

SOCIAL MEDIA, THE FIRST AMENDMENT, AND DEMOCRATIC DYSFUNCTION IN THE TRUMP ERA

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ABSTRACT

In the fall of 2019, the congressionally endowed Drake Constitutional Law Center held a symposium on the book, Democracy and Dysfunction, authored by University of Texas law professor Sandy Levinson and Yale law professor Jack Balkin. Several scholars offered commentary on the book. This Article focuses on how the Internet is not what it used to be. The Internet is now a major reason why the U.S. political system has broken down. While several other books have made this argument at length, this Article synthesizes these viewpoints in a concise and useful manner.

In 1997, the U.S. Supreme Court treated Internet 1.0 as a sacrosanct technology. The Internet has changed dramatically since then with Facebook, Google, and Amazon becoming among the world's most dominant companies and social media platforms taking charge. Yet the Court has still provided these companies with the utmost protection. Unfortunately, Internet 2.0 contains encrypted websites allowing dangerous collaborations, salacious materials, a Dark Web, and even postings designed to sabotage elections. It is no accident that the Russians succeeded at influencing the 2016 U.S. presidential election. People's privacy is also being invaded. And President Donald Trump tweets messages with racist, sexist, and otherwise inflammatory elements on social media.

This Article shows how the poisonous social media mentioned above and the absence of useful restrictions have caused political dysfunction. The Article also shows how several often-praised First Amendment cases have contributed to these problems, as have the imprecise and detrimental algorithms employed by these companies. Moreover, the Article asserts that the provisions of 42 U.S.C. § 230 could be used by these private entities to support cleansing efforts that are necessary and thereby avoid government controls.

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I. INTRODUCTION

Professor Sanford Levinson and Professor Jack Balkin's important book, *Democracy and Dysfunction*, consists of a dialogue examining how the U.S. political system's serious polarization relates to the U.S. Constitution's "hard wired" structural provisions.¹ Sandy is the "revolutionary." He advocates for a constitutional convention, numerous constitutional amendments, and abolition of the U.S. Senate and the Electoral College, as well as removal of the Constitution's many veto points and its other undemocratic features.² Jack focuses on "constitutional rot," but his recommendations are progressive, not revolutionary.³ Most problems can be solved without constitutional change. These include eliminating life tenure for U.S. Supreme Court justices and altering the Electoral College. Yet, despite their superb analyses, it is vital, I think, to discuss how social media platforms, bolstered by an overly libertarian First Amendment, have contributed to political dysfunction.⁴ After all, the increased polarization and gridlock can only occur if there has been a change in people's psychology and

1. See SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION 2 (2019); see also *Partisan Antipathy: More Intense, More Personal*, PEW RES. CTR. (Oct. 10, 2019), <https://www.people-press.org/2019/10/10/partisan-antipathy-more-intense-more-personal/> [https://perma.cc/TD2Y-DFSG] ("Three years ago, Pew Research Center found that the 2016 presidential campaign was 'unfolding against a backdrop of intense partisan division and animosity.' Today, the level of division and animosity—including negative sentiments among partisans toward the members of the opposing party—has only deepened."); see generally THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 163–79 (1st ed. 2012).

2. See generally LEVINSON & BALKIN, *supra* note 1. The book does briefly reference the social media issue.

3. *Id.* at 105.

4. Niall Ferguson, *Social Networks Are Creating a Global Crisis of Democracy*, GLOBE & MAIL (Jan. 19, 2018), <https://www.theglobeandmail.com/opinion/niall-ferguson-social-networks-and-the-global-crisis-of-democracy/article37665172/> [https://perma.cc/CF5P-LPLB].

society. Digital platforms are such a game changer. They control minds.⁵ Jack is a master of this scholarly domain, but I will try to offer some useful thoughts.⁶

This Article dovetails with the current “techlash” in which politicians, scholars, and others are blaming social media for our increasingly coarse public arena.⁷ We even have a President who uses Twitter to slam the “lamestream” media, convert the truth into “fake news,” and shame his Republican critics as “scum.”⁸ Yet, not long ago, the Internet was characterized as a miraculous technological innovation, with social media being a step in its evolution—a kind of Internet 2.0. This miracle view is apparent in the U.S. Supreme Court’s first Internet case, *Reno v. ACLU*.⁹ The Court in 1997 ruled that a part of the Communication Decency Act (CDA) violated the First Amendment.¹⁰

The Court celebrated how the Internet created a global library that permitted unprecedented international and domestic interactions as well as collaborations.¹¹

5. See Simon McCarthy-Jones, *Social Networking Sites May Be Controlling Your Mind—Here’s How to Take Charge*, CONVERSATION (Dec. 5, 2017), <https://theconversation.com/social-networking-sites-may-be-controlling-your-mind-heres-how-to-take-charge-88516> [https://perma.cc/Q26Y-J5M9].

6. See, e.g., Jack M. Balkin, Essay, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1151–52 (2018); Jack M. Balkin, *Fixing Social Media’s Grand Bargain* 4–5 (Hoover Working Grp. on Nat’l Sec., Tech., & Law, Aegis Series Paper No. 1814, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3266942 [https://perma.cc/UW79-CXK6].

7. See Eve Smith, *The Techlash Against Amazon, Facebook, and Google – and What They Can Do*, ECONOMIST (Jan. 20, 2018), <https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do> [https://perma.cc/QUY8-SR27]. Numerous, generally pro-Internet scholars have published books that are critical of social media. These include the following: NICHOLAS CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* (2011); JAVON LANIER, *TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW* (2018); ANDREW MARANTZ, *ANTI-SOCIAL: ONLINE EXTREMISTS, TECHNO-UTOPIANS, AND THE HIJACKING OF THE AMERICAN CONVERSATION* (2019); CASS SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* (3d ed. 2018) [hereinafter SUNSTEIN, *DIVIDED DEMOCRACY*]; SIVA VAIDHYANATHAN, *ANTI-SOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY* (2018); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

8. See generally Mike McIntire, Karen Yourish & Larry Buchanan, *In Trump’s Twitter Feed: Conspiracy-Mongers, Racists, and Spies*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-disinformation.html?action=click&module=RelatedLinks&pgtype=Article>.

9. See *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

10. *Id.*

11. *Id.* at 853.

These could be of an academic, business, or personal nature.¹² The CDA, however, prohibited the posting or sending of certain sexually explicit material to minors.¹³ Though that restriction appeared admirable, the CDA would have also prevented adult access to that material,¹⁴ as well as juvenile access to sex-education sites.¹⁵ Thus, the Court correctly concluded the CDA was overbroad, vague, content discriminatory, and punitive.¹⁶ The CDA would force many socially valuable websites to shut down.¹⁷

Yet the Court unnecessarily decided that laws restricting the Internet must meet strict scrutiny.¹⁸ It therefore placed the Internet in the same, protected media category as newspapers, which are relatively harmless.¹⁹ But this ignored the Internet's interactive, more sexually explicit, and graphically violent content.²⁰ The Court, however, was impressed by this new technology and sought to ensure its growth.²¹

The U.S. Supreme Court has continued to protect the Internet even as it has become dominated by massive social media platforms.²² We are in a second Gilded Age.²³ The acronym GAFA stands for Google, Amazon, Facebook, and Apple.²⁴ Facebook is estimated to have 2.7 billion users, one-third of the world's population.²⁵ On the popular TV show *Silicon Valley*, the CEO of a new startup testified on Capitol Hill, "Facebook owns 80 percent of mobile social traffic

12. *See id.*

13. *Id.* at 849.

14. *Id.* at 874–75.

15. *Id.* at 856–57.

16. *Id.* at 844.

17. *Id.* at 872.

18. *Id.* at 879.

19. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1984) (quoting *Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

20. Mark S. Kende, *The Supreme Court's Approach to the First Amendment in Cyberspace: Free Speech as Technology's Hand-Maiden*, 14 CONST. COMMENT. 465, 478 (1997).

21. *Reno*, 521 U.S. at 885.

22. Jack M. Balkin, Lecture, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1191–92 (2016) [hereinafter Balkin, *Information Fiduciaries*].

23. *Id.* at 1185–86.

24. J. Clement, *Google, Apple, Facebook, and Amazon (GAFA) – Statistics & Facts*, STATISTA (July 13, 2018), <https://www.statista.com/topics/4213/google-apple-facebook-and-amazon-gafa/> [https://perma.cc/4JVM-FW6Q].

25. John Nancarrow, *Congress Tests Zuckerberg with Trust on Libra*, BLOOMBERG L. (Oct. 24, 2019), <https://news.bloomberglaw.com/banking-law/congress-tests-zuckerberg-on-trustworthiness-with-libra>. Libra is Facebook's proposed cryptocurrency. *Id.*

Google owns 92 percent of search, and Amazon Web Services [with its Cloud] is bigger than their next four competitors combined. . . . They track our every move, they monitor every moment in our lives, and they exploit our data for profit.”²⁶ There is also Reddit, Twitter, LinkedIn, Instagram (owned by Facebook now), WhatsApp (owned by Facebook now), YouTube (owned by Google now), and more.²⁷ Despite this platform success, the Court is still overprotecting.

For example, in 2017, the Court in *Packingham v. North Carolina* struck down a law that prohibited registered sex offenders from using social media sites open to minors.²⁸ The Court waxed poetic about Facebook as the “modern public square.”²⁹ This guarantees the strongest protection for these sites.³⁰ Social media was also the main forum for “exploring the vast realms of human thought and knowledge.”³¹ This ruling is one of several where the Court has made it practically impossible for laws to protect children from harmful Internet material, as discussed later.³² The Court acts differently regarding sex offenders in the brick-and-mortar context.³³ And social media is not truly a “public” forum unless it permits people to meet each other inadvertently or makes people run into novel ideas.

The U.S. Court of Appeals for the Ninth Circuit highlighted the irony of judicial overprotection in 2008:

The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is

26. Dana Goodyear, *Thomas Middleditch's Chat-Room Childhood*, NEW YORKER (Oct. 28, 2019), <https://www.newyorker.com/magazine/2019/11/04/thomas-middleditchs-chat-room-childhood> (quoting Richard Hendricks, a character on *Silicon Valley*). The European Union fined Google \$2.7 billion for antitrust violations in 2017 (over manipulated search results) and \$5 billion in 2018 (for “illegally tying” Chrome “and search apps to Android”). Tom Warren, *Google Fined a Record \$5 Billion by the EU for Android Antitrust Violations*, VERGE (July 18, 2018), <https://www.theverge.com/2018/7/18/17580694/google-android-eu-fine-antitrust> [https://perma.cc/7C6N-DLRS]. Google is appealing both results. *Id.*

27. See, e.g., Nathan Reiff, *Top Companies Owned by Facebook*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/articles/personal-finance/051815/top-11-companies-owned-facebook.asp> [https://perma.cc/7R6X-83PQ].

28. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017).

29. *Id.* at 1737.

30. *See id.*

31. *Id.* The Court also pronounced, “[T]he Cyber Age is a revolution of historic proportions” *Id.* at 1736.

32. *See* sources and accompanying text *infra* note 184.

33. See, e.g., *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) (en banc).

conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.³⁴

So what caused this techlash, besides the concerns raised above? The answer is that the same low barriers to entry that make the Internet so breathtaking have allowed mischief, or much worse.³⁵ A newspaper screens an op-ed for publication, among hundreds of submissions. But anyone can tweet and seek attention. This Article surveys several social media issues that relate to democratic dysfunction. It will then mention some possible solutions. The Article does not argue that we would be better off without social media, given its innumerable benefits, but there are costs. The Article also does not generally analyze social media business models, given the symposium's space limits.

II. RUSSIAN AND OTHER ELECTION INTERFERENCE

The most obvious example of social media causing democratic dysfunction is Russian and other involvement in the 2016 presidential election. Kathleen Hall Jamieson authored a scrupulously researched 2018 Oxford University Press book titled *Cyberwar: How Russian Hackers and Trolls Helped Elect a President: What We Don't, Can't, and Do Know*.³⁶ Using hard data and forensic analysis, the book shows Russian social media interference, mainly via Facebook, and some other improper actions probably led to President Donald Trump's victory.³⁷ Jamieson's scholarly credibility was highlighted by *New Yorker* award-winning investigative reporter Jane Mayer.³⁸ Mayer relied on Jamieson's work for a seminal 2018 investigative article into the election.³⁹ The Mueller Report confirmed the Russian involvement.⁴⁰

34. *Id.*

35. See *Reno v. ACLU*, 521 U.S. 844, 849 (1997); see also *Packingham*, 137 S. Ct. at 1736 (stating new inventions have often been exploited by the “criminal mind”).

36. KATHLEEN HALL JAMIESON, *CYBERWAR: HOW RUSSIAN HACKERS AND TROLLS HELPED ELECT A PRESIDENT: WHAT WE DON'T, CAN'T, AND DO KNOW* 60–63, 205–13 (2018).

37. See generally *id.* at 67–131 (detailing various methods of interference during the 2016 presidential election), 215–24 (offering various means to address future election interference).

38. Jane Mayer, *How Russia Helped Swing the Election for Trump*, *NEW YORKER* (Sept. 24, 2018), <https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump> [https://perma.cc/X5FD-SEH3].

39. *Id.*

40. See generally SPECIAL COUNSEL ROBERT S. MUELLER III, DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019), <https://www.justice.gov/storage/report.pdf> [https://perma.cc/8AD6-RGMN].

Indeed, Mayer and others report Russian agents published over 3,000 Facebook ads during the 2016 presidential campaign,⁴¹ most of which sowed social discord in President Trump's favor.⁴² Some of these came from the trolling Russian Internet Research Agency.⁴³ The ads were so sophisticated that they even tried to suppress the U.S. black vote.⁴⁴ Russian agents also created at least 470 fake Facebook accounts, and 6 of them were seen approximately 340 million times.⁴⁵ Moreover, Twitter acknowledges 50,000 fake accounts were established there during the campaign.⁴⁶ Mayer even explained how social media may have caused FBI Director James Comey to make unprecedented statements toward the end of the campaign that were devastating to former Secretary of State Hillary Clinton.⁴⁷

III. PRIVACY VIOLATIONS AND ELECTION INTERFERENCE

Journalists also learned Cambridge Analytica (CA), which had connections to former prominent Trump aide and alt-right aficionado, Steven Bannon, obtained data from more than 50 million Facebook users by creating and exploiting a Facebook app.⁴⁸ The app included a quiz where takers unknowingly gave up valuable data.⁴⁹ CA then created "psychographic profiles" that targeted uncommitted voters with Republican leanings to support President Trump.⁵⁰ There is a frightening documentary called *The Great Hack* that explains what transpired,

41. Alfred Ng, *Congress Releases All 3000-Plus Facebook Ads Bought by Russians*, CNET (May 10, 2018), <https://www.cnet.com/news/congress-releases-all-3000-plus-facebook-ads-bought-by-russians/> [https://perma.cc/8D52-2TMB].

42. Mayer, *supra* note 38 (describing how the Russian ads, according to the director of the Tow Center, "provoked outrage, created discontent with social systems such as police and safety, pushed certain urban and disadvantaged communities to feel marginalized, and amplified wedge issues beyond authentic reach through social media, which then magnified media coverage of certain issues").

