

The First Amendment's Role on the Internet Governed by Private Actors: Disclosure Requirements as the "Best of Disinfectants"

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Introduction

In the twenty years since the Supreme Court first considered regulation of speech on the internet,¹ the medium has lived up to its promise to provide a myriad of opportunities for speech. But in that same time period, the enormously expanded power of companies like Twitter and Facebook over those speech opportunities has brought new challenges to First Amendment jurisprudence. As a result, courts, legislatures, scholars, and commentators have grappled with how the First Amendment should respond to the internet phenomenon and whether longstanding principles and precedent are up to the challenge.

Government-imposed disclosure requirements on internet platforms regarding how they curate their content is the most plausible option for marrying First Amendment values with practical considerations. Part I of this Article recounts how the prominence of social media platforms at once enhances First Amendment values, places pressure on longstanding doctrine, and presents new challenges to applying First Amendment protections. Part II reviews the background and recent changes to the Communications Decency Act of 1996's liability shield as applied to speech posted on social media platforms. Part III reviews scholarship on the First Amendment's role in the context of social media platforms and concludes that disclosure requirements are the most workable solution.

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¹ See *Reno v. ACLU*, 521 U.S. 844 (1997) (speaking enthusiastically of how the "vast democratic forums of the Internet" held a great promise to enhance the free speech values of the First Amendment).

I. The Internet's Promotion of, and Clash with, First Amendment Values

A. *Explosion of Access to Channels for Speech*

The internet provides twenty-first-century citizens with twenty-four-hour access to channels for speaking and hearing about everything, including the location of a Black Lives Matter demonstration, presidential policy statements, and college roommates' travel adventures. This instant access includes fora for interacting with elected officials, friends, and strangers with similar interests, and for speaking on a myriad of topics. The internet—and especially the social media platforms that have emerged to host, publish, and promote speech—provides more access than ever for people to express themselves, seemingly in furtherance of the bedrock principle that “debate on public issues should be uninhibited, robust, and wide-open.”²

The Court first considered proposed restrictions on speech on the internet in 1997, finding them unconstitutional.³ Twenty years later, in the first case in which the Court addressed the First Amendment's role in the context of the modern internet, the Court unequivocally described the paramount role the medium plays in citizens exercising their First Amendment rights.⁴ Writing for a unanimous Court in *Packingham v. North Carolina*,⁵ Justice Anthony Kennedy stated that the “most important [place for speech] is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.”⁶ In those certain terms, the Court seemed to elevate internet fora to the vaulted tier of traditional public fora like public squares and streets.⁷

Striking down a North Carolina law restricting internet use by those convicted of certain sex crimes, the *Packingham* Court emphasized that a “fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.”⁸ This could be rewritten to read that all persons have a right to access the internet in order to speak and listen.

² *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

³ *See Reno*, 521 U.S. 844.

⁴ *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

⁵ 137 S. Ct. 1730 (2017).

⁶ *Id.* at 1735 (citation omitted) (quoting *Reno*, 521 U.S. at 868).

⁷ *See id.* This is an unsurprising stance from what First Amendment scholars have dubbed the “most speech-protective Court in a generation, if not in our history.” Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 64 (2016).

⁸ *Packingham*, 137 S. Ct. at 1735.

And for the most part, all persons can easily access the internet to speak and listen; all they have to do is sign up for a Facebook, Twitter, or Instagram account. These platforms play a key role in individuals' personal lives as well as national events.

Due to the influence and pervasiveness of these major platforms, there have been calls for both greater transparency regarding social media companies' moderation or curation of content⁹ as well as for liability for social media companies that host harmful speech.¹⁰ The topic of regulation of speech on the internet has generated a multitude of scholarly articles evaluating whether and how the First Amendment can play a role in the realm of online speech.

Behind the concerns over the free speech values of social media companies is the recognition that the primary body controlling speech is not the government, but rather private companies. And these private companies fall outside the scope of the constitutional rights codified in the Bill of Rights. On its face, the First Amendment¹¹ seems largely powerless to affect private governance of internet speech.

B. *Enhancement of, and Pressure on, First Amendment Values and Doctrines*

With the evolution of speech and its shift from physical spaces to the internet has come the amplification of views that much of society finds abhorrent, testing the bounds of longstanding First Amendment doctrines. The Islamic State of Iraq and Syria, known as ISIS, relies on social media to recruit followers—in one instance by a “Cats of Jihad” campaign—and promote its message.¹² Students are now unsure of the bounds of their First Amendment protections when posting unsavory

⁹ See Letter from John Thune, Chairman, U.S. Senate Comm. on Commerce, Sci., & Transp., to Mark Zuckerberg, Chairman & Chief Exec. Officer, Facebook, Inc. 2–3 (May 10, 2016), <https://perma.cc/7NBX-FK2X>.

¹⁰ See Tarleton Gillespie, *How Social Networks Set the Limits of What We Can Say Online*, WIREd (June 26, 2018, 7:00 AM), <https://perma.cc/6LGP-TXSB>; cf. Craig Timberg et al., *Fiery Exchanges on Capitol Hill as Lawmakers Scold Facebook, Google and Twitter*, WASH. POST (Nov. 1, 2017, 11:58 AM), <https://perma.cc/U8ZR-SFGD> (quoting Senator Dianne Feinstein as telling the general counsels of Facebook, Google, and Twitter that “[y]ou bear this responsibility. You’ve created these platforms. And now they are being misused. And you have to be the ones to do something about it. Or we will.”).

¹¹ U.S. CONST. amend. 1 (“Congress shall make no law . . . abridging the freedom of speech . . .”).

