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Theoretical Justifications for Government Regulation of Social Media Platforms

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ABSTRACT

Calls for government intervention into the regulation of social media are on the rise. Journalists, politicians, and scholars have proposed various potential solutions, many of which focus on government activity. What these proposals have in common is a view of social media platforms as, justifying treatment under the law that is different from treatment of traditional media distributors, such as newspapers and broadcasters. This paper is agnostic on the exact form that such government regulation should take, and indeed whether government regulation should be pursued at all. Rather, it seeks to critically examine the justifications in media and in scholarly literature for such intervention.

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I. INTRODUCTION

Calls for government intervention into the regulation of social media platforms are on the rise. Indeed, intensified government intervention seems unavoidable given the proliferation of fake news, data breaches, election interference, and other harms committed and amplified through social media platforms. Even the leaders of social media companies, once the greatest supporters of a libertarian Internet, now call for intervention¹—or at least acknowledge its inevitability.² The breakup of “Big Tech” is on the radar for most of the Democratic primary frontrunners,³ making significant reform a realistic possibility in the coming years.

¹ Hannah Murphy, *Mark Zuckerberg’s Call for More Tech Rules Fails to Impress*, FIN. TIMES (Mar. 31, 2019), <https://www.ft.com/content/69b2fc4c-53d4-11e9-91f9-b6515a54c5b1>.

² Julia Kollewe, *Tim Cook: Tech Firms Should Prepare for ‘Inevitable’ Regulation*, GUARDIAN (Nov. 19, 2018), <https://www.theguardian.com/technology/2018/nov/19/tim-cook-tech-firms-prepare-inevitable-regulation-cambridge-analytica>.

³ Senator Elizabeth Warren, most famously, has released a platform proposing public utility treatment for platforms, as well as antitrust action to break up Facebook’s ownership of Instagram and WhatsApp. Elizabeth Warren, *Here’s How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>. Senator Bernie Sanders has stated that he supports this proposal. Cristiano Lima, *Sanders Backs Call to Break Up Facebook*, POLITICO (May 15, 2019), <https://www.politico.com/story/2019/05/15/sanders-backs-calls-to-break-up-facebook-1327881>. Former Vice President Joe Biden has not made any formal commitment, though he has commented that breaking up large tech companies is “worth a really hard look.” David Sherfinski, *Joe Biden Says He’s Open to Breaking Up Facebook*, WASH. TIMES (May 13, 2019), <https://www.washingtontimes.com/news/2019/may/14/joe-biden-says-hes-open-breaking-facebook/>. And Mayor Pete Buttigieg has suggested “a spectrum” of regulation potentially including splitting up companies, though he has not taken a hard stance in favor of breaking up such companies. Casey Tolan, *Pete Buttigieg Was Facebook’s 287th User. Now He Says the Company Has Too Much Power*, MERCURY NEWS (May 14, 2019), https://www.mercurynews.com/2019/05/14/pete-buttigieg-facebook-harvard-break-up-big-tech/?utm_campaign=socialflow.

Many scholars have proposed potential solutions, including myriad forms of government activity. Justifications for special treatment of social media platforms vary. A justification is necessary, however, where proposals seek to treat social media platforms differently from other types of media distributors, such as traditional newspapers and broadcasters.

This paper is agnostic on the exact form that such government regulation should take, and indeed whether government regulation should be pursued at all. Rather, it seeks to critically examine the justifications in the scholarly literature for such intervention.

II. CONSIDERING POTENTIAL NORMATIVE THEORIES

A. Pervasiveness

One group of justifications relies on the central role of social media platforms in our daily lives. This theory, which I will call “pervasiveness,” relies on the number of users and potential impact of platforms in various areas. The centrality of social media to users’ lives, along with the “substantially larger audience” compared to the audiences of traditional media, thus justifies interference by government.⁴ What Christopher Yoo calls the “inevitability of intermediation”⁵ is a result of the role of the modern Internet as the “dominant platform for mass communications.”⁶ Thus, any problems that appear on social media platforms—whether it be hate speech, fake news, or something else—are of outsized proportion and could only be adequately dealt with through government intervention.

Pervasiveness theory appears in various forms. One focuses on the unique influence of social media platforms themselves, particularly when it comes to the potential role of

⁴ See Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1653 (2015).

⁵ Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697 (2010).

⁶ *Id.* at 701.

algorithms or content-moderation in deciding what information users see.⁷ This is further justified by the vast variety of roles the Internet now plays in our day-to-day lives, particularly its “vital role in our social world, private sphere, and economy.”⁸ This justification finds support even in Supreme Court precedent – the Court in *Packingham v. North Carolina* referred to cyberspace as one of “the most important places (in a spatial sense) for the exchange of views.”⁹ In the particular context of the role of social media platforms in our political sphere, scholars point to platforms’ potential role in “agenda setting,” such as through the example of former president Donald Trump’s presidential campaign’s overwhelming presence on Facebook and Twitter.¹⁰

⁷ Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 127 (2006) (“As search engines become more authoritative, encompassing more and more sources of data, they are also likely to become more important sources of information in our daily lives.”); Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 206–07 (2018) (“Today, most providers do not simply relay messages in the charming interest of sharing ideas or making connections, uninterested in what users say or do. The most popular applications today collect, exhaustively analyze, sort, reconfigure, and repurpose customer information for commercial gain. . . . Sometimes, their designs are so deeply affecting that they transform the ways in which people talk about experiences in the physical world.”).

⁸ Alexander Owens, *Protecting Free Speech in the Digital Age: Does the FCC’s Net Neutrality Order Violate the First Amendment?*, 23 TEMP. POL. & CIV. RTS. L. REV. 209, 216 (2013); *see also id.* at 216 (“The Internet is your radio, your newspaper, your television, your mailbox, your telephone, your library, your local marketplace, your bank teller, and quite a bit more.”); JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 39 (2019) (noting that “access to platforms—whether online marketplaces or search engines or payment systems or computing environments—is increasingly essential to reaching any customers at all”).

⁹ 137 S. Ct. 1730, 1735 (2017).

¹⁰ *See, e.g.*, Samuel C. Woolley & Douglas R. Guilbeault, *Computational Propaganda in the United States of America: Manufacturing Consensus Online*, COMP. PROP. RES. PROJECT 4, 7 (Oxford U. Project on Comp. Prop., Working Paper No. 2017.5, 2017). The theory of agenda setting developed in the context of traditional news media, based on media surrounding the 1968 presidential campaign. *Id.* at 7. Woolley and Guilbeault note that the primary finding, that “the power of the press to

Another form of pervasiveness theory focuses more on the amplification of individual voices through the use of social media platforms, which allows individuals—including those with extremist or violent views—to reach wider audiences. Unlike previous forms of communication, the Internet has the potential to connect vast numbers of people and enables most participants to not only act as listeners, but as speakers.¹¹ The participatory nature of the Internet was originally lauded as its great contribution, facilitating free expression and participation. The rise of social-media communications taking the form of hate speech,¹² online harassment,¹³ and terrorist activities,¹⁴ however, made the pervasiveness of social media communications a concerning megaphone for such voices.

shape public attention” is most significant “during a heavily contested election,” extends to the role of social media in 2016. *Id.*

¹¹ Nicolas P. Dickerson, Comment, *What Makes the Internet So Special? And Why, Where, How, and By Whom Should Its Content Be Regulated?*, 46 HOUS. L. REV. 61, 64–65 (2009) (“For the first time in history, nearly anyone can both have his or her voice heard by an enormous audience and listen to the speech of millions of other individuals worldwide. . . . This participatory nature of the Internet is what makes it special and sets it apart from any other form of communication to come before it.”).

¹² See Binny Mathew et al., *Spread of Hate Speech in Online Social Media*, 10 ACM CONF. WEB SCI. 173 (2019); Steve Stecklow, *Why Facebook Is Losing the War on Hate Speech in Myanmar*, REUTERS (Aug. 15, 2018), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>; see also Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035 (2018) (describing and commenting on social media companies’ recent revisions to hate speech policies in response to pressure from European regulators).

¹³ Danielle Keats Citron, *Addressing Cyber Harassment: An Overview of Hate Crimes in Cyberspace*, 6 CASE W. RES. J.L. TECH. & INTERNET 1 (2015); see also James Grimmelman, *Don’t Censor Search*, 117 YALE L.J. POCKET PART 48, 48 (2007) (“People have always been jerks; the Internet lets them be jerks on an unprecedented scale by combining anonymity and public visibility.”).

