notes that Google used its dominant advertising technology product to demonetize conservative media outlets, including The Federalist. YouTube, a Google subsidiary, blocked videos from Republican politicians and media groups. Amazon censored conservative organizations, including the Family Research Council and the Alliance Defending Freedom by blocking Americans' ability to donate to these groups through the AmazonSmile tool. Facebook's algorithms, advertising policies, and content moderation rules have all combined to discriminate against conservative viewpoints, shadow ban conservative organizations and individuals, and suppress political speech. An alternative view is found in Paul M. Barrett and J. Grant Sims, *False Accusation: The Unfounded Claim That Social Media Companies Censor Conservatives* (NYU Stern Center for Business and Human Rights, February 2021). This study was funded by Craig Newmark, the billionaire founder of the Craigslist platform and colleague of the major platform providers. It makes the claim that the conservatives claim is largely based on a lack of data which Twitter and other others do not provide.

In 2021, the Internet is a far different place than it was in the early years of its development. It is time to reexamine the policies adopted in those early years and consciously decide to continue or change them. In our view, the goal should be to ensure that all users enjoy the Internet and the social media space with as much freedom as is compatible with national security. We inhabit a world of corporate gigantism characterized not by outright monopolies but by oligopolies like the Big Three technology companies: Facebook, Google, and Twitter. Just as Justice Brandeis recognized the dangers to democracy posed by the big trusts of his day and he and his colleagues in government took action to prevent the undoing of our democracy, we too must act today to protect the democratic principles on which this country was founded.

In the final days of the 2020 Presidential campaign this became an explosive issue when reports of actions by candidate Joe Biden's son, Hunter Biden, and his financial dealings with various foreign entities were initially reported by the *New York Post*. Twitter and Facebook immediately blocked them from appearing on their platforms.[2] Media reported the subsequent, extensive controversy over these allegations in October 2020. Following the 2020 election social media postings by President Trump, as well as various Senators, Congressmen, and other political figures were subject to removal from the major platforms. The accounts of President Trump and others were permanently terminated by these providers, barring any future posts, in a highly controversial move that served to heighten political tensions and division.[3]

The authors recognize that, before new policies regarding content moderation and government-imposed accountability of social media platforms can be developed, a more robust factual record, as opposed to anecdotal data, is needed. This will require serious, independent

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[2] The stories in question grew out of a discovery of a laptop computer belonging to Hunter Biden that had been left for repair, later abandon by him, and then turned over to the FBI, the *New York Post* and others containing large numbers of emails and other materials bearing on Hunter Biden's foreign dealings and connections to his father Joe Biden. The initial stories are: Emma-Jo Morris and Gabrielle Fonrouge, "Hunter Biden emails show leveraging connections with his father to boost Burisma pay," N.Y. POST, October 14, 2020; Emma-Jo Morris and Gabrielle Fonrouge, *Smoking-gun email reveals how Hunter Biden introduced Ukrainian businessman to VP dad*, N.Y. POST, October 14, 2020,; Emma-Jo Morris and Gabrielle Fonrouge, *Emails reveal how Hunter Biden tried to cash in big on behalf of family with Chinese firm*, N.Y. POST, October 15, 2020; Ebony Bowden, *Inside Hunter Biden's murky history of business dealings in China*, N.Y. POST, October 14, 2020. For some of the subsequent commentary, see: Editorial Board, *Facebook censors The Post to help Joe Biden's 2020 campaign*, N.Y. POST, October 14, 2020; Miranda Devine, *Big Tech is in the tank for Biden, Democrats*, N.Y. POST, October 14, 2020; Editorial Board. *The left's favorite way to rebut foes: Silence them*, N.Y. POST, October 19, 2020; Noah Manskar*, Facebook limits spread of The Post's Hunter Biden exposé*, N.Y. POST, October 14, 2020; Ebony Bowden, *Biden campaign 'glad' Twitter, Facebook censored Post's Hunter Biden exposé*, N.Y. POST, October 15, 2020; David Harsanyi, *Twitter's squelching of The Post makes absolutely no sense*, N.Y. POST, October 15, 2020; Bruce Golding, *Twitter still holding The Post's account hostage over Hunter Biden links*, N.Y. POST, October 16, 2020; Josh Hawley, *Senate GOP must act now to stop tomorrow's Big Tech abuses*, N.Y. POST, October 19, 2020; and Brian Flood, *These five people are allowed to tweet but one of America's oldest newspapers can't*, N.Y. POST, October 21, 2020. Apart from the *Post,* see Holman W. Jenkins, Jr., Opinion, "A Laptop Window on the Oligarchy -- Hunter Biden was for sale to anybody who wanted influence with his father," *Wall Street Journal*, October 21, 2020.

[3] Such actions have given rise to a new terminology, including a "cancel culture" and the "deplatforming" of individuals. See Jacqueline Pfeffer Merrill "An Intelligent Person's Guide to Modern Culture," *Perspectives on Political Science.* (January 2, 2020) 48–50, and Rebecca Hamilton, "De-Platforming Following Capitol Insurrection Highlights Global Inequities Behind Content Moderation," *Just Security* (January 20, 2021).

research and much more transparency from the platforms about how and why they moderate content and the limitations and possibilities for human-based and automated moderation. This record must reflect serious, independent research and much more transparency from the platforms about how and why they moderate content and the limitations and possibilities for human-based and automated moderation. This policy path allowed the Internet and technology companies to flourish and a diversity of voices to reach distant audiences.

II. The Social Media Revolution

Google was created in 1998; Facebook in 2004; and Twitter in 2006. The social media revolution was launched. It brought new media unique to cyberspace, enabling personal sharing and interaction never previously imagined.[4] Social media's growth, technological development and integration into contemporary culture constitute a revolution quite possibly without historical precedent. For a substantial number of people, social media have become a dominant feature of their lives. They also have become a central element of politics, commerce, government, education, and culture. Social media applications include blogs, social networks, forums, photo sharing, and virtual worlds. Social media have become ubiquitous.

A highly significant result of this technology revolution is that a vast majority of the American population now obtains its "news" and information from social media outlets and no longer from printed newspapers, magazines, and other traditional media.[5] These outlets are owned and operated by a small number of platform operators such as Google, Facebook, and Twitter that offer users free access to "post" information. They are alleged to engage in political messaging by means of editing posted content and denying access to some users for political reasons.[6] Professional journalists standards seem absent from this new environment.

A. Evolution of Social Media

Social media started with simple platforms. American Online's instant messenger (AIM) was created for real people, using their real names. MySpace was the first social media site to reach a million monthly active users in 2004, surpassing Google in 2006, as the most visited website in the United States. Friendster, another one of the original social networks, was sold in 2015 and became a social gaming site. The initial social networks, however, were relatively short-lived. While Gi5, MySpace and Friendster were close competitors to Facebook in 2008, by 2012 they had virtually no share of the market. Facebook, Google, and Twitter took social media to new

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[4] The technical term for such media is "social awareness streams." See, for example, H. Kietzmann, and Jan Kristopher Hermkens, "Social media? Get serious! Understanding the functional building blocks of social media." *Business Horizons* 54: 241–251. (2011). See also Timothy Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, (New York: Columbia Global Reports, 2018). Chris Hughes, "It's Time to Break Up Facebook," *New York Times* (May 9, 2019). Cecilia Kang, "Facebook Set to Create Privacy Positions as Part of F.T.C. Settlement," *New York Times* (May 1, 2019). Nicholas Thompson and Fred Vogelstein, "15 Months of Fresh Hell Inside Facebook," *Wired* (May 2019).

[5] See Abraham Wagner and Nicholas Rostow, CYBERSECURITY AND CYBERLAW (Durham: Carolina Academic Press, 2020).

[6] By some accounts these "big three" have almost total control of all data reaching the vast majority of all Americans, with Google being the "gateway" to all data now. See *The Third Way Report*, House Judiciary *op. cit.*

levels. Facebook, with more than a billion accounts, led to the rise of many networking sites in the course of propelling the social network revolution.[7] Recent research shows that the audience spends some 22 percent of their time on social networking sites, thus showing how popular social media platforms have become.[8]

As the world of social media has expanded, other sites such as Twitter, Instagram, and Snapchat have emerged and attracted millions of users worldwide. Originally the domain of college students and younger users, all age and status groups now use social media. Users now include the Pope and the President of the United States, as well as military leaders and entertainment stars.[9] Some social media sites have a greater likelihood than others of users will re-sharing content posted by another user to their social network, and many social media sites provide specific functionality to enable sharing, such as Twitter's retweet button, Pinterest pin, or Tumblr's reblog function.[10]

Increasingly, social media have incorporated media monitoring tools that allow marketers to search, track, and analyze web conversation about their brand or about topics of interest. This undisputed fact seems amazing in that it is accepted by a legal regime that abhors the concept of government surveillance of email looking for potential threats, with cleared personnel such as those at NSA, and secure systems, but has no issue with Google searching all hosted Gmail accounts to sell things. These tools range from free, simple applications to subscription-based, sophisticated tools. A honeycomb framework defines how social media services focus on some or all of several functional building blocks; such blocks help explain the engagement needs of the social media audience. For example, LinkedIn users are thought to care mostly about identity, reputation, and relationships, whereas YouTube's primary features are sharing, conversations, groups, and reputation. Some companies build their own social containers linking the functional

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[7] Facebook was launched in 2004 by Mark Zuckerberg and two Harvard roommates. Membership was initially limited to Harvard students, but was expanded to other colleges in the Boston area, the Ivy League, and gradually most universities in Canada and the United States, corporations, and by 2006, to everyone of age 13 and older with a valid email address. Possibly the most sensational business story in history, Facebook went from a Harvard dorm room project to a multi-billion dollar enterprise in a matter of months.

[8] *See Social Media Fact Sheet*, PEW RES. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media/. Most recently the COVID-19 pandemic which kept many people at home during 2020 has caused this figure to increase greatly as people of all ages have been "locked down" in their homes using their computers for large amounts of time.

[9] Shimon Peres, at age 90, when President of Israel quipped of his Facebook account, that for generations Jews were known as the "people of the book" and now they were "the people of the Facebook." As president Donald Trump was a regular user of Twitter and helped popularize it as a ubiquitous feature of political communication by candidates and office-holders.

[10] Use of social media has been greatly enhance with applications ("apps") for mobile devices such as smartphones and tablets. Here mobile marketing applications allow the creation and exchange of user-generated content, and since these apps run on mobile devices, they can incorporate new factors such as the current location of the user (location-sensitivity) or the time delay between sending and receiving messages (time-sensitivity).

building blocks around their brands and engage people around a narrower theme, rather than social media containers such as Google, Facebook, and Twitter.[11]

Social media is different from earlier forms of communications. An earlier generation watched television rather than listen to radio to obtain media content (although the car radio has remained a potent instrument). Social media has created a nation of media content *creators*—every person can be a reporter or pundit. Today, almost 80% of American adults are online and nearly 60% of them use social networking sites.[12] According to a Pew Research Center survey, adults aged 18 to 29 in the United States are more likely to get news indirectly via social media than from print newspapers or news sites.[13] More Americans get their news via the Internet than from newspapers or radio; some 75 percent say they get news from e-mail or social media sites updates. Facebook and Twitter make news a more participatory experience than before as people share news articles and comment on other people's posts.[14] Social media also fosters communication. One recent study found that more than half of Internet users use two or more social media sites to communicate with their family or friends.[15]

Social media platforms also have become venues for undesirable and criminal activities.[16] Foreign powers have used social media through bots and trolls to try to influence elections, while terrorist organizations have used these platforms for recruitment and other operations. Lone-

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[11] Technically Google's Gmail is a communications medium and not a social media platform, although Google, which owns YouTube, is included as a major platform provider. See Andrew Keane Woods, *Litigating Data Sovereignty*, 128 YALE L.J. 238 (2018) and Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1185 (2016). The situation is quite the opposite in Europe. The General Data Protection Regulation (GDPR) affords law enforcement and security services broad access and controls commercial exploitation of personal data. *See Google Spain SL v. Agencia Espanola de Protection de Datos*, *2013 E.C.R. C-131/12*.

[12] *See* Angela Barnes & Christine Laird, "The Effects of Social Media on Children," COMMUNICATION AND SOCIAL MEDIA (2012), and Mary Madden, Amanda Lenhart, Sandra Cortesi, Urs Gasser, Maeve Duggan, Aaron Smith, and Meredith Beaton, *Teens, Social Media, and Privacy*, BERKMAN CTR. FOR INTERNET & SOC'Y and PEW RES. CTR. (2013).

[13] Elisa Shearer, *Social media outpaces print newspapers in the U.S. as a news source*, PEW RES. CTR. (December 10, 2018), https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/.

[14] In the United States, 81% of people say they look online for news of the weather, first and foremost. National news at 73%, 52% for sports news, and 41% for entertainment or celebrity news. Here two-thirds of the online news users were younger than 50, and 30% were younger than 30. Now 33% of young adults get news from social networks while 35% watched TV news and 13% read print or digital content, and 19% of Americans got news from Facebook, Google+, or LinkedIn. More than 36% of Twitter users use accounts to follow news organizations or journalists. Nineteen percent of users say they got information from news organizations of journalists. TV remains most popular source of news, but audience is aging (only 34% of young people). Of those younger than 25, 29% said they got no news yesterday either digitally or traditional news platforms. Only 5% under 30 said they follow news about political figures and events. Barns and Laird, *op. cit.*

[15] See Nicholas Carr, "Is Google Making Us Stupid? What the Internet is doing to our brains," *Atlantic* (July/August 2008).

[16] See Abraham R. Wagner, *The Unsocial Network: New Media and Changing Paradigms*, Paper Presented to the 11th International Conference – World Summit on Counter-Terrorism, Herzliya, Israel (September 2011).

wolves and other potential attackers make all too frequent use of internet chat rooms and social media platforms to spread hate and inspire destructive and/or fatal attacks.

The culture of Silicon Valley – home to the major media platforms – has led to complaints of political monotones on social media. Conservatives complain that Facebook, Google, and Twitter, for example, favor liberal or left-wing messages to the disadvantage of other perspectives, discriminating against conservative viewpoints and shadow banning conservative organizations and individuals. Although it has not yet been substantiated with empirical evidence, a substantial number of observers believe that political bias in social media has become pervasive, particularly since the 2016 election of Donald Trump as president.[17]

Conservatives accuse Facebook, Google, and Twitter of promoting their political perspectives. Indeed, both conservatives and liberals have come to recognize the power of Facebook, Google, and Twitter to alter search algorithms and even ban or disconnect commentators and fire staff who do not share the company politics.[18] In several cases, critics have claimed that employment actions have resembled "political purification."[19] Federal and state law have increasingly over time come to prohibit discrimination in employment based on a range of factors such as race, sex, age and others. Decisions to terminate employees based on political views or a refusal to take specific actions based on the political viewpoint of those running the major platforms is an area where future litigation and legislation can be expected.

News reports and congressional inquiries have focused mainly on the actions of Twitter, Facebook and Google.[20] It is not yet clear, however, what legislative or other remedies might be possible, although this subject recently has been the subject of extensive Congressional inquiry and study [21] Some have argued that this situation is not totally asymmetric, and that some left-wing individuals and organizations also have been banned, but little evidence exists to support such claims.[22]

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[17] Many such critics have been guests on the Fox News' Tucker Carlson show (*see infra* note 22).

[18] "Conservative" and "Liberal" are used here as commonplace adjectives, not as precisely defined political terms.

[19] See, *e.g.*, Ben Shapiro, "Viewpoint Discrimination with Algorithm," *National Review* (March 7, 2018); Kyle S. Reyes, "Here's Your Proof that Facebook Discriminates Against Conservatives," *New Boston Post* (November 28, 2017); Victor Garcia, *Jason Chaffetz: Social media discrimination against conservatives 'very real,'* FOX NEWS (March 20, 2019); Michael Nunez, "*Former Facebook Workers: We Routinely Suppressed Conservative News*," *Gizmodo* (May 9, 2016); Nicholas Kristoff, "A Confession of Liberal Intolerance," *New York Times* (May 7, 2016); Elizabeth Dwoskin and Craig Timberg, "Google, Twitter face new lawsuits alleging discrimination against conservative voices," *Washington Post* (January 8, 2018); Elizabeth Weise, "Ex-Google engineer Damore sues alleging discrimination against white, conservative men," *USA Today* (January 9, 2018).

[20] See *supra* note 9.

[21] See *Investigation and Competition in Digital Markets: Majority Report and Recommendations* (Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, October 2020), and the Minority view in *supra* note 1.

[22] Some major platforms, for example, have banned Louis Farrakhan well as some white supremacist organizations and various terrorist organizations and their supporters. Farrakhan is famously anti-Semitic and anti-Israel but defies any simple, left-right characterization. See *Farrakhan: In His Own Words*, Anti-Defamation League (December 11, 2019).