¹² See Jaime M. Freilich, Note, *Section 230's Liability Shield in the Age of Online Terrorist Recruitment*, 83 BROOK. L. REV. 675, 675–76 (2018).

content online, outside of school hours.¹³ In short, the increased access to speech channels moderated and curated by private companies places pressure on longstanding First Amendment doctrines and principles. This Section briefly reviews those pressures, notes two examples of problems unique to the internet, and then concludes by summarizing the concerns raised by private companies' control over speech on the internet's "vast democratic forums."¹⁴

1. Pressures on Longstanding First Amendment Doctrines

a. *Prior Restraints*

The facts before the Supreme Court in the seminal *Pentagon Papers*¹⁵ case—a huge win for the press and the First Amendment—seem almost quaint now in the age of WikiLeaks.¹⁶ At the time of this writing, it would appear a fruitless endeavor for the government to seek an injunction to prevent a newspaper from printing classified documents. Inevitably, the documents would have already appeared on an anonymous file-sharing service such as WikiLeaks. Indeed, some of the past decade's biggest stories have come through leaks and hacks of files that are then posted online for anyone with an internet connection to comb through.¹⁷ Such a scenario evinces a recurring practice that has emerged in the increasingly digital world of the twenty-first century: hackers breach a security system and post internal, confidential information online. Several hackers have even publicly stated that their motives are altruistic; that they want to

¹³ See generally Elizabeth A. Shaver, *Denying Certiorari in Bell v. Itawamba County School Board: A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539 (2017) (describing how federal circuit courts have "grappled with the issue whether, and to what extent, school officials constitutionally may discipline students for their off-campus [online] speech").

¹⁴ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

¹⁵ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). The "Pentagon Papers" referred to materials concerning a classified Defense Department study of the United States' activities in Vietnam. The Nixon administration sought to prevent the *New York Times* and *Washington Post* from publishing the materials. In the landmark decision, the Supreme Court held that the First Amendment prohibited the administration from doing so. *Id.* at 714.

¹⁶ See Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2315 (2014). That is not to say, however, that governments have stopped looking for ways to prevent journalists from publishing certain information. See generally Megan L. Shaw, Note, *When the Fourth Estate's Well Runs Dry*, 83 BROOK. L. REV. 701 (2018) (advocating for courts to treat subpoenas for names of journalists' sources as prior restraints).

¹⁷ See Rajiv Gupta, Commentary, *The Panama Papers Signal a New Kind of Cyber Attack*, FORTUNE (Apr. 9, 2016, 10:00 AM), <https://perma.cc/8U6F-LA3G> ("This generation's Watergate will be conducted through shared folders and chatrooms.").

provide the public with critical information about major companies or governmental agencies.¹⁸

News organizations can lean on broad First Amendment protections against prior restraints that permit the publication of illegally obtained materials, so long as the organization itself was not involved in the illegal activity.¹⁹ These constitutional protections stem from the “assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”²⁰ “Hacktivism” at once provides journalists with massive amounts of newsworthy information as well as tools to protect a source’s anonymity. The internet is a boon to journalists looking for stories.

b. *Virtual Town Halls*

Politicians’ use of social media has resulted in open questions as to whether the First Amendment plays a role in that use. For example, the U.S. Court of Appeals for the Second Circuit held that President Donald Trump’s use of Twitter created a public forum and that he engaged in unconstitutional viewpoint discrimination by “utilizing Twitter’s ‘blocking’ function to limit certain users’ access to his social media account, which is otherwise open to the public at large, because he disagrees with their speech.”²¹ In a pretrial motion at the district court, however, the Department of Justice argued that the proper analogy is Twitter functions like a convention where a politician can choose to approach or avoid anyone.²²

¹⁸ For example, after WikiLeaks published thousands of documents detailing alleged Central Intelligence Agency hacking tools, its founder, Julian Assange, pledged to provide further information to several tech giants whose products the CIA targeted. Assange stated that he would provide these companies with the information so that they could identify and patch their own security flaws. See Thomas Brewster, *Julian Assange: Wikileaks May Have Evidence CIA Spied on US Citizens*, FORBES (Mar. 9, 2017, 11:12 AM), <https://perma.cc/NG32-7V8X>.

¹⁹ See *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (“[A] stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”).

²⁰ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

²¹ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230, 237 (2d Cir. 2019), *reh’g denied*, 953 F.3d 216 (2d Cir. 2020).

²² Jeffrey Toobin, *Trump’s Twitter Blockees Go to Court*, NEW YORKER (Mar. 19, 2018), <https://perma.cc/3H7C-P3MH>.

2. Unique Problem: Offensive Speech Amplified and Memorialized

With platforms that provide access for people to post, tweet, and comment has come the amplification of voices that most of society abhors. Offensive speech can be hard to escape or erase from the internet's long memory and can follow a victim for years.²³ Cyberbullying is one such example of how offensive speech on the internet is hard to ignore.²⁴

In 1971, the Supreme Court in *Cohen v. California*²⁵ advised individuals that they "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."²⁶ But in the age of the internet, it is now much harder for individuals to "avert their eyes" from offensive speech, particularly if that speech is targeted at their individual online profiles. As one school principal noted, children have always dealt with meanness, but due to the permanence of speech posted on the internet, mean-spirited comments last much longer.²⁷ And as a New Jersey eighth grader put it, social media users do not bat an eye at posting mean-spirited comments: "It's easier to fight online, because you feel more brave and in control On Facebook, you can be as mean as you want."²⁸

3. Unique Problem: Fake News

The circulation of "fake news" in the months leading up to the 2016 U.S. presidential election exposed another problem with social media platforms: users, too believing of stories they read online, being unable to discern true reporting from "trolls."²⁹ There are now guides on how to

²³ See generally Margaret Talbot, *The Attorney Fighting Revenge Porn*, NEW YORKER (Nov. 28, 2016), <https://perma.cc/AC45-9CL6> (describing one attorney's career advocating for laws to protect victims of "revenge porn").