¹⁴ Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J. L. & TECH. 4 (2004); see also Lyrrisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147 (2011).

Both forms of pervasiveness theory focus in part on the number of users of social media platforms to describe their wider reach. This reasoning often relies on Pew Research Center data reporting the use of social media websites—nearly two-thirds of American adults and ninety percent of young adults age eighteen to twenty-nine.¹⁵ Some authors focusing on the role of social media platforms in the context of distribution of news focus on Pew Research Center data specifically evaluating users’ sources of news, which reports that two-thirds of Americans get “at least some” of their news on social media.¹⁶ This increased to 73% in 2019.¹⁷ The 2019 Pew study found that respondents themselves believe in some form of pervasiveness theory, with most respondents reporting that social media companies have “too much control” over the mix of news people see, and that this control makes the mix of news that users receive “worse.”¹⁸

Several aspects of pervasiveness, however, make it an imperfect justification for increased government intervention. First, as Yochai Benkler points out, the oft-cited claim that 67 percent of Americans get their news on social media includes 20 percent who “hardly ever” get their news on social media, with only 20 percent of respondents saying that they “often” get their news on social media.¹⁹ Results were similar in

¹⁵ Michael Patty, *Social Media and Censorship: Rethinking State Action Once Again*, 40 MITCHELL HAMLINE L.J. PUB. POL. PRACTICE 99, 102 (2019) (citing Maeve Duggan & Aaron Smith, *The Political Environment on Social Media*, PEW RESEARCH CTR.: INTERNET & TECH. (Oct. 25, 2016), <http://www.pewinternet.org/2016/10/25/the-political-environment-on-social-media/>).

¹⁶ Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CTR. 1 (Sept. 2017), <https://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

¹⁷ Elisa Shearer & Elizabeth Grieco, *Americans Are Wary of the Role Social Media Sites Play in Delivering the News*, PEW RESEARCH CTR. 7 (Oct. 2019), <https://www.journalism.org/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news/>.

¹⁸ *Id.* at 2.

¹⁹ YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 72 (Alex Flach et al. eds., 2018)

2019.²⁰ When asked where they got news “often,” 57 percent responded television, and another 25 percent responded radio.²¹ As such, television continues to be the primary source of news for most individuals, qualifying the view of social media as the primary news distributor.

Further, while the breadth of the services provided by platforms certainly speaks to their scale and influence on our daily lives, it may also caution against governing by broad strokes, demanding a nuanced approach.²² At minimum, requiring social media platforms to regulate the content that appears on their sites will take a great amount of resources and effort, potentially taking away from the innovation or provision of additional services. Regulations of content might also need to be narrowly tailored to address the contexts we are most concerned about, in order to prevent content regulation from expanding to the aspects of platforms that are most valued—their ability to foster connections and give well-intentioned users a platform.

B. Virality and Efficacy

The second group of justifications stems from pervasiveness – not only is social media overwhelming in its prevalence in our lives, but it has the actual effect of providing a megaphone to certain voices, and this megaphone is more effective at influencing people than previous forms of news have been. Thus, it is not just the reach of Internet speech, but its greater ability to influence people, that justifies government intervention.

²⁰ The number of respondents who got news from social media “often” increased to 28%. 26% responded “sometimes,” 18% responded “hardly ever,” and 27% never get news from social media. Shearer & Gottfried, *supra* note 16, at 7.

²¹ BENKLER ET AL, *supra* note 19, at 72.

²² See Taylor Owen, *Big Tech’s Net Loss: How Governments Can Turn Anger into Action*, GLOBE & MAIL (Dec. 28, 2018), <https://www.theglobeandmail.com/opinion/article-big-techs-net-loss-how-governments-can-turn-anger-into-action/>.

Efficacy stems in part from the fact that Internet speech can be communicated instantaneously, and at a much lower cost than other forms of expression.²³ Most social media platforms are free to use. All an individual has to do to become a “content creator” is create an account. While most users on a social media platform might not have a wide reach organically, through a lack of followers on their posts, every post has the potential to become a viral sensation, not only spreading that one post but often also providing speakers with a future audience.²⁴ While the lower costs of speaking has the benefit of facilitating people’s freedom to speak, it also allows for greater ability to inflict harm or organize consensus.²⁵

The efficacy of speech is also a result of microtargeting, particularly through social media platforms’ algorithms that aim at increasing “clicks” and “views” by providing users with information that they are most likely to interact with. Thus, a post is more likely to appear high on the newsfeed of a user who is more likely to interact with it. This is why, for example, users with an interest in conspiracy theories might see more and more conspiracy theories over time; algorithms that recognize a user’s interest in such content will continue to show the user similar content to maximize the user’s activity

²³ Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 391 (2017) (citing Tushnet, *supra* note 4, at 1651–58); see also Sofia Grafanaki, *The First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 124 (2018) (“Technology has made it extremely cheap, quick, and easy for just about anyone to create content and make it available online.”); H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 383 (2007) ([T]he digital data flowing through this system is itself exceptional, because it is easy to create and manipulate, easy to copy with no degradation in quality, and easy to access and distribute.”).

²⁴ See Matt Flegenheimer, *What Happens When Ordinary People End Up in Trump’s Tweets*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-retweets.html>.

²⁵ Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 HOFSTRA L. REV. 1, 11 (2012) (“[S]ocial media lowers the costs of informing and organizing people quickly.”); Tushnet, *supra* note 4, at 1654–55.

on the platform. Microtargeting has improved over time as social media platforms have carved out monopolistic positions over certain swathes of data, as storage and processing capacity has increased, and as machine learning algorithms have developed.²⁶

Virality and efficacy are particularly concerning in the political arena. As early as 2012, scholars expressed concern that the use of technology to manipulate voters would quickly increase, leading to overly-effective targeting of communications.²⁷ For social media platforms in particular, scholars expressed concern that platforms provided a medium for effective, significant voter manipulation.²⁸ The ability to use platforms for manipulations at the individual level is a significant potential tool for campaigns.²⁹ Further, the use of virality and efficacy is frequently pulled in to discussions about the spread of fake news surrounding the 2016 election. The low cost of entry into the social media news landscape allows new, smaller media organizations to compete against large, established news media incumbents.³⁰ The mere production of “political clickbait” can be enough to keep a small business running.³¹ The fake news produced by such companies gains traction because it can easily go viral, creating a unique environment for the speech as a “weaponized tool.”³²

These concepts also take center stage in discussions of hate speech on the Internet. Hate groups are able to use their potential reach on the platform as an “inexpensive medium for

²⁶ BENKLER ET AL., *supra* note 19, at 272.

²⁷ See Zeynep Tufekci, *Beware the Smart Campaign*, N.Y. TIMES (Nov. 16, 2012), <https://www.nytimes.com/2012/11/17/opinion/beware-the-big-data-campaign.html>.

²⁸ See, e.g., Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335 (2014).

²⁹ BENKLER ET AL., *supra* note 19, at 274.

³⁰ *Id.* at 280.

³¹ *Id.*

³² Michael K. Park, *Separating Fact from Fiction: The First Amendment Case for Addressing “Fake News” on Social Media*, 46 HASTINGS CONST. L.Q. 1, 2 (2018).

ideological distribution.”³³ Once they have created a network, hate groups can coordinate their activities through online forums and chat rooms, creating the opportunity to turn their shared hateful views into violent action.³⁴ The ability to spread their influence through viral social media posts expands the influence of any hate group far beyond the limitations of any specific geographic location—a limitation that otherwise might have limited hate groups’ formation, at least in certain areas.³⁵ Extremist content that goes viral further benefits from creation of “radicalization echo chamber[s],” further pushing Internet users towards extremist groups.³⁶

There are, however, doubts as to the extent to which virality has actually changed the nature of speech. While speakers can reach more listeners than ever before, and the costs of speaking are lower than they have ever been, the content of such speech has not necessarily changed.³⁷ Further, some have argued that the actual differences in reach and cost are overblown. Traditional media included areas of polarized or extremist speech (think *The Sun*), which reached huge audiences. And while the costs of speaking are lower on the Internet, radio was also considered a low-cost and wide-reaching form of communication, with an influence perhaps as far-reaching and pervasive as the Internet has today.³⁸ Groups of individuals with extreme views on the Internet might merely

³³ Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 832 (2001).

³⁴ Alexander Tseses, *Prohibiting Incitement on the Internet*, 7 VA. J. L. & TECH. 5, 6 (2002).