43. *Id.*

44. *Id.*

45. *Id.* ("Of the four hundred and seventy Facebook accounts known to have been created by Russian saboteurs during the campaign, a mere six of them generated content that was shared at least three hundred and forty million times.").

46. *Id.* ("Twitter recently acknowledged that it, too, was deeply infiltrated, hosting more than fifty thousand impostor accounts."). Mayer also highlights that Russian bots sent 2.1 million tweets related to the election. *Id.*

47. *See id.* This explanation is toward the end of Mayer's article.

48. Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>.

49. *Id.*

50. Sue Halpern, *Cambridge Analytica and the Perils of Psychographics*, NEW YORKER (Mar. 30, 2018), <https://www.newyorker.com/news/news-desk/cambridge-analytica-and-the-perils-of-psychographics> [https://perma.cc/PTZ2-4N7V].

though it has some inaccuracies.⁵¹ Amazon Web Services was implicated too.⁵²

The U.S. government fined Facebook \$5 billion for this data breach.⁵³ The breach is one of the key reasons for the techlash.⁵⁴ But the financial penalty was not enough to change the company's business model.⁵⁵ Mark Zuckerberg and other Facebook officials subsequently apologized and testified in Congress.⁵⁶ Congress, however, distrusts Zuckerberg for good reason, and his duty remains to his shareholders, not the general public.⁵⁷ Facebook and these other platforms gather as much data as possible, usually without people's knowledge.⁵⁸ This eventually generates revenue as data is distributed to various advertisers and vendors.⁵⁹ Moreover, Facebook's slogan for years was "move fast and break things."⁶⁰ Meanwhile, President Trump encouraged and praised Wikileaks when it, and its Russian accomplices, released secret Democratic National Committee and Clinton

51. L.M., *"The Great Hack" Is a Misinformed Documentary About Misinformation*, ECONOMIST (July 24, 2019), <https://www.economist.com/prospero/2019/07/24/the-great-hack-is-a-misinformed-documentary-about-misinformation>.

52. Sarah Frier, Matt Day & Josh Eidelson, *Millions of Facebook Records Found on Amazon Cloud Servers*, BLOOMBERG (Apr. 3, 2019), <https://www.bloomberg.com/news/articles/2019-04-03/millions-of-facebook-records-found-on-amazon-cloud-servers> [<https://perma.cc/C2ZD-KM7P>].

53. Mike Snider & Edward C. Baig, *Facebook Fined \$5 Billion by FTC, Must Update and Adopt New Privacy, Security Measures*, USA TODAY (July 24, 2019), <https://www.usatoday.com/story/tech/news/2019/07/24/facebook-pay-record-5-billion-fine-u-s-privacy-violations/1812499001> [<https://perma.cc/QN2U-ZJSM>].

54. Emma Goldberg, *'Techlash' Hits College Campuses*, N.Y. TIMES (Jan. 11, 2020), <https://www.nytimes.com/2020/01/11/style/college-tech-recruiting.html>.

55. See Snider & Baig, *supra* note 53.

56. *Id.*

57. Besides the CA debacle, Zuckerberg broke a promise he had made to Congress that Facebook would keep WhatsApp separate. Mike Isaac, *Zuckerberg Plans to Integrate WhatsApp, Instagram, and Facebook Messenger*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html>.

58. Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html>.

59. Alexis C. Madrigal, *Facebook Didn't Sell Your Data; It Gave It Away*, ATLANTIC (Dec. 19, 2018), <https://www.theatlantic.com/technology/archive/2018/12/facebooks-failures-and-also-its-problems-leaking-data/578599/>.

60. See generally JONATHAN TAPLIN, *MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY* (2017).

campaign information.⁶¹ Wikileaks also had contacts with CA.⁶² And “Big Data” has us all in its eyes and ears.⁶³

Recent reports indicate Russia is using new methods to interfere in African elections, which may be their warm-up for the United States in 2020.⁶⁴ And the Trump Administration is essentially ignoring this voter-security problem, perhaps knowing Vladimir Putin’s candidate preference. False, inflammatory posts have also been used by increasingly autocratic governments in Europe, China, Arab governments, etc., to suppress democratic movements.⁶⁵ The anti-immigrant message has played especially well in Hungary and Poland.⁶⁶ This is ironic because some democracy movements relied on these platforms initially.⁶⁷ This was certainly the “Arab Spring” narrative before it became the Arab frost.⁶⁸

IV. ALGORITHM BIAS AND POLARIZATION

A core problem is that social media sites have financial incentives to use algorithms that channel consumers to the most inflammatory sites possible to solidify the user’s interest. Jack Balkin describes the business model as

61. Mayer, *supra* note 38.

62. Carole Cadwalladr & Stephanie Kirchgaessner, *Cambridge Analytica Director ‘Met Assange to Discuss U.S. Election’*, GUARDIAN (June 7, 2018), <https://www.theguardian.com/uk-news/2018/jun/06/cambridge-analytica-brittany-kaiser-julian-assange-wikileaks> [https://perma.cc/MQG8-QZCK].

63. Charlie Savage, *NSA Triples Collection of Data from U.S. Phone Companies*, N.Y. TIMES (May 4, 2018), <https://www.nytimes.com/2018/05/04/us/politics/nsa-surveillance-2017-annual-report.html>.

64. Davey Alba & Sheera Frenkel, *Russia Tests New Disinformation Tactics in Africa to Expand Influence*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/2019/10/30/technology/russia-facebook-disinformation-africa.html>.

65. *The Rise of Digital Authoritarianism: Fake News, Data Collection, and the Challenge to Democracy*, FREEDOM HOUSE (Nov. 1, 2018), <https://freedomhouse.org/article/rise-digital-authoritarianism-fake-news-data-collection-and-challenge-democracy> [https://perma.cc/LU8K-P2QX].

66. THOMAS HUDDLESTON & HIND SHARIF, WHO IS RESHAPING PUBLIC OPINION ON THE EU’S MIGRATION POLICIES 17 (2019), <https://www.migpolgroup.com/wp-content/uploads/2019/09/Discussion-Policy-Briefs-Public-Opinion.pdf> [https://perma.cc/VM2J-XVY7]; cf. Tyler Anbinder, *Trump Has Spread More Hatred of Immigrants than Any American in History*, WASH. POST (Nov. 7, 2019), https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html.

67. Jessi Hempel, *Social Media Made the Arab Spring, but Couldn’t Save It*, WIRED (Jan. 26, 2016), <https://www.wired.com/2016/01/social-media-made-the-arab-spring-but-couldnt-save-it> [https://perma.cc/FJ9C-HGEV].

68. *Id.*

“monetizing personal data.”⁶⁹ The relatively staid *New York Times* editorial writer, Thomas Friedman, recently wrote that Mark Zuckerberg’s profit motivation and Facebook’s negative global effects, along with President Trump, made Friedman “fear for his country” more than during the Cold War or Vietnam.⁷⁰ Just think of Facebook’s live coverage of the New Zealand massacre and Facebook’s contribution to genocide in Myanmar.⁷¹ Cass Sunstein decries this profit motive as well.⁷² And Tim Wu elaborates that the platforms are based on a pay-to-play model.⁷³ The sites are not geared toward promoting rational political debate. And they are not geared toward promoting family, friends, and other social connections. The sites travel in “clickbait.”

Cass Sunstein has explained Internet algorithms produce “cascades,” as the users receive postings suggesting they visit similar sites.⁷⁴ Political echo chambers are created.⁷⁵ And unlike a television, the individual will not usually run into opposing channels.⁷⁶ Sunstein has long advocated that these sites send contrasting information to its political “monogamists,” akin to the Federal Communications Commission’s former Fairness Doctrine.⁷⁷

Here are some other examples. YouTube contains moon landing videos. But

69. Jack Balkin, *Three Questions: Prof. Jack Balkin on Facebook and the Risks of ‘Data Capitalism’*, YALE INSIGHTS (May 8, 2018), <https://insights.som.yale.edu/insights/three-questions-prof-jack-balkin-on-facebook-and-the-risks-of-data-capitalism> [https://perma.cc/6WBQ-4RPA].