²⁴ Cyberbullying includes "online activities ranging from barrages of teasing texts to sexually harassing group sites." Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES (June 27, 2010), <https://perma.cc/7ABU-QNWN>.

²⁵ 403 U.S. 15 (1971).

²⁶ *Id.* at 21.

²⁷ See Hoffman, *supra* note 24.

²⁸ *Id.*

²⁹ See generally OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS* (2017), <https://perma.cc/9TKS-RLAL> (reporting on Russia's use of cyber tools and media campaigns to influence U.S. public opinion). Former White House officials told media outlets that the Obama administration "received multiple warnings from national security officials between 2014 and 2016 that the Kremlin was ramping up its intelligence operations and building disinformation networks it could use to disrupt the U.S. political system." Ali Watkins, *Obama Team Was Warned in 2014 About Russian Interference*, POLITICO (Aug. 14, 2017, 5:04 AM), <https://perma.cc/59WU-LPMK>.

identify fake news,³⁰ and some social media companies are actively flagging potential fake news stories for readers.³¹

The COVID-19 pandemic has seen social media companies attempt to thread the needle of preventing the spread of misinformation while still affording users the ability to express views on their governments' responses to the pandemic. In response to governors' stay-at-home orders, unhappy citizens sought to organize protests against the orders. Such activity—protesting an act of the government—is undisputedly core First Amendment activity. However, because the would-be protestors took to Facebook to organize and express their views, they were subject to Facebook's prohibition on content “advocat[ing] for in-person gatherings that don't follow government health guidance.”³² Similarly, Twitter updated its policies to prohibit users from tweeting “[c]ontent that increases the chance that someone contracts or transmits the [COVID-19] virus.”³³ Using that broad guidance, Twitter removed over 2,230 tweets in one month.³⁴

Though trolls and misinformation may well be a very real threat to the integrity of presidential elections and the health and safety of citizens—particularly during the COVID-19 pandemic—broad government regulation of misinformation is most likely blocked by the First Amendment.³⁵ However, no such protection exists when the speech is made on a private company's platform.

³⁰ See Vignesh Ramachandran, *How Do You Identify Fake News?*, PROPUBLICA ILL. (Apr. 4, 2018, 4:00 AM), <https://perma.cc/CWK7-UTSJ>.

³¹ See Amber Jamieson & Olivia Solon, *Facebook to Begin Flagging Fake News in Response to Mounting Criticism*, THE GUARDIAN (Dec. 15, 2016, 3:05 PM), <https://perma.cc/7KN9-JTFV> (reporting that “[d]isputed articles will be marked with the help of users and outside fact checkers amid widespread criticism that fake news influenced the US election”).

³² Georgia Wells & Andrew Restuccia, *Facebook Puts Limits on Protest Organizers*, WALL ST. J. (Apr. 20, 2020, 5:53 PM), <https://perma.cc/NS4K-TD4X>.

³³ Jay Peters, *Twitter Will Remove Misleading COVID-19-Related Tweets That Could Incite People to Engage in 'Harmful Activity'*, THE VERGE (Apr. 22, 2020, 8:05 PM) (quoting Twitter Safety (@TwitterSafety), TWITTER (Mar. 18, 2020, 4:22 PM), <https://perma.cc/H2U5-AJTT>), <https://perma.cc/K23A-XSF2>.

³⁴ *Id.*

³⁵ See *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012) (plurality opinion) (false statements constitutionally protected); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (posting of illegally-obtained materials constitutionally protected so long as the individual was not involved in the illegal act of obtaining the materials).

4. Big Picture: Private Companies' Power to Regulate Speech

Beyond the struggle of applying established doctrines to uncharted territory, the future of free speech may hang in the balance precisely because the First Amendment may not even apply to those that control twenty-first-century speech fora. The fate of millions of people's speech is now in the hands of a small number of private companies. While some laud this private-company control as an opportunity to remove speech tools from those disseminating abhorrent speech,³⁶ that power raises questions about how private entities dictate what speech is worthy of posting and who has access to key platforms.

For instance, after a 2017 white nationalist rally in Charlottesville, Virginia, erupted in violence, many internet platforms cut off service to so-called hate groups or removed their material.³⁷ The ability of private companies to eliminate a group's or an individual's access to the "vast democratic forums of the Internet"³⁸ raises slippery-slope questions.³⁹ An internet platform executive recognized his problematic power in an email to his employees, shockingly stating "I woke up this morning in a bad mood and decided to kick [a group] off the internet."⁴⁰ This executive's comment is particularly concerning because his platform, Cloudflare, is an "essential" part of the internet.⁴¹ Cloudflare blocks malicious traffic to websites and is one of the few companies in the world that provides this

³⁶ See *More Perfect: The Hate Debate*, WNYC STUDIOS (Nov. 6, 2017), <https://perma.cc/E2MU-ADVQ>.

³⁷ David Ingram & Joseph Menn, *Internet Firms Shift Stance, Move to Exile White Supremacists*, REUTERS (Aug. 16, 2017, 4:42 PM), <https://perma.cc/X3R4-HDF6> ("The wave of internet crackdowns against white nationalists and neo-Nazis reflected a rapidly changing mindset among Silicon Valley firms on how far they are willing to go to police hate speech.").