³⁵ See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 63 (2009) (“Online, bigots can aggregate their efforts even when they have insufficient numbers in any one location to form a conventional hate group.”).

³⁶ See Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015), <https://slate.com/news-and-politics/2015/12/isiss-online-radicalization-efforts-present-an-unprecedented-danger.html>.

³⁷ Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379 (2017).

³⁸ *Id.* at 395.

be a shift of those same groups that existed in traditional media to a new platform.³⁹

As for efficacy, evidence about the actual effectiveness of microtargeting is mixed, particularly in the political arena. As Yochai Benkler and his coauthors explain, the “best publicly available scientific evidence” of the use of Facebook’s data for targeted marketing is through a pair of papers by Kosinski and Stillwell, who found that Facebook data could be used to identify personality traits, and that advertising designed to fit an individual’s specific personality attribute performed better than advertising designed for people with the opposite personality attribute.⁴⁰ Benkler identifies several limitations that counsel against interpreting these results as demonstrating particular effectiveness of manipulation through social media data, including the potential negative effects of misidentified targeted appeals, data demonstrating that some targeted appeals actually have negative effects on voters, and the limitation that not many individuals use Facebook enough to be effectively targeted.⁴¹ As such, the actual effect of microtargeting on efficacy might be overblown, and may not be significant enough to justify intervention.

C. Numerosity and Attention Scarcity

A third line of reasoning about the need to regulate social media platforms focuses on the sheer number of inputs. With users able to create content at little to no cost, the amount of content that users face is unprecedented.⁴² This creates two

³⁹ See, e.g., John Herrman, *For the New Far Right, YouTube Has Become the New Talk Radio*, N.Y. TIMES (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/magazine/for-the-new-far-right-youtube-has-become-the-new-talk-radio.html>.

⁴⁰ BENKLER ET AL., *supra* note 19, at 276–77.

⁴¹ *Id.* at 278.

⁴² Notably, the numerosity of inputs also gives platforms an important source of their current power: data. Platforms’ ability to operate profitably relies on their collection, use, and sale of user data. The more users speak on and interact with the platform, the more information the platform has for its potential uses. The most notable use of data thus far has been targeted advertising. See COHEN, *supra* note 8, at 38–39 (noting the pre-Internet

results: first, the social media platform is in the best (perhaps the only) position to control what users see, so solutions premised on the free-market ideal of individuals choosing what content they view are unrealistic; second, due to the number of inputs and the scarcity of individual attention, platforms have an outsized ability to influence users through their decisions on what to present. Although some users may be aware that their online behavior affects the content they are shown, few users actually are.⁴³ Further, even where users become aware of algorithmic influence, they may not change their behavior in order to affect these algorithms' operation.⁴⁴ The option of "opting out" of personal data collection may seem like a user-centric solution, but is unrealistic given the ability of modern algorithms to identify users' identities even where they opt out of data collection.⁴⁵ Proponents of government intervention argue that creating requirements for social media platforms to intervene is the only way to effectively combat false information; opponents of such intervention, in turn, argue that giving platforms this power is unreasonably risky.⁴⁶

attempts at targeting advertising "lacked and likely could not imagine collecting precise, granular information about customer desires and resources" of the kind that platforms currently have). For further discussion of the role of the profit motive, see *infra* Part II.F.

⁴³ Paul Hitlin & Lee Raine, *Facebook Algorithms and Personal Data*, PEW RESEARCH CTR. (Jan. 16, 2019), <https://www.pewresearch.org/internet/2019/01/16/facebook-algorithms-and-personal-data/> (finding that 74 percent of Facebook users surveyed were not aware that the site's algorithm maintained a "Your ad preferences" page listing their traits and interests).

⁴⁴ *But cf.* Motahhare Eslami et al., "I Always Assumed that I Wasn't Really that Close to [Her]": Reasoning About Invisible Algorithms in the News Feed, 33rd Annual ACM Conference on Human Factors in Computing Systems (Apr. 2015), available at http://www-personal.umich.edu/~csandvig/research/Eslami_Algorithms_CHI15.pdf (finding that many users who became aware of algorithmic influence changed their usage patterns).

⁴⁵ See *Your Data Is Shared and Sold...What's Being Done About It?*, KNOWLEDGE @ WHARTON (Oct. 28, 2019), <https://knowledge.wharton.upenn.edu/article/data-shared-sold-whats-done/>.

⁴⁶ See Madeleine Rosuck, Comment, *When Lies Go Viral: The First Amendment Implications of Regulating the Spread of Fake News*, 21 SMU

The number of speakers on the Internet, even just speakers with vast audiences, makes suppression of messages difficult no matter the actor.⁴⁷ In particular, however, numerosity limits the ability of the individual user to effectively cull through the materials she finds on social media platforms. Users are at risk of being overwhelmed by the “flooding” of false information, where an audience receives too much information to parse out what is true and what is false, or lacks enough attention to acknowledge new, corrective information.⁴⁸ In other words, platforms and other Internet intermediaries can help users “screen out bad content and locate and access good content.”⁴⁹ To require lay users to censor content on their own, without any technical support, seems unrealistic;⁵⁰ as a result, policies have generally shifted to requiring censorship by the platform itself.⁵¹

The impact of the overwhelming volume of information on the Internet on users is exacerbated by users’ “attention

SCI. TECH. L. REV. 319, 331-32 (2018); *see also* Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms*, 15 WA. J. L. TECH & ARTS 36, 42-443 (2019) The focus of government regulation on platforms rather than speakers themselves might be also be a result of numerosity. Jack Balkin notes that the intense rise in the number of speakers due to the Internet made it more difficult for the government to use “soft power to control coverage and agenda setting,” leading governments to focus instead on intermediaries. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2308 (2014).

⁴⁷ Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 13 (2006); *see also id.* at 13 n.2 (comparing censorship on the Internet with the efforts to suppress the Pentagon papers, which were limited to a “finite series of major newspapers”).

⁴⁸ Jonathan D. Varat, *Truth, Courage, and Other Human Dispositions: Reflections on Falsehoods and the First Amendment*, 71 OKLA. L. REV. 35, 50 (2018).

⁴⁹ Yoo, *supra* note 5, at 709.

⁵⁰ *See Grafanaki, supra* note 23, at 125 (“We the listeners need someone—the algorithms—to curate for us and tell us where to look; it is simply impossible to go through everything that is out there on our own.”).

⁵¹ Yoo, *supra* note 5, at 705.

scarcity.”⁵² The ability to create content with ease has made attention a critical resource.⁵³ As Tim Wu describes it, “If it was once hard to speak, it is now hard to be heard.”⁵⁴ Thus, while creating and disseminating speech is now easier than ever, few users actually have regular audiences to listen to them. For example, a recent Pew report found that among the bottom 90% (in terms of activity) of Twitter users, the median number of followers is 19, even though 47% of them reported using Twitter at least once a day.⁵⁵ Even individuals with large audiences might not consistently reach them, if social media platforms’ algorithms do not deem their content sufficiently provocative for recommendation to viewers.

Attention scarcity does not just give outsized power to the speakers with large audiences; it also gives the main platforms “an extremely important role in the construction of public discourse.”⁵⁶ Through decisions on what appears on a

⁵² See TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* (2016).

⁵³ Grafanaki, *supra* note 23, at 124 (“Information has become abundant; in fact, we are drowning in it, and what is now becoming scarce is that which information consumes, i.e. the attention of the listeners.”); see also, e.g., Zeynep Tufekci, “*Not This One*”: *Social Movements, the Attention Economy, and Microcelebrity Networked Activism*, 57 AM. BEH. SCIENTIST 848, 853, 856 (2013) (arguing that social networks have “change[d] the power media have to frame social movements,” shifting power from traditional media to shared power between “institutions (media outlets), individual mediators of attention . . . , celebrities, or algorithms . . . that can bring attention to a topic”); Charles M. Blow, *Trump’s Attention Economy*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/opinion/trump-attention-economy.html> (“Not only is our influence — and sometimes even our worth — determined by the amount of attention we garner; the amount of attention we have to give — or should I say ‘pay’ — is a limited commodity and whoever owns it owns us to some degree, even against our will.”).

⁵⁴ Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 554 (2018).

⁵⁵ Stefan Wojcik & Adam Hughes, *Sizing Up Twitter Users*, PEW RESEARCH CTR. (Apr. 24, 2019), <https://www.pewresearch.org/internet/2019/04/24/sizing-up-twitter-users/>.