70. Thomas L. Friedman, *Trump, Zuckerberg & Pals Are Breaking America*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/2019/10/29/opinion/trump-zuckerberg.html>. Democracy’s global fragility has received huge attention. One prominent book is STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 56 (2018) (“The other major factor diminishing the power of traditional gatekeepers was the explosion of alternative media, particularly cable news and social media . . .”); *see generally* *CONSTITUTIONAL DEMOCRACY IN CRISIS?* (Mark Graber, Sanford Levinson & Mark Tushnet eds., 2018).

71. Eleanor Ainge Roy, *Facebook Are ‘Morally Bankrupt Liars’ Says New Zealand’s Privacy Commissioner*, GUARDIAN (Apr. 8, 2019), <https://www.theguardian.com/technology/2019/apr/08/facebook-are-morally-bankrupt-liars-says-new-zealands-privacy-commissioner> [https://perma.cc/S9C5-EXWY].

72. SUNSTEIN, *DIVIDED DEMOCRACY*, *supra* note 7, at 15 (discussing the “Daily Me”).

73. Tim Wu, *Facebook Isn’t Just Allowing Lies, It’s Prioritizing Them*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/opinion/facebook-political-ads.html> (“[P]aid promotions gain access to the full power of Facebook’s tools of microtargeting, its machine learning and its unrivaled collection of private information, all to maximize the influence of blatant falsehoods.”).

74. SUNSTEIN, *DIVIDED DEMOCRACY*, *supra* note 7, at 74.

75. *See id.*

76. CASS SUNSTEIN, *REPUBLIC* 73–74 (2001) [hereinafter SUNSTEIN, *REPUBLIC*].

77. *Id.* at 182–89.

down the rabbit hole, one finds videos or stories saying there never was a moon landing.⁷⁸ These are irrational conspiracy theories, yet they may be credible to those already disillusioned and frustrated. Or these fringe locations may themselves foster disillusionment. Another example is global warming.⁷⁹ If the public does not believe in climate change, then political ambition to combat the problem will not exist, and dysfunction will reign.

In 2019, the U.S. Court of Appeals for the Second Circuit ruled in *Force v. Facebook, Inc.* that Facebook was not liable even though its algorithms helped terrorists collaborate to attack U.S. citizens in Israel.⁸⁰ Chief Judge Robert Katzmann concurred in part but criticized the algorithms as not being neutral, given the hate-based linkage.⁸¹ And he cited data showing social media algorithms have contributed to political polarization.⁸² But some studies have taken the opposite view, though these studies are problematic.⁸³ Nonetheless, at the symposium, Jack Balkin described the nation as the most politically polarized since the Civil War, so algorithms are not just some minor academic concern. Indeed, this technology's potential was already apparent in Lawrence Lessig's classic book, *Code*.⁸⁴

78. The Telegraph, *The Moon Landing at 50: Debunking the Conspiracy Theories*, YOUTUBE (July 18, 2019), <https://www.youtube.com/watch?v=ewV3dBgTa5w> [<https://perma.cc/46FT-M5MT>].

79. Yu Luo, Jiaying Zao & Rebecca M. Todd, *Climate Explained: Why Are Climate Change Skeptics Often Right-Wing Conservatives?*, CONVERSATION (Sept. 18, 2019), <https://theconversation.com/climate-explained-why-are-climate-change-skeptics-often-right-wing-conservatives-123549> [<https://perma.cc/YN4E-EJ5K>].

80. *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), *petition for cert. filed*, (No. 19-859, 2020).

81. *Id.* at 83, 85 (Katzmann, J., concurring in part and dissenting in part). Katzmann also explained the CDA was meant to protect minors from indecent speech, not facilitate terrorist speech. *Id.*

82. *Id.* at 87.

83. See, e.g., Andrew Soergel, *Is Social Media to Blame for Political Polarization in America?*, U.S. NEWS (Mar. 20, 2017), <https://www.usnews.com/news/articles/2017-03-20/is-social-media-to-blame-for-political-polarization-in-america> [<https://perma.cc/46A3-2C3Z>] (detailing a study indicating elderly individuals were becoming the most polarized of all groups, even though their social media use was among the least frequent). One problem with this study is its small number of subjects. It also does not test how the increased use of social media by the subjects would have impacted them. *Id.* And there are many contrasting studies relied upon in the books and writings mentioned earlier by scholars such as Cass Sunstein and Tim Wu. *See supra* notes 72–73.

84. See generally LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* (1999).

V. THE CLOAK OF FREE SPEECH DOCTRINE

In 2019, Mark Zuckerberg defended Facebook at Georgetown University by invoking U.S. Supreme Court free speech norms.⁸⁵ He invoked the marketplace-of-ideas theory to double down on Facebook's refusal to censor false political speech.⁸⁶ Other inflammatory sites have offered similar defenses.⁸⁷ Many experts, however, criticized Zuckerberg as ignoring speech harms.⁸⁸ Yet Facebook does enforce speech limitations, though often not effectively.⁸⁹ Part of that may be due to the platform's size, but the policies also have ambiguities.⁹⁰ And Facebook has a hypocrisy problem, since it censors speech to satisfy foreign governments such as Turkey or India.⁹¹ Indeed, prominent screenwriter Aaron Sorkin explained how he was threatened with lawsuits by Zuckerberg over the accuracy of Sorkin's movie, *The Social Network*.⁹²

One problem here is that leading Supreme Court free speech cases have weak reasoning. A highly respected scholar referred to the Court's speech doctrine as akin to Ptolemy's astronomy.⁹³ For example, in *United States v. Alvarez*, the

85. Tony Romm, *Zuckerberg: Standing for Voice and Free Expression*, WASH. POST (Oct. 17, 2019), <https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression/> [https://perma.cc/Z6YD-8J3R] (text of Georgetown University speech).

86. *Id.*

87. See, e.g., Alan Feuer, *Free Speech Scholars to Alex Jones: You're Not Protected*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/business/media/alex-jones-free-speech-not-protected.html>.

88. Timothy Egan, *Why Doesn't Mark Zuckerberg Get It?*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/opinion/facebook-mark-zuckerberg.html>. Several *New Yorker* columnists separately criticized Zuckerberg's speech for varying reasons. See, e.g., Sue Halpern, *The Problem of Political Advertising on Social Media*, NEW YORKER (Oct. 24, 2019), <https://www.newyorker.com/tech/annals-of-technology/the-problem-of-political-advertising-on-social-media>; Andrew Marantz, *Mark Zuckerberg Still Doesn't Get It*, NEW YORKER (Oct. 19, 2019), <https://www.newyorker.com/news/daily-comment/mark-zuckerberg-still-doesnt-get-it>.

89. *Community Standards: Objectionable Content*, FACEBOOK, https://www.facebook.com/communitystandards/objectionable_content [https://perma.cc/H7J6-VXG9].

90. See *id.*; *infra* note 148.

91. Hanna Kozlowska, *These Are the Countries Where Facebook Censors the Most Illegal Content*, QUARTZ (May 16, 2018), <https://qz.com/1279549/facebook-censors-the-most-illegal-content-in-turkey/> [https://perma.cc/9J3Y-Y6AH].

92. Aaron Sorkin, *Aaron Sorkin: An Open Letter to Mark Zuckerberg*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/opinion/aaron-sorkin-mark-zuckerberg-facebook.html>.

93. Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Makes It Particularly Urgent for the*

Supreme Court in 2012 ruled the Stolen Valor Act violated the First Amendment, despite the Act outlawing *false* representations about military service.⁹⁴ Cass Sunstein and others have argued against protecting lies and “fake news,” since they do not further any marketplace.⁹⁵ Moreover, there are now “deep fakes” in which sophisticated algorithms and artificial intelligence create undetectable false imagery.⁹⁶

The U.S. Supreme Court in *R.A.V. v. City of St. Paul* ruled in 1992 that, though fighting words were unprotected, a law banning racist fighting words was illegal content discrimination.⁹⁷ Justice Antonin Scalia’s majority engaged in categorical distortions as the concurring opinions pointed out that the greater ban permits the lesser.⁹⁸ Municipalities should be able to ban the type of racist fighting words that could, for example, cause urban riots.⁹⁹ Moreover, the United States is one of the only countries that allows hate speech.¹⁰⁰ Similarly, social media facilitates violent, white-supremacist posts.¹⁰¹

Then, there are misogynistic posts. Some are consistent with the 2015 decision in *Elonis v. United States*, where the Supreme Court reversed the conviction of a man who used Facebook to terrify his ex-wife.¹⁰² The Court, however, found the threats were not clear enough.¹⁰³ *R.A.V.* and *Elonis* are unfortunately reasoned. At least state cyberstalking and revenge-porn laws have

Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment, 81 IOWA L. REV. 883, 885 (1996).

94. United States v. Alvarez, 567 U.S. 709, 715 (2012).

95. Cass R. Sunstein, *Falsehoods and the First Amendment*, (July 25, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426765 [<https://perma.cc/YNF7-S2F2>] (explaining that a chilling effect on speech is not always bad).

96. *Id.* at 2.

97. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

98. *Id.* at 400–01 (White, J., concurring).

99. *Id.* at 416 (Stevens, J., concurring).

100. Adam Liptak, *Unlike Other Countries, U.S. Defends Freedom to Offend*, N.Y. TIMES (Nov. 8, 2008), <https://www.nytimes.com/2008/06/12/us/12hate.html>.

101. Editorial Board, *We Have a White Nationalist Terrorist Problem*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/opinion/mass-shootings-domestic-terrorism.html>; Daisuke Wakabayashi, *Legal Shield for Websites Rattles Under Onslaught of Hate Speech*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/technology/section-230-hate-speech.html?action=click&module=Well&pgtype=Homepage§ion=Technology>.

102. *Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015).

103. *Id.* at 2012.

generally survived.¹⁰⁴ But one counterargument is that allowing hate speech could permit human-rights entities to intervene in certain situations.¹⁰⁵

Any doubts that these platforms cause harm should have disappeared after last year's El Paso mass shooting. The police soon learned the shooter had published a racist, hate-filled manifesto.¹⁰⁶ Yet much of the manifesto echoed writings from hate-filled social media sites called 8Chan and 4Chan.¹⁰⁷ These sites can appeal to individuals desperately looking for identity affirmation.¹⁰⁸

Another problematic case is the 1969 per curiam decision in *Brandenburg v. Ohio*, where the Court correctly struck down a law that prohibited the advocacy of crimes.¹⁰⁹ Though well-intentioned, the Court said incitement of illegal conduct could only be prohibited if the speech advocated imminent lawlessness and was likely to cause this lawlessness.¹¹⁰ This test does not fit the social media scenario where no crowd is cheered on by the dangerous speech.¹¹¹ Some federal appellate courts have therefore upheld convictions, even in the absence of classic imminence, in Internet cases, such as the ruling on the "Nuremberg Files" from the Ninth Circuit.¹¹² That decision is correct, but it is problematic under a strict reading of *Brandenburg*.

The reality is social media allows U.S. white supremacists to work with European white supremacists and permits jihadists all over the globe to

104. See Ruobing Su, Tom Porter & Michelle Mark, *Here's a Map Showing Which US States Have Laws Against Revenge Porn — and Those Where It's Still Legal*, BUS. INSIDER (Oct. 30, 2019), <https://www.businessinsider.com/map-states-where-revenge-porn-banned-2019-10> [https://perma.cc/AM9Z-65PQ].

105. Hadi Al Khatib & Dia Kayyali, *YouTube Is Erasing History*, N.Y. TIMES (Oct. 23, 2019), <https://www.nytimes.com/2019/10/23/opinion/syria-youtube-content-moderation.html>.

106. See Jonathan Taplin, *How to Force 8Chan, Reddit and Others to Clean up*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/opinion/8chan-reddit-youtube-el-paso.html>.

107. *Id.*

108. See David Brooks, *When Trolls and Crybullies Rule the Earth*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/opinion/online-trolling-empathy.html>. These sites also cause mental health problems. See, e.g., Holly B. Shakya & Nicholas A. Christakis, *A New More Rigorous Study Confirms: The More You Use Facebook, the Worse You Feel*, HARV. BUS. REV. (Apr. 10, 2017), <https://hbr.org/2017/04/a-new-more-rigorous-study-confirms-the-more-you-use-facebook-the-worse-you-feel> [https://perma.cc/UK29-MNQK].

109. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

110. *Id.* at 447.

111. *See id.*

112. See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002) (en banc).

collaborate, as Chief Judge Katzmann from the Second Circuit showed.¹¹³ The Internet also spreads contagion. For example, the Netflix television show *13 Reasons Why* is about teen suicide, and there were reports of a spike in teen suicides after the show debuted.¹¹⁴ Further, these sites have an addictive quality that has attracted certain individuals and led them to commit horrific acts.¹¹⁵ They provide an identity to lonely, angry people.¹¹⁶ Yet as discussed previously, these people reside in echo chambers, though there is a chicken-and-egg problem too.¹¹⁷

And even if one thinks the government should not censor this speech, there is no reason why private platforms should allow it, especially when there is bullying, stalking, threats, incitement, hate speech, and the like. The Dark Web is perhaps even worse, as it seems to exist only to facilitate illicit activity, such as identity theft and criminal collaboration.¹¹⁸

VI. PLATFORM IMMUNITY UNDER § 230

One of the most important reasons for these dominant platforms is another part of the CDA, 47 U.S.C. § 230. Jeff Kosseff recently authored a book on this, *The Twenty-Six Words That Created the Internet*. Specifically, § 230(c)(1) states, “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.”¹¹⁹ This means noninterfering platforms remain immune from defamation, incitement, emotional distress,

or other lawsuits, regardless of what third parties post,¹²⁰ but the platforms generate

113. See *Force v. Facebook, Inc.*, 934 F.3d 53, 82–83, 84–85 (2d Cir. 2019) (Katzmann, J., concurring in part and dissenting in part), *petition for cert. filed*, (No. 19-859, 2020).

114. Matthew S. Schwartz, *Teen Suicide Spiked After Debut of Netflix’s ‘13 Reasons Why,’ Study Says*, NPR (Apr. 30, 2019), <https://www.npr.org/2019/04/30/718529255/teen-suicide-spiked-after-debut-of-netflixs-13-reasons-why-report-says> (finding teen suicides increased over 28 percent in the first month, but the study could not prove causation, only correlation).

115. See *Brooks*, *supra* note 108; *McCarthy-Jones*, *supra* note 5.

116. See *Brooks*, *supra* note 108.

117. See *SUNSTEIN*, *DIVIDED DEMOCRACY*, *supra* note 7.

118. Kristin Broughton, *Three Charged with Operating Illicit Dark-Web Marketplace*, WALL STREET J. (May 3, 2019), <https://www.wsj.com/articles/three-charged-with-operating-illicit-dark-web-marketplace-11556928822>.

119. 47 U.S.C. § 230 (c)(1) (2018).