³⁸ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

³⁹ See Kate Klonick, Opinion, *The Terrifying Power of Internet Censors*, N.Y. TIMES (Sept. 13, 2017), <https://perma.cc/9ZFB-2BLR>. The post in which Cloudflare's CEO explained the decision to terminate the neo-Nazi group's access described the decision as "dangerous" and pointed to the issue that is the subject of this Article: "Without a clear framework as a guide for content regulation, a small number of companies will largely determine what can and cannot be online." Matthew Prince, *Why We Terminated Daily Stormer*, CLOUDFLARE: THE CLOUDFLARE BLOG (Aug. 16, 2017, 6:29 PM), <https://perma.cc/SMDP-MMZC>. Indeed, authoritarian regimes have used control of access to the internet as a means of censorship. See Emma Woollacott, *Russia Cuts Off Its Internet, with Mixed Results*, FORBES (Dec. 24, 2019, 6:46 AM), <https://perma.cc/F35F-HDGS> (opining that one motivation behind Russia's new law "requir[ing] internet providers to ensure that their networks can carry out 'centralized traffic control'" is to permit the Russian government to, as one human rights advocate put it, "directly censor content or even turn Russia's internet into a closed system").

⁴⁰ Ingram & Menn, *supra* note 37.

⁴¹ Klonick, *supra* note 39.

protection.⁴² Without it, websites could be taken offline by extortionists, political opponents, or hackers. It is concerning that one individual can essentially and unilaterally revoke access to a user's website. While the impulse to not provide services to neo-Nazis, as in the case of the Cloudflare executive, may be justified from a moral perspective, if the government had such power—for example, if a president could cut off services to certain groups depending on his morning mood—surely society would be up in arms.⁴³

II. Changes to the Internet's Magna Carta: The Communications Decency Act of 1996

Any examination of speech on the internet requires a discussion of the Communications Decency Act of 1996 (“CDA”).⁴⁴ The CDA plays a major role in the ability of social media platforms to host content that would otherwise put them at risk for tortious liability. In particular, section 230 of the CDA has provided such strong protections since its enactment over two decades ago that it is referred to as the “Internet's Magna Carta.”⁴⁵

⁴² *Id.*

⁴³ Not only do private companies have the power to unilaterally revoke internet access—and access to the speech fora therein—the advent and minimal regulation of those companies have provided government actors with new opportunities to censor speech. First Amendment scholar Professor Jack Balkin wrote in 2014 that the advent of the internet has given governments power to employ “new-school” regulations aimed at speech intermediaries rather than individuals. See Balkin, *supra* note 16, at 2298, 2308. Governments now have the ability to use subtle techniques that run in the background to control and monitor people's speech, resulting in “control and surveillance [that] seem indistinguishable from normal conditions rather than singular or intermittent displays of extraordinary force.” *Id.* at 2309. Professor Balkin cites the San Francisco public-transit authority's decision to cut off phone service in order to prevent a planned “flash-mob” protest as one such subtle technique. *Id.* n.38. Balkin coined the term “collateral censorship” to describe this indirect regulation through private internet intermediaries. His recent scholarship seeks to sound the alarm on government actors taking advantage of the minimal regulation for their own agendas. See Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011 (2018) [hereinafter Balkin, *Free Speech*].

⁴⁴ Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133-43 (codified as amended in scattered sections of 18 and 47 U.S.C.).

⁴⁵ Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1373 (2018).

A. *Safe Harbor for Speech Hosts*

Section 230 of the CDA is “widely known for sheltering online platforms from vicarious liability for users’ speech torts.”⁴⁶ This section 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.”⁴⁷ In practice, if internet platforms like Twitter and Facebook allow users to post on their platforms, those platforms are immune from civil liability for any tortious consequences of the users’ posts. Congress included section 230 “because it wanted Internet companies to be ‘free to develop new and innovative services’” without facing the threat of liability when acting as publishers of third-party content.⁴⁸

B. “*Passive Conduits*”?

To avoid civil liability, internet platforms vehemently argue that they are mere “passive conduits” for users’ speech.⁴⁹ Meaning, the platforms do not post or edit the content and thus cannot be deemed *publishers* of that content. In tension with this position is the argument that “Facebook is analogous to a newspaper and that its handling of a feature like Trending Topics is analogous to a newspaper’s editorial choices.”⁵⁰ Thus, any congressional regulation of the platform, even with the goal of protecting users’ speech, would impermissibly infringe on the platform’s First Amendment rights. Looking at social media platforms’ stances leads to the conclusion that the platforms want to have their cake and eat it too. For instance, when a party challenges a platform’s display of user content, the

⁴⁶ *Id.* at 1369; see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”).

⁴⁷ 47 U.S.C. § 230(c)(1) (2012).

⁴⁸ Freilich, *supra* note 12, at 680 (quoting *CDA 230: Legislative History*, ELECTRONIC FRONTIER FOUND., <https://perma.cc/R2KH-J8J5>).

⁴⁹ Langvardt, *supra* note 45, at 1373 (“[W]hen they want to avoid vicarious liability, they cast themselves as passive conduits for speech; but when they object to regulation, they claim to be editors of speech entitled to robust protections.”).

⁵⁰ HEATHER WHITNEY, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV., *SEARCH ENGINES, SOCIAL MEDIA, AND THE EDITORIAL ANALOGY 3* (2018), <https://perma.cc/XA68-R8WS> (noting cases in which social media platforms asserted that their content curation practices warrant the same First Amendment protections as a newspaper’s decisions to run certain articles).

platform analogizes itself to a content curator—like a newspaper—and thus deserving of First Amendment protection.⁵¹ Yet when responding to an assertion that a user's speech caused harm, the platform asserts that it is a mere passive conduit of the speech and thus cannot be treated as the publisher or speaker of the content.⁵²

C. Modifications to Section 230

Under the Trump administration, the strength of the Internet's Magna Carta took two major hits.