⁵⁶ Wu, *supra* note 54, at 555.

user's feed and in what order, whether by algorithms⁵⁷ or by human interference,⁵⁸ platforms can decide what the user's limited attention is taken up by.⁵⁹ To some, this further justifies government interference—without the government setting the parameters of how companies should exercise their discretion, platforms may use their ability to set the agenda in harmful ways.⁶⁰ Others, however, may fear that shifting this power to

⁵⁷ See Zeynep Tufekci, *Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency*, 13 COLO. TECH. L.J. 203 (2015).

⁵⁸ See Jeffrey Rosen, *The Delete Squad*, NEW REPUBLIC (Apr. 29, 2013), <https://newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules>; Jeffrey Rosen, *Google's Gatekeepers*, N.Y. TIMES (Nov. 28, 2008), https://www.nytimes.com/2008/11/30/magazine/30google-t.html?_r=1.

⁵⁹ Zeynep Tufekci, *How Facebook's Algorithm Suppresses Content Diversity (Modestly) and How the Newsfeed Rules Your Clicks*, MEDIUM (May 7, 2015), <https://medium.com/message/how-facebook-s-algorithm-suppresses-content-diversity-modestly-how-the-newsfeed-rules-the-clicks-b5f8a4bb7bab>; see also Ashley Rodriguez, *YouTube's Recommendations Drive 70% of What We Watch*, QUARTZ (Jan. 13, 2018), <https://qz.com/1178125/youtubes-recommendations-drive-70-of-what-we-watch/>.

⁶⁰ This concern shows up on both sides of the political spectrum. Liberal and progressive commentators worry that platforms will use their power primarily in ways that profit them, or limit their moderation of platforms to appease conservatives. See, e.g., Natasha Bertrand & Daniel Lippman, *Inside Mark Zuckerberg's Private Meetings with Conservative Pundits*, POLITICO (Oct. 14, 2019), <https://www.politico.com/news/2019/10/14/facebook-zuckerberg-conservatives-private-meetings-046663>; Matt Binder, *Facebook Leaves No Doubt: It's the Right Wing's Social Network Now*, MASHABLE (Oct. 30, 2019), <https://mashable.com/article/facebook-right-wing-social-network/>. Conservative commentators, meanwhile, worry that their voices will be silenced due to the liberal leanings of platforms' officers and employees. See, e.g., Cathy Young, *How Facebook, Twitter Silence Conservative Voices Online*, HILL (Oct. 28, 2016), <https://thehill.com/blogs/pundits-blog/media/303295-how-facebook-twitter-are-systematically-silencing-conservative>; David Shepardson, *Facebook, Google Accused of Anti-Conservative Bias at U.S. Senate Hearing*, REUTERS (Apr. 10, 2019), <https://www.reuters.com/article/us-usa-congress-socialmedia/facebook-google-accused-of-anti-conservative-bias-at-u-s-senate-hearing-idUSKCN1RM2SJ>.

the government carries even greater risks, such as using social media to exert social control.⁶¹

One potential counter to the justification of regulation due to platforms' potential to take advantage of their power to present information combined with users' attention scarcity is that media organizations have always considered popularity and majority preference in "content selection and placement."⁶² In deciding what to show in order to appeal to such preferences in what to write about and how to present it, traditional media sources could influence lazy readers through their choices of title and headline. While the ability of traditional media to curate based on audience preferences was not equivalent to the ability to do so online,⁶³ the influence on readers may have been similar.

Further, the role of platforms in screening out bad content is actually an important economic role.⁶⁴ While allowing platforms to exercise this power at their own discretion gives them significant power, this may be power that we wish to keep out of the hands of the government. In China, for example, the power of the government over the Internet, including over regional social media platforms, is a cause for great concern.⁶⁵

⁶¹ Cf. William Zheng, *How Official Chinese Propaganda Is Adapting to the Social Media Age as Disaffection Spreads Among Millennials*, S. CHINA MORNING POST (Feb. 10, 2019), <https://www.scmp.com/news/china/politics/article/2185300/how-official-chinese-propaganda-adapting-social-media-age>.

⁶² Grafanaki, *supra* note 23, at 126 (citing Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 1021, 1023 (2018)).

⁶³ *Id.*

⁶⁴ Yoo, *supra* note 5, at 709.

⁶⁵ See Mara Hvistendahl, *Inside China's Vast New Experiment in Social Ranking*, WIRED (Dec. 14, 2017), <https://www.wired.com/story/age-of-social-credit/>; Li Yuan, *China Masters Political Propaganda for the Instagram Age*, N.Y. TIMES (Oct. 5, 2019), <https://www.nytimes.com/2019/10/05/technology/china-propaganda-patriotism.html>; Zheng, *supra* note 61.

D. Anonymity

Another common justification for treating the Internet differently from other forms of communication is the potential for anonymity. Originally, anonymity was seen as an important benefit of the Internet, allowing people to more freely express themselves. In modern times, however, anonymity results in drawbacks that many argue outweigh its benefits. Here, I identify three ways that anonymity is used to justify government interference into platforms: first, anonymity allows speakers who would otherwise face some sort of sanction—whether legal or societal—to escape that sanction by hiding their identity, so platforms should sanction such users by removing their content; second, anonymity pushes governments to regulate platforms rather than individuals because individuals are more difficult to identify; and third, anonymity extinguishes one potential way to verify the quality of content—the reputation of the speaker—so platforms or government must step in to subsidize this verification.

The role of anonymity in avoiding legal and societal sanctions is fairly straightforward. Without the ability to identify a speaker, the law's ability to punish that speaker disintegrates.⁶⁶ Attempts to track individuals through their IP address are of limited efficacy, and modern technologies to facilitate anonymity and work around this are plentiful.⁶⁷ Thus, even if a user reports another user's unlawful activity, law enforcement faces significant obstacles in identifying who the actual actor behind the online persona is. Anonymity also allows individuals to make harmful and offensive statements without having their name attached to it, avoiding potential

⁶⁶ Hon. Alex Kozinski & Josh Goldfoot, *A Declaration of the Dependence of Cyberspace*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 169, 170 (Berin Szoka & Adam Marcus eds., 2010).

⁶⁷ See, e.g., Melissa Burns, *Internet Privacy: Protecting Your Anonymity on the Web in 2018*, TECHGENIX (June 8, 2018), <http://techgenix.com/internet-privacy/>; Greg Norcie, *Anonymity Isn't a Bug – It's a Feature*, CTR. DEM. & TECH. (Nov. 5, 2015), <https://cdt.org/insights/anonymity-isnt-a-bug-its-a-feature/>.

negative consequences to their reputation.⁶⁸ While some limited shaming might be possible through platforms' ability to "ban" the user, an anonymized user might be able to come back through the use of an alternative anonymous identity, engaging in the same activities without the stigma of their prior acts.

Governments might focus the regulatory efforts on platforms, rather than actual speakers producing harmful speech, because speakers often cannot be identified, thus cannot be sanctioned or influenced directly.⁶⁹ Where individuals producing and disseminating content act anonymously, governments seeking to control or sanction that speech are better off targeting the infrastructure through which that content travels, including platforms.⁷⁰ This is particularly significant due to the cross-border nature of communication over the Internet, which limits governments' sovereignty to sanction even identifiable online actors. As a result, proponents of regulation argue that governments have no choice but to impose their standards on the platforms themselves, requiring the platforms to regulate and sanction conduct in the manner the governments would have done so.⁷¹

Anonymity also further exacerbates the difficulties users face in verifying accurate information and ignoring false information. A fairly straightforward proxy for accuracy is the reputation of the speaker. Anonymity, however, gives repetitive producers of false speech an easy way out of this reputational consequences, impeding users' ability to vet

⁶⁸ Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 63 (2009) ("Communication advances allow people to separate their ideas from their physical presence.").

⁶⁹ Kreimer, *supra* note 47, at 13.

⁷⁰ Balkin, *supra* note 46, at 2304; *see also* Kreimer, *supra* note 47, at 27 (describing the regulation of Internet intermediaries as a product of "targeting the weakest link," allowing for the exercise of regulatory authority where other tactics, such as regulating the speakers or listeners, are undesirable or ineffective).

⁷¹ Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035 (2018) (describing and commenting on social media companies' recent revisions to hate speech policies in response to pressure from European regulators).

them.⁷² Without the reputational consequences of previous lies, individuals (or, perhaps, bots) committed to spreading misinformation become even more difficult to stop.