Little doubt can exist that these major platforms are able to control or restrict political speech. Precise metrics for evaluating the impact are still under development. What can or should be done about the situation is not obvious. While the world of social media has greatly expanded and sites have attracted billons of users worldwide, they also enable users to re-share content that others post. It is also the case the social media platform operators also incorporate monitoring tools that enable marketers to search, track, and analyze conversations on topics of interest which provides a source of income. As noted *supra*, even personal email is scanned by platform operators and used to market products based on email content.[23]

Where television turned an earlier generation who read or listened into *watchers* of media content, the emergence of social media has created a nation of media content creators. Social media also fosters communication, often with family or friends. For young children, social media sites can help promote creativity, interaction, and learning while it enables them to stay connected with their peers and helps them to interact with each other.[24] Questions remain as to what social media can and should do about wrong potentially harmful information

At the core of the dispute as to what posts and posters can be barred from social media is a discussion about content. Is it (a) misinformation, (b), or (c) incitement to violence.[25] These are significantly different categories and can be the subject of an informed dialogue.[26] In terms of misinformation, Twitter has published a civic integrity policy that currently is limited to false or misleading posts. Twitter's civic integrity policy targets the most directly harmful types of content, namely, those related to false claims on how to participate in civic processes; content that could intimidate or suppress voter participation; and false affiliation.[27] Facebook has made efforts

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[23] This undisputed fact seems amazing in that it is accepted by a legal regime that abhors the concept of NSA surveillance of email looking for potential threats, with cleared personnel and secure systems, but has no issue with Google searching all hosted Gmail accounts to sell things. See Woods, *supra* note 10; Balkin, *supra* note 10. The situation is quite the opposite in Europe under the General Data Protection Regulation (GDPR) where law enforcement and security services are afforded broad access and commercial exploitation of personal data is controlled. See *Google Spain SL v. Agencia Espanola de Protection de Datos*, *supra* note 10.

[24] Wagner and Rostow, *op. cit, supra* note 4. See also Madden, et al, *op. cit., supra* note 13.

[23] See report, *supra* note 19; Buck, *supra* note 1.

[25] Soroush Vosoughi, Deb Roy, and Sinan Ara, "The spread of true and false news online," *Science* (March 9, 2018). See also Filippo Menczer and Thomas Hills, "Information Overload Helps Fake News Spread, and Social Media Knows It," *Scientific American* (December 1, 2020), and Liang Wu, Fred Morstattery, Kathleen M. Carleyz, and Huan Liu, *Misinformation in Social Media: Definition, Manipulation, and Detection*, review article presented as a tutorial at SBP'16 and ICDM'17.

[26] With respect to violence, Twitter has articulated a policy which states: "You may not threaten violence against an individual or a group of people. We also prohibit the glorification of violence. Glorifying violent acts could inspire others to take part in similar acts of violence. . . . For these reasons, we have a policy against content that glorifies acts of violence in a way that may inspire others to replicate those violent acts and cause real offline harm, or events where members of a protected group were the primary targets or victims." https://help.twitter.com/en/rules-and-policies/glorification-of-violence.

[27] https://blog.twitter.com/en_us/topics/company/2020/civic-integrity-policy-update.html. This policy was expanded in 2020 to include false information about the COVID-19 pandemic. Notwithstanding this policy Twitter has continued to permit a vast number of postings that promote child sexual exploitation and incite violence from posters in Iran and elsewhere. See *John Doe v. Twitter*, 3:21-cv-00485 (Northern District of California, January 20, 2021).

to identify false news. To this end, Facebook uses third-party fact-checking to limit the spread of false news and make it as difficult as possible for those posting false news to buy ads on Facebook.[28]

One consequence of the COVID-19 pandemic which swept the nation for 2020 and has continued into 2021 has been the greatly increased use of online systems, including social media, by people of all ages.[29] The national "lockdowns" of people across the nation and extensive use of online platforms for education at all grade levels for many months caused those at home for extensive periods to pay far greater attention to these available media streams and other online information sources.

B. Data Mining and Content Control

Platform ownership brings with it extraordinary messaging influence, affecting the political narrative reaching huge numbers of people. Each of the "big three" platform providers, in particular, exercise a level of unregulated control that affects politics through messaging they put out or the posts and editorial choices they make. These platform owners have the ability to silence or marginalize views and conservatives have claimed they have denied them access, and Fox News's Tucker Carlson has publicized complaints of access denial.[30]

Platform operators already mine personal data and target what they show about taste to expand markets and revenues. There is little reason to doubt that the same phenomenon does not take place in the political sphere. In 2018, the European Parliament, in questioning the CEO of Facebook, Mark Zuckerberg, accused Facebook's algorithm of censoring conservative political voices. To many, the principal platforms appear to share a "progressive" or left-wing perspective, although some platforms also tilt in the opposite political direction. Facebook is thought to be politically "liberal;" although its board of directors includes at least one prominent supporter of President Trump. More recently Mark Zuckerberg, Facebook CEO, and Jack Dorsey, Twitter CEO, testified before a U.S. Senate committee about their platforms, misinformation, and the 2020 elections.[31]

Major platform operators have exercised their power to send out political messages, at least in their ability to limit or remove postings that are contrary to their beliefs and promote the reposting or "re-tweeting" of messages they support. In this regard, their actions are not different

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[28] https://www.facebook.com/formedia/blog/working-to-stop-misinformation-and-false-news. Facebook claims to be applying machine learning to assist response teams in detecting fraud and enforcing policies against inauthentic spam accounts and detection of fake accounts on Facebook, which makes spamming at scale much harder.

[29] Karen Hao and Tanya Basu. "The coronavirus is the first true social-media "infodemic," *MIT Technology Review* (February 12, 2020). Eli Pacheco, *COVID-19's Impact on Social Media Usage*, The Brandon Agency (September 22, 2020); and Cinelli *Matteo* Cinelli, Matteo, Walter Quattrociocchi, Alessandro Galeazzi, Carlo Michele Valensise, Emanuele Brugnoli, Ana Lucia Schmidt, Paola Zola, Fabiana Zollo, and Antonio Scala, "The COVID-19 Social Media Infodemic," *Cornell University Scientific Reports* (December 2020).

[25] *See* report, *supra* note 19; Buck, *supra* note 1

[31] See "Zuckerberg and Dorsey Face Harsh Questioning From Lawmakers," *The New York Times* (January 6, 2021). www.nytimes.com/live/2020/11/17/technology/twitter-facebook-hearings.

from measures to mine data to influence individual market choices. The operators employ sophisticated computer algorithms and human staff to identify and remove content that violates their community guidelines or terms of service agreements. Critics claim that this enforcement is skewed so as to target material that opposes the companies' agendas and political views.[32]

Users and others whose views have been rejected or whose access has been terminated by the platform operators might wonder whether the law addresses these sorts of actions and whether regulatory agencies like the Federal Communications Commission (FCC), Federal Trade

[32] Among the most persistent and vocal opponents of this practice has been Fox News' Tucker Carlson. He frequently features this issue on his daily show. *See*, *e.g.*, Tucker Carlson, *Tech Tyranny and the Election*, TUCKER CARLSON TONIGHT, September 4, 2020; https://www.youtube.com/watch?v=JERmGQhRsOk; *Tucker Carlson - Tech Tyranny - Disturbing Political Behavior*, TUCKER CARLSON TONIGHT, April 26, 2018, https://www.youtube.com/watch?v=22bnikzHrtQ; Tucker Carlson, *Tech Tyranny: Censoring the Town Square*, TUCKER CARLSON TONIGHT, July 2, 2019, https://www.youtube.com/watch?v=D-2HGm6Jlvk; Tucker Carlson, *Big Tech censors dissent over coronavirus lockdowns*, TUCKER CARLSON TONIGHT, Apr 29, 2020, https://www.youtube.com/watch?v=sPrbGU0Wyh4, Tucker Carlson, *Big Tech tyranny: Should the government intervene?*, TUCKER CARLSON TONIGHT, September 1, 2018, https://video.foxnews.com/v/5829567761001#sp=show-clips; Tucker Carlson, *Tech Tyranny: Impeachment Edition, How big tech is trying to shape the impeachment narrative*, TUCKER CARLSON TONIGHT, November 13, 2019, https://www.facebook.com/TuckerCarlsonTonight/videos/836976493386729/?v=836976493386729; Harmeet Dhillon and Tucker Carlson, *Dhillon on Tech Tyranny*, TUCKER CARLSON TONIGHT, September 1, 2018, https://www.dhillonlaw.com/blog/news/google-damore/dhillon-tech-tyranny/; Raheem Kassam on "Tucker Carlson Tonight," March 5, 2019, https://americanmind.org/video/raheem-kassam-on-tucker-carlson-tonight-3-5-19/. A substantial number of social media critics identify as conservatives. Whatever they are, they assert that social media companies circumscribe how they are able to publicize their views. See, Caleb Ecarma, "Fox News is Freaking Out Over 'Tech Tyranny'" *Vanity Fair* (January 13, 2021). On the other side, defenders of the social media companies' decisions note that, despite conservatives' claims of censorship, conservatives "still rule online" and drive the political conversation with posts and messaging that drives massive engagement. See, e.g., Mark Scott, *Despite cries of censorship, conservatives dominate social media*, POLITICO (Oct. 27, 2020, 1:38 PM), https://www.politico.com/news/2020/10/26/censorship-conservatives-social-media-432643; Kevin Roose, *What if Facebook Is the Real 'Silent Majority'?*, *New York Times* (Nov. 4, 2020), https://www.nytimes.com/2020/08/27/technology/what-if-facebook-is-the-real-silent-majority.html. The twitter account @FacebooksTop10, created by journalist Kevin Roose, presents which Facebook accounts had the most engagement the previous day and lends support to this claim; every day, conservatives clearly outnumber liberals in the top ten. Another rebuttal of conservatives' claims comes from those who suggest that conservatives simply produce more content that violates the tech giants' rules. False claims of election fraud, spurious allegations targeting the U.S. Postal Service, charges that COVID-19 was the product of a government conspiracy, and other such claims are simply more prevalent on the right, the argument goes, and are justifiably subject to fact-checks or removal. *See, e.g.,* Renee Diresta, *Social Media Fact-Checking is Not Censorship*, SLATE (June 4, 2020, 11:03 AM), https://slate.com/technology/2020/06/twitter-fact-checking-trump-misinformation-censorship.html; James Clayton, *Social media: Is it really biased against US Republicans?*, BBC (October 27, 2020), https://www.bbc.com/news/technology-54698186 (noting that conservatives are "disproportionately affected" by Facebook's policy against voter fraud disinformation and that one study found that Trump was the "largest single driver of COVID-19 disinformation").

Commission (FTC) or other government agencies could or should intercede. Most recently this matter has become the subject of congressional interest.[33]

Given the seriousness of the allegations of political bias in social media platforms' practices, it is imperative to undertake investigations of the utmost professionalism. In doing so, a number of issues likely will need attention from lawmakers. They include the legal status of the platform operators and whether their status in the existing technological environment should obligate them to adhere to any accepted standard of "fairness." Are they analogous to a telecommunications service provider, such as a telephone company, or a broadcast activity such as a radio station or television channel? While they clearly have some of the attributes of both, the reality is that social media are in fact a new technology paradigm that requires a new legal regime that recognizes what they are and the role they play in modern society.

If social media involves manipulation, is it "fair" manipulation under the existing legal regime? If not, what specific actions might ensure access to social media platforms of all political persuasions? Are there changes that could be made to Section 230 of the Communications Decency Act of 1996 that would address these allegations of political bias? Finally, what potential role can existing regulatory agencies have in addressing the issue? Other questions may arise as a result of additional research.

III. Challenge to the Legal Regime

As Dr. Johnson said long ago, "the Law is the last Result of Public Wisdom, acting upon public Experience."[34] What he meant was that law expresses a society's social and policy choices. The internet and all it has spawned, including social media, is ahead of the law. More importantly, it is ahead of our ability or willingness to consider how best to regulate it. Cyber realities, including what many commentators are calling the age of "big data,"[35] are for the moment beyond the current state of legal knowledge, or at least policies that are now in place.

The law and courts nonetheless have not been idle. In light of the technical nature of the Internet and cyberspace itself, and the fact that geography is irrelevant in important respects,

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[33] See Tony Romm, "Amazon, Apple, Facebook and Google grilled on Capitol Hill over their market power," *Washington Post* (July 29, 2020), https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/; Cecilia Kang, Jack Nicas, and David McCabe, "Amazon, Apple, Facebook and Google Prepare for Their 'Big Tobacco Moment," *New York Times* (July 28, 2020), https://www.nytimes.com/2020/07/28/technology/amazon-apple-facebook-google-antitrust-hearing.html. The investigation by the Judiciary committee subcommittee concluded that they found that the regulatory authorities were NOT doing enough under their current authorities. *See* report, *supra* note 19. They recommend some things to shore up the enforcement of the antitrust laws by the regulatory authorities.

[34] Richard Ingrams (ed.), *Dr Johnson by Mrs. Thrale: The Anecdotes of Mrs. Piozzi in their Original Form* (London: Chatto & Windus, 1984), at 61.

[35] *See* EXEC. OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES AND PRESERVING VALUES (May 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

scholars and courts have grappled with jurisdiction, the nature of the service providers and platform operators, and liabilities and responsibilities.[36]

Cases in Europe and the United States thus far have dealt with postings placed on the Internet and the various platforms that violate specific criminal statutes or reasonably well-established social norms.[37] In *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002), for example, the Supreme Court addressed the First Amendment issue raised by childhood pornography exposure and the Child Online Protection Act (COPA).[38] The so-called "right to be forgotten" has provoked legal challenges in Europe to online operations that raise issues akin to those faced by the U.S. Supreme Court. Legislation and case law in Europe is significantly ahead of U.S. law—taking steps to address, assess, or reassess the consequences of the new technological context in which we live.[39]

Thus far, however, no legal regime has addressed the central point of this article: what limitations might exist or be imposed on the major platform providers with respect to their control of, and/or influence over, political discourse. It is only recently that Congressional inquiry into the matter has begun, and some potential revisions to Section 230 of the Communications Decency

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[36] *See*, *e.g.*, David R. Johnson and David G. Post, "Law and Borders-The Rise of Law in Cyberspace," 48 STAN. L. REV. 1367 (1996); Jennifer Daskal, "Borders and Bits," 71 VAND. L. REV. 179 (2018); Jennifer Daskal "Law Enforcement Access to Data Across Borders: The Evolving Security and Rights Issues," 8 J. NAT'L SEC. L. & POLICY 473 (2016); Jennifer Daskal, "The Un-Territoriality of Data," 125 YALE L.J. 2 (November 2015); Lura DeNardis, "The Emerging Field of Internet Governance," YALE INFO. SOC'Y PROJECT WORKING PAPER SERIES (July 2014); Jack Goldsmith, "Against Cyberanarchy," 65 U. CHI. L. REV. 1199 (1998); Jack Goldsmith, "The Internet and the Abiding Significance of Territorial Sovereignty," 5 IND. J. GLOBAL LEGAL STUD. 475 (1998); Timothy S. Wu, "Cyberspace Sovereignty? – The Internet and the International System," 10 HARV. J. L. & TECH. 647 (1997); Jonathan Zittrain, "Be Careful What You Ask For: Reconciling a Global Internet and Local Law," BERKMAN CENTER, Res. Publication No. 2003-03 (May 2003).

[37] See Zittrain, *op. cit.* In terms of the tort liability of ISPs and hosts of Internet forums, Section 230(c) of the Communications Decency Act (CDA) (1996) may provide immunity in the U.S. which has been interpreted to say that operators of Internet services are not to be construed as publishers and thus not legally liable for the words of third parties who use their services. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court unanimously ruled that anti-indecency provisions of the CDA violated the First Amendment's guarantee of freedom of speech. This was the first major Supreme Court ruling on the regulation of materials distributed via the Internet.

[38] See also *La Ligue Contre Le Racisme et l'antisemitisme (LICRA) v. Yahoo! Inc.,* Superior Court of Paris (No. RG:00/05382000, November 22, 2000). In this French case two French civil rights organizations sued Yahoo! over the availability of Nazi content to French users of its services under French law. Under the threat of substantial financial penalty, the French Court ordered Yahoo! to take "all necessary measures to dissuade and render impossible" access within France to sites displaying Nazi paraphernalia or other anti-Semitic content and directed Yahoo! France to display an interstitial warning to users in France prior to enabling their access to Yahoo.com. While Yahoo! France substantially complied with the order, Yahoo! resisted French court's efforts to dictate changes to its U.S.-based services. See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

[39] See Jeffrey Rosen, "The Right to Be Forgotten," 64 STAN. L. REV. ONLINE 88 (February 13, 2012); Emily Shoor, "Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation," 39 BROOKLYN J. INT'L L. 1 (2014). The "right to be forgotten" raises important issues for historians and historical knowledge. See, for example, Nicholas Stargardt, *The German War: A Nation Under Arms, 1939-1945* (New York: Basic Books, 2015), where persons appear without more than the first initial of their last name in order to respect the right to be forgotten.