In April 2018, President Trump signed a bill amending section 230 to remove the liability shield for internet service providers when hosting content that unlawfully “promote[s] and facilitate[s] prostitution” and for “websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.”⁵³ Congress's motivation for amending section 230 was to eliminate “legal protection to websites that unlawfully promote and facilitate prostitution and . . . traffick[ing]” as well as websites that have been reckless in allowing such facilitation.⁵⁴

Commentators noted the legislation's language was broadly written in a way that could “reach online services that aren't classified as platforms of any sort—[appearing] to apply to public and private online forums and even emails and direct messages.”⁵⁵ Free speech advocates criticized the bill as unnecessary because the federal government already had the authority to prosecute individuals and companies that aid in promoting and facilitating prostitution, on the internet or by any other means.⁵⁶ Hot on the heels of the bill's passage by Congress and before President Trump's signature, and as if to prove the critics right, the Federal

⁵¹ See David L. Hudson Jr., *Free Speech or Censorship? Social Media Litigation Is a Hot Legal Battleground*, ABA J. (Apr. 1, 2019, 12:05 AM), <https://perma.cc/XM6Y-9F3H> (quoting Professor Kyle Langvardt as saying “[t]hese platforms see themselves as the New York Times, and content moderation as a form of editing”).

⁵² See JOHN SAMPLES, CATO INST., *WHY THE GOVERNMENT SHOULD NOT REGULATE CONTENT MODERATION OF SOCIAL MEDIA* 24 n.15 (2019), <https://perma.cc/94BU-5DP9> (quoting the head of global policy at Facebook as saying that social media “generally do not create or choose the content shared on their platform; instead, they provide the virtual space for others to speak” (quoting Monika Bickert, *Defining the Boundaries of Free Speech on Social Media*, in *THE FREE SPEECH CENTURY* 254 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019))).

⁵³ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 2(1), 132 Stat. 1253, 1253 (2018).

⁵⁴ *Id.* § 2(1)–(2), 132 Stat. at 1253.

⁵⁵ Mike Godwin, *Why Internet Advocates Are Against the Anti-Sex Trafficking Bill*, SLATE (Mar. 14, 2018, 6:31 PM), <https://perma.cc/GX6E-CTNS>.

⁵⁶ Charlie Savage & Timothy Williams, *U.S. Seizes Backpage.com, a Site Accused of Enabling Prostitution*, N.Y. TIMES (Apr. 7, 2018), <https://perma.cc/A37K-8P4S>.

Bureau of Investigation seized Backpage.com, a site long investigated for potentially facilitating prostitution.⁵⁷ But this proved insufficient for the free speech advocates' criticism to carry the day. The bill had support from a coalition of state attorneys general, President Trump signed it into law with much fanfare, and, in anticipation of its enactment, Craigslist took down its "missed connections" online bulletin board.⁵⁸

Two years later, President Trump took direct aim at section 230's liability shield more generally. Enraged that Twitter included a warning label on certain of his tweets containing unsubstantiated claims about voter fraud,⁵⁹ President Trump issued Executive Order No. 13,925 to purportedly "clarify" the scope of section 230's liability shield.⁶⁰ The executive order notes that a handful of social media companies "wield immense . . . power" to shape and "control[] vital avenues for our national discourse" and directs the Federal Communications Commission to clarify the scope of section 230's liability shield.⁶¹ The order further directs heads of agencies to analyze federal funds paid to social media companies so that the Department of Justice may review the "viewpoint-based speech restrictions imposed" by those companies.⁶²

While seeking to peel back the broad protection provided by section 230, the order is largely a legally meaningless "piece of political theater" given the decades of judicial precedent upholding the validity of the liability shield.⁶³ Absent an act of Congress—which President Trump has called for⁶⁴—section 230's liability shield will continue to provide social media companies with broad protection for speech posted on their platforms.

III. The First Amendment's Role in the Context of the Internet

Scholarship devoted to the First Amendment seems to recognize that the quantity and quality of speech that occurs on private companies' platforms warrant examination. Scholars' "solutions" to the problem of regulating speech in the twenty-first century range from extreme—social

⁵⁷ See *id.*; Lalita Clozel, *FBI Seizes Backpage.com, a Site Criticized for Sex-Related Ads*, WALL ST. J. (Apr. 6, 2018, 5:01 PM), <https://perma.cc/R8MF-ESJZ>.

⁵⁸ See Savage & Williams, *supra* note 56.

⁵⁹ Bobby Allyn, *Stung by Twitter, Trump Signs Executive Order to Weaken Social Media Companies*, NPR (May 28, 2020, 4:59 PM), <https://perma.cc/N2TZ-EJUB>.

⁶⁰ See Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

⁶¹ *Id.* at 34,079, 34,080, 34,081.

⁶² *Id.* at 34,081.

⁶³ Allyn, *supra* note 59 (quoting Professor Kate Klonick).

⁶⁴ See Donald J. Trump (@realDonaldTrump), TWITTER (May 29, 2020, 11:15 AM), <https://perma.cc/K56K-EGBS>.

media companies should adhere to First Amendment doctrines as if each were a state actor—to more tempered—social media companies should not be exempt from civil liability for users' speech. This Part explores those extremes and suggests a compromise resolution.