However, many scholars disagree that anonymity is as easy to obtain as we might think. Daniel Solove argues that Internet anonymity might better be described as “traceable anonymity,” where online speech can be anonymous, but inevitably leaves trails that can be traced back to speakers who caused harm to another.⁷³ Most anonymous users likely lack the technical wherewithal to truly anonymize their online presence, leaving their IP addresses available as a gold mine of identifying information.⁷⁴ Further, users’ online behavior might leave traces that can be used to “re-identify” them, including such information as “[z]ip codes, gender...dates of birth, [and] all identifying information that we key in to online dialog boxes on a regular basis.”⁷⁵ Indeed, the potential of reidentification has been demonstrated by computer scientists; reidentification technology has been so effective that commentators are concerned that regulations to increase data privacy cannot exist without decreasing the utility of data.⁷⁶ Without realistically attainable anonymity, its usefulness as a justification for government interference is limited.

⁷² Tushnet, *supra* note 4, at 1648; *see also* Walter Isaacson, *How to Fix the Internet*, ATLANTIC (Dec. 15, 2016), <https://www.theatlantic.com/technology/archive/2016/12/how-to-fix-the-internet/510797/> (“Now the problem is nobody can tell if you’re a troll. Or a hacker. Or a bot. Or a Macedonian teenager publishing a story that the Pope has endorsed Trump.”).

⁷³ DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 146 (2007) (citing Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 U. MIAMI L. REV. 991, 1028, 1032, 1044 (2004)).

⁷⁴ *Id.* at 147; Ari Ezra Waldman, *Durkheim’s Internet: Social and Political Theory in Online Society*, 7 N.Y.U. J.L. LIB. 345, 393–94 (2013).

⁷⁵ Waldman, *supra* note 74, at 394 (citing SOLOVE, *supra* note 73, at 147).

⁷⁶ Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701 (2010).

E. Journalistic Ethics and Norms

Scholars (and social media platforms themselves) have argued against government interference on the basis of comparisons to traditional media.⁷⁷ Under this argument, platforms, much like newspapers, radio stations, or television networks, exercise editorial discretion through the algorithms that decide where in a user’s interface a certain piece of content appears.⁷⁸ The argument that social media platforms exercise editorial discretion encompasses both express decisions on whether and when to remove content and algorithmic decisions, including how the algorithms function and what data should be collected and presented.⁷⁹

The U.S. Supreme Court has adopted this perspective, finding that the editorial discretion exercised by publishers implicates free speech.⁸⁰ The Supreme Court has also found that the narrow range of exceptions to the general rule in favor of preserving editorial discretion, all of which appear in the context of broadcasting, are not applicable to the Internet.⁸¹

⁷⁷ The comparison of platforms and other Internet intermediaries to traditional media distributors stands in contrast to the theory of “internet exceptionalism,” or “whether the technological characteristics of the Internet . . . justify treating regulation of information dissemination through the Internet differently from regulation of such dissemination through nineteenth- and twentieth-century media, such as print, radio, and television.” Tushnet, *supra* note 4, at 1638.

⁷⁸ Yoo, *supra* note 5, at 707–08 (“[T]he content that [Internet intermediaries] select and the manner in which they present them represent a distinct editorial voice that constitutes the primary source of value they provide to end users.”); see also John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353, 401 (2012) (arguing for targeted regulation at the network level, but not at the level of algorithmic decisions, which are editorial discretion).

⁷⁹ See Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J. L. & TECH. 191, 192 (2006) (“Principally, these editorial judgments are instantiated in the parameters set for the automated operations, but search engines also make individualized judgments about what data to collect and how to present it.”).

⁸⁰ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

⁸¹ Yoo, *supra* note 5, at 702, 724.

The D.C. Circuit noted that First Amendment protection may apply to social media platforms that “engage in editorial discretion” when “selecting which speech to transmit.”⁸² Other courts have explicitly analogized platforms like Google to publishers, finding that the First Amendment protects them from suits challenging ranking and delisting decisions.⁸³ Commentators and courts turn to the “editorial analogy” in articles debating the application of the First Amendment to shield companies like Facebook and Google against legislation and litigation.⁸⁴

Following on from this theory is the idea that the real issue with social media platforms is not the discretion they hold in what to present or how to present it, but the lack of a journalistic code of ethics or some other set of norms to guide them, as has always existed in traditional media. Formal codes of journalistic ethics, combined with norms of objectivity and independence, might have served as a counterweight to the media’s power to shape the public conversation.⁸⁵ Major

⁸² U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 742 (D.C. Cir. 2016).

⁸³ See, e.g., e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016); e-ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-00646-PAM-CM, 2017 WL 2210029, at *11 (M.D. Fla. Feb. 8, 2017) (holding at summary judgment that the First Amendment protects Google’s delisting decisions, analogizing the decision to delist to a publisher’s decision about what to publish); Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014) (analogizing search engine operator’s organizational decisions to analogy a “newspaper editor’s judgment of which . . . stories to run.”); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (denying injunctive relief, requiring Google to list plaintiff’s site in its search results, on First Amendment grounds).

⁸⁴ See Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. (Feb. 27, 2018), <https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy> (identifying limits in the editorial analogy); Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It’s Not a Close Question)*, KNIGHT FIRST AMEND. INST. (Feb. 26, 2018), <https://knightcolumbia.org/content/course-first-amendment-protects-google-and-facebook-and-its-not-close-question> (responding to Whitney’s argument).

⁸⁵ Wu, *supra* note 54, at 569.

platforms, on the other hand, have none of these ethical safeguards.⁸⁶ Of course, platforms continue to enforce certain internal norms – you can’t post nude photos on Facebook, for example. However, these norms rarely focus on the accuracy of content.

Part of the reason for the development of a social Internet without any central rules or norms may have been the view of the Internet as a place where users could make their own rules. By allowing rule by “community norms,” the Internet served as an alternative to laws imposed by external bodies, allowing individuals greater freedom, governed only by rules they have affirmatively assented to.⁸⁷ However, while activities by users may have been governed by such norms, platforms are able to incorporate their own rules, both through code⁸⁸ and through enforcement of internal terms and conditions.

Alternatively, the lack of a central ethical code might be the result of the Internet’s global nature. With a variety of different actors and governments at play, users might not all assent to a code of ethics that matches the United States “professional objective model” that journalism adopted.⁸⁹ With the creators of journalistic content now dispersed far beyond the central big-media incumbents in the United States, a unified

⁸⁶ *Id.* The significance of a lack of meaningful norms might also matter for interpreting the applicability of judicial precedent on the role of broadcasters, which may have developed based on the underlying assumption of the existence of such norms. *See* Tushnet, *supra* note 4, at 1650 (“[S]tandard First Amendment doctrine may rest on a judgment that norms—of newspapers, broadcasters, and the like—have developed to restrict harmful actions to some significant degree.”).

⁸⁷ *See* Marc MacCarthy, *What Payment Intermediaries Are Doing About Online Liability and Why It Matters*, 25 BERKELEY TECH. L.J. 1037, 1101 (2010).

⁸⁸ *See id.* at 1119–20; *see also* LAWRENCE LESSIG, CODE AND OTHER LAWS 24, 27 (1999) (recognizing that many features of the Internet are coding choices, and that the architecture and code of a network are its forms of regulation).

⁸⁹ Priyanjana Bengani, *Controlling the Conversation: The Ethics of Social Platforms and Content Moderation*, TOW CTR. DIGITAL JOURNALISM 7 (Apr. 2018).

code of journalistic ethics might be harder to come by if other governments push back against U.S. standards. Indeed, the European Union has repeatedly set its own standards, in contrast with the positions in the U.S., when it comes to content on social media platforms.⁹⁰

While platforms may argue that they do incorporate certain ethical guidelines through their terms of services, even platforms with internal terms and conditions suffer from a lack of mediation; unlike traditional media, platforms do not evaluate content before it is uploaded for users to view. Without the mediation of an editor, who may fact-check an individual's sources or otherwise point them towards a broader set of materials, individual content creators could stray towards polarization and ignorance, reproducing such materials and influencing fellow users.⁹¹ The lack of such mediation might be the reason why online content tends towards the ideologically homogenous and polarized,⁹² and why platforms lack a culture of finding and curbing rumors and libel.⁹³ Further, the focus on promoting user engagement rather than

⁹⁰ Examples include the area of data privacy, *see* Chris Jay Hoofnagle et al., *The European Union General Data Protection Regulation: What It Is and What It Means*, 28 INFO. & COMM. TECH. L. 65, 73–74 (2019) (describing the requirements of the GDPR and distinguishing it from U.S. privacy standards), and hate speech. *See* Citron, *supra* note 71, at 1037–38 (describing changes to social media companies' speech policies resulting from pressure by European regulators).