Act (CDA) have been introduced into Congress.[40] Based on media discussions and congressional testimony three potential scenarios for the future stand out:

(1) *Do nothing – accept the status quo.* Facebook, Google, and Twitter are commercial social media platform providers, not broadcast media as defined in existing legislation. Their ability to control political discourse on their platforms may be objectionable to some, but many feel that it is one price of democracy. Their actions have not created a political messaging monopoly, although this concept is being increasingly challenged.[41]

(2) *Recognize the reality that social media platforms are in fact today's leading communications media.* Social media platforms therefore are akin to broadcast media, which, in 1949, became subject to the "fairness doctrine" and control by the FCC.[42] They should be "honest, equitable and balanced." More recently, some commentators see Section 230 of the Communications Decency Act of 1996 as a possible means for holding major platform providers responsible for actions taken to limit posting of political views not in agreement with the platform's owners.

(3) *Break up Facebook – it is too big.* A concept recently espoused by one of Facebook's founders is a modern-day parallel to the breakup of Standard Oil and other large trusts of an earlier era, deemed to be exercising too much control—and doing so in unconscionable ways—over their part of the economy to be consistent with the Sherman and Clayton Anti-Trust Acts prohibition on restraint of trade and commerce and the Constitution's purpose to "the promote general Welfare, and secure the Blessings of Liberty."[43]

Until very recently, most legal action related to platforms has targeted illegal activities on the Internet in connection with drug trafficking, child pornography, terrorist operations, and other identified crimes.[44] Such activities would be subject to prosecution whether they took place on-line or off-line. An open question remains, however, what regulatory action, if any, might be appropriate for non-criminal activities such as objectional postings or use of the Internet and social

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[40] As discussed *infra* p. 13, the Online Freedom and Viewpoint Diversity Act (S. 4534) to modify Section 230 of the Communications Decency Act was introduced into the Senate in September 2020.

[41] The House Committee found "In the absence of competition, Facebook's quality has deteriorated over time, resulting in worse privacy protections for its users and a dramatic rise in misinformation on its platform." This can be a theory of monopoly because if Facebook faced more competition maybe Facebook would be pressured to better address its controversial issues like privacy. This is the harm to consumers. Report*, supra* note 19.

[42] At the time "broadcast media" included radio and television which used RF system to broadcast their signals. Cable providers and non-wireless systems did not exist yet. As non-wireless systems that did not "broadcast" signals evolved, questions emerged as to what types of content could be regulated, such as that including adult material (nudity), foul language and even smoking. The current regime holds that all of this content is acceptable for non-wireless operations.

[43] U.S. Const. pmbl. *See* Chris Hughes, *It's Time to Break Up Facebook*, *New York. Times* (May 9, 2019); *see also* Timothy Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports, 2018). See also Federal Trade Commission, *FTC Sues Facebook for Illegal Monopolization* (December 9, 2020).

[44] *See* Wagner and Rostow, *supra* note 4.

media platforms by minors, for example, to access materials which most parents find inappropriate. Here the most recent discussion has focused on "misinformation" or "disinformation" which may be factually incorrect or misleading, but does not involve criminal activity.[45]

Events prior to the 2020 presidential election with respect to censorship of Republican or conservative posters or even articles in national newspapers, particularly the *New York Post*, have resulted in movement on two fronts suggested above. Action in the Senate Judiciary Committee, led by Senators Ted Cruz (R-TX) and Josh Hawley (R-MO), initiated hearings aimed at revising Section 230 of the Communications Decency Act to remove the immunity from lawsuit provision for platform providers. In addition, in September 2020 Senators Roger Wicker (R-Miss), Lindsey Graham, (R-SC), and Marsha Blackburn, (R-TN) introduced the Online Freedom and Viewpoint Diversity Act to modify Section 230 of the Communications Decency Act. Proponents of the bill believed that it would clarify the original intent of the law and increase accountability for content moderation practices.[46]

Following the 2020 presidential election President Trump repeatedly called for revocation of Section 230 and attempted to have it removed as an amendment to the 2020 National Defense Authorization Act (NDAA). As history would have it, the NDAA was passed over Trump's veto, without the change to Section 230 he sought.[47] What further legislative action might be taken with respect to Section 230 remains an open question, as both the presidency and both houses of Congress came under Democratic control following the 2020 elections.

In addition, in October 2020 the Department of Justice and the attorneys general of 12 states have filed suit against Google alleging violations of the Sherman Act and the Clayton Act.[48] While this litigation is still in the early stages, it may yet evolve into a landmark case. In a related action in December 2020 the Federal Trade Commission and a coalition of 48 state attorneys general filed broad antitrust charges against Facebook, seeking a reversal of its acquisitions of WhatsApp and Instagram. In this case the primary defense is that both acquisitions resulted in

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[45] See fn. 25, supra.. See also, Sara Brown. *MIT Sloan research about social media, misinformation, and elections* (MIT Sloan School of Management, October 5, 2020), and Gordon Pennycook and David G. Rand, "Fighting misinformation on social media using crowdsourced judgments of news source quality," *Proceedings of the National Academy of Sciences* (February 12, 2019) pp. 2521-2526. https://doi.org/10.1073/pnas.1806781116, and Chris Meserole, *How misinformation spreads on social media—And what to do about it* (Washington: Brookings Institution, Wednesday, May 9, 2018).

[46] See S. 4534, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/senate-bill/4534; see also *Wicker, Graham, Blackburn Introduce Bill to Modify Section 230 and Empower Consumers Online*, U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, Sept. 8, 2020, https://www.commerce.senate.gov/2020/9/wicker-graham-blackburn-introduce-bill-to-modify-section-230-and-empower-consumers-online.

[47] Tony Hatmaker, "Trump Vetoes Major Defense Bill, Citing Section 230," *TechCrunch* (December 23, 2020). https://techcrunch.com/2020/12/23/trump-ndaa-veto-section-230/.

[48] *United States et al. v. Google, LLC*, No: 20-cv-03010 (D.D.C. Oct 20, 2020).

better products for consumers — an implicit reference to the "consumer harm" standard that has also been central to the Department of Justice's case against Google.[49]

A. Consequences of the Status Quo

Attempts by the U.S. government to control or regulate speech instantly raise First Amendment concerns. Uncertainty exists with respect to defining the *status quo*. What kind of companies are at issue? Social media companies provide a platform. They publish or post materials written by their users. They provide avenues for communication like the telephone or telegraph. They also acquire data about their users, more often than not without their consent (who for example reads the contract to which they must assent in order to access Microsoft products or Google products or Facebook products—they are examples of contracts of adhesion).[50] The companies benefit from favorable Federal law but are not acting under color of law. The First Amendment *per se* does not apply to them.[51] The principal argument being that the protection of freedom of speech does not obligate them to post any item on their commercial service, much as a newspaper is not obligated to publish any letter sent to the editor.

Under the U.S. Constitution, political speech and advocacy are protected from government abridgement. It is a well-settled tenet of Constitutional law that political speech and advocacy are at the core of the First Amendment that protects the right of any person to engage in political speech and advocacy, regardless of whether it concerns a particular issue or candidate for office. In 1966, the Supreme Court struck down an Alabama law that made it a crime for a newspaper editor to publish an election-day editorial that sought to persuade people to vote in a particular way.[52] The First Amendment also protects against government attempts to target speech based on its content and limits the government's ability to enact laws that target speech based on the topics it covers or the views it expresses.[53]

In spite of the issues raised by social media actions with respect to speech, some commentators are concerned about prior restraint by the government, which in most situations

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[49] *FTC Sues Facebook for Illegal Monopolization*, *op. cit.* See also, Menesh S. Patel, *Merger Breakups* (Working Paper, January 15, 2020), and Russell Brandom, "Facebook calls antitrust lawsuits 'revisionist history," *The Verge* (December 9, 2020).

[50] Adhesion contracts have grown in relevance recently due to the rise of digitally signed contracts and "click through" contracts. Courts have held that in order for an electronic contract to be valid, it should appear as identical to a paper contract as possible. Buried clauses, or inconspicuous clauses, will likely not be enforced. In *Fairfield Leasing Corporation v. Techni-Graphics, Inc.*, 607 A.2d 703 (1992) the Superior Court of New Jersey invalidated an adhesion contract because its waiver clause was single-spaced and had a small typefont; as such, the court deemed the clause to be too inconspicuous.

[51] See Balkin, *supra* note 10.

[52] The Court held that it would be "difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press," reasoning that the First Amendment exists to "protect the free discussion of governmental affairs." *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966).

[53] The Supreme Court reinforced this long-standing principle when it struck down New York's "Son of Sam" law, which required all proceeds from a book written by an accused or convicted criminal to go to a special Crime Victims Board. The Court held that "[t]he First Amendment presumptively places this sort of discrimination beyond the power of the government." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

violate the First Amendment, because social media platforms increasingly resemble publications. The Supreme Court has repeatedly rejected attempts by the government to censor speech prior to publication.[54] The Court also has held that any prior constraints on speech, at a minimum, must be necessary to further a governmental interest of the highest magnitude.[55]

In addition, the First Amendment protects speakers' rights by limiting liability for intermediaries, such as newspapers. Should commercial social media platforms be viewed in a similar light? The Court has held that the First Amendment limits the liability that may be imposed on third parties who enable speakers to reach an audience, in order to protect the rights of speakers who depend on them. In *Smith v. California*, 361 U.S. 147, 154 (1959), for example, the Court held that booksellers could not be strictly liable for obscene content in books they sell because cautious booksellers would over-enforce, removing both legal and illegal books from the shelves. The resulting "censorship affecting the whole public" would be "hardly less virulent for being privately administered."[56] These principles apply to laws holding that internet service providers are intermediaries liable for users' speech. In line with this logic, government outsourcing censorship to social media likely would violate the First Amendment.

B. The Fairness Doctrine

One possible approach for dealing with the "tech tyranny" problem is to acknowledge the reality that social media platforms today are the leading communications media, the contemporary equivalent of broadcast media. One option, therefore, is to regulate social media platforms in the same manner as the government once regulated broadcast media. In following this path forward, the challenges of ensuring that social media platforms do not influence users in a politically biased manner may be reduced.

In 1949, the Federal Communications Commission (FCC), which Congress established in part to regulate the broadcast media, made broadcast media subject to the "fairness doctrine." The FCC Fairness Doctrine required that all major broadcasting outlets spend equal time covering both sides of all controversial issues of national importance. The goal was to have broadcast media that were "honest, equitable and balanced."[57] The radio and television operators of the era required

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[40] In 1963, the Supreme Court ruled that a state commission to review literature for "obscene, indecent or impure language" constituted an unconstitutional prior restraint. The Court held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," such that the government cannot enjoin "particular publications" that it finds "objectionable" without a prior "judicial determination "that such publications may" lawfully be banned." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

[55] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-66 (1976), and must include clear, narrow standards about what the government can restrain. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

[56] In 1962, the Supreme Court ruled that a state commission to review literature for "obscene, indecent or inappropriate language," *New York Times Co. v. Sullivan*, 376 U.S. 254 (1962). In this landmark case, the Court observed that failing to protect the *New York Times* from liability for third party advertisements "would discourage newspapers from carrying 'editorial advertisements' … and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities[.]" *Sullivan*, 376 U.S. at 266.

[57] The FCC made a ruling in 1941 known as the "Mayflower Doctrine," which stated that radio stations, due to their public interest obligations, must remain neutral in matters of news and politics, and they were not allowed to give

radio frequency spectrum allocations and broadcast licenses from the FCC, which provided the basis for the FCC's authority to regulate the licensees.[58] In contrast to the world of cable television or the Internet today, at the time, the radio frequency spectrum was limited and, therefore, requiring license holders to follow fairness standards made sense at the time.

The fairness doctrine of the FCC required holders of broadcast licenses both to present controversial issues of public importance and to do so in a manner that was—in the FCC's view—honest, equitable, and balanced. Because the technological context had changed with the development of cable television and digital communications, the FCC eliminated the policy in 1987 and removed the rule that implemented the policy from the *Federal Register* in 2011. Given limited broadcast space, the point of the doctrine was to ensure that viewers were exposed to a diversity of viewpoints. The Supreme Court upheld the FCC's authority to enforce the fairness doctrine where channels were limited. The Court did not, however, rule that the FCC was *obliged* to do so. The Court reasoned that the scarcity of the broadcast spectrum, which limited the opportunity for access to the airwaves, created a need for the doctrine.[59]

In *Red Lion Broadcasting Co. v. FCC*, the Court upheld the constitutionality of the fairness doctrine in a case of an on-air personal attack, in response to challenges that the doctrine violated the First Amendment.[60] The case began when journalist Fred J. Cook, after the publication of his *Goldwater: Extremist of the Right*, was the topic of discussion by Billy James Hargis on his daily Christian Crusade radio broadcast in Red Lion, Pennsylvania. Mr. Cook sued arguing that the fairness doctrine entitled him to free airtime to respond to the personal attacks. The Court ruled that broadcasters must make time available at their own expense in order to meet their fairness obligations.[61] The *Red Lion* Court reasoned that, because of the scarcity of radio frequencies with which broadcasters of any kind could relay information, the FCC constitutionally could mandate broadcasters to present important issues of public concern in as unbiased a manner as possible.

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editorial support to any particular political position or candidate. In 1949, the FCC repealed the Mayflower Doctrine, which had forbidden editorializing on the radio and laid the foundation for the Fairness Doctrine, reaffirming the FCC's holding that licensees must not use their stations "for the private interest, whims or caprices [of licensees], but in a manner which will serve the community generally." *See* Kathleen Ann Ruane, CONG. RESEARCH SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES (July 2011); Hugh Carter Donahue, *The Battle to Control Broadcast News: Who Owns the First Amendment* (Cambridge: MIT Press 1988).

[58] Cable operators, and more recently satellite-based operators, do not require spectrum allocations and FCC licenses according to the FCC. This is not entirely correct, as satellite systems do in fact use RF downlinks to reach their subscribers, although this point has yet to be litigated, and is seldom mentioned.

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

[60] The Court cited a 1959 Senate report stating that radio stations could be regulated in this way because of the limited public airwaves at the time. Writing for the Court, Justice Byron White declared "A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others.... It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." The Court warned that if the doctrine ever restrained speech, then its constitutionality should be reconsidered. See Fred W. Friendly, *The Good Guys, the Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting* (New York: Random House 1976).

[61] *Red Lion*, 395 U.S. at 369.

The fairness doctrine required broadcasters to devote some of their airtime to discussing controversial matters of public interest and to air contrasting views regarding those matters. Stations were given wide latitude as to how to provide contrasting views. They could use news segments, public affairs shows, or editorials. The doctrine did not insist on equal time for opposing views; rather, stations had to present contrasting viewpoints. The FCC required broadcasters to provide adequate coverage of public issues, and to ensure that coverage fairly represented opposing views. It also required broadcasters to provide reply time to issue-oriented citizens. Broadcasters could therefore trigger Fairness Doctrine complaints without editorializing. Prior to 1949, broadcasters only had to satisfy the general "public interest" standards of the Communications Act. The doctrine remained a matter of general policy and was applied on a case-by-case basis until 1967, when certain provisions of the doctrine were incorporated into FCC regulations. Some commentators believe that the demise of this FCC rule contributed to the rising level of party polarization in the United States.[62]

In 1974, the FCC stated that Congress had delegated to it authority to mandate a system of "access, either free or paid, for person or groups wishing to express a viewpoint on a controversial public issue . . .," but that it had not yet exercised that power because licensed broadcasters had "voluntarily" complied with the "spirit" of the doctrine. Here the FCC said that "voluntary compliance" *might prove* not to be adequate to ensure balance, but warned that the doctrine of "voluntary compliance" was inadequate, either in its expectations or in its results. In one landmark case, the FCC argued that teletext was a new technology that created soaring demand for a limited resource, and thus could be exempt from the fairness doctrine.[63] In the case of *Miami Herald Publishing Co. v. Tornillo*,[64] however, Chief Justice Warren Burger wrote about "Government-enforced right of access." This decision differs from *Red Lion v. FCC* in that it applies to a newspaper, which, unlike a broadcaster, does not require a scarce radio frequency spectrum allocation, is unlicensed, and can theoretically face an unlimited number of competitors.

In 1984, the Court ruled that Congress could not forbid editorials by non-profit stations that receive grants from the Corporation for Public Broadcasting.[65] The Court's 5-4 majority decision by Justice Brennan stated that while many now considered that expanding sources of communication had made the fairness doctrine's limits unnecessary,"[W]e are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC

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[62] In 1969 the court of appeals, in an opinion written by Justice Warren Burger, directed the FCC to revoke Lamar Broadcasting's license for television station WLBT due to the station's segregationist politics and ongoing censorship of NBC network news coverage of the civil rights movement.