A. *Social Media Companies as State Actors versus Purely Private Entities*

1. Social Media Companies as State Actors

With few exceptions, constitutional constraints apply only to government actors. The Supreme Court recognized one such exception in 1946 when it found that a privately run company-town's operations were essentially a public function and therefore subject to constitutional regulations.⁶⁵ In *Marsh v. Alabama*,⁶⁶ the Court recognized that “[e]xcept for [its private ownership, the town] has all the characteristics of any other American town.”⁶⁷ As such, the town was a state actor and could not limit a Jehovah's Witness's ability to distribute religious literature on a street corner.⁶⁸ The application of *Marsh*'s “quasi-municipality” doctrine enjoyed only brief prominence in the context of private shopping malls. The Court overruled that expansion in the 1970s.⁶⁹

Despite the limited application of *Marsh* since the seventies, its quasi-municipality doctrine has made its way into many scholars' discussions of applying First Amendment principles to social media companies.⁷⁰ While applying *Marsh* to social media companies may seem farfetched,⁷¹ the Court's recent *Packingham v. North Carolina* decision may have breathed new life into the argument.⁷² In *Packingham*, the Court emphasized the

⁶⁵ See *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁶⁶ 326 U.S. 501 (1946).

⁶⁷ *Id.* at 502.

⁶⁸ See *id.* at 509.

⁶⁹ See *Hudgens v. NLRB*, 424 U.S. 507, 517–18 (1976).

⁷⁰ See, e.g., Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1609–13 (2018) (recounting the expansion and ultimate demise of the quasi-municipality doctrine to shopping malls but noting that recent Supreme Court jurisprudence provides a “new basis to argue that [social media] platforms perform quasi-municipal functions”); Langvardt, *supra* note 45, at 1366 (arguing that courts relaxing the state-action doctrine to apply to speech occurring on privately-owned online platforms is unlikely in the foreseeable future, but “not completely unthinkable”).

⁷¹ See Langvardt, *supra* note 45, at 1367–68.

⁷² See generally Klonick, *supra* note 70, at 1609–12 (tracing the history of private entities being treated as quasi-municipalities for First Amendment purposes).

importance of the internet—and especially social media—to the exercise of speech. The Court first noted the “basic rule . . . that a street or a park is a quintessential forum for the exercise of First Amendment rights.”⁷³ The *Packingham* Court then elevated social media to the level of those quintessential fora: “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.”⁷⁴ This comparison of social media to streets and parks opens the door to arguments that the quasi-municipality doctrine should extend to internet platforms. The Court noted that it has long “sought to protect the right to speak in th[e] spatial context.”⁷⁵ With the Court analogizing the internet to areas that enjoy First Amendment protection, the possible resurrection of the quasi-municipality doctrine does not seem so farfetched.

While applying the quasi-municipality doctrine to social media companies may appeal to those concerned with the opacity of those companies’ policies and practices of curating—or, more cynically, censoring—content, subjecting private companies to First Amendment requirements may prove to be unworkable. Any application of the doctrine to social media companies would surely face a challenge on the theory that such regulation would infringe on the companies’ own First Amendment rights. Social media companies assert that the editorial decisions of traditional media, like newspapers, are analogous to social media companies’ algorithms and determinations about what content they allow.⁷⁶ If the platform is acting as a quasi-governmental actor, would its own speech then be designated as “government” speech and thus subject to a different set of doctrines?

2. Social Media Companies as Purely Private Entities, Outside the First Amendment’s Reach

At the other end of the spectrum, some courts and commentators remain steadfast in arguing that, as private entities, social media companies are outside the First Amendment’s reach. And, the argument goes, that government officials exercising authority over private entities’ content moderation would “politiciz[e] tech.”⁷⁷ Further, as one court

⁷³ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)).

⁷⁴ *Id.* (citation omitted) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

⁷⁵ *Id.*

⁷⁶ WHITNEY, *supra* note 50, at 3.

⁷⁷ SAMPLES, *supra* note 52, at 23.

observed, “that social media sites like FaceBook [sic] and Twitter have become the equivalent of a public forum for sharing ideas and commentary” has no bearing on the question of whether the First Amendment applies.⁷⁸ Rather, the relevant inquiry into whether the First Amendment applies is whether there is some *state* action that is purportedly restricting speech.⁷⁹

Moreover, the argument continues, laws already exist that target individuals' harmful speech. For example, litigation against some of the white nationalists who organized the 2017 Charlottesville rally framed the white nationalists' online speech as conspiracy.⁸⁰ The hateful online speech, plaintiffs argued, moved beyond the First Amendment's protection by organizing a conspiracy to commit illegal acts.⁸¹ Is it practical, however, to subject social media companies to liability for users' speech or to impose First Amendment requirements on private companies?

B. *A Middle Ground: Disclosure Requirements*

1. Content Curation Policies

Social media platforms are almost universally acknowledged as essential to modern free speech, yet remarkably little is known about how these platforms promote or organize certain content.⁸² Outside interference with the 2016 election prompted interest in exactly *how* giants like Twitter and Facebook use algorithms to promote certain speech and target certain users.⁸³ During Mark Zuckerberg's congressional testimony in April 2018, Senator Ted Cruz focused his questioning not on the scandalous data breach that prompted the hearings, but on a two-year-old report that “Facebook had purposefully and routinely suppressed conservative stories from trending news” and shut down conservative

⁷⁸ See *Nyabwa v. FaceBook*, No. 2:17-CV-24, 2018 U.S. Dist. LEXIS 13981, at *2 (S.D. Tex. Jan. 26, 2018).

⁷⁹ See *id.*

⁸⁰ See Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss at 41, *Sines v. Kessler*, No. 3:17-cv-00072-NKM (W.D. Va. Feb. 20, 2018) (“Plaintiffs allege that Defendants . . . organized, oversaw, and carried out a conspiracy to commit illegal acts of violence and intimidation.”).

⁸¹ See *id.*

⁸² Klonick, *supra* note 70, at 1601.