⁹¹ *See* Margulies, *supra* note 14, at 25–26. Interestingly, some have commented that the shift of responsibility for public-facing content is even a breach of journalists' ethical duties, replacing the "editorial judgments and cultures of public accountability" with social media companies' "commercial content moderation, algorithmic filters, online community standards, and platform terms of service." Bengani, *supra* note 89, at 4. This has led to a call for a "reboot" of journalistic ethics, with an eye towards setting standards that reflect the global landscape of modern media. *Id.* at 8. However, journalists' ability to step into this role are limited; the centrality of platforms to the distribution of media means publishers must cooperate with them and follow their rules. *Id.* at 10.

⁹² *Id.* at 7; *See* Newman et al., *Social Media in the Changing Ecology of News: The Fourth and Fifth Estates in Britain*, 7 INT'L J. INTERNET SCI. 6, 7 (2012).

⁹³ Margulies, *supra* note 14, at 26.

quality content might further exacerbate algorithms' tendency to promote lower-quality or more-heavily-polarized information, where users are more likely to engage with such sources.⁹⁴

Of course, the call for journalistic standards only applies to the extent that the editorial analogy is persuasive. Given platforms' and scholars' use of the analogy as a shield against litigation and legislation, the stakes of applying the analogy are relatively high.⁹⁵ Some have argued, for example, that the First Amendment protections that platforms are due through the editorial analogy shields them from antitrust scrutiny.⁹⁶ Critics argue that the editorial analogy fails based on its rationales – if, for example, the editorial analogy applies because both search results and editorial newspaper publications “rank and organize content” and choose “what should be presented to users,” this would lead to absurd results, including things like grocery store layouts or the selection of books for sale at a book store as protected editorial decisions, in contrast to settled precedent.⁹⁷ This is still a question of live debate, with other commentators finding social media platforms' protection under the First Amendment clear.⁹⁸

⁹⁴ See sources cited *infra* note 102.

⁹⁵ See, e.g., Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results*, 8 UCLA J. L. ECON. & POL'Y 883 (2012) (arguing that, because search engine's selection and sorting decisions are analogous to other editorial judgments, such results are protected by the First Amendment).

⁹⁶ *Id.* at 895–99.

⁹⁷ Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. 10 (Feb. 27, 2018) (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011)), <https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy>.

⁹⁸ E.g., Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)*, KNIGHT FIRST AMEND. INST. (Feb. 26, 2018) (citing *Zeran v. American Online*, 129 F.3d 327, 330 (4th Cir. 1997)), <https://knightcolumbia.org/content/course-first-amendment-protects-google-and-facebook-and-its-not-close-question> (“[A] publisher's traditional editorial functions' include 'deciding whether to publish,

Another important distinction is tied to liability. While newspapers, broadcasters, and other publishers have typically accepted liability for the information they publish, social media platforms have taken the position that they are not tied to the substance of their content. This perspective weakens arguments that claim that “requirements that these companies alter their results as tantamount to compelling the companies to speak.”⁹⁹ Facebook, in particular, has made public statements disavowing its role as an editor.¹⁰⁰ However, these arguments vary depending on their convenience for the platform; platforms embrace the editorial analogy when it shields them from liability, and renounce it when it creates more risk of being sued.

F. Economic Motivations

Other scholars focus on the potential harms of social media companies’ role in public discourse given that they are fundamentally motivated by profit.¹⁰¹ The prominence of individual articles, meanwhile, is selected based on their potential for “virality” in order to maximize clicks and user interaction, not based on their journalistic quality.¹⁰² Indeed,

withdraw, postpone or alter content.’ That’s exactly what Google’s search engine and Facebook’s newsfeed do.”).

⁹⁹ Whitney, *supra* note 97, at 13.

¹⁰⁰ See Ravi Somaiya, *Facebook Takes Steps Against “Click Bait” Articles*, N.Y. TIMES (Aug. 25, 2014), <http://www.nytimes.com/2014/08/26/business/media/facebook-takes-steps-against-click-bait-articles.html> (quoting Greg Marra, the engineer who oversees Facebook’s News Feed algorithm, saying that he and his team “explicitly view ourselves as not editors”).

¹⁰¹ See, e.g., Jack M. Balkin, Keynote Address at the Association for Computing Machinery Symposium on Computer Science and Law: How to Regulate (and Not Regulate) Social Media 11–12 (Oct. 28, 2019) (transcript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484114) (hereinafter *Balkin Keynote*).

¹⁰² Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, TOW CTR. DIGITAL JOURNALISM 15 (2017); see also Ben Popken, *As Algorithms Take Over, YouTube’s Recommendations Highlight a Human Problem*, NBC NEWS (Apr. 19, 2018), <https://www.nbcnews.com/tech/social-media/algorithms-take-over-youtube-s-recommendations-highlight-human-problem-n867596> (“[A]ll these

the lack of a code of journalistic ethics might be tied in with platform companies' motives. The creation of journalistic standards, ethical norms, and editorial judgment would go against the platforms' central mission: to maximize the number of users on their platforms. Content that best satisfies the goals of increasing the user base and increasing users' interactions with the site is likely lower quality.¹⁰³ "Clicks and shares . . . take priority over the quality of information."¹⁰⁴ The 2019 Pew study suggests that social media companies' incentives to favor virality are also a cause for public concern – of those respondents who said that social media companies treat different news organizations differently, 88% said that the companies favored news organizations that produce "attention-grabbing articles."¹⁰⁵

Some scholars explain this focus on user activity as a result of the rise of the "informational economy."¹⁰⁶ The informational economy is structured around the value platforms can extract from user data.¹⁰⁷ By harvesting, using, and selling user data, platforms are able to offer their services for "free" while extracting data at no cost. They then use that data to profit off manipulation of the very users they pulled it from, through such things as targeted advertisements or adjustments to newsfeeds.¹⁰⁸ The profit comes from platforms' ability to sell both the data itself and effective targeted manipulation, using their ability to transform that data into information.¹⁰⁹ Thus, social media companies have become

companies . . . prioritize growth over anything else. They may not be meaning to do it, but if growth is the goal, then user experience is not the goal.").

¹⁰³ Grafanaki, *supra* note 23, at 125.

¹⁰⁴ *Id.* at 130.

¹⁰⁵ Shearer & Grieco, *supra* note 17, at 4.

¹⁰⁶ COHEN, *supra* note 8, at 37.

¹⁰⁷ *See Data Is Giving Rise to a New Economy*, *ECONOMIST* (May 6, 2017), <https://www.economist.com/briefing/2017/05/06/data-is-giving-rise-to-a-new-economy>.

¹⁰⁸ BENKLER ET AL., *supra* note 19, at 269.

¹⁰⁹ *See id.*

dependent on the “accumulation and monetization of personal data” to succeed.¹¹⁰

One potential counterpoint to treating social media platforms differently because they lack a code of journalistic ethics is that under Section 230 of the Communications Decency Act, they are not technically “publishers.”¹¹¹ Though this perspective contradicts the position that algorithms are akin to editorial judgments, critics of that position argue that the treatment of platforms should not match that of traditional media.¹¹² One important difference is that in traditional media, the audience attributes media to the speaker (that is, the publisher or broadcaster); readers do not, however, attribute the messages of media distributed through social media platforms to the platforms themselves.¹¹³ This would suggest that imposing journalistic norms on the platforms, who are not the actual creators of the material that is distributed through them, is inappropriate.

Further, operating with a motive for profit—and basing the distribution media around that motive—is not necessarily unique to platforms. Traditional media has always based its coverage on the media that it believed readers or listeners would most readily consume. Without regular consumers of the media produced, news organizations could not survive; it was

¹¹⁰ Natasha Tusikov & Blayne Haggart, *It's Time for a New Way to Regulate Social Media Platforms*, CONVERSATION (Jan. 16, 2019), <https://theconversation.com/its-time-for-a-new-way-to-regulate-social-media-platforms-109413>; see generally SHOSHANNA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 8–12 (2019).

¹¹¹ 47 U.S.C. § 230 (2016).