120. See *id.*

more usage by sending links to the speakers.¹²¹

In *Zeran v. America Online, Inc.*, a federal judge in 1997 confirmed § 230 prevented America Online (AOL) from being liable for third-party posts.¹²² He referenced congressional “intent ‘to encourage the development of technologies, procedures, and techniques’ that moderate offensive content,” as opposed to making the platform host liable.¹²³ Subsequently, the U.S. Court of Appeals for the Fourth Circuit in 1997 agreed,¹²⁴ and prominent judge Harvie Wilkinson endorsed even more speech protection.¹²⁵ That paved the way for this Internet.¹²⁶ The only statutory exception is for sex trafficking.¹²⁷ And subsequent case law has affirmed this broad § 230(c)(1) immunity.¹²⁸ Danielle Citron and Benjamin Wittes point out how the Second Circuit case, previously referenced, and others have even used § 230 to immunize Facebook from liability regarding civil actions involving material support for terrorism.¹²⁹

VII. CURRENT PROPOSALS RELATED TO SOCIAL MEDIA

Former presidential candidate Elizabeth Warren, state attorneys general, politicians, and scholars have recommended that federal antitrust laws dismember these goliaths.¹³⁰ This threat has caused some platforms to self-regulate, as will be shown.¹³¹ But the self-regulation has not been dramatic. Moreover, pending

121. See JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 212 (2019).

122. *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1134–35 (E.D. Va. 1997), *aff’d*, 129 F.3d 327 (4th Cir. 1997).

123. KOSSEFF, *supra* note 121, at 89.

124. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

125. KOSSEFF, *supra* note 121, at 93.

126. *See id.*

127. 47 U.S.C. § 230 (e)(5) (2018).

128. Danielle Keates Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 402 (2017).

129. *Id.* at 403. There are many other § 230 material-support cases, but the courts have usually ruled that causation cannot be shown, rather than focus on what § 230 means. For a list of blog posts on these other cases, see Eric Goldman, *Second Circuit Issues Powerful Section 230 Win to Facebook in “Material Support for Terrorists” Case*—Force v. Facebook, TECH. & MARKETING L. BLOG (July 31, 2019), <https://blog.ericgoldman.org/archives/2019/07/second-circuit-issues-powerful-section-230-win-to-facebook-in-material-support-for-terrorists-case-force-v-facebook.htm> [https://perma.cc/B677-6UG3]. Goldman is a strong supporter of § 230 immunity. *See id.*

130. See, e.g., Matt Stevens, *Elizabeth Warren on Breaking up Big Tech*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/politics/elizabeth-warren-break-up-amazon-facebook.html>.

131. *See* Wakabayashi, *supra* note 101.

legislative proposals seem to lack the necessary votes at this point.¹³² Nonetheless, Aaron Sorkin recently warned, “The law hasn’t been written yet—yet—that holds carriers of user-generated internet content responsible for the user-generated content they carry, just like movie studios, television networks and book, magazine and newspaper publishers.”¹³³

Facebook has committed to having 35,000 employees search for unpermitted content,¹³⁴ but that will still not be enough, as Siva Vaidhyanathan has argued.¹³⁵ And Facebook supposedly prohibits other false advertising.¹³⁶ Facebook has also taken down sites, for example, of white supremacist Alex Jones and Nation of Islam leader Louis Farrakhan based on their dangerous content.¹³⁷ And Facebook is apparently cutting off links to the violent sites 8Chan and 4Chan mentioned earlier.¹³⁸ Further, Facebook has tried a method that redirects users looking for hate speech to contrary sites.¹³⁹ Moreover, Facebook is also establishing its own supreme court, namely an 11-person, internal board of experts to assist with content decisions.¹⁴⁰

Zuckerberg’s decision not to remove false political ads, however, is meeting significant resistance from a large group of Facebook employees who signed a joint letter.¹⁴¹ The letter emphasizes the policy will only enhance distrust of

132. *See generally id.*

133. Sorkin, *supra* note 92.

134. Egan, *supra* note 88. Facebook’s latest content restrictions are at <https://www.facebook.com/communitystandards/> [<https://perma.cc/GT2K-STD6>].

135. Siva Vaidhyanathan, *The Real Reason Facebook Won’t Fact-Check Political Ads*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/2019/11/02/opinion/facebook-zuckerberg-political-ads.html>.

136. Matthew S. Schwartz, *Facebook Bans Alex Jones, Louis Farrakhan, and Other ‘Dangerous’ Individuals*, NPR (May 3, 2019), <https://www.npr.org/2019/05/03/719897599/facebook-bans-alex-jones-louis-farrakhan-and-other-dangerous-individuals> [<https://perma.cc/3ZWS-5MPH>].

137. *Id.*

138. Davey Alba et. al., *Facebook Expands Definition of Terrorist Organizations to Limit Extremism*, N.Y. TIMES (Sept. 18, 2019), <https://www.nytimes.com/2019/09/17/technology/facebook-hate-speech-extremism.html?action=click&module=Well&pgtype=Homepage§ion=Technology>.

139. *Id.*

140. *Id.*

141. *Read the Letter Facebook Employees Sent to Mark Zuckerberg About Political Ads*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/technology/facebook-mark-zuckerberg-letter.html>.

Facebook.¹⁴² Facebook's most infamous fake ad misinforms readers about the actions of former Vice President Joe Biden (President Trump's possible future opponent) and Biden's son.¹⁴³ That paid ad remains.¹⁴⁴ Thus, Facebook employees eloquently wrote:

Misinformation affects us all. Our current policies on fact checking people in political office, or those running for office, are a threat to what FB stands for. We strongly object to this policy as it stands. It doesn't protect voices, but instead allows politicians to weaponize our platform by targeting people who believe that content posted by political figures is trustworthy.¹⁴⁵

Zuckerberg has also befriended Tucker Carlson, the Fox News commentator who has made numerous misogynistic comments,¹⁴⁶ and Zuckerberg has started a purportedly elite news feed yet allowed the alt-right site Breitbart to be part of it.¹⁴⁷ In general, Facebook has applied its policies inconsistently, and it still has failed at removing some horrific child pornography by not using the most sophisticated tracking methods.¹⁴⁸

142. *Id.*

143. Cecilia Kang & Mike Isaac, *Biden Escalates Attack on Facebook over False Political Ads*, N.Y. TIMES (Oct. 18, 2019), <https://www.nytimes.com/2019/10/18/technology/biden-facebook-ad.html>.

144. *Id.*

145. *Read the Letter Facebook Employees Sent to Mark Zuckerberg About Political Ads*, *supra* note 141.

146. 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> [https://perma.cc/4PS9-94SB].

147. Charlie Warzel, *Why Will Breitbart Be Included in 'Facebook News?'*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/opinion/mark-zuckerberg-facebook.html>. Google had earlier proposed more "original" news. Marc Tracy, *Google Says a Change in Its Algorithm Will Highlight 'Original Reporting'*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/business/media/google-algorithm-original-reporting.html?action=click&module=Well&pgtype=Homepage§ion=Technology>. These platforms are acting to show they supposedly care about the decimation they have caused of both some important newspapers and the local reporting done by those papers.

148. Reka Basu, Opinion, *Facebook's Ad Policy Seems to Have It Backwards*, DES MOINES REG., Nov. 10, 2019, at 1; Tracy, *supra* note 147. One reason Facebook's policies have been applied inconsistently is sloppy drafting. They have a policy essentially outlawing the "glorification" or "celebration" of violent depictions. *Violent and Graphic Content*, FACEBOOK, https://www.facebook.com/communitystandards/graphic_violence [https://perma.cc/VC3W-X3HN]. Yet that would seem to prohibit depictions of the crucifixion. *See id.* And that section is distinct from one on "Violence and Criminal Behavior." *Compare id.*, with *Violence and*

Twitter, by contrast, has announced it will prohibit false political advertising globally. Twitter's CEO, Jack Dorsey, stated:

This isn't about free expression. This is about paying for reach. And paying to increase the reach of political speech has significant ramifications that today's democratic infrastructure may not be prepared to handle. It's worth stepping back in order to address.