⁸³ See Nancy Scola & Josh Meyer, *Google, Facebook May Have to Reveal Deepest Secrets*, POLITICO (Oct. 1, 2017, 6:49 AM), <https://perma.cc/L48R-3H3U> (“As the probes unfold into social media's role in spreading misinformation, U.S. lawmakers are beginning to show an interest in the mechanics of everything from how Facebook weights news items to how Google ranks search results.”).

pages, with one page labeled “unsafe to the community.”⁸⁴ In response, Zuckerberg stated a commitment to keeping the platform as one “for all ideas” but did not explain how or why certain content is removed.⁸⁵

Two years later, Facebook announced an independent oversight board would become operational in 2020 and be funded by a \$130 million trust.⁸⁶ In an editorial, the four co-chairs of the oversight board described its plan to focus on “[c]ases that examine the line between satire and hate speech, the spread of graphic content after tragic events, and whether manipulated content posted by public figures should be treated differently from other content.”⁸⁷ The oversight board will have the power to “make final and binding decisions on whether specific content should be allowed or removed from Facebook and Instagram (which Facebook owns).”⁸⁸ And those binding decisions will be public.⁸⁹ While the planned transparency is promising and the co-chairs list their fixed terms and independence from Facebook,⁹⁰ it remains to be seen how Facebook and Mark Zuckerberg will adhere to the “commitment” to follow the oversight board’s decisions.

Requiring social media companies to disclose just how they offer their users news and set information agendas would be a practical response to the opacity that currently exists. As Professor Jonathan Zittrain notes, “[n]ews divisions were by strong tradition independent of the commercial side of broadcasting and publishing.”⁹¹ Zittrain calls for social media companies to recognize a similar special responsibility—separate from any government mandate—for how their platforms inform public discourse.⁹² During his testimony before Congress, Zuckerberg noted that

⁸⁴ Ian Schwartz, *Zuckerberg to Cruz on Bias: Silicon Valley “Extremely Left-Leaning” Place, “I Understand” the Concern*, REALCLEAR POL. (Apr. 10, 2018), <https://perma.cc/HTK2-J24Q>.

⁸⁵ *Id.* Facebook’s and Twitter’s practices and algorithms for removing content are closely guarded. Trade-secret doctrine protects companies, but often to the detriment of individuals. *See, e.g.*, TAYLOR R. MOORE, CTR. FOR DEMOCRACY & TECH., TRADE SECRETS & ALGORITHMS AS BARRIERS TO SOCIAL JUSTICE (2017), <https://perma.cc/CC9Q-3JSE> (advocating for a “social justice framework [to] be incorporated into trade secret protection when applied to risk-assessment algorithms,” with the intention of “fill[ing] the gap in trade secret law that allows unfettered protection for harmful risk-assessment algorithms used in the criminal justice system”).

⁸⁶ *See* Catalina Botero-Marino et al., Opinion, *We Are a New Board Overseeing Facebook. Here’s What We’ll Decide.*, N.Y. TIMES (May 6, 2020), <https://perma.cc/WV3E-LY25>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See id.* It is not clear how long Facebook has committed to employing an oversight board or if there is even a mechanism to reevaluate how the oversight board is structured or hears cases.

⁹¹ Jonathan Zittrain, *The Age of Misinformation*, THE ATLANTIC (May 3, 2017), <https://perma.cc/4PDW-K24J>.

⁹² *See id.*

in evaluating Facebook's philosophy toward its corporate responsibility, the company needs to take a "more proactive role" in ensuring that Facebook's tools are used in "good and healthy" ways.⁹³ This would include, per Zittrain, social media companies "be[ing] upfront about how they promote some stories and de-emphasize others, instead of treating their ranking systems as trade secrets."⁹⁴ Facebook's recent efforts to create an oversight board is a step in the right direction, but a voluntary recognition of some vague social responsibility does not inspire much confidence.

Aside from appealing to social media companies' senses of responsibility, is there a constitutional avenue to compel the companies to promote First Amendment values? Supreme Court jurisprudence upholding regulation of broadcasting may provide such an avenue. Though the Court in *Reno v. American Civil Liberties Union*⁹⁵ held that the internet does not warrant the same supervision as radio,⁹⁶ in light of how the internet has matured, it may be time for the Court to revisit that decision. Such a shift would be in line with how the Court changed its approach to radio regulations. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,⁹⁷ the Court noted that in the 1920s, radio was in its infancy and the "unregulated and burgeoning private use of the new media . . . had resulted in an intolerable situation demanding congressional action."⁹⁸ Just as when radio had matured and demanded congressional attention, so too has the internet matured since the Court's *Reno* decision and provided an opportunity for litigants to demand congressional action.⁹⁹ As the United States Court of Appeals for the Ninth Circuit noted over a decade ago, the internet "has outgrown its swaddling clothes and no longer needs to be so gently coddled."¹⁰⁰

⁹³ Katie Leslie, *In Hearing with Facebook's Mark Zuckerberg, Ted Cruz Avoids Questions About Cambridge Analytica*, DALL. MORNING NEWS (Apr. 10, 2018, 10:45 PM), <https://perma.cc/Q5R2-6BVN>.

⁹⁴ Zittrain, *supra* note 91.

⁹⁵ 521 U.S. 844 (1997).

⁹⁶ *See id.* at 868–70.

⁹⁷ 412 U.S. 94 (1973).

⁹⁸ *Id.* at 104.

⁹⁹ *See* Klonick, *supra* note 70, at 1612 ("While it is unclear how the Court would draw the line between the internet functions of concern in *Reno* and the growth of social media platforms, *Packingham's* emphasis on the right to platform access might revive the concerns over scarcity raised by these cases.").