¹¹² Scholars have noted that Section 230 is a reflection of “internet exceptionalism.” See, e.g., Jenna K. Stokes, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 BERKELEY TECH. L.J. 929, 932 (2014). By “treat[ing] online providers more favorably than offline publishers—even when they publish identical content,” Section 230 recognizes and codifies the theory of internet exceptionalism. *Id.* (citing Eric Goldman, *The Third Wave of Internet Exceptionalism*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 165, 165 (Berin Szoka & Adam Marcus eds., 2010)).

¹¹³ Blevins, *supra* note 78, at 387.

to these consumers that traditional media producers catered.¹¹⁴ Executives running traditional media companies likely similarly prioritized maximizing readers or listeners, though they were counterbalanced by the incentives of the journalists.¹¹⁵ The relationship between traditional producers and platforms, one might argue, is similar—the platforms are motivated by their desire for user engagement, but the major producers of news still encompass the values of journalistic ethics. The one difference is the creation of new, smaller-scale “news” operations that are not actually focused on quality journalism, but rather share the same click-focused motivations as the platforms. Imposing a modern code of journalistic ethics might be better focused on getting such producers of content in line, rather than guiding the platforms.

III. KEY CONCLUSIONS

While the debate over what form government intervention into social media platforms’ practices should take—whether it’s government regulation of the speech that goes through platforms, imposing minimum standards all platforms are required to meet, or something in between—the justifications for intervention are often simply assumed, rooted in theories of Internet exceptionalism. In response to potential First Amendment challenges to such intervention, scholars point to many of the same features of the Internet, arguing that these features distinguish speech over social media from traditional forms of media.

Upon closer inspection, however, many of these assumed justifications have significant counterpoints that have gone unaddressed. While this for some justifications, these counterpoints are significant enough to eliminate their

¹¹⁴ See Bengani, *supra* note 89, at 4 (“Throughout history, journalists have had uneasy relationships with audiences: they are economically essential, core to the profession’s public accountability, bellwethers of popular culture, and frequent sources for secret information—but they are also abstractions, masses that journalists can never really know.”).

¹¹⁵ *Id.* at 12.

persuasiveness entirely, others simply support certain types of interventions over others.

A. Many Commonly-Cited Justifications Are of Limited Persuasiveness

Several of the discussed theories are based on incorrect or overblown assumptions. Pervasiveness, for example, often focuses on Pew surveys regarding the wide use of the Internet as a source of news and information. Upon closer examination of the 2017 data frequently cited, only one-fifth of respondents got their news from social media.¹¹⁶ These numbers have increased slightly over time – in 2019, the number of respondents who declared receiving news from social media “often” increased to 28%.¹¹⁷ However, only just above half (55%) of U.S. adults get their news from social media at least “sometimes”; the remainder “hardly ever” or “never” use social media for news.¹¹⁸ Similarly, anonymity only serves to explain the exceptional nature of the Internet to the extent that it is truly achievable. If, as some scholars argue, true online anonymity is impossible given reidentification technology and the limitation of most users’ lack of technical expertise to achieving only “traceable anonymity,” anonymity can play only a limited role in explaining why our concerns of the Internet rise to the level of intervention.

Theories like virality and numerosity, meanwhile, are limited by mixed evidence about their potential to actually affect users’ opinions. Social media platforms do have wide reach and may provide a space for extremist communities, where like-minded people can support each other in views that would be shamed if communicated to the general public. Even putting aside the risk of such communities, social media platforms may play a role in the creation of “filter bubbles,” communities in which individuals rarely engage with people

¹¹⁶ See Shearer & Gottfried, *supra* note 16.

¹¹⁷ Shearer & Grieco, *supra* note 17, at 7.

¹¹⁸ *Id.*

with opposing views.¹¹⁹ Further, the ease with which individuals can speak on the Internet leads to issues of flooding and filtering, where platforms both create the conditions for overabundance of information and retain all the power in deciding how to present that information. The issue with these explanations, however, is the difficulty in truly distinguishing them from other media, which has a long history of exception from government intervention. Polarized communities existed long before the advent of social media, both through in-person communities and traditional media sources, such as smaller newspapers or conservative talk radio.

B. Other Theories Are More Convincing, But with Significant Limitations

Concerns about social media companies' economic motivations, supporting user engagement over the accuracy or quality of the information spread through them, combined with the lack of some internal ethical code, might be the best explanation for why, despite sharing many characteristics with traditional news providers, we have special concern about news spread through social media. The economic motivations are a result of these companies discovering that the best way to make money through their platforms is the use of a free resource—users' data—combined with microtargeting and other technologies focused on advertising.¹²⁰ These motivations lead social media platforms to prefer content that users are more

¹¹⁹ See, e.g., Tien T. Nguyen et al., *Exploring the Filter Bubble: The Effect of Using Recommender Systems on Content Diversity*, PROCEEDINGS OF THE 23RD INT'L CONFERENCE ON WORLD WIDE WEB (2014), <https://archive.thewebconf.org/proceedings/www2014/proceedings/p677.pdf>; see also Monica Anderson & Andrea Caumont, *How Social Media Is Reshaping News*, PEW RESEARCH CTR. (Sept. 24, 2014), <https://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/>; John Keegan, *Blue Feed, Red Feed*, WALL ST. J. (May 18, 2016), <http://graphics.wsj.com/blue-feed-red-feed/>.

¹²⁰ See ZUBOFF, *supra* note 110, at 75 (“[T]he growing stores of collateral signals would be repurposed to improve the profitability of ads for both Google and its advertisers.”); *id.* at 81 (“Behavioral data . . . became the pivotal . . . raw material for the construction of a dynamic online advertising marketplace.”).

likely to engage with, since that engagement produces more data for the companies to use and profit from. Thus, if we value high-quality information, working against this motivation seems central.

Similarly, a desire for high-quality information supports the importance of the journalistic ethics rationale. Although traditional media companies share many attributes of social networks, including pervasiveness (providing the majority of news that individuals consume), the potential for smaller communities that all share the same views, and a motivation to profit, codes of journalistic ethics lead us to trust traditional news organizations' outputs. In contrast, since curation by platforms adheres to no specific code, "fake news" and other forms of misinformation become a significant threat. This might be the greatest risk – pervasiveness, numerosity, anonymity, and other factors matter less if the information they spread to readers is accurate and informative. Concerns about platforms became central only after their potential harms, were revealed.

C. These Theories' Relative Persuasiveness and Limitations Can Counsel for Certain Types of Solutions Over Others

1. Direct Government Intervention – Regulations and Enforcement

The sizable influence of platforms on their users has caused some scholars to counsel for a change in legal standards, as the treatment of traditional media cannot apply to companies with such power to manipulate the markets they operate in.¹²¹ There have also been calls to shift from allowing governance by platforms' unique internal standards to creation of rules specific to each individual country's preferences.¹²² There is already movement in this direction, such as through

¹²¹ See Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 164–65, 204 (2017).

¹²² See, e.g., Tusikov & Haggart, *supra* note 110.

the application of the GDPR¹²³ and the banning of social media platforms that refuse to comply with specific standards in countries including China and Turkey.¹²⁴

Direct government intervention is best supported by the numerosity and ethical code rationales. Numerosity explains that the number of inputs on social media platforms requires some sort of central regulation, whether that be by the platforms themselves or some other entity. The lack of a central ethical code, meanwhile, has led to differing standards between platforms, many of which have been criticized as insufficient. Government intervention could be used to create ethical rules and norms that apply to all social media platforms, combined with the means to enforce them. Such intervention raises concerns, however, in certain countries where government intervention into content control carries with it the potential for propaganda and the censorship of dissenting voices.¹²⁵ Given what we know about users' attention scarcity and the potential that manipulation has, centralizing this power

¹²³ 2016 O.J. (L119) 1.

¹²⁴ See Paige Leskin, *Here Are All the Major US Tech Companies Blocked Behind China's "Great Firewall"*, BUS. INSIDER (Oct. 10, 2019), <https://www.businessinsider.com/major-us-tech-companies-blocked-from-operating-in-china-2019-5?r=US&IR=T>; Hannah Roberts, *The Turkish Government Reportedly Blocked WhatsApp and Other Social Media Sites*, BUS. INSIDER (Nov. 4, 2016), <https://www.businessinsider.com/social-media-and-messaging-sites-blocked-in-turkey-2016-11?r=US&IR=T>. Other countries have taken more limited approaches, such as Germany's Network Enforcement Act, or NetzDG, which requires online platforms with at least 2 million users located in Germany to set up procedures to review complaints about content, and to remove illegal content within 24 hours or face up to €50 million in fees. See William Echikson & Olivia Knodt, *Germany's NetzDG: A Key Test for Combatting Online Hate*, CEPS RES. REP. (Nov. 2018), https://www.ceps.eu/system/files/RR%20No2018-09_Germany%27s%20NetzDG.pdf.

