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# FIRST AMENDMENT LAW REVIEW

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**INTERNET ACCESS, HATE SPEECH AND THE FIRST  
AMENDMENT**

Jerome A. Barron\*

**I. THE PROBLEM OF ACCESS AND HATE SPEECH ON THE  
INTERNET**

When I wrote *Access to the Press-A New First Amendment Right*,<sup>1</sup> I did not expect that it would attract the attention that it did. The idea of a right of access to the media was met with considerable interest and even some acceptance. I remember that Walter Cronkite mentioned the article on the CBS Evening News. To the young law professor that I then was, all of it was a great surprise, and a welcome one. A less welcome surprise was the reactions I received from some racists across the country. They reasoned that if access to the media became a right, then their bigoted notions on race and religion would at last secure entry to the mass media. In short, a right of access would give hate speech a way to enter the mass media.

The problem of how to deal with hate speech has become an even more difficult problem with the advent of the Internet. We know the recent shootings in Charleston, Pittsburgh and El Paso were perpetrated by young men who had been incited by hate speech posts and websites.

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<sup>1</sup> 80 HARV. L. REV. 1641 (1967).



The connection of those shooters with hate speech messages on social media platforms merits our attention. It is, therefore, worth exploring these tragedies from the perspective of their connection with the Internet. On June 16, 2015, a 21-year-old white supremacist entered a historic African American church in Charleston, South Carolina. He prayed with the parishioners, then pulled out his handgun. He shot and killed 9 people, including the pastor of the church, and injured many others.<sup>2</sup> Reflecting three years later on the mass shooting in Charleston, a Washington Post journalist, Rachel Hatzipanagos, observed that social media is used by white supremacists in order to more widely disseminate their message of hate online. She points out that when the message “reaches certain people, the online message can turn into real life violence.”<sup>3</sup> She expresses what happens quite succinctly: “[W]hen online hate goes offline, it can be deadly.”<sup>4</sup>

A middle-aged white supremacist entered a synagogue in Pittsburgh, Pennsylvania in October 2018 and killed 11

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<sup>2</sup> See Jason Horowitz, Nick Corasanti & Ashley Southall, *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES, (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html>.

<sup>3</sup> Rachel Hatzipanagos, *How online hate turns into real life violence*, WASH. POST, (Nov. 30, 2018, 2:31 AM EST), <https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/>.

<sup>4</sup> *Id.*

members of the congregation. But before he did so, “he posted one last message online.”<sup>5</sup> He did not file his message on Facebook or Twitter but on Gab, “a social media network that has become a forum for racist extremists.”<sup>6</sup> After the shooting at the synagogue, Gab went offline because its “service providers suspended accounts and threatened to shut the website down.”<sup>7</sup> A message on Gab.com indicated that the website would not be accessible for a while “as the site shifts to a new hosting service provider.”<sup>8</sup> The hosting provider gave Gab “24 hours to [switch providers]” and stated that Gab had “violated its terms of service.”<sup>9</sup> It is hard to suppress the thought that it would have been better for all if the host provider had acted sooner.

This year, on an August Saturday, a young white male in his twenties entered a Walmart in El Paso, crowded with Hispanic shoppers, and fired an AK-47 style rifle. Twenty-two people were killed and others were injured. According to an arrest warrant affidavit, the suspect told the police: “I’m the

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<sup>5</sup> Kevin Roose, *On Gab, An Extremist Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/gab-robert-bowers-pittsburgh-synagogue-shootings.html>.

<sup>6</sup> *Id.*

<sup>7</sup> Brett Molina, *What is Gab, the fringe social network used by Pittsburgh shooting suspect?*, USA TODAY (Oct. 29, 2018), <https://www.usatoday.com/story/tech/nation-now/2018/10/28/pittsburgh-synagogue-shooting-what-gab-fringe-site-used-suspect/1798862002/>.

<sup>8</sup> *Id.*

<sup>9</sup> Roose, *supra* note 5.

shooter.” He “admitted targeting Mexicans in the attack.”<sup>10</sup> Just before firing the shooter posted a four-page, anti-immigrant manifesto on the Internet. The manifesto declared his support for the man who killed fifty-one people in a Mosque in Christchurch, New Zealand. The manifesto also expressed “his fear about Hispanic people gaining power in the United States.”<sup>11</sup> It should be noted that the Christchurch, New Zealand shooter had announced his attack on the same website used by the Charleston shooter. National security expert Juliette Kayyem, at Harvard University’s Kennedy School of Government, has written concerning the El Paso Walmart massacre that “white supremacist terrorism has what amounts to a dating app online,” which brings “like-minded individuals together through social media platforms and more remote venues.”<sup>12</sup> These platforms “exist to foster rage.” This paper seeks to examine how First Amendment law wrestles with this problem.