[63] The Telecommunications Research and Action Center (TRAC) and Media Access Project (MAP) argued that teletext transmissions should be regulated like any other airwave technology, hence the Fairness Doctrine was applicable and must be enforced by the FCC. Teletext, or broadcast teletext, is a videotex standard for displaying text and rudimentary graphics on suitably equipped television sets. Teletext sends data in the broadcast signal, hidden in the invisible vertical blanking interval area at the top and bottom of the screen. Thus, teletext utilizes the existing RF spectrum allocation for the TV station and does not required any additional spectrum. Presumably, the FCC can be seen to have regulatory authority since it granted the initial spectrum allocation and license to the operator.

[64] 418 U.S. 241 (1974).

[65] *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[66]

Noting that the FCC was considering repealing the fairness doctrine rules on editorials and personal attacks out of fear that those rules might be "chilling speech," the Court added:

> Of course, the Commission may, in the exercise of its discretion, decide to modify or abandon these rules, and we express no view on the legality of either course. As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing rather than enhancing speech, we would then be forced to reconsider the constitutional basis of our decision in that case.[67]

The FCC opened an inquiry inviting public comment on alternative means for administrating and enforcing the Fairness Doctrine. In 1985 the FCC released a report on *General Fairness Doctrine Obligations* stating that the doctrine hurt the public interest and violated free speech rights guaranteed by the First Amendment.[68] Responding to the 1986 *Telecommunications Research & Action Center v. F.C.C.* decision,[69] the 99th Congress directed[70] the FCC to examine alternatives to the Fairness Doctrine and to submit a report to Congress on the subject.[71] In 1987, in *Meredith Corporation v. F.C.C.* the case was returned to the FCC with a directive to consider whether the doctrine had been "self-generated pursuant to its general congressional authorization or specifically mandated by Congress."[72]

In 1987 the FCC abolished the doctrine by a 4-0 vote in *Syracuse Peace Council*.[73] In 1989, the D.C. Circuit Court of Appeals upheld the decision but without addressing the First Amendment issues that the FCC raised.[74] In *Syracuse Peace Council*, the FCC suggested that, because of the many media voices in the marketplace, the doctrine be deemed unconstitutional, stating that:

> The intrusion by government into the content of programming occasioned by the enforcement of [the Fairness Doctrine] restricts the journalistic freedom of broadcasters ... [and] actually inhibits the presentation of controversial issues of

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[66] *Id*. at 369.

[67] *Id* at 384.

[68] *General Fairness Doctrine Obligations of Broadcast Licensees*, Report, 50 Fed. Reg. 35418 (1985).

[69] 801 F.2d 501 (D.C. Cir. 1986), *reh'g denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 3196 (1987).

[70] Making Continuing Appropriations for Fiscal Year 1987, P.L. 99-500. See also, *Conference Report to Accompany H.J.Res. 738*, H.Rept. 99-1005. 99th Cong., 2d Sess. (1986).

[71] Ruane, *supra* note 46.

[72] 809 F.2d 863, 872 (D.C. Cir. 1987).

[73] See generally *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, N.Y.*, 2 F.C.C. Red. 5043 (1987).

[74] *Syracuse Peace Council v. Fed. Communications Commission*, 867 F. 2d 654, 656 (D.C. Cir. 1989).

> public importance to the detriment of the public and the degradation of the editorial prerogative of broadcast journalists.[75]

At the 4-0 vote, FCC Chairman Patrick said: "We seek to extend to the electronic press the same First Amendment guarantees that the print media have enjoyed since our country's inception."[76]

Members of Congress, who said the FCC had tried to "flout the will of Congress" and the decision was "wrongheaded, misguided and illogical," opposed the FCC vote. In June 1987, Congress attempted to preempt the FCC decision and codify the Fairness Doctrine, but President Ronald Reagan vetoed the legislation. In 1991, President George H.W. Bush threatened another veto of an attempt to revive the doctrine.

In February 2009, FCC Chairman Fowler said that his work toward revoking the Fairness Doctrine under the Reagan Administration had been a matter of principle (his belief that the Doctrine infringed the First Amendment), not partisanship. He described the White House staff raising concerns, at a time before the prominence of conservative talk radio and during the preeminence of the three major television networks and PBS in political discourse, that repealing the policy would be politically unwise. He also described the FCC staff's position noting that the only thing that really protects you from the savageness of the three networks—every day they would savage Ronald Reagan—is the Fairness Doctrine, and Fowler is proposing to repeal it.

Two corollary rules of the fairness doctrine include the "personal attack rule" and the "political editorial" rule. They remained in effect until 2000. The "personal attack" rule applied whenever a person or small group was subject to a personal attack during a broadcast. In such cases, stations had to notify such persons (or groups) within a week of the attack, send them transcripts of what was said, and offer the opportunity to respond on-the-air. The "political editorial" rule applied when a station broadcasted editorials endorsing or opposing candidates for public office. The rule stipulated that the unendorsed candidates be notified and allowed a reasonable opportunity to respond.

In October 2000, the U.S. Court of Appeals for the D.C. Circuit ordered the FCC to justify these corollary rules in light of the decision to repeal the Fairness Doctrine. The FCC did not provide prompt justification. As a result, both corollary rules were repealed in October 2000.[77]

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[75] 867 F. 2d at 658.

[76] *Syracuse Peace Council v. FCC*, 276 U.S. App. D.C. 38 (1989). Under the "fairness doctrine," the Federal Communications Commission has, as its 1985 Fairness Report explains, required broadcast media licensees (1) "to provide coverage of vitally important controversial issues of interest in the community served by the licensees" and (2) "to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues." Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143, 146 (1985). In adjudication of a complaint against Meredith Corporation, licensee of station *WTVH* in Syracuse, New York, the Commission concluded that the doctrine did not serve the public interest and was unconstitutional. Accordingly, it refused to enforce the doctrine against Meredith. Although the Commission somewhat entangled its public interest and constitutional findings, we find that the Commission's public interest determination was an independent basis for its decision and was supported by the record. We uphold that determination without reaching the constitutional issue.

[77] Robert W. Leweke, "Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules," 6 COMMUNICATION LAW AND POLICY 557 (October 1, 2001).

In February 2005, legislation was introduced into Congress by 24 co-sponsors introduced legislation, the Fairness and Accountability in Broadcasting Act of 2005[78], at a time when Republicans held a majority of both Houses. The act would have shortened a station's license term from eight years to four, with the requirement that a license-holder cover important issues fairly, hold local public hearings about its coverage twice a year, and document to the FCC how it was meeting its obligations. The bill was referred to committee, but progressed no further. In the same Congress, other legislation was introduced "to restore the Fairness Doctrine;" the Media Ownership Reform Act of 2005 with 16 co-sponsors in Congress.[79] This bill too failed to become law.

In June 2007, Senator Richard Durbin (D-IL) stated that "It's time to reinstitute the Fairness Doctrine," an opinion shared by his Democratic colleague, Senator John Kerry (D-MA). At the time, however, Senator Durbin had "no plans, no language, no nothing."[80] By 2008 then-Speaker of the House Nancy Pelosi (D-CA) stated that she and her fellow Democratic Representatives did not want to forbid reintroduction of the Fairness Doctrine, adding "the interest in my caucus is the reverse" and stated that she personally supported revival of the Fairness Doctrine. Other Democrats agreed and noted that they wanted all broadcast stations to have to present a balanced perspective and show different points of view. Senator Bingham noted that the U.S. operated under a Fairness Doctrine for many years and that the country was well-served. Others within the Democratic caucus thought it should also apply to cable and satellite broadcasters as well.

In 2009 several Democratic senators, including Senator Tom Harkin (D-IA) noted that ". . .we gotta get the Fairness Doctrine back in law again" and that "...they are just shutting down progressive talk from one city after another . . . and that's why we need the fair—that's why we need the Fairness Doctrine back."[81] At the same time, former President Bill Clinton also supported a revival of the Fairness Doctrine, noting "you either ought to have the Fairness Doctrine or we ought to have more balance on the other side, because essentially there's always been a lot of big money to support the right wing talk shows."[82]

Notwithstanding the Supreme Court's decision in *Red Lion*, prominent conservatives and libertarians view the Fairness Doctrine as an attack on First Amendment protections for speech

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[78] H.R. 501, The Fairness and Accountability in Broadcasting Act would have amended the Communications Act of 1934 to prohibit the Federal Communications Commission (FCC) from issuing or renewing any license for a broadcasting station based upon a finding that the issuance or renewal serves the public interest, convenience, and necessity unless such station covers issues of importance to the local community in a fair manner, taking into account diverse interests and viewpoints of the local community.

[79] H.R. 3302. The Media Ownership Reform Act would have amended the Communications Act of 1934 to require a broadcast licensee to afford reasonable opportunity for the discussion of conflicting views on issues of public importance, consistent with the rules and policies of the Federal Communications Commission (FCC).

[80] Marin Cogan, "Bum Rush: Obama's secret plan to muzzle talk radio. Very, very secret," *New Republic* (December 3, 2008).

[81] Michael Calderon, "Sen. Harkin: 'We need the Fairness Doctrine back,'" *Politico* (February 11, 2009).

[82] John Eggerton, "Bill Clinton Talks of Re-Imposing Fairness Doctrine or At Least "More Balance" MEDIA, BROADCASTING & CABLE (February 13, 2009).

and the press as well as property rights.[83] Editorials in *The Wall Street Journal* and *The Washington Times* in 2005 and 2008 said that Democratic attempts to bring back the Fairness Doctrine have been made largely in response to conservative talk radio.[84] In 1987, Edward O. Fritts, president of the National Association of Broadcasters, in applauding President Reagan's veto of a bill intended to turn the doctrine into law, said the doctrine was an infringement on free speech and intruded on broadcasters' journalistic judgment.

In 2007, Republican Senator Norm Coleman (R-Minn.) proposed an amendment to a defense appropriations bill that forbade the FCC from using any funds to adopt a fairness rule, blocking it in part on grounds that the amendment belonged in the Commerce Committee's jurisdiction. Also, in 2007 the Broadcaster Freedom Act was proposed in the Senate with 35 co-sponsors and Republican John Thune (R-SD) with 8 co-sponsors.[85] In the House, the then-Congressman Mike Pence (R-IN) proposed it with 208 co-sponsors. The bill provided that:

> The Commission shall not have the authority to prescribe any rule, regulation, policy, doctrine, standard, or other requirement that has the purpose or effect of reinstating or re-promulgating (in whole or in part) the requirement that broadcasters present opposing viewpoints on controversial issues of public importance, commonly referred to as the `Fairness Doctrine', as repealed in General Fairness Doctrine Obligations of Broadcast Licensees.[86]

None of these measures came to the floor of either house.

The following year, 2008, the FCC stated that the reinstitution of the Fairness Doctrine could be intertwined with the debate over network neutrality. That idea would classify network operators as common carriers required to admit all internet services, applications and devices on equal terms, presenting a potential danger that net neutrality and Fairness Doctrine advocates could try to expand content controls to the Internet.[87] There was also a fear that this measure could come to include "government dictating content policy." At the time some conservatives argued that the three main points supporting the Fairness Doctrine — media scarcity, liberal viewpoints being censored at a corporate level, and public interest — were all myths or at least out of date given the digital world's lack of space limits, unlike the world of radio frequency.

When running for the presidency in 2008, Barack Obama, then a Democratic Senator from Illinois, opposed re-imposition of the Fairness Doctrine on broadcasters. He said that the issue for consideration was not the Fairness Doctrine, but how to open the airwaves and modern communications to as many diverse viewpoints as possible. At the time, Obama supported media-ownership caps, network neutrality, public broadcasting, and increasing minority ownership of

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[83] Editorial, "Fairness' is Censorship," *Washington Times* (January 17, 2008).

[84] See, *e.g.*, "Rush to Victory," *The Wall Street Journal* (April 4, 2005); *'Fairness' is Censorship*,' *supra* note 72.

[85] S. 1748; S. 1742.

[86] Broadcast Freedom Act of 2007, H.R. 2905. *See* Jeff Poor, *FCC Commissioner: Return of Fairness Doctrine Could Control Web Content*, BUSINESS & MEDIA INSTITUTE (August 13, 2008).

[87] Timothy Wu, "Network Neutrality, Broadband Discrimination," 2 JOURNAL ON TELECOM & HIGH TECH LAW 141 (2003).

broadcasting and print outlets. Following his election as President, Obama continued to oppose the revival of the Doctrine.[88]

During the 111th Congress (January 2009 to January 2011), the Broadcaster Freedom Act of 2009 was introduced to block reinstatement of the Fairness Doctrine,[89] and in February 2009 the Senate added that act as an amendment to the District of Columbia House Voting Rights Act of 2009,[90] a bill which later passed the Senate 61-37, but not the House of Representatives. According to some press reports that vote on the Fairness Doctrine rider was a response to conservative radio talk show hosts who feared that Democrats would try to revive the policy to ensure liberal opinions got equal time. Clearly, President Obama had no intention of reimposing the doctrine, but some Republicans, led by Senator Jim DeMint (R-SC), wanted a legislative guarantee against re-imposition of the Fairness Doctrine.

At that time, a number of media reform organizations believed that a return to the Fairness Doctrine was not so important as setting stronger station ownership caps and stronger "public interest" standards enforcement, possibly with funding from fines given to public broadcasting.[91] During this period public opinion was divided on how broadcasters should be forced to offer "equal time" to both sides.[92]

Finally, in June 2011, both Republicans and Democrats said that the FCC, in response to their requests, had set a target date of August 2011 for removing the Fairness Doctrine and other "outdated" regulations from the FCC's rulebook. Accordingly, in August 2011, the FCC voted to remove the rule that implemented the Fairness Doctrine, along with more than 80 other rules and regulations, from the *Federal Register* following an executive order by President Obama directing a "government-wide review of regulations already on the books" to eliminate unnecessary regulations.

Today, there is renewed interest in, and concern about, employing a new version of the Fairness Doctrine to counteract politically biased social media. The fact is that that the leading platforms do not simply post the materials that they receive electronically, but also employ both sophisticated computer algorithms as well as human content monitors to review incoming posts. As discussed *supra*, existing data suggest that the software and human moderators are politically biased against conservatives and that frequently conservative posts and posters are blocked.

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[88] *White House: Obama Opposes 'Fairness Doctrine' Revival,* FOX NEWS (February 18, 2009).

[89] S.34; S.62; H.R.226.

[90] Pain-Capable Unborn Child Protection Act, S.160 (2019).

[91] *See*, *e.g.*, John Halpin, James Heidbreder, Mark Lloyd, Paul Woodhull, Ben Scott, Josh Silver, and S. Derek Turner, *The Structural Imbalance of Talk Radio*, CTR. FOR AM. PROGRESS (May 25, 2012). www.americanprogress.org/issues/general/reports/2007/06/20/3087/the-structural-imbalance-of-political-talk-radio/

[92] In one 2008 poll released by Rasmussen Reports, 47% of 1,000 likely voters supported a government requirement that broadcasters offer equal amounts of liberal and conservative commentary, while 39% opposed such a requirement. Further, 57% opposed and 31% favored requiring Internet websites and bloggers that offer political commentary to present opposing points of view. Respondents also agreed that it is "possible for just about any political view to be heard in today's media" (including the internet, newspapers, cable TV and satellite radio), but only half the sample said they had followed recent news stories about the Fairness Doctrine closely.

Over time the Fairness Doctrine has been strongly opposed by some conservatives and libertarians who view it as an attack on First Amendment rights and property rights. Some authorities see the reinstitution of the Fairness Doctrine could be intertwined with the debate over network neutrality (a proposal to classify network operators as common carriers required to admit all Internet services, applications, and devices on equal terms), presenting a potential danger that net neutrality and Fairness Doctrine advocates could try to expand content controls to the Internet.[93]

When in 2011, the FCC voted to remove the rule that implemented the Fairness Doctrine, along with more than 80 other rules and regulations, from the *Federal Register* following an executive order signed by President Obama, it directed a "government-wide review of regulations already on the books" to eliminate unnecessary regulations.[94] The Fairness Doctrine remains one of the most famous and controversial media policies ever enacted. At the same time, the Fairness Doctrine continues to be invoked by proponents and detractors alike and use a variety of methods to show how it figures within contemporary regulatory debates.