¹²⁵ For example, Singapore's recent "anti-fake news law," allowing the government to remove articles that breach government regulations, has raised concerns "that Singapore's authoritarian government will further stifle dissent." Jamie Fullerton, *Singapore to Introduce Anti-Fake News Law, Allowing Removal of Articles*, GUARDIAN (Apr. 1, 2019), <https://www.theguardian.com/world/2019/apr/01/singapore-to-introduce-anti-fake-news-law-allowing-removal-of-articles>.

creates significant risks. Further, as discussed above, centralized ethical codes still run into the problem of globalization. Given that most social media companies have their home base in the United States, the U.S. is the most likely government to address this. U.S. standards, however, may fall short of providing the protections that other countries want for their users.

2. Public Ownership / Public Options

Another line of proposals argues for reforms that focus on the profit incentives, eliminating platforms' ability to monetize user data.¹²⁶ One such reform is public ownership – as the argument goes, government-run social media platforms will not be reliant on profit, avoiding platforms' potential harms to users without eliminating them entirely.¹²⁷ A slightly less extreme version of this solution proposes that social media platforms be regulated as public utilities.¹²⁸ However, centralizing control of social media introduces a completely different host of problems, including (but certainly not limited to) the potential that certain types of *beneficial* content regulation could be struck down under the First Amendment if promulgated by governments rather than by public actors,¹²⁹ and the severe potential harms of government propaganda and surveillance.¹³⁰

¹²⁶ *E.g.*, Tusikov & Haggart, *supra* note 110.

¹²⁷ Phillip N. Howard, *Let's Nationalize Facebook*, SLATE (Aug. 16, 2012), <https://slate.com/technology/2012/08/facebook-should-be-nationalized-to-protect-user-rights.html>; Nick Srnicek, *We Need to Nationalise Google, Facebook, and Amazon. Here's Why*, GUARDIAN (Aug. 30, 2017), <https://www.theguardian.com/commentisfree/2017/aug/30/nationalise-google-facebook-amazon-data-monopoly-platform-public-interest>.

¹²⁸ *See, e.g.*, K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234 (2018).

¹²⁹ *Balkin Keynote* at 17.

¹³⁰ *Id.* at 14–15; *see also* Bei Qin, David Stromberg, and Yanhui Wu, *Why Does China Allow Freer Social Media? Protests Versus Surveillance and Propaganda*, 31 J. ECON. PERSP. 117 (2017); Zheng, *supra* note 61;

Alternatively, there is the suggestion of a public *option* for social media.¹³¹ Rather than direct regulation of social media companies, the public option would emerge as a market competitor, “compet[ing] on the quality of its service rather than — as now — the number of clicks.”¹³² This solution focuses on the profit motive as the greatest harm to social media, focusing the solution on providing high-quality, accurate information. This model does not need the support of some other theory to succeed. Rather, it creates an area where norms can be created and enforced, allaying users’ concerns about the potential negative externalities of private social media. Unfortunately, such an option would have its limits. We need only look across the pond to critics of the BBC to see that public options are rarely accepted as unbiased or without inaccuracies.¹³³

3. Fiduciary Duties

Still another form of government intervention, first proposed by Jack Balkin, calls for treating social media companies as “information fiduciaries,” binding them to codes of conduct that apply in areas like law and medicine.¹³⁴ Tim Wu similarly asks laws and regulations to “requir[e] that major speech platforms behave as public trustees, with general duties to police fake users, remove propaganda robots, and promote a robust speech environment surrounding matters of public concern.”¹³⁵ A bill introduced in the Senate, titled the “Data Care Act of 2018,” took this approach into stride, proposing duties of “care, loyalty, and confidentiality” for all “online

¹³¹ Rahman, *supra* note 124, at 249; Diane Coyle, *We Need a Publicly Funded Rival to Facebook and Google*, FIN. TIMES (July 9, 2018), <https://www.ft.com/content/d56744a0-835c-11e8-9199-c2a4754b5a0e>.

¹³² Coyle, *supra* note 131.

¹³³ See generally *Criticism of the BBC*, WIKIPEDIA, https://en.wikipedia.org/wiki/Criticism_of_the_BBC.

¹³⁴ Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016).

¹³⁵ Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 1, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete>.

service providers,” resulting in civil penalties if breached.¹³⁶ This would raise the duties owed by online service providers to standards similar to those applied to banks, lawyers, and hospitals. As Senator Brian Schatz (D-HI), the Senator who introduced the bill, explained, “[j]ust as doctors and lawyers are expected to protect and responsibly use the personal data they hold, online companies should be required to do the same.”¹³⁷

Public utility theory and the information fiduciaries approach both rely primarily on some idea of pervasiveness. They point to social media platforms’ central role in the spread of information. The *Packingham* Court, for example, “equate[d] the entirety of the internet with public streets and parks.”¹³⁸ Finding that social media served as “the modern public square,”¹³⁹ it found fundamental that all persons have access to such a forum under the First Amendment.¹⁴⁰ Treating social media platforms like public goods requires that they be so central to modern life that their regulation is necessary. This argument runs into problems, however, on two metrics. First, other media entities, such as newspapers and broadcasters, have played (and continue to play) a similarly central role in most people’s lives. However, they are treated differently from other types of public goods because they involve speech, implicating First Amendment protections. Compounding this is evidence that television and newspapers continue to be the main source of news for most people; if we aren’t regulating the most prominent sources of information, this rationale does not support regulation of platforms.

¹³⁶ Data Care Act of 2018, S. 3744, 115th Cong. (2018).

¹³⁷ *Schatz Leads Group of 15 Senators In Introducing New Bill To Help Protect People’s Personal Data Online* (Dec. 12, 2018), <https://www.schatz.senate.gov/press-releases/schatz-leads-group-of-15-senators-in-introducing-new-bill-to-help-protect-peoples-personal-data-online>.

¹³⁸ *Packingham*, 137 S.Ct. at 1738 (Alito, J., concurring).

¹³⁹ *Id.* at 1737.

¹⁴⁰ *Id.* at 1735.

While the information fiduciaries approach does take steps to eliminate platforms' profit motivations, it takes this reasoning into account, proposing instead that because such companies "collect, analyze, use, sell, and distribute" personal information, they owe special duties to the users they get this information from.¹⁴¹

4. Antitrust

There is also a range of antitrust scholars (and politicians), who focus not on the problems inherent in social media platforms but on their exacerbation due to centralization of the social media market in only one or two companies.¹⁴² Elizabeth Warren, for example, argues that breaking up certain big-tech mergers would "promote healthy competition," pressuring such companies to be more responsive to user concerns.¹⁴³ Antitrust enforcement actions have been the most significant recent threat to such companies, most notably with the Federal Trade Commission and various state attorneys general launching investigations into Facebook's potential anticompetitive effects.¹⁴⁴

This focus on social media companies' anticompetitive effects implicates several concerns. For example, a traditional argument for antitrust intervention is the value of competition in promoting innovation. Antitrust analysis, however, incorporates various rationales that address whether a company

¹⁴¹ Balkin, *supra* note 130, at 1186.

¹⁴² See also Balkin *Keynote* at 9 ("To achieve a healthy and vibrant public sphere, we also need many different kinds of social media with many different affordances Moreover, these applications can't be owned or controlled by the same companies.").

¹⁴³ Warren, *supra* note 3.

¹⁴⁴ See David McLaughlin et al., *Facebook's New FTC Probe Covers Wide Sphere But Faces Long Odds*, BLOOMBERG (July 24, 2019), <https://www.bloomberg.com/news/articles/2019-07-24/facebook-says-it-s-being-investigated-by-the-ftc-over-antitrust>; Casey Newton & Zoe Schiffer, *Google and Facebook's Antitrust Problem Is Getting Much More Serious*, VERGE (Sept. 10, 2019), <https://www.theverge.com/interface/2019/9/10/20858028/google-antitrust-investigation-state-attorneys-general-facebook>.

has simply become “too big.” Pervasiveness, for example, argues that certain platforms’ roles in the provision of information are outsized, causing concerns about the spread of misinformation. A major defense such companies have is their provision of a “free” service – certain types of evidence in antitrust actions, such as price hikes, are thus inapplicable. However, discussions of profit motivation may be implicated to point out the role that users’ data plays in these companies’ survival.