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<sup>10</sup> Rebecca Falconer, *El Paso suspect confessed to targeting Mexicans in mass shooting*, AXIOS (Aug. 9, 2019), <https://www.axios.com/el-paso-shooting-what-know-far-d9fa3faf-76b7-4c4b-95ef-7e1d5c97359a.html>.

<sup>11</sup> Simon Romero, Manny Fernandez & Mariel Padilla, *Day at a Shopping Center in Texas Turns Deadly*, N.Y. TIMES (Aug. 3, 2019), <https://www.nytimes.com/2019/08/03/us/el-paso-walmart-shooting.html>.

<sup>12</sup> Juliette Kayyem, *There are no lone wolves*, WASH. POST (Aug. 4, 2019), <https://www.washingtonpost.com/opinions/2019/08/04/there-are-no-lone-wolves/>.

When I argued for a right of access to the media, entry for speech could in the main only be accomplished at the sufferance of the gatekeepers to what were then the dominant vehicles for the transmission of ideas—local radio and television stations, radio and tv networks, and the daily newspapers. All these media had one thing in common: they had editors. Access was a matter of editorial discretion. Technology accomplished what I had hoped law would be able to do—give each individual access to the media. Elsewhere I have described what the Internet has done for access.<sup>13</sup>

Technology has done for access what law had refused to do. Today, individual access is possible on a scale that was unfathomable forty years ago. The Internet, whose very mode is access, has transformed our world. The Internet has transformed our lives and I would say mostly for the better. But one of the negatives is that the universal access which it affords has confronted us with the problem of hate speech.

The power that the Internet has given to hate speech can be seen if we measure the number of people affected by hate

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<sup>13</sup> Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 950 (2007).

speech in the Age of the Internet. Professor David Hudson has called attention to the contemporary scale of hate speech:<sup>14</sup>

The Anti-Defamation League reported that from August 1, 2015, through July 31, 2016, there were more than 2.6 million tweets it considered anti-semitic, with nearly 20,000 of them aimed at journalists. And after the 2016 election, the Southern Poverty Law Center compiled data from more than 1,800 extremist Twitter accounts and noted a rise in anti-Muslim images and memes between November 8 and December 8. Twitter later suspended some of those accounts.

47 U.S.C § 230.

Unlike the publishers of traditional media, internet service providers are freed from liability for the content they transmit. A federal statute, 47 U.S.C. § 230(c), makes this possible.<sup>15</sup> The theme of § 230 is to free online providers from liability from whatever harmful effects that flow from the

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<sup>14</sup> See David Hudson, *Social Clashes—Digital Free Speech is a Hot Legal Battleground*, A.B.A. JOURNAL, (Apr. 1, 2019, 12:05 AM CDT), <http://www.abajournal.com/magazine/article/social-clashes-digital-free-speech>.

<sup>15</sup> (c) Protection for “Good Samaritan” blocking and Screening of Offensive Material

- (1) Treatment of Publisher or Speaker
 

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.
- (2) Civil Liability
 

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 or availability of material that they provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
  - (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (2).

content published by the entities they host. Section 230 has been interpreted broadly by the courts. In *Force v. Facebook*,<sup>16</sup> U.S. citizens who were victims of a Hamas attack in Israel, relying on federal anti-terrorism law, brought suit against Facebook for facilitating the attack. They alleged that Facebook was liable for providing a platform to advance terrorist objectives of Hamas. Relying on Sec. 230, the federal district court dismissed the suit and a divided panel of the United States Court of Appeals for the Second Circuit, relying entirely on § 230, rejected the appeal. Judge Katzmann, speaking for the Second Circuit panel, stated “In light of Congress’s objectives, the Circuits are in general agreement that the text of Sec. 230(c)(1) should be broadly construed in favor of immunity.”<sup>17</sup>

Generally, under § 230 the harmful effects of content that appear on the Internet do not subject the internet service provider to liability. 47 U.S.C. § 230 has some exceptions. The provision states it has no effect on criminal law, intellectual property law, communications privacy law, or sex trafficking law. Suppose, however, an additional exception for hate speech

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<sup>16</sup> 304 F. Supp. 315 (E.D.N.Y. 2018).