Resurrection of the Fairness Doctrine, as some have suggested, really depends on a legal regime that recognizes the new technological landscape and sees cable and satellite media providers, as well as Internet platform providers as public services that would be subject to regulatory control by the FCC or another agency. As in other areas, the law is decades behind the technology and would require a bi-partisan agreement to update an antiquated legal regime

C. The "Trust Busting" Approach

A second possible approach for dealing with "tech tyranny" is in the anti-trust context. The size and market dominance of the most important platform providers arguably should be examined through the Anti-Trust law lens. Facebook, Google, and Twitter have the ability to mine data and shape consumer habits. This fact shows that they have the technical ability to control political discourse by permitting or denying use and controlling searches by net users. There are unquestionably parallels to the evolution of large business organizations or "trusts" in the late 19th century. Several writers have referred to this as the "curse of bigness" and have argued that Facebook and the others need to be broken up as Standard Oil was in 1911 for violating the Sherman Anti-Trust Act of 1890.[95]

Antitrust law in the U.S. is a collection of federal and state laws that regulate the conduct and organization of businesses to promote fair competition. The principal beneficiary are consumers because they obtain the benefit of lower prices and more innovation as a result of

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[93] *See* Wu, *supra* note 76; Gary S. Becker, Dennis W. Carlton, and Hal S. Sider, "Net Neutrality and Consumer Welfare," JOURNAL OF COMPETITION LAW & ECONOMICS (September 2010).

[94] Victor Pickard, "The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse," 12 INT'L J. COMM. 3434 (2018). See also Alix McKinna, "FCC Repeals the Fairness Doctrine and Other Regulations," REGULATORY REVIEW (September 26, 2011); Clint Bolick, "Obama And The Fairness Doctrine," *Forbes* (November 22, 2008).

[95] See, Chris Hughes, "It's Time to Break Up Facebook," *New York. Times* (May 9, 2019). See also Timothy Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports, 2018).

competition and the efficiencies the marketplace induces when not manipulated. In addition to the Sherman Act, other relevant federal statutes are the Clayton Act of 1914 and the Federal Trade Commission Act of 1914.[96] These Acts, first, restrict the formation of cartels and prohibit other practices in restraint of trade. Second, they restrict the mergers and acquisitions of organizations that could substantially lessen competition. Third, they prohibit the creation of a monopoly and the abuse of monopoly power.[97]

To understand why these laws were enacted and how they may be applicable to the social media corporations of today, it is useful briefly to review the genesis of these laws and the circumstances from which they arose. The years between 1865 and 1914 witnessed one of the greatest industrial expansion of all time; during this time America emerged as the leading industrial power of the planet. A large part of this massive industrialization in America was due to the actions of the government at all levels: federal, state, and local. Public land grants and tax exemptions provided to railroad corporations encouraged massive construction across the country. There was also a sense of a reassuring attitude of sympathy by the government towards business enterprise. This friendly atmosphere was especially conducive to investment and entrepreneurship—and abuse. At the same time that the industrialists were pushing for a free, highly competitive economy, however, they were busy building ever larger, oligopolistic empires. For those that lived through the era of the trusts, it seemed like industrialization was synonymous with what Brandeis worried about, Bigness.[98]

Between the 1890s and the early years of the twentieth century, one of the great consolidation movements of American industry took place. It was the era of the Sugar Trust, the Beef Trust, the Steel Trust, the Oil Trust, and the Money Trust. A trust was a corporate device, a legal instrument, to manage size and to promote the accumulation of capital and managerial efficiency. The corporate trust allowed individual owners of businesses to transfer their stocks to the trust. Symbolic of this era of big trusts was the US Steel Corporation, organized in 1901 as the

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[96] Although "trust" has a specific legal meaning, in the late 19th century the word was commonly used to denote big business, because that legal instrument was frequently used to affect a combination of companies. Large manufacturing conglomerates emerged in great numbers in the 1880s and 1890s, and were perceived to have excessive economic power. The Interstate Commerce Act of 1887 began a shift towards federal rather than state regulation of big business. It was followed by the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, the Federal Trade Commission Act of 1914, the Robinson–Patman Act of 1936, and the Celler–Kefauver Act of 1950. At the time many small, railroads were being bought up and consolidated into giant systems. Those favoring strong antitrust laws argued that, in order for the American economy to be successful, it would require free competition and the opportunity for individual Americans to build their own businesses. As Senator Sherman put it, "If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life." Congress passed the Sherman Antitrust Act almost unanimously in 1890, and it remains the core of antitrust policy. The Sherman Act prohibits agreements in restraint of trade and abuse of monopoly power. It gives the Justice Department the mandate to go to federal court for orders to stop illegal behavior or to impose remedies. See William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago: University of Chicago Press, 1965) and Jay Pil Choi (ed.), *Recent Developments in Antitrust: Theory and Evidence* (Cambridge: The MIT Press, 2007).

[97] *See* Adolph A. Berle, "Corporate Powers as Powers in Trust," 44 HARV. L. REV. 1049 (1931).

[98] Louis D. Brandeis, "A Curse of Bigness," *Harpers Weekly* (January 10, 1914). See also, Barak Orbach and Grace Campbell Rebling, "The Antitrust Curse of Bigness," 85 S. CAL. L. REV. 605 (2012).

first billion-dollar corporation in history. When it was created it fused 200 companies together in the steel and iron business and controlled 60 percent of the production in the whole industry. The same tendency for consolidation was observable in railroading. In 1910, 67 percent of the total trackage in the United States was owned by only fifty-four companies, each owning over 1,000 miles of track.

During this era, with the development of powerful trusts in American, Americans soon recognized that such aggregation of wealth and economic power in relatively few hands could be dangerous as well as beneficial. The challenge was to find the proper encouragement of efficiency and maximum production in the context of protecting the consumer against abuse. By the end of the 1880s the need for some control over the concentration of economic power was so obvious that all the major political parties in the country included antitrust planks in their platforms. At both the state and national level, government started to act against the actions of corporations that were at the heart of the consolidation movement. Many states set up regulatory commissions that would serve as strict monitors of industrial behavior.

At the national level, the first solution to the question of industrial concentration was the passage of the Interstate Commerce Act of 1887 that created the Interstate Commerce Commission in response to the economic power of the railroads. This new law marked the start of the federal government's interference in the operations of the capitalist economy through a regulatory commission. The second solution Americans implemented to address the irresponsible power of industrial concentration was unique as compared with other industrial countries – the Sherman Antitrust Act of 1890. The philosophy behind the law was that the federal government should act to re-establish and preserve competition throughout the economy. In 1903, 1904, and 1910 new laws were passed supplying the Interstate Commerce Commission with tools it could use to tame the railroads. The Clayton Antitrust Act of 1914 defined a number of objectionable, monopolistic practices by corporations with criminal and civil penalties attached. It was meant to plug the holes in the old Sherman Act of 1890.

As an additional safeguard, the Federal Trade Commission was created to serve as a kind of watchdog over the practices of the business world. The Commission was empowered to publicize corporate activities contrary to the public interest and to take the delinquents to court. Now the principle of the regulatory commission that had first applied to railroads was made applicable to industrial combines. Compared with other industrial nations, the United Sates is unique in how it had put prohibitions on interference with competition into statutory law. President Franklin Roosevelt noted that "The Sherman and Clayton Acts have become as much a part of the American way of life as the due process clause of the Constitution."[99] It was the fear of bigness and market domination by a few giant corporations that thwarted competition that dominated the government's actions in its antitrust regulations. And although no court has ever ruled that size in

[99] See Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* (Harvard Business School, 2019).

itself is a violation of the Sherman Act,[100] courts have echoed the fears of bigness and the practices it seems to beget.[101]

One of the more well-known trusts was the Standard Oil Company. In the 1800s and 1880s, John D. Rockefeller had used economic threats against competitors and secret rebate deals with railroads to build what was called a monopoly in the oil business. The company's rapid growth in size led to fears of social harms that would come from it. At the time of the corporation's formation it controlled 10 percent of the nation's oil-refining capacity.[102] By 1880, Standard Oil owned or effectively controlled 90 to 95 percent of the nation's petroleum and distribution facilities.[103] A government investigation concluded that Standard Oil's monopoly power was built "primarily on the control of transportation facilities in one form or another."[104] According to the report, Oil Standard has been "crippling existing rivals and preventing the rise of new ones by vexation and oppressive attacks upon them."[105]

In 1911, the Supreme Court ordered the dissolution of the Standard Oil trust, finding it had violated the Sherman Act.[106] It broke the monopoly into three dozen separate companies that competed with one another, including Standard Oil of New Jersey (later known as Exxon and now ExxonMobil), Standard Oil of Indiana (Amoco), and Standard Oil Company of New York (Mobil, again, later merged with Exxon to form ExxonMobil), of California (Chevron),etc. Rockefeller controlled some 90 percent of the U.S. oil market—wells, refineries, pipelines.[107] In approving the breakup the Supreme Court added the "rule of reason": not all big companies, and not all monopolies, are evil; and the courts (not the executive branch) are to make that decision. To be harmful, a trust had to damage the economic environment of its competitors.[108]

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[100] See, e.g., *United States v. U.S. Steel Corp*., 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offence or the existence of unexerted power an offence.").

[101] See, e.g., *Alcoa*, 148 F. 2d at 427 (Hand, J.) ("[The Sherman Act] did not condone 'good trusts' and condemn 'bad' ones; it forbad all"); Horace H. Robbins, "Bigness," the Sherman Act and Antitrust Policy," 39 VIRGINIA L. REV. 907 (1953).

[102] U.S. Dep't of Commerce & Trade, Report of the Comm'r of Corps. On the Petroleum Industry, Part I: Position of the Standard Oil Company in the Petroleum Industry 2, XVI, 28 (May 20, 1907).

[103] *Id.* at XVI, 49.

[104] *Id.* at XVIII, 8-13, 21-38.

[105] *Id.* at XXI.

[106] The Standard Oil Trust was formed in 1882 combing the Standard Oil Company and other companies that were engaged in producing, refining, and marketing oil. The companies transferred their stock "in trust" to nine trustees headed by John D. Rockefeller and in exchange received a beneficial interest in the trust. In 1899 the trust renamed its New Jersey firm Standard Oil Company (New Jersey) and incorporated it as a holding company and all assets formerly in the trust were then transferred to the New Jersey company. Due to their monopolistic conduct, the Supreme Court ordered the break-up of the organization in *Standard Oil Co. v. United States* 221 U.S. 1 (1911). The New Jersey company was ordered to divest itself of its major holdings—33 companies in all.

[107] Eugene V. Rostow, *A National Policy for the Oil Industry* (New Haven: Yale University Press, 1948).

[108] *Standard Oil Co. v. United States*, 221 US 1, 50 (1911)("the vast accumulation of wealth in the hands of corporations and individuals. . . . oppress individuals and injure the public generally.").

The Sherman Act dealt with cartels and monopolies that restrained trade but left a gap. Instead of forming a cartel, businesses could simply merge into one entity. This period between 1895 and 1904 saw a "great merger movement" as business competitors combined into ever more giant corporations. Since under a literal reading of Sherman Act, no remedy could be granted until a monopoly had already formed, the Clayton Act of 1914 attempted to fill this gap by giving jurisdiction to prevent mergers in the first place if they would "substantially lessen competition."[109]

Public officials during the Progressive Era put passing and enforcing strong antitrust high on their agenda. President Theodore Roosevelt sued 45 companies under the Sherman Act, while President William Howard Taft sued 75. In 1902, Roosevelt stopped the formation of the Northern Securities Company, which threatened to monopolize transportation in the Northwest.[110] By 1904, the Supreme Court move to end the great merger or consolidation movement. In *Northern Securities*, the Court held that the Sherman Act condemned some acquisitions of firms by a holding company.[111] No longer was there any doubt that size was accepted as a matter to be concerned about in contemplating anti-trust regulations.

United States Steel Corporation, which was much larger than Standard Oil, won its antitrust suit in 1920. What benefits did Standard Oil provide that US Steel did not?. In fact, it lobbied for tariff protection that reduced competition, and so contending that it was one of the "good trusts" that benefited the economy is specious. Likewise, International Harvester survived its court test, while other monopolies were broken up in tobacco, meatpacking, and other industries. Hundreds of executives of competing companies who met together illegally to fix prices went to federal prison.

Hostility to big business began to decrease after the Progressive Era, when, for example, Ford Motor Company dominated auto manufacturing, building many cheap cars that put America on wheels, and at the same time lowered prices, raised wages, and promoted manufacturing efficiency. Large companies became an attractive place to work; new career paths opened up in middle management while suppliers discovered that big corporations were also big purchasers. Talk of "trust busting" faded. Government under President Herbert Hoover in the 1920s promoted business cooperation and made the FTC an ally of "respectable business."

Under President Franklin Roosevelt's New Deal, attempts were made to stop cutthroat competition. The National Industrial Recovery Act (NIRA) was a short-lived program in 1933–35 designed to strengthen trade associations, and raise prices, profits and wages at the same time.

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[109] The Supreme Court called the Sherman Act a "charter of freedom", designed to protect free enterprise in America. Justice Douglas also noted that the goal was not only to protect consumers, but at least as importantly to prohibit the use of power to control the marketplace. The Clayton Act (1914) prohibited specific business actions such as price discrimination if they substantially lessened competition. At the same time Congress established the Federal Trade Commission (FTC), who's legal and business experts could force business to agree to "consent decrees", which provided an alternative mechanism to police antitrust. In the current context the Congress has identified direct evidence from their investigation of Facebook acquiring Instagram and a former employee stating how Facebook founder Mark Zuckerberg deliberately prevented Instagram from making improvements to compete for users. This is exactly the kind of anticompetitive behavior that the antitrust statute is supposed to prevent.

[110] See *Northern Securities Co. v. United States,* 193 U.S. 197 (1904).

[111] *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

The Robinson-Patman Act of 1936 sought to protect local retailers against the onslaught of the more efficient chain stores, by making it illegal to discount prices. To control big business, the New Deal policymakers federal and state regulation—controlling the rates and telephone services provided by AT&T, for example—and by building up countervailing power in the form of labor unions.

During the 1970s the antitrust environment was dominated by the case *United States v. IBM*, filed by the Justice Department in 1969. At the time, IBM dominated the computer market through alleged bundling of software and hardware as well as sabotage at the sales level and false product announcements. It was one of the largest and certainly the lengthiest antitrust cases ever brought against a company. In 1982, the Reagan administration dismissed the case, and the costs and wasted resources were heavily criticized.[112] There is, however, an argument that, despite the fact that the case was finally dismissed, the legal pressure on IBM allowed for the development of an independent software and personal computer industry with major importance for the national economy. To the extent the case stopped anti-competitive practices, it achieved the goals of the antitrust laws.

In 1982, the Reagan administration did use the Sherman Act to break up AT&T into one long-distance company and seven regional "Baby Bells," arguing that competition should replace monopoly for the benefit of consumers and the economy as a whole. The pace of business takeovers accelerated during the 1990s, but whenever one large corporation sought to acquire another, it first had to obtain the approval of either the FTC or the Justice Department. Frequently the government demanded that certain subsidiaries be sold so that the new company would not monopolize a particular geographical market.

A highly publicized case came in 1999 when a coalition of 19 states and the Justice Department sued Microsoft and the resulting trial found that Microsoft had forced many companies in an attempt to prevent competition from the Netscape browser.[113] In 2000, the trial court ordered Microsoft to split in two, preventing it from future misbehavior. The Court of Appeals affirmed in part and reversed in part.[114] In addition, it removed the judge from the case for discussing the case with the media while it was still pending. With the case in front of a new judge, Microsoft and the government settled, with the government dropping the case in return for Microsoft agreeing to cease many of the practices the government challenged. In his defense, CEO Bill Gates argued that Microsoft always worked on behalf of the consumer and that splitting the company would

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[112] The complaint for the case *United States v. IBM*, 517 U.S. 843, had been filed in 1969 and in 1975 the government's antitrust suit against IBM finally went to trial alleging IBM violated the Sherman Act by monopolizing or attempting to monopolize the general purpose electronic digital computer system market, specifically computers designed primarily for business. After thousands of hours of testimony (testimony of over 950 witnesses, 87 in court, the remainder by deposition), and the submission of tens of thousands of exhibits. Finally, in 1982 the case was withdrawn on the grounds that the case was "without merit." See Richard J. Hofstadter, "What Ever Happened to the Antitrust Movement?" *The Paranoid Style in American Politics and Other Essays* (New York: Vintage Books, 1965).

[113] See Andrew I. Gavil and Harry First, *The Microsoft Antitrust Cases - Competition Policy for the Twenty-first Century* (Cambridge: MIT Press, 2014).

[114] *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001). See David S. Evans (ed.), *Microsoft, Antitrust and the New Economy: Selected Essays* (New York: Springer, 2002).

diminish efficiency and slow the pace of software development. At the same time, the case revealed that the kind of practices that had brought Congress to pass the Sherman and Clayton Acts were not in a historical dustbin.