....

.... Internet political ads present entirely new challenges to civic discourse: machine learning-based optimization of messaging and micro-targeting, unchecked misleading information and deep fakes. All at increasing velocity, sophistication, and overwhelming scale.¹⁴⁹

Velocity is presumably meant to reference artificial intelligence and quantum computing, among other developments.¹⁵⁰ Further, Dorsey acknowledged this material could impact millions of voters,¹⁵¹ so it is Zuckerberg's move. Twitter also announced it would block statements of religious hatred.¹⁵² And YouTube has announced it will remove white-supremacist or similar material (e.g., statements that there was no Holocaust).¹⁵³ But even Twitter still allows numerous

Criminal Behavior, FACEBOOK, https://www.facebook.com/communitystandards/violence_criminal_behavior [https://perma.cc/J9B3-JWKK]. On the pedophile front, see Michael H. Keller & Gabriel J.X. Dance, *Child Abusers Run Rampant as Tech Companies Look the Other Way*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/interactive/2019/11/09/us/internet-child-sex-abuse.html?searchResultPosition=1> (showing tech company sites such as Google Drive, Dropbox, and Microsoft OneDrive do not really have internal policies requiring them to search for uploaded pedophilia posts, in contrast to Facebook, which is at least trying); Michael H. Keller & Gabriel J.X. Dance, *The Internet Is Overrun with Images of Child Sexual Abuse. What Went Wrong?*, N.Y. TIMES (Sept. 29, 2019), <https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html?searchResultPosition=12>.

149. Kara Swisher, *Was That the Best Subtweet Ever?*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/2019/10/30/opinion/political-advertising-facebook-twitter.htm?action=click&module=Opinion&pgtype=Homepage>.

150. *See id.*

151. *Id.*

152. *Twitter Bans Religious Insults Calling Groups Rats or Maggots*, BBC NEWS (July 9, 2019), <https://www.bbc.com/news/technology-48922546> [https://perma.cc/Q7Y4-ETT2] (detailing Twitter's ban on "dehumanizing" religious comments).

153. Kaya Yurrief, *YouTube Says It's Removing More Hate Speech than Before but Controversial Channels Remain up*, CNN (Sept. 3, 2019), <https://www.cnn.com/2019/09/03/tech/youtube-hate-speech/index.html> [https://perma.cc/63US-BS2K]; *see* Natasha

problematic statements, especially from its most famous user, President Trump.¹⁵⁴ His tweets often have racial and sexist tones, especially in the immigration area, and many are false.¹⁵⁵ The *New York Times* recently ran a Sunday-front-page investigative report titled *The Twitter Presidency*.¹⁵⁶ The main article said, “Such is the frenetic life cycle of conspiracy-driven propaganda, fakery, and hate in the age of the first Twitter presidency.”¹⁵⁷ The President even tried to block political opponents from accessing his tweets.¹⁵⁸ But the Second

Circuit confirmed the President could not censor his tweets, given this country’s principles of democracy and freedom of speech.¹⁵⁹

Numerous proposals for altering § 230 immunity have been offered.¹⁶⁰ Senator Mark Warner issued a white paper stating that deep fakes should not be immune.¹⁶¹ He even proposed a state law tort for failure to take down deep fakes.¹⁶²

Lomas, *YouTube Is Now Taking Down More Videos of Known Extremists – in Major Policy Change*, TECHCRUNCH (Nov. 4, 2017), <https://techcrunch.com/2017/11/14/in-major-policy-change-youtube-is-now-taking-down-more-videos-of-known-extremists/> [https://perma.cc/AN8X-FYH4]. But this change has not gone smoothly. See generally Neima Jahromi, *The Fight for the Future of YouTube*, NEW YORKER (July 8, 2019), <https://www.newyorker.com/tech/annals-of-technology/the-fight-for-the-future-of-youtube>.

154. See Terry Collins, *Trump’s Itchy Twitter Thumbs Have Redefined Politics*, CNET (Jan. 20, 2018), <https://www.cnet.com/news/donald-trump-twitter-redefines-presidency-politics/> [https://perma.cc/55CB-QSQL].

155. See, e.g., Anbinder, *supra* note 66; see also Steve Rattner, *Donald Trump Has Told 13,435 Lies While in Office*, MSNBC (Oct. 18, 2019), <https://www.msnbc.com/morning-joe/watch/trump-has-told-13-435-while-in-office-wapo-71560773873> [https://perma.cc/V6B7-FZCK].

156. Michael D. Shear et. al., *How Trump Reshaped the Presidency in over 11,000 Tweets*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html>. Former Democratic presidential candidate Kamala Harris has argued Twitter must block Trump’s posts as they violate company policies. Donie O’Sullivan, *Kamala Harris Calls on Twitter CEO to Suspend Donald Trump*, CNN (Oct. 2, 2019), <https://www.cnn.com/2019/10/02/politics/kamala-harris-donald-trump-twitter/index.html> [https://perma.cc/24FX-4SQZ].

157. McIntire et. al., *supra* note 8.

158. Hadas Gold, *Trump Unblocks Some, but Not All Twitter Users*, CNN BUSINESS (June 5, 2018), <https://money.cnn.com/2018/06/05/media/trump-twitter-block/index.html> [https://perma.cc/2779-542N].

159. Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019).

160. See generally Ellen Goodman & Ryan Whittington, *Section 230 of the Communications Decency Act and the Future of Online Speech*, GERMAN MARSHALL FUND U.S. (Aug. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458442.

161. *Id.* at 7.

162. *Id.* at 7–8.

Senator Joe Manchin has recommended an exception from immunity for drug trafficking.¹⁶³ Danielle Citron and Benjamin Wittes argue platforms should only be immune if they have engaged in “reasonable efforts to address unlawful activity.”¹⁶⁴ Numerous other proposals are being floated, such as curing supposed anticonservative biases and so-called “quid pro quo” standards.¹⁶⁵ There, immunity would only apply if the platforms banned improper posts.¹⁶⁶ Some of these proposals, however, would subject platforms to substantial litigation and interfere with their services. Experts also suggest platforms impose disclosure obligations.¹⁶⁷

The European Union recently adopted a law to enhance individual privacy online called the General Data Protection Regulation (GDPR).¹⁶⁸

Germany is even more protective.¹⁶⁹ The British have issued an Online Harms White Paper for solving these problems.¹⁷⁰ The European presumption is that users must consent to data distribution whereas the U.S. default is the opposite.¹⁷¹ European courts have also recognized a “right to be forgotten” in certain situations

163. *Id.* at 8.

164. *Id.* at 9; Citron & Wittes, *supra* note 128, at 416.

165. Goodman & Whittington, *supra* note 160, at 10 (Senator Josh Hawley’s proposal); *id.* at 11 (Rebecca Tushnet’s suggestion).

166. *See id.* at 10, 11.

167. See, e.g., Sandra M. Jones, *Chicago Booth’s Stigler Center Suggests Way to Protect Consumers While Promoting Competition*, U. CHI. NEWS (Sept. 17, 2019), <https://news.uchicago.edu/story/policy-brief-how-rein-power-big-tech> [https://perma.cc/4X64-5K8N] (noting the University of Chicago Booth Business School’s Stigler Center issued a report recommending many new policies, including federal law “[e]xtend campaign disclosure obligations to specifically target digital platforms, including relationships with politicians, academic funding, and the intentional promotion or demotion of content related to political figures”).

168. *Complete Guide to GDPR Compliance*, GDPR.EU, <https://gdpr.eu/> [https://perma.cc/66T8-D4VC].

169. The law has the acronym BDSG. Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], June 30, 2017 (Ger.), https://www.gesetze-im-internet.de/bdsg_2018/ [https://perma.cc/U8RC-YCWB].