<sup>17</sup> *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019).

were added to 47 U.S.C. § 230.<sup>18</sup> This exception would be for online hate speech likely to incite violence against individuals or groups because of their race, religion or ethnicity. Would inclusion of such an exception be consistent with the First Amendment?

## II. THE SUPREME COURT AND HATE SPEECH

I suppose it could be asked at this point: Instead of adding another exemption to § 230, why not deal with the matter directly? Why not enact a federal law that prohibits the dissemination of hate speech on the Internet? The Supreme Court has dealt with the problem of hate speech in a number of cases. But, there is not much encouragement in Supreme Court case law for those who are interested in drafting hate speech laws. The demands of the First Amendment law in this area are rigorous. However, the true threat doctrine of *Virginia v. Black*<sup>19</sup> might be helpful in drafting such legislation.

### *A. The True Threat Doctrine*

In *Virginia v. Black*, Justice O'Connor declared for the Court that there were some "categories of expression" which government could regulate "consistent with the Constitution."<sup>20</sup> Such a category is expression which constitutes a "true threat."

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<sup>18</sup> 47 U.S.C. § 230(2)(e) (2018).

<sup>19</sup> 538 U.S. 343 (2003).

<sup>20</sup> *Id.* at 358.

Justice O'Connor then set forth a definition of a true threat.<sup>21</sup> “[S]tatements where the speaker means to communicate a serious expression of an intent to commit [an] act of unlawful violence to [a] particular individual or [a] group of individuals . . . . Intimidation in the constitutionally proscribable sense of the word is a type of true threat.”

I have emphasized the word “group” here because at common law group defamation was not actionable. Of course, *Virginia v. Black* was not a defamation case but a criminal case. However, defamation of libel of a racial or religious group in American law has long been deemed not actionable because racial or religious groups were too large and too amorphous. But if the circumstances are such that intimidation of a racial or religious group can meet the definition of a true threat, then perhaps it is possible to fashion a hate speech law which passes First Amendment muster.

Speech critical of racial and religious groups is deemed protected under our First Amendment law.<sup>22</sup> The Supreme Court decision in *Virginia v. Black*<sup>23</sup> doesn't change this. But the “true threat” doctrine does create an exception to this principle

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<sup>21</sup> *Id.* at 359–60 (emphasis added).

<sup>22</sup> See generally *id.*

<sup>23</sup> *Id.*



in our First Amendment law.<sup>24</sup> Justice O'Connor observed that the rationale for the "true threat" doctrine can be found in some of the language from *R.A.V. v. City of St. Paul*.<sup>25</sup> The rationale is to protect "*individuals* from the fear of violence" and "from the disruption that fear engenders" as well as from the possibility of the threatened violence.<sup>26</sup>

Is the "true threat" doctrine a sufficient basis for the enactment of a state or federal hate speech law? Perhaps it could be. However, Justice O'Connor's opinion focuses on the KKK and its use of a burning cross as a symbol of intimidation. Indeed, *Virginia v. Black* may be viewed as applying just to symbols such as cross burnings and swastikas, which come with a history of violence and intimidation.

Hate speech on the Internet is a relatively recent phenomenon in the history of free speech in the United States. However, hate speech or group defamation, as it was called earlier, has been with us for a long time. Earlier Supreme Court cases that dealt with group defamation reaching

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<sup>24</sup> *Id.*

<sup>25</sup> 505 U.S. 377, 388 (1992).

<sup>26</sup> *Black*, 538 U.S. at 360 (emphasis added).

essentially opposite holdings are *Terminiello v. City of Chicago*,<sup>27</sup> and *Beauharnais v. Illinois*.<sup>28</sup>

*B. Terminiello v. City of Chicago*

In *Terminiello*, a Catholic priest under suspension from his Bishop, gave a violently anti-semitic speech in a Chicago auditorium to the Christian Veterans of America. Furthermore, Terminiello attacked President Roosevelt and Eleanor Roosevelt. There were 800 people in the auditorium and 1,000 angry protesters outside. Police were unable to keep order and arrested Terminiello for violating a city ordinance that provided that “misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.”<sup>29</sup> The Illinois state courts upheld the conviction, but the Supreme Court, 5-4, per Justice Douglas, reversed. Justice Douglas used the very words of the ordinance to define the grand purpose of the First Amendment.

Justice Douglas acknowledged that Terminiello in his speech inside the auditorium “condemned the conduct of the crowd outside and vigorously, if not viciously, criticized

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<sup>27</sup> 337