It is still the case that the FTC, the Department of Justice, state governments and private parties who are sufficiently affected may all bring actions in the courts to enforce the antitrust laws. The scope of antitrust laws, and the degree to which they should interfere in an enterprise's freedom to conduct business, or to protect smaller businesses, communities, and consumers, continue to be debated. One view, often associated with the "Chicago School of economics" contends that antitrust laws should focus solely on the benefits to consumers and overall efficiency, while a broad range of legal and economic theory sees the role of antitrust laws as also controlling economic power in the public interest.[115] How this might apply to the current issue of the power exercised by social medial platform operators remains a new and open question. Anti-trust cases filed in late 2020 and 2021 against Google and Facebook are still in their early stages before the courts.[116]

Some writers refer to "the curse of bigness" and show how size can become a menace—both industrial and social.[117] It was Justice Louis Brandeis who coined the phrase, "The Curse Bigness." He believed that absolute corporate size was a public evil. In 1912, testifying before Congress he stated, "[W]e cannot maintain democratic conditions in America if we allow organizations to arise in our midst with the power of the [large trusts]. Liberty of the American citizen cannot endure against such organizations."[118] Although Brandeis recognized that size may not be a crime, it could "become obnoxious by reason of the means through which it was attained or the uses to which it is put."[119] The domination of social media by a few giant platform providers has not diminished this concern, which Brandeis illuminated in a different technological context.

Those concerned about the size of corporations view "Bigness" as a possible industrial menace because it tilts the playing field against existing or putative competitors. It can also be a social menace because it vests substantial power in a handful of people. In his dissenting opinion in *Columbia Steel*, Justice Douglas warned that size is an "industrial menace" because it creates

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[115] See Richard A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976), and Robert H. Bork, *The Antitrust Paradox* (New York: The Free Press 1993.). Judge Bork's writings on antitrust law along with those of Prof. Posner and other law and economics thinkers, were heavily influential in causing a shift in the U.S. Supreme Court's approach to antitrust laws since the 1970s, to be focused solely on what is best for the consumer rather than the company's practices.

[116] See fn. 44 and fn. 45, *supra*.

[117] See Louis D. Brandeis, "A Curse of Bigness," *Harper's Weekly* (January 10, 1914), at 18 (Brandeis wrote that size may not be a crime in and of itself but that "size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put."). See Orbach and Rebling, *supra* note 87; Richard J. Hofstadter, *What Ever Happened to the Antitrust Movement?*, in *The Paranoid Style in American Politics and Other Essays* (New York: Vintage Books, 1965); Louis Brandeis, *The Curse of Bigness* (New York: Viking Press, 1934).

[118] Hearings Before the H. Comm. on Investigation of United States Steel Corporation, 62d Cong. 2862 (1912) (statement of Louis Brandeis).

[119] Brandeis, *A Curse of Bigness*, *supra* note 105, at 18. See also Orbach and Rebling, *supra* note 87.

gross inequalities against existing or putative competitors."[120] It was also a "social menace," according to Douglas, because it allows control over prices and "is the measure of the power of a handful of men over our economy." Such power "can be utilized with lightning speed," and "tends to develop into a government in itself."[121] The philosophy of the Sherman Act is that it should not exist – industrial power should be decentralized and should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed people. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.

By contrast, others who support efficiency argue that antitrust legislation should be changed primarily to benefit consumers and have no other purpose. Free market economist Milton Friedman states that he initially agreed with the underlying principles of antitrust laws but that he concluded that they do more harm than good. Economist Alan Greenspan argues that the very existence of antitrust laws discourages business owner from some activities that might be socially useful out of fear that their business actions will be determined illegal and dismantled by government. He argues that:

> No one will ever know what new products, processes, machines, and cost-saving mergers failed to come into existence, killed by the Sherman Act before they were born. No one can ever compute the price that all of us have paid for that Act which, by inducing less effective use of capital, has kept our standard of living lower than would otherwise have been possible. Hence, legal action is uncalled for and wrongly harms the firm and consumers.[122]

Ordinarily, one might think that market forces, not government intervention, can regulate, control, and even solve a problem such as biased content on social media platforms. Theoretically, if a product is bad or the customers are not satisfied, the consumers simply will switch to an alternative. Businesses seek to keep customers so they will fix bad practices and/or products. In the context of bias content on social media platforms, users theoretically will move to a different platform, and the original platform will alter its content moderation practices. This conclusion presumes, however, that realistic alternatives exist. Twitter and Facebook account for the overwhelming market share of social media.[123] With few major social media platforms available there are fewer alternatives for users and therefore Facebook and Twitter confront no economic incentives to moderate their content in an evenhanded manner.

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[120] *United States v. Columbia Steel Co.,* 334 U.S. 495, 535 (Douglas, J., dissenting).

[121] *Id*. at 536.

[122] Some writers provide a moral argument against antitrust laws, holding that these laws in principle criminalize any person engaged in making a business successful, and, thus, are gross violations of their individual expectations. Such laissez faire advocates suggest that only a coercive monopoly should be broken up, that is the persistent, exclusive control of a vitally needed resource, good, or service such that the community is at the mercy of the controller, and where there are no suppliers of the same or substitute goods to which the consumer can turn.

[123] *Social Media Stats Worldwide*, STAT COUNTER GLOBAL STATS, Oct. 2020, https://gs.statcounter.com/social-media-stats.

One of the challenges to utilizing the anti-trust legislation is that it is very difficult for the government to win these types of cases. This is mainly because in the 1970s, the Supreme Court decided to interpret the federal antitrust statutes as being designed exclusively to promote "consumer welfare." This created a situation where monopolies were allowed to continue as long as prices stay low. Doing so, however, can still cause damage but just not related to pricing. One recent recommendation made by the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, is to reassert "the original intent and broad goals of the antitrust laws, by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals." If Congress were to act on this recommendation and pass a new law to eliminate the consumer welfare standard, overriding the Supreme Court, it would have important implications for the ability of the government to counter the activities of social media platforms that have used their monopolistic positions in the marketplace to censor speech.

The remaining question is, if the largest social media platforms are broken up, what will the Internet look like? The major platforms provide "free goods" to users so there is no advantage for them to use an alternative service or platform. Certainty they cannot be accused of overcharging users, as they are providing free services. At the same time there is a great deal of inertia, and many users are used to looking at Twitter and Facebook. Forcing them to convert to new or other platforms could be a difficult task indeed.[124]

Is a potential solution to limit further market concentration by blocking, on anti-competitive grounds, the mergers/consolidation of these platform companies. For example, why not bar Facebook or Google or Twitter from acquiring WhatsApp and Instagram or YouTube or other competitors? Considering this problem, the recent House minority report found:

> The majority staff similarly offers a recommendation to set rebuttable presumptions to deny mergers at a 40 percent market stake for the seller and that a buyer may not control more than 25 percent of the market. Setting a bright line rule for mergers and acquisitions similar to the Philadelphia National Bank ruling may appear to serve as a straightforward and simple path to protecting the marketplace. However, we are concerned that these presumptions present a rigid line that is far too low and will only serve to dissuade companies from taking growth-oriented mindsets. We are also concerned that these rules will reach far beyond the technology marketplaces and will cut off access to venture capital.[125]

Apart from the investigations by the Congress, the Department of Justice has focused on what it deems to be a monopoly position on the part of Google in the Internet search area. As

[124] At the same time, younger users in particular have migrated from Facebook to other social media platforms such as Snapchat, Instagram, TikTok and others.

[125] Buck, *supra* note 1, at 14.

noted earlier, the Justice Department and twelve state attorneys general have sued Google for anti-trust violations.[126] In particular, the Department of Justice found that:

> Over the last ten years, internet searches on mobile devices have grown rapidly, eclipsing searches on computers and making mobile devices the most important avenue for search distribution in the United States. . . . Even where users can change the default, they rarely do. This leaves the preset default general search engine with *de facto* exclusivity. . . . For years, Google has entered into exclusionary agreements, including tying arrangements, and engaged in anticompetitive conduct to lock up distribution channels and block rivals. . .
>
> Between its exclusionary contracts and owned-and-operated properties, Google effectively owns or controls search distribution channels accounting for roughly 80 percent of the general search queries in the United States. Largely as a result of Google's exclusionary agreements and anticompetitive conduct, Google in recent years has accounted for nearly 90 percent of all general-search-engine queries in the United States, and almost 95 percent of queries on mobile devices. Google has thus foreclosed competition for internet search. General search engine competitors are denied vital distribution, scale, and product recognition—ensuring they have no real chance to challenge Google. Google is so dominant that "Google" is not only a noun to identify the company and the Google search engine but also a verb that means to search the Internet.[127]

Without question Google will certainly push back on the government's allegations in this suit can be anticipated that this litigation will take a long time to achieve resolution. Use of the Sherman and Clayton Acts in this context is novel, with Google pointing to the fact that its services are not only free to users, but other alternative search engines, such as Bing, are also freely available. Yet they may still have to answer those who say Google and its ilk engage in predatory practices that block competition and innovation and encourage high-tech, industrial sclerosis.

D. Section 230 of Communication Decency Act (CDA)

The protections to online service providers provided in Section 230 of the Communication Decency Act (CDA) have come under extensive scrutiny recently on issues related to hate speech and ideological biases related to political discussions and the content moderation practices of social media companies.[128] On May 28, 2020, President Trump issued an executive order on Preventing Online Censorship, stating that the protections conferred by Section 230 of the Communications Decency Act of 1996 "should be clarified." The order called on the Department of Justice to "assess whether any online platforms are problematic vehicles for government speech due to

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[126] *United States et al. v. Google, supra* note 38. In particular the Justice Department bring this action under Section 2 of the Sherman Act, 15 U.S.C. § 2, to restrain Google LLC (Google) from unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices, and to remedy the effects of this conduct.

[127] *Id.* at 3-4.

[128] 47 U.S.C. § 230.

viewpoint discrimination." This action raises the issue of whether private entities should be compelled to serve as viewpoint-neutral vehicles for dissemination of "government speech."

In June 2020 Republican Senators Ted Cruz (R-TX) and Josh Hawley (R-MO), introduced a bill that would have amended Section 230 so that, "Big tech companies would have to prove to the FTC by clear and convincing evidence that their algorithms and content-removal practices are politically neutral" and have remained at the forefront of this effort. In his final months in office President Trump became increasingly vocal on this subject and attempted to have Section 230 repealed as an amendment to the 2020 National Defense Authorization Act (NDAA). As history would have it, the NDAA Congress passed the 2020 NDAA over Trump's veto, without the repeal he wanted.[129]

There also have been other calls from Congress to amend aspects of Section 230. To understand how potential amendments to Section 230 may be relevant to these more recent concerns related to political bias in social media practices it is useful to review the history and purpose of Section 230. Hearings held during October and November 2020 have included extensive testimony by representatives of the major platform providers as well as reporting from the Congressional staff.[130]

(i) History of Section 230 of the CDA

Section 230 of the Communications Decency Act (CDA) of 1996 provides legal immunity for website publishers of third-party content. Section 230(c)(1) provides established this immunity from liability for providers and users of an "interactive computer service"—"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"[131] Adopted at a time when Internet use was just starting to expand in terms both of breadth of services and range of consumers, commentators frequently refer to Section 230 as instrumental and has frequently been referred as a key law that has allowed the Internet to flourish.[132]

Before Section 230 became law, if online platforms tried to conduct any content moderation for their sites, to keep their sites free from obscenity and malicious behavior for

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[129] Tony Hatmaker, "Trump Vetoes Major Defense Bill, Citing Section 230," *TechCrunch* (December 23, 2020). See fn. 43 *supra*.

[130] "Section 230 hearings: Twitter, Facebook and Google CEOs testify before Congress – as it happened," *The Guardian* (October 28, 2020). See also, *Investigation and Competition in Digital Markets: Majority Report and Recommendations, supra* note 19*;* Buck*, supra* note 1.

[131] 47 U.S.C. § 230.

[132] The passage and subsequent legal history supporting the constitutionality of Section 230 have been considered essential to the growth of internet through the early part of the 21st century. Coupled with the Digital Millennium Copyright Act (DMCA) of 1998, Section 230 provides Internet service providers safe harbors to operate as intermediaries of content without fear of being liable for that content as long as they take reasonable steps to delete or prevent access to that content. These protections allowed experimental and novel applications in the internet area without fear of legal ramifications, creating the foundations of modern internet services such as advanced search engines, social media, video streaming, and cloud computing. See Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Ithaca: Cornell University Press, 2019).

instance, they faced the potential of unlimited liability for all of the user-generated content on their sites.[133] On the other hand, if they did nothing to control such obnoxious content, they could avoid any liability.[134] One can imagine the great disincentive that was established for internet platforms to do nothing to try to clean up the content on their sites.

The legal and policy framework of Section 230 has allowed countless websites to build successful business models around user-generated content. YouTube allows users to upload their own videos; Amazon and Yelp offer consumer reviews.[135] Craigslist is host to classified ads; Facebook and Twitter offer social networking to hundreds of millions of Internet users; search engines like Google offer users access to virtually unlimited quantities of information;[136] and online encyclopedias like Wikipedia provide users the opportunity to create or edit articles on topics as varied as Armageddon and Zoology.[137] Without question, Section 230 has been integral to Internet innovation and the growth of Internet companies. It has allowed the Internet to thrive.

Given the size of user-generated websites (for example, Facebook alone has more than 1.69 billion users, and YouTube, which is owned by Google, users upload 100 hours of video every minute), it would not be feasible for online intermediaries to prevent objectionable content from appearing on their sites.[138] The law, however, does not protect any "interactive computer service" that becomes complicit, in whole or in part, in the creation of illicit content.[139] So, if a platform did review material and edit it then the protections of Section 230 would not apply to the platform. Section 230 does provide an exception to this loss of immunity for a platform that reviews and edits content.

According to the "Good Samaritan" provision of Section 230, if the purpose of one's reviewing or editing content to restrict obscene or otherwise objectionable content, then a platform will be protected.[140] The law also does not require a social media platform to carry out content moderation. As noted *supra*, Twitter and the other platform providers engage in reviewing content and performing moderation in accordance with their terms-of-service agreements and published policies for what they see as a beneficial public service. The disputed efforts here are the

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[133] *Stratton Oakmont v. Prodigy Servs. Co.,* 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

[134] *Cubby, Inc. v. CompuServ, Inc.,* 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

[135] *Kimzey v. Yelp! Inc.,* 836 F. 3d 1263 (9th Cir. 2016).

[136] *Fakhrian v. Google*, No. B260705 (Cal. Ct. App. April 25, 2016).

[137] *Bauer v. Glatzer*, Docket No. L-1169-07 (Superior Court of N.J., Monmouth County, 2008).

[138] Section 230 also offers its legal shield to bloggers who act as intermediaries by hosting comments on their blogs. Under the law, bloggers are not liable for comments left by readers, the work of guest bloggers, tips sent via email, or information received through RSS feeds. This legal protection can still hold even if a blogger is aware of the objectionable content or makes editorial judgments.

[139] *Federal Trade Comm'n v. Leadclick Media, LLC*, 838 F 3d 158 (2d Cir. 2016) (rejecting a claim of 230 immunity because the internet marketer had provided advice to the creators of illegal content); *FTC v. Accusearch*, 570 F. 3d 1187, 1197 (10th Cir. 2009)(holding that a website's posting of content constituted "development" of illegal content because the site had knowingly transformed the information that had previously been private into a publicly available commodity.).

[140] 47 U.S.C. Section 230 (c)(2)(A).

moderation of content that is viewed by the platform moderators as misinformation, or incitement to violence.[141]

Critics maintain that a substantial number of the deleted posts and barred posters, largely from conservatives, have nothing to do with violence whatsoever, and do not contain any false claims on how to participate in civic processes or otherwise intimidate or suppress voter participation. At the same time Twitter, for example, fails to moderate or delete posts from Iran and other terrorist regimes promoting violence, or the large number of posts related to the sexual exploitation of children.[142]

(ii) Section 230 as a Defense for Internet Platforms

While courts held that several aspects of the CDA were unconstitutional restrictions of freedom of speech, Section 230 survived and has been a valuable defense for Internet intermediaries ever since. "By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[143]

In the 1959 *Smith v. California* case the Supreme Court set the foundation for distributor liability standards when the Court concluded that imposing a standard of strict liability on booksellers for the distribution of obscene content violated the Frist Amendment because such a rule would chill non-obscene speech. According to the Court, "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter."[144] The Court was concerned that if a bookseller could be held criminally liable even without any knowledge of the content of the material, then the bookseller would tend "to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."[145]

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[141] See fn. 27 supra.

[142] See *John Doe v. Twitter*, 3:21-cv-00485 (N.D. CA, January 20, 2021).

[143] *Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). The case involved a person that sued America Online (AOL) for failing to remove, in a timely manner, libelous ads posted by AOL users that inappropriately connected his home phone number to the Oklahoma City bombing. The court found for AOL and upheld the constitutionality of Section 230, stating that Section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." The court asserted in its ruling Congress's rationale for Section 230 was to give internet service providers broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material. See also *Blumenthal v. Drudge*, 922 F. Supp. 44, 52 (D.D.C. 1998) (§ 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions); 141 Cong. Rec. H8460-01, H8470 (1995) (statement of Rep. Barton) (Congress enacted § 230 to give interactive service providers "a reasonable way to . . . help them self-regulate themselves without penalty of law").