¹⁰⁰ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008). Indeed, social media companies themselves are advocating for regulations and "clearer rules." Angel Au-Yeung, *Mark Zuckerberg's Message to the U.S. Government in Annual Note: Regulate Us, Just Don't Break Us Up*, FORBES (Jan. 9, 2020, 5:14 PM), <https://perma.cc/F5XG-8CBT> (summarizing Zuckerberg's annual personal challenge for Facebook).

The government would not have to reinvent the wheel to find ways to impose regulations on social media companies. It has already imposed such regulations on broadcast radio and television.¹⁰¹ With the constitutionally permissible regulation of broadcasting as a backdrop, a statute requiring social media companies to disclose to a government agency—or even just to the public—how they promote some content and tag others as inaccurate seems plausible and practical. This approach “might help to dispel illusions that activity occurring on the platform is unmediated and neutral.”¹⁰² Disclosure of algorithms is seen by some as the “key to corporate accountability,” for “[w]ithout knowledge of the factors that provide the basis for decisions, it is impossible to know whether companies engage in practices that are deceptive, discriminatory or unethical.”¹⁰³

Any such disclosure requirement would not infringe on *how* social media companies choose to curate content and thus would not overly infringe on the companies’ own First Amendment rights. Just as the *McCutcheon v. Federal Election Commission*¹⁰⁴ plurality noted in the context of disclosure of campaign contributions, “disclosure [requirements] often represent[] a less restrictive alternative to flat bans on certain types or quantities of speech.”¹⁰⁵ Moreover, modern technology allows for disclosure requirements to serve as a “particularly effective means of arming the voting public with information.”¹⁰⁶ As discussed *supra*, because the internet and its social media platforms have risen to the vaulted tier of a public forum,¹⁰⁷ disclosure requirements are the least restrictive means of arming social media users with information.

A disclosure requirement would demand transparency and allow consumers to understand how their own speech and the speech they follow on the platforms are being curated, tagged as inaccurate, or removed. Depending on what the disclosures reveal, social media users could demand different practices or choose to leave a platform with

¹⁰¹ See generally *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (holding that the FCC’s “must-carry” provisions did not violate cable television companies’ First Amendment rights as speakers); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (noting that the government has a legitimate interest in allocating scarce broadcast frequencies).

¹⁰² Langvardt, *supra* note 45, at 1383.

¹⁰³ Scola & Meyer, *supra* note 83.

¹⁰⁴ 572 U.S. 185 (2014).

¹⁰⁵ *Id.* at 223 (plurality opinion).

¹⁰⁶ *Id.* at 224.

¹⁰⁷ See *supra* Section I.A.

practices with which the user disagrees.¹⁰⁸ Indeed, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁰⁹ Rather than impose specific regulations defining what constitutes permissible speech regulation by social media companies, the government could merely require disclosure of each company’s policies and practices and let the marketplace do the rest.

2. Political Advertising Disclosures

A narrower approach to disclosure requirements could focus on disclosure in the context of users’ political advertising purchases. An example of disclosure legislation was introduced in the Senate in 2017 and was endorsed by both Facebook and Twitter.¹¹⁰ The Honest Ads Act sought to “enhance the integrity of American democracy and national security by improving disclosure requirements for online political advertisements in order to uphold the United States Supreme Court’s well-established standard that the electorate bears the right to be fully informed.”¹¹¹ The proposed legislation would have required online platforms to maintain and disclose a complete record of persons whose requests to purchase political advertisements on the platform exceed \$500.¹¹² Such political advertising-related disclosure requirements are in line with the Supreme Court’s campaign finance jurisprudence.¹¹³ Specifically, a “public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return.”¹¹⁴ Imposing disclosure requirements on political advertising

¹⁰⁸ It is important to note that disclosure requirements might not push users to demand social media platforms engage in speech-protective practices. Cf. *Gora*, *supra* note 7, at 72 (“In a time when the Supreme Court was affording more free speech protection in its legal rulings than almost any predecessor Court, in everyday life, these are trying times for free speech. Censorship seems to reign, both at home and abroad, in what sometimes seems to be a war on free speech.”).

¹⁰⁹ *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (quoting LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 62 (Sherman F. Mittell ed., 1933)).

¹¹⁰ See Taylor Hatmaker, *Twitter Endorses the Honest Ads Act, a Bill Promoting Political Ad Transparency*, TECHCRUNCH (Apr. 10, 2018, 1:28 PM), <https://perma.cc/EF8K-GLYD>.

¹¹¹ Honest Ads Act, S. 1989, 115th Cong. § 2 (2017).

¹¹² *Id.* § 8(a).

¹¹³ See *McCutcheon v. FEC*, 572 U.S. 185, 223 (2014) (plurality opinion) (noting that disclosure of campaign contributions provides voters with the “sources of election-related spending” (quoting *Citizens United v. FEC*, 558 U.S. 310, 367 (2010))). Facebook itself has supported these disclosure requirements in the past. Au-Yeung, *supra* note 100.

¹¹⁴ *Buckley*, 424 U.S. at 67.

would provide voters, government officials, and interest groups with information on potential corruption or undue influence.

Conclusion

Most scholars seem to analyze the emergence of the internet as the primary place for speech under the theory that extending traditional First Amendment doctrines to private actors will prove unwieldy and unworkable. The “solution” should likely include new doctrines that account for First Amendment values but not traditional First Amendment doctrine.¹¹⁵ But how can society reconcile the robust communication avenues that private companies provide with the potential for limitless censorship of speech for millions of people? The debate rages on.

¹¹⁵ See Balkin, *Free Speech*, *supra* note 43, at 2032 (“The solution will not necessarily—or even primarily—involve enforcing the doctrines of the First Amendment jot for jot against private-infrastructure providers. To be sure, it *will* concern the free speech *values* that animate the First Amendment. But the best way to protect those values is not to apply doctrines developed for states as rules for private actors.”).