170. *Online Harms White Paper*, GOV.UK, <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper> [https://perma.cc/ HM3L-4YLL].

171. Ulrich Wuermeling, *A Reality Check for Europe’s Data Privacy Law*, U.S. NEWS & WORLD REP. (May 31, 2019), <https://www.usnews.com/news/best-countries/articles/2019-05-31/commentary-a-reality-check-for-europes-data-privacy-law> [https://perma.cc/7NX8-FAJX]. So far, California is the only U.S. state that has enacted a privacy law with significant European characteristics. *Id.*

that is part of the GDPR.¹⁷²

Jack Balkin and Jonathan Zittrain propose social media platforms be treated as “information fiduciaries.”¹⁷³ Balkin analogizes this to the duty that a lawyer owes a client or a doctor owes a patient.¹⁷⁴ For example, Facebook would then have a duty of loyalty, good faith, and candid disclosure regarding how user data is employed. This proposal has drawn support from over a dozen U.S. senators and even Zuckerberg himself, apparently.¹⁷⁵

Yet Lina Khan and David Pozen have highlighted some problems, such as the platform facing conflicts between its obligations to shareholders and its new duty to users.¹⁷⁶ This approach also does nothing about the massive size of these entities, which includes their political lobbying power.¹⁷⁷ Also, corporations have behaved badly despite fiduciary duties. Moreover, this approach mainly addresses privacy concerns, yet these platforms create other democracy deficits. Further, Balkin and Zittrain are not clear about how they would enforce this plan.

Jed Rubenfeld has argued that these entities are so dominant and that government has been so supportive, they could be treated as state actors.¹⁷⁸ But this seems like an untenable stretch for state-action doctrine, especially with this current Supreme Court. Moreover, it’s not clear whether Rubenfeld’s proposal would cause more harm than good, since state actors cannot censor as much as private actors.¹⁷⁹ It is vital to make progress regarding these platforms because the scholar Niall Ferguson is right: “Social networks are creating a global crisis for

172. Datenschutz-Grundverordnung [DSGVO] [General Data Protection Regulation], art. 17, *translation at* <https://gdpr-info.eu/art-17-gdpr/> (Ger.) [<https://perma.cc/3NMQ-5D2Q>].

173. See, e.g., Balkin, *Information Fiduciaries*, *supra* note 22, at 1186–87; Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/>.

174. Balkin, *Information Fiduciaries*, *supra* note 22, at 1125.

175. Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 500–01 (2019). Khan and Pozen also indicate that Balkin’s theory implicitly trusts the major tech companies. *Id.* at 534. Yet the title of the *Atlantic* magazine article by Balkin and Zittrain suggests otherwise. *Id.* at 509. Further criticisms of the fiduciary theory can be found at an online symposium. *Information Fiduciaries*, LAW & POL. ECON. (July 4, 2019), <https://lpeblog.org/category/symposia/information-fiduciaries/> [<https://perma.cc/LY72-WUL2>].

176. Khan & Pozen, *supra* note 175, at 524.

177. *Id.* at 528.

178. Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE (Nov. 4, 2019, 8:20 AM), <https://www.lawfareblog.com/are-facebook-and-google-state-actors> [<https://perma.cc/BHY4-QR6S>].

179. *See id.*

democracy”¹⁸⁰

VIII. SOME SUGGESTIONS

Another key part of the CDA is 47 U.S.C. § 230(c)(2), which specifies the following:

No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to . . . material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected”¹⁸¹

This is the “Good Samaritan” provision, and it is an important extension of the safe-harbor immunity referenced previously.¹⁸² It has been under-discussed by scholars.

While some objected to the Good Samaritan provisions as endorsing censorship, § 230(c)(2) left the decision to private platforms and showed congressional concern over only specific kinds of Internet content.¹⁸³ My view is that the only way these platforms will avoid major government regulation is for the sites to self-regulate content using this provision as a guide. This self-regulation could produce higher quality political discourse. The need for broader and more effective self-regulation is especially clear regarding children.¹⁸⁴ And any argument that self-regulation will cut shareholder profits in the short run by reducing usage does not apply in the long run given this techlash.

Here’s the crucial point—these companies are moving in the content-moderation direction anyway, as discussed. This is not a pipe dream. Further, more self-regulation could prevent these companies from having their business models changed against their will.¹⁸⁵

180. Ferguson, *supra* note 4.

181. 47 U.S.C. § 230 (2018).

182. *See id.*

183. *See id.*

184. The U.S. Supreme Court has found several laws designed to protect children from sexually explicit material to be unconstitutional. *See* Mark S. Kende, *The U.S. Supreme Court’s First Amendment Refusal to Protect Children Regarding Sexually Explicit Speech on the Internet*, in 15 DIGITIZATION AND THE LAW 111, 111–26 (Eric Hilgendorf & Jochen Feldle eds., 2018) (for online access, visit <https://www.nomos-elibrary.de/10.5771/9783845289304-111/the-u-s-supreme-court-s-first-amendment-refusal-to-protect-children-regarding-sexually-explicit-speech-on-the-internet?page=1>).

185. A detailed analysis of a possible change to the business model is not this Article’s

IX. CONCLUSION

Inevitably, the companies will fall short in their content-moderation implementation efforts, but § 230(c)(2) imposes a good faith test at most.¹⁸⁶ The idea of making the platforms send out opposing links or using a redirect method also seems promising, as suggested in the Cass Sunstein books mentioned earlier.¹⁸⁷ The fiduciary duty idea is potentially beneficial, especially if Professors Balkin and Zittrain answer the objections and garner even greater political support.¹⁸⁸ Indeed, the English white paper proposes a statutory duty of care that goes much farther.

Finally, the U.S. government could enact a data privacy law, utilize a suitable government agency for enforcement, and bring antitrust lawsuits if private solutions are not carried out. The University of Chicago Booth School of Business's Stigler Center has recently issued an important, lengthy document advocating for such an agency and making many other recommendations.¹⁸⁹ But enacting private, content-moderation restrictions and reducing § 230(c)(1) immunity seem the most practical for now.¹⁹⁰ In the end, however, making our democracy functional will require significant platform changes. Otherwise, these sources of private power will contribute to more democratic dysfunction and oligarchy.

topic (nor was it the topic of my symposium presentation). Moreover, it is far too complex for this Article's space limits.

186. See 47 U.S.C. § 230.

187. See SUNSTEIN, DIVIDED DEMOCRACY, *supra* note 7; SUNSTEIN, REPUBLIC, *supra* note 76. But see Christopher Bail et al., *Exposure to Opposing Views on Social Media Can Increase Political Polarization*, 115 PROC. NAT'L ACAD. SCI. 9216 (2018).

188. Enhanced fiduciary obligations for the board of directors of these tech platforms is another one of the Stigler Center's recommendations. Jones, *supra* note 167. So it is in the realm of the possible.

189. Jones, *supra* note 167 (finding its base in part on the leadership of economist Dr. Luigi Zingales); see Steve Lohr, *What, If Anything, Should Be Done to Rein in Big Tech?*, N.Y. TIMES (Nov. 11, 2019), <https://www.nytimes.com/2019/11/11/business/dealbook/makan-delrahim-kevin-systrom-bill-gates-regulation-technology.html> ("Congress is looking at creating a new digital authority or significantly expanding the powers of the Federal Trade Commission to regulate the tech giants."). Each giant creates unique problems, though there is also overlap. Simplistically, Google manipulates searches, Facebook has problematic paid and other content, Apple controls what apps it allows, and Amazon's Cloud services and other market powers are massive. See *supra* note 26.

190. Jones, *supra* note 167 ("Remove the safe-harbor protections associated with Section 230 of the 1996 Communications Decency Act for content actively promoted and monetized by digital platforms.").