[144] *Smith v. California*, 361 U.S. 147, 153 (1959).

[145] *Id*. at 154-155.

After the *Smith* case, lower courts applied a common law rule that distributors could not be liable for content created by others unless the distributors knew or had reason to know of the illegal content. Going forward, distributors would be treated differently from publishers since, unlike distributors who did not control the content of the material, publishers did have control over the content.[146]

In the early 1990s this common law rule was applied in two separate cases involving lawsuits against two Internet service providers, CompuServe, and Prodigy. In applying the common law rule in these two cases, the courts provided two different interpretations of whether the service providers should be treated as distributors, entitled to the same liability standards to which newsstands were held, or publishers of content created by its users.[147] It was the ruling in *Stratton Oakmont v. Prodigy Service Co*. that paved the way for legislative action and the passage of Section 230.[148] In that case, after being sued due to defamatory comments made on a Prodigy financial bulletin board, the company claimed the same distributor liability standard that CompuServe had claimed four years earlier in another case. The New York Supreme Court held that online service providers could be held liable for the speech of their users.

Unlike CompuServe, however, Prodigy lost the case when the New York state trial court found that Prodigy was a publisher, liable regardless of whether it knew or had reason to know of the allegedly defamatory content, and not a distributor as CompuServe was since Prodigy had exercised substantial control over user content. For instance, Prodigy had employed contract moderators and implemented detailed user conduct rules. To lawmakers in Congress, this did not make sense. These rulings would discourage online services from moderation, thereby leaving plenty of objectionable material like pornography out on the internet, where children would be at risk of exposure.

In June 1995, Republican Representative Chris Cox (R-CA) and Democratic Senator Ron Wyden (D-OR) introduced the bi-partisan Internet Freedom and Family Empowerment Act which focused on the liability of online platforms for user content and the need to eliminate any disincentive to moderation. According to the relevant provision of the bill that would later become Section 230, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[149]

Importantly, the bill codified "user control" as an express policy goal. The idea was that the users should determine what content should be available to them and their children. Cox and Wyden wrote, "These services offer users a great degree of control over the information that they receive . . ."[150] They were advocates of minimum government regulation and encouraged the "development of technologies which maximize user control over what information is received by

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[146] See, e.g., *Dworkin v. Hustler*, 611 F. Supp. 781 (D. Wyo. 1985); *Osmond v. Ewap*, 153 Cal. App. 3d 842 (Cal. Ct. App. 1984).

[147] *Cubby v. CompuServe*, *supra* note 121, at 140; *Stratton Oakmont v. Prodigy Service Co., supra* note 120.

[148] *Stratton Oakmont v. Prodigy Service Co., supra* note 120.

[149] 47 U.S.C. § 230 (c)(1).

[150] 47 U.S.C. § 230(a)(2).

individuals, families and schools who use the internet and other interactive computer services."[151] One idea advocated by Brendan Carr, FCC Commissioner, is to allow users to engage in their own content moderation by having consumers turn off the bias filters.[152]

In addition, *Zeran* notes "the amount of information communicated via interactive computer services is . . . staggering." The specter of tort liability in an area of such prolific speech would have an obviously chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

This rule, cementing Section 230's liability protections, has been considered one of the most important case laws affecting the growth of the Internet, allowing websites to be able to incorporate user-generated content without fear of prosecution.[153] At the same time, however, this has led to Section 230 being used as a shield for some website owners as courts have ruled Section 230 provides complete immunity for Internet service providers with regard to the torts committed by their users over their systems.[154] Most cases involving Section 230 challenges were decided in favor of service providers, ruling in favor of their immunity from third-party content on their sites.

(iii) Recent Efforts to Amend Section 230

Recent scrutiny of major social media sites, notably the "Big Tech" companies including Twitter, Facebook, and Google has greatly increased, largely as a result of Russian interference in the 2016 election, where it was alleged that Russian agents used the sites to spread propaganda and false statements to influence the election in favor of Donald Trump.[155] These platforms were also criticized for not taking action against users that used the social media outlets for harassment and hate speech against others. Some in Congress, from both parties, have recognized that additional changes could be made to Section 230 to require service providers to deal with these bad actors, beyond what Section 230 already provided to them.[156]

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[151] 47 U.S.C. § 230(b)(3).

[152] Statement Of Commissioner Brendan Carr On Introduction of the SMARTER Act (May 15, 2018).

[153] *See* Matt Shroud, "These six lawsuits shaped the internet," *Verge* (August 19, 2014).

[154] *See* Rebecca Tushnet, "Power Without Responsibility: Intermediaries and the First Amendment," 76 GEO. WASH. L. REV. 101 (2008); Jeff Kosseff, "The Gradual Erosion of the Law That Shaped the Internet: Section 230s Evolution Over Two Decades," COLUM. SCI. & TECH. L. REV. (2017).

[155] See Robert S. Mueller, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (March 2019) (submitted to the Attorney General pursuant to 28 C.F.R. § 600.8(c)).

[156] See *supra* note 97. On the Senate side, several Republican senators, including Ted Cruz and Josh Hawley, have accused major social networks of displaying a bias against conservative perspectives when moderating content (for example, suspending Twitter accounts for rule violations). Cruz has argued that section 230 should only apply to providers that are politically "neutral,", suggesting that a provider "should be considered to be a [liable] 'publisher or

Some authorities argue that political neutrality was not the intent of Section 230 according to the authors of the law, but rather making sure that the platform service providers had the ability to make content-removal judgements without fear of liability. There have been concerns that any attempt to weaken Section 230 could actually cause an increase in censorship when services lose their liability.[157] Attempts to sue technology companies for damages for apparent anti-conservative bias, arguing against Section 230 protections, generally have proved unsuccessful thus far.[158]

Concerned politicians and citizens raised calls at large tech companies for the need for hate speech to be removed from the internet; however, hate speech is generally protected speech under the First Amendment. Section 230 protects these technology companies from an obligation to moderate such content as long as it is not illegal. Here the third party hate speech in question would have to constitute copyright infringement, advocacy of prostitution, or child pornography for the technology company to be forced to remove it.[159] As a result, technology companies do not need to take measures against hateful content, thus allowing the hate content to proliferate online.

Some individuals in Congress have indicated they may pass a law that changes how Section 230 would apply to hate speech, indicating Section 230 needs to be both "a sword and a shield" for Internet companies. The sword would allow them to remove content they deem inappropriate for their service, and the shield would help keep offensive content from their sites without liability. Since the tech companies have not been willing to use the sword to remove content, it may be necessary to take away that shield. Some have compared Section 230 to the Protection of Lawful

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speaker' of user content if they pick and choose what gets published or spoken. Section 230 does not contain any requirements that moderation decisions be neutral. Hawley alleged that section 230 immunity was a "sweetheart deal between big tech and big government." See Li Zhou, Nancy Scola, and Ashley Gold, "Senators to Facebook, Google, Twitter: Wake up to Russian Threat," *Politico* (November 1, 2017); Elliott Harmon, *No, Section 230 Does Not Require Platforms to Be 'Neutral,'* ELECTRONIC FRONTIER FOUNDATION (April 12, 2018); Adi Robertson, "Why the internet's most important law exists and how people are still getting it wrong," *Verge* (June 21, 2019). In June 2019, Sen. Hawley (R-MO) introduced the Ending Support for Internet Censorship Act (S. 1914), that would remove section 230 protections from companies whose services have more than 30 million active monthly users in the U.S. and more than 300 million worldwide, or have over $500 million in annual global revenue, unless they receive a certification from the majority of the Federal Trade Commission that they do not moderate against any political viewpoint, and have not done so in the past 2 years. In December 2018, Republican representative Louie Gohmert (R-TX) introduced the Biased Algorithm Deterrence Act (H.R.492), which would remove all Section 230 protections for any provider that used filters or any other type of algorithms to display user content when otherwise not directed by a user.

[157] *See* Elizabeth Nolan Brown, *"*Expect More Conservative Purges on Social Media If Republicans Target Section 230," *Reason* (November 28, 2018), https://reason.com/2018/11/28/stop-blaming-section-230/.

[158] An antitrust lawsuit brought by Freedom's Watch in 2018 against Google, Facebook, Twitter, and Apple for using their positions to engage in anti-conservative censorship was dismissed by the D.C. Circuit Court of Appeals in May 2020. The court ruled that First Amendment rights can only apply to censorship by the government and not by private entities. See Erik Larson, "Twitter, Facebook Win Appeal in Anticonservative-Bias Suit*," Bloomberg News* (May 27, 2020).

[159] See *Blockowicz, v. Williams,* 2010 WL 5262726 (7th Cir. 2010), and https://pubcit.typepad.com/clpblog/2010/12/courts-address-a-section-230-question-that-seems-hard-at-first-blush-what-happens-after-a-defamation.html.

Commerce in Arms Act, a law that grants gun manufacturers immunity from certain types of lawsuits when their weapons are used in criminal activities.[160]

In February 2020 Attorney General William Barr argued that, while Section 230 was needed to protect the Internet's growth while most companies were not stable: "No longer are technology companies the underdog upstarts. . . they have become titans of U.S. industry." He questioned the need for Section 230's broad protections and argued that the Department of Justice wanted reform and better incentives to improve online content by technology companies within the scope of Section 230 rather than change the law directly. The Department of Justice subsequently issued four major recommendations to Congress in June 2020 to modify Section 230.[161] In September 2020 Barr further detailed his thoughts on revision and clarification to Section 230 to "recalibrate" Section 230 immunity to take into account the vast technological changes that have occurred since the Communications Decency Act of 1996 was passed."[162]

1. Incentivizing platforms to deal with illicit content, including calling out "bad Samaritans" that solicit illicit activity and remove their immunity, and carve out exemptions in the areas of child abuse, terrorism, and cyber-stalking, as well as when platforms have been notified by courts of illicit material;
2. Removing protections from civil lawsuits brought by the federal government;
3. Disallowing Section 230 protections in relationship to antitrust actions against the large Internet platforms; and
4. Promoting discourse and transparency by defining existing terms in the statute like "otherwise objectionable" and "good faith" with specific language, and requiring platforms publicly to document when they take action against specific content unless such publicity may interfere with law enforcement or risk harm to an individual.

While in office, President Trump became a major proponent of limiting the protections of technology and media companies under Section 230 due to claims of an anti-conservative bias. During a July 2019, "Social Media Summit" Trump criticized how the "big three" – Twitter, Facebook, and Google—handled conservative voices on their platforms, and also warned that he would seek "all regulatory and legislative solutions to protect free speech."[163] Following his loss in the 2020 elections he became an increasingly vocal critic on this subject, blaming the major social media platforms, at least in part, for what he claimed to be a "stolen election" and sought unsuccessfully to have Section 230 repealed.

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[160] Felix Gillette, "Section 230 Was Supposed to Make the Internet a Better Place. It Failed*," Bloomberg* (August 7, 2019). Some have argued, for example that "[Facebook] is not merely an Internet company. It is propagating falsehoods they know to be false", and that the U.S. needed to "[set] standards" in the same way that the European Union's General Data Protection Regulation (GDPR) set standards for online privacy.

[161] Dept. of Justice, DEP'T OF JUSTICE'S REVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996 (June 17, 2020).

[162] Letter from the Office of the Attorney Gen. to Michael R. Pence, President, U.S. Senate (September 23, 2020).

[163] Tony Romm, "Trump accuses social media companies of 'terrible bias' at White House summit decried by critics," *Washington Post* (July 11, 2019).

In late May 2020, Twitter marked tweets President Trump with respect to mail-in voting and possible fraud "potentially misleading" and linked readers to a special page that provided analysis and fact-checks of Trump's statement from CNN and *The Washington Post.* This was the first time it had used the process on Trump's messages.[164] Subsequent to the 2020 elections Twitter actions with respect to Trump's tweets became increasingly frequent, as well as some of those close to Trump including several members of Congress, Senators, and some of his supporters in the media. Ultimately Twitter closed Trump's personal Twitter account permanently as well as others supporting him.[165]

Trump signed Executive Order on Preventing Online Censorship[166] directing executive departments and agencies to interpret Section 230 in a manner that would not permit liability protection for online platforms that—rather than acting in "good faith" to remove objectionable content ["obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable"]—instead engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree.[167] Such actions constitute "editorial conduct" that is not protected by the "Good Samaritan" rule contained in Section 230 protecting the blocking of harmful content from liability at law. The executive order instructed the Justice and Commerce Departments to petition the FCC to clarify the meaning of Section 230.[168]

At the time Trump stated his rationale for it,"[a] small handful of social media monopolies controls a vast portion of all public and private communications in the United States. They've had unchecked power to censor, restrict, edit, shape, hide, alter, virtually any form of communication between private citizens and large public audiences." The executive order asserts that media companies that edit content apart from restricting posts that are violent, obscene or harassing, as outlined in the "Good Samaritan" clause §230(c)(2), are then "engaged in editorial conduct" and may forfeit any safe-harbor protection granted in §230(c)(1). Twitter critics point to the fact that while Trump and various conservatives are moderated or banned entirely, the platform continues to post tweets from not only liberals, but figures such as Iran's ayatollah who constantly proclaims, "death to America" and "death to Israel" as well as individuals engaged in illegal child pornography, sex trafficking and others engaged in practices that are clearly supportive of

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[164] *Id.* Jack Dorsey, Twitter's CEO, defended the action stating that they were not acting as an "arbitrator of truth." Dorsey's statement explained "Our intention is to connect the dots of conflicting statements and show the information in dispute so people can judge for themselves." See also Glenn Kessler, "Trump made 30,573 false or misleading claims as president. Nearly half came in his final year," *Washington Post* (January 23, 2021).

[165] See Kate Cooper and Mike Isaac, "Twitter Permanently Bans Trump, Capping Online Revolt," *New York Times* (January 8, 2021).

[166] Exec. Ord. 13,925 (May 28, 2020)

[167] *Id*.; 85 Fed. Reg. No. 106 (June 2, 2020), at §2.

[168] *Id*. at § 2(b).

violence, obscene and illegal conduct.[169] As noted *supra*, such posts appear to be in direct violation of Twitter's terms-of-service and stated policies.[170]

Courts have interpreted the "in good faith" portion of the statute based on its plain language and the executive order purports to establish conditions where that good faith may be revoked, such as if the media companies have shown bias in how they remove material from the platform. The goal of the executive order is to remove the Section 230 protections from such platforms, and thus leaving them liable for content. Whether a media platform has bias would be determined by a rulemaking process to be set by the FCC in consultation with the Commerce Department, the National Telecommunications and Information Administration (NTIA), and the Attorney General, while the Justice Department and state attorney generals will handle disputes related to bias, gather these to report to the Federal Trade Commission, who would make determinations if a federal lawsuit should be filed.

The 2020 Trump executive order came under considerable criticism. Some in Congress argued that the executive order was a "mugging of the First Amendment," and that there does need to be a thoughtful debate about modern considerations for Section 230. Some within the legal community, including the Electronic Frontier Foundation, argue the that the executive order starts with a flawed misconstruing of linking sections §230(c)(1) and §230(c)(2), which were not written to be linked and have been treated by case law as independent statements in the statute, and thus "has no legal merit."[171]

In June 2020, the Center for Democracy & Technology filed a lawsuit seeking preliminary and permanent injunction against enforcement of the executive order, asserting that the Order created a chilling effect on free speech since it puts all hosts of third-party content "on notice that content moderation decisions with which the government disagrees could produce penalties and retributive actions, including stripping them of Section 230s protections."[172] As the executive order directed, on July 27, 2020, the Secretary of Commerce petitioned the FCC through the NTIA to issue a rule. The FCC published a proposed rule, calling for public comment mid-September 2020.[173]

Aside from the hearing held in the House with major platform providers action in the Senate Judiciary Committee, discussed *supra*, which were led by Senators Ted Cruz (R-TX) and Josh Hawley (R-MO) sitting on the Senate Judiciary Committee, focused on specific changes to

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[169] See https://endsexualexploitation.org/articles/twitter-has-a-sex-trafficking-problem/.

[170] See fn. 26 and fn 27 *supra*.

[171] Electronic Frontier Foundation, *CDA 230: The Most Important Law Protecting Internet Speech.*

[172] *See* Todd Spangler, "Lawsuit Alleges Donald Trump's Executive Order Targeting Twitter, Facebook Violates First Amendment," *Variety* (June 2, 2020). A second lawsuit against the executive order was filed by activist groups including Rock the Vote and Free Press on August 27, 2020, after Twitter had flagged another of Trump's tweets for misinformation related to mail-in voting fraud. The lawsuit stated that should the executive order be enforced, Twitter would not have been able to fact-check tweets like Trump's as misleading, thus allowing the President or other government officials to intentionally distribute misinformation to citizens.

[173] *See* Judy E. Faktorovitch, "The FCC Opens Public Comments on Trump's Proposed Revisions to Section 230," LAWFARE (August 21, 2020).

Section 230 which would deal with some of the issues identified during the 2020 presidential campaign on the deliberate blocking of media supportive of President Trump, or reflecting badly on the reportedly nefarious business activities of Hunter Biden and the Democratic presidential candidate Joe Biden.[174] Republicans on the Senate Commerce Committee, including Roger Wicker (R-Miss), Lindsey Graham, (R-SC), and Marsha Blackburn, (R-TN) introduced the Online Freedom and Viewpoint Diversity Act to modify Section 230. This was a partisan effort to remove the immunity protection for the platform providers that the act's sponsors believed would increase accountability by the platforms for content moderation practices.[175]

Thus far no legislation affecting Section 230 has passed the House and Senate and become law. At the same time, the public discussion over content moderation, deplatforming, and the cancel culture by social media platforms continues to grow more intense with no end in sight.

IV. Conclusion

Since the founding of the country, American politics have featured partisan media. The eighteenth century was famous for warring opinions in the press. One could look to certain newspapers and pamphlet printers knowing what side they favored. In the age of radio and television, air waves were a limited commodity, by virtue of the technology of the time, overseen by the Federal government, and it was possible to impose fairness requirements, insisting that licensees offer time to different views. The Internet age escapes such limits. Barriers to entry are virtually nil as are the limits on Internet space. As a practical matter anyone can create a web site as the costs of the equipment, registration and service are minimal. Yet fairness issues exist. Major platform providers are few in number and wield enormous influence, from consumer to political preferences.

Given the huge numbers of people who spend their leisure time on these platforms and depend on them for news, the near-monopoly power such platforms exercise is worrisome, particularly in an American political environment that always seems to be highly charged and often toxic, but has clearly become much more so in the past few years.[176] During 2020 the COVID-19 pandemic forced large numbers of people to remain in their homes where they spent even more time on the social media platforms and viewing television channels which likely exacerbated the situation.[177]

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[174] See fn. 2 *supra*..

[175] S. 4534, https://www.congress.gov/bill/116th-congress/senate-bill/4534. See also, https://www.commerce.senate.gov/2020/9/wicker-graham-blackburn-introduce-bill-to-modify-section-230-and-empower-consumers-online.

[176] A majority of the nation's newspapers no longer even offer print editions, relying on their online publication. Even cable news is largely watched by senior citizens. By one report the average age of CNN viewers is 65, and that of Fox News viewers is 67. Younger Americans are largely glued to their iPhones, iPads and other connected devices displaying social media.

[177] See Ella Koze and Nathaniel Popper, "The Virus Changed the Way We Internet." *The New York Times* (April 7, 2020). www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html.

First, serious research into the question of platform bias and political discrimination is essential in order to know whether data exist to support anecdote. It is well known that Google, Facebook, Twitter, and others monitor those who use their products and exploit the information to increase market share or to direct market choices. Most would agree that as these platforms offer their services to users for free, the advertising they receive as a result seems to be a fair bargain.[178] In the political sphere, commentators worry that online platforms employ the same techniques to homogenize political messaging and weed out employees whose views do not comport with their leadership. Recent testimony by the CEO's of Twitter, Google and Facebook before the House and Senate made clear that this was in fact the case.[179] At the same time these same platforms refuse to make available actual data on removal of posts and posters to support such research.[180]

Second, once data are available, the scope of the problem of tech tyranny in the political process can be assessed and evaluated. Without question the nation has become hyper partisan and one that now displays a highly toxic political environment. Central to this is in fact the role that social media play in creating this situations, and it would be helpful to have an agreed upon data base to support further discussion of the issues involved.

Third, as a general matter, unlike in the early days of the Internet when less regulation made sense, today, the Internet cries out for some appropriate, tailored law. What the nation should or will do with regard to this area remains an open question. While some believe that it is still early, it is also the case that the "Wild West" days of the Internet, which characterized the 1990s, those times are over.[181] A legal regime for the Internet is needed in a range of areas and progress toward this end has been under way for some time.[182]

The absence of a legal regime for cyber was tolerable for a while; but the history of American society suggests that, ultimately, the cyberlandscape, like all parts of the society, needs some law in order to enhance the general welfare and add to the blessings of liberty. While some view any form of government-imposed accountability or regulation as doing more harm than good and perceive only free market options as the path forward, given the unprecedented ways Big Tech has accumulated and wields power, a light form of regulation may be the most prudent means, in

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[178] Not considered here is the privacy issue related to free email services, such as Google's Gmail, where Google computers scan all personal email and users are then bombarded with advertising related to email content.

[179] See fn 27 *supra*. These include Sundar Pichai, Google CEO, Mark Zuckerberg, Facebook CEO, and Jack Dorsey, Twitter CEO, in their testimony before a U.S. Senate committee about their platforms, misinformation and the 2020 elections.

[180] See Barrett and Sims, *False Accusation, op. cit.*

[181] In recent Congressional testimony, the CEOs of Apple, Google, Facebook, and Amazon tried to convince the House Judiciary Committee that their business practices don't amount to anti-competitive monopolies. This was seen as one of the biggest tech oversight moments in recent years, part of a long-running antitrust investigation that has mustered hundreds of hours of interviews and over a million documents from the companies in question. The CEOs made the case that their companies are providing beneficial products in a landscape filled with competition and that their massive scale simply makes their services better. See Adi Robertson, "Everything you need to know from the tech antitrust hearing: Apple, Google, Facebook, and Amazon versus Congress," *Verge* (July 29, 2020); *see also* Electronic Frontier Foundation, *Online Speech and the First Amendment: Ten Principles from the Supreme Court* (2019) for an outline of the key issues.

[182] See Wagner and Rostow, *op. cit*. In Particular, Ch. 5, *The Legal Regime for Cyberspace*.

the words of the drafters of Section 230, "to preserve the vibrant and competitive free market that presently exists." Since the adoption of Section 230, social media platforms have become behemoths, with market capitalizations that are greater than those of the largest automakers and even the GNP of some nations; they wield state-like influence on the everyday lives of users. It is time to give back to the users control of what content they view on the Internet. How successful we are in doing that may depend on what path is chosen to reach that goal.

(1) Defining the Problem: Most authorities agree that the legal regime with respect to social media platforms is inadequate and lags well behind the technology. Even where there is agreement about the nature of the problem, there is disagreement on the appropriate remedy. At the same time, no agreed understanding exists as to the nature of online platform providers rendering agreement on an appropriate legal regime to govern their activities almost impossible. By analogy, are platform providers such as Twitter, Facebook, and Google principally a communications medium, similar to a telephone company offering a service to their users? It may in fact be the case that these new technologies are not perfect analogs, and are a hybrid that share some characteristics of a telephone company, a TV or radio station, and a newspaper. Accordingly a legal regime needs to be crafted that addresses these hybrid characteristics.

Considering social media as analogous to the early broadcast media such as radio and television, giving the government the power to regulate and impose a Fairness Doctrine, what would be the legal regime for regulation of online social media companies? Is there a requirement to be fair in providing social media content to users and what would "fair" look like? Who or what would decide? How would content regulation requiring fairness comport with the First Amendment?

(2) Measuring the Impact: Serious discussion of political bias issues raised with regard to the platform behemoths is still in the early stage. Comprehensive analysis of the extent to which the major platforms do in fact limit, reject, or cancel political opinions, as conservatives allege, is essential. Bi-partisan investigations by Congressional committees, the Congressional Research Service (CRS), foundations and academic researchers accompanied prior discussion of the Fairness Doctrine and Section 203.[183] In 2019-20, Congress conducted another investigation with a view to legislation. So far, a bi-partisan consensus has not been reached on courses of action.[184] Apolitical research may be a pipe-dream; serious research and debate about the conclusions ought

[183] Ruane, *supra* note 46.

[184] *See* Cecelia Kang and David McCabe, "Big Tech Was Their Enemy, Until Partisanship Fractured the Battle Plans," *New York Times* (October 6, 2020); and Steve Lohr, "This Man May Be Big Tech's Biggest Threat," *New York Times* (December 8, 2019).

not to be. The relevant federal agencies that might be involved in cyber-oversight, such as the FCC, the FTC, and the NTIA also should undertake their own independent studies.[185]

Given the capabilities of the tech giants it may be possible to obtain data on this subject from them, although they may hesitate to provide such information, even in an age of "total transparency." Congress may need to develop incentives for the cooperation of technology companies in providing the necessary data related to their content moderation practices and procedures. Any commission tasked with establishing a factual record of any content bias by social media companies would likely need subpoena authority. In addition to any government-led research efforts, the legal and academic community should embrace the problem and provide further analysis of the issue so that an informed dialogue may evolve.[186]

(3) The Effect of Doing Nothing: The *status quo* provides a legal baseline. Twitter, Facebook, and Google are commercial platform operators, not broadcast media using scarce radio frequency spectrum as defined in existing legislation. Their technical ability to control or at least influence political discourse on their platforms may be objectionable, but it is hard not to see it as American democracy in action in today's technological context.

Alternative social media platforms, blogs and other avenues for free expression exist, but they lack the commercial power of the "big three." A recent entry into the social media platform space, Parler, found itself subject to "deplatforming" and actions by some of the commercial giants including Apple, Amazon and Google to put it out of business, leading some to question the argument that such alternative platforms might arise and provide a venue for free expression of conservative views.[187] Existing legislation prohibits use of the Internet and various applications for criminal activity, such as human trafficking and other crime, but how and whether to regulate "speech" is an entirely different question. The extent to which anti-trust legislation and actions can be utilized here is still in an early stage before the courts.

(4) Treating Internet Platforms as Communications Media: The major social media platforms provide a place for others to place content. They are significantly different from telephone companies in that they do in fact exercise power with respect to the content posted and do not simply connect users. Also unlike the telephone companies, they monitor the content of

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[185] Recently the FCC invited public comment on the petition for rulemaking filed by the NTIA regarding Section 230 of Communications Decency Act. This followed President Trump's executive order on "Preventing Online Censorship," which called on the NTIA to file a petition with the FCC to clarify the scope of Section 230 which shields the providers and users of online services from liability for third-party content. See Judy E. Faktorovitch, "The FCC Opens Public Comments on Trump's Proposed Revisions to Section 230," *Lawfare* (August 21, 2020). It is too early to assess how the Biden administration or the new Congress will address this issue. For some years, the Congressional (House) Cyber Caucus functioned as a bi-partisan and highly cooperative group, looking at the issues of the time and responsible for the introduction of legislation with bi-partisan support.

[186] Federal sponsorship of study in this critical area would be useful, as it has in many other similar areas of concern. Funding and direction for such studies could easily be included in the authorizing legislation for the Department of Commerce or another department.

[187] Mike Masnick, "A Few More Thoughts On The Total Deplatforming Of Parler & Infrastructure Content Moderation, *TechDirt* (January 15, 2021). The decision by Apple, for example, to remove Parler from the Apple store so that it could not be downloaded to any Apple devices basically rendered the platform largely impossible to use.

the postings and make decisions based on their internal evaluation of the content. As noted *supra*, they can be seen as a hybrid. For example, Google provides users with Gmail (email) service and does not stop or intercept email based on content.[188] At the same time, Google, Twitter, Facebook and the other major platform providers have elected to involve themselves in content moderation and have barred from their platforms specific content based on the political views of the platform management.

(5) Reviving the Fairness Doctrine: One approach to dealing with the problems would be to treat the platform providers as if they were traditional broadcast media such as radio and television. The government imposed the Fairness Doctrine on radio and television channels which were users of scarce RF spectrum at the time. The goal was media that were "honest, equitable and balanced." The FCC eliminated the policy in 1987, although the Supreme Court upheld the FCC's right to enforce the rule where there was a "scarcity of broadcast spectrum." One might argue that the control exercised by the three major platform operators creates the kind of scarcity that justified the original Fairness Doctrine.

It is worth recalling that the Fairness Doctrine was eliminated as the technology changed. Cable and satellite systems came into use which did not compete for scarce RF spectrum, which was the basis for the FCC's role in the first place. In the era of the new technology, alternative stations and channels proliferated and reflected a wide range of political views. In cyberspace, there exists no technical bar to any number of additional social media platforms or sites entering the space which could (or do) post materials reflecting a wide range of views.[189]

(6) Amending Section 230: Critics of online bias have focused on "the Section 230 carveout" and the immunity it provides with respect to the Internet publication of third-party information. Some commentators advocate amending the 1996 Communications Decency Act (CDA), of which Section 230 is a part, to remove this protection. Most authorities agree that the legislation, which was a major milestone in its time, is now over two decades old and needs revision as the technology and culture of Internet use has changed significantly. It has also become a central issue in a nation that has become hyper partisan and deeply divided.

Those urging elimination of the Section 230 carveout would have the government make a major leap from restricting access by minors to objectionable pornography to the political sphere and removing the ability of Internet platform providers to control political content. It is difficult to know, however, what the Internet would look like without Section 230 and whether it would

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[188] Google employs software to scan all user email content so it can then sell the information to commercial firms that then send targeted advertising email to the Gmail users, often referred to as "spam." This practice raises important legal issues, particularly Fourth Amendment privacy issues. In the current U.S. legal regime, if NSA were to scan all email for national security purposes, it would be broadly condemned in the media and most likely sued. At the same time people seem relatively indifferent to the same activity conducted by a commercial enterprise. The situation is reversed in Europe under the GDPR. See Wagner and Rostow, *op. cit.* In particular, *Ch. 6: Privacy as an Evolving Concept.*

[189] In reality, the "big three" – Google, Facebook and Twitter do dominate the space, but there are a myriad of others in existence as well. Of late the issue of the new platform Parler attempting to enter the market and actions taken by major forms to impede this have attracted considerable attention. See fn, 179 *supra.*

solve the various criticisms about moderation and control of online content by the major platform providers. Because of the lack of caselaw applying the common law liability standard to modern Internet platforms, it is unknowable how courts may apply the rule today in the absence of Section 230.

Aside from removing Section 230 entirely, however, there are useful options to consider with respect to amending Section 230 in order to ensure that the market-based system is meeting users' expectations in 2021 and into the future. Today there is a very different world then in 1996 when Section 230 was enacted into law. Being suspended from an online platform today, for instance, can have much more significant consequences for a person, as well as a newspaper or even a presidential candidate than in 1996.[190] Today, a platform's decision to take down or leave up certain political content, or bar an individual from a platform entirely, can have a much greater impact on users' perspectives than it did in 1996 when about 40 million people worldwide had Internet access compared to 7.5 billion now.

(7) Trust-Busting Redux: One proposed solution focuses on the market influence and practices of the major platform providers and applies the tests of the anti-trust laws to them. That they have accrued enormous power is not in dispute. That, *per se*, is not violative of any laws. Neither is size *per se* a violation. Rather, engaging in restraints on inter-state commerce, predatory practices that suppress competition other than through the operation of supply and demand, and other hallmarks of behavior that violate antitrust laws invite scrutiny with severe penalties.

It is not self-evident that successful enforcement of the antitrust laws against the principal social media platforms will have any impact on their practices with respect to favoring this or that political (or even consumer) message. To require that each media give fair or equal time to views opposed by ownership and management would run into First Amendment challenges. Most people strenuously oppose any tampering with that bedrock of American freedom. At present the core issue involves the barring of some posters or removing specific posts that are not consistent with the political views of the platform owners and managers. The extent to which the is a first Amendment issue is also the subject of debate. Some critics believe the world is now in the middle of a long-awaited "techlash" against the technology giants.[191]

(8) The Legal Context of Regulation: Valid concerns over the problem of tech tyranny and the control of the political narrative by major social media platforms have arisen fairly quickly and without question have done so in the midst of a highly charged and toxic political environment.

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[190] During his presidency Donald Trump frequently used Twitter and other social media platforms. From his official declaration of candidacy in June 2015 through the four years of his presidency, he tweeted over 34,000 times. His tweets were considered to be official statements made by the President of the United States. He was permanently barred from Twitter in January 2021, just before the end of his presidency. See John Herrman, "What Was Donald Trump's Twitter?," *The New York Times* (January 12, 2021).

[191] In the United Kingdom, which approaches this matter differently than the United States, the Committee on Standards in Public Life has set out guidelines for prosecuting web giants such as Facebook, arguing that they are publishers, not mere "platforms," and therefore responsible for the content they host.

The current lack of data or substantial analysis underscores the speed at which this situation has arisen and how the issue is subject to abuse.

What should be done? This article is one attempt to contribute to the debate by highlighting relevant issues and the need for both further research and a dialogue within the legal community. At the same time, one should not forget that participation in the forum is a right (and even duty) of citizenship and should be exercised. In that way, as Justice Brandeis pointed out in connection with the relationship among the branches of government, friction among competing opinions is the surest way "to save the people from autocracy."[192] Therefore, our answer is not more speech regulation but more speech, which is the traditional American approach to disputes and that the current information environment is sorely testing Americans' commitment to that approach.

[192] *Myers v. United States,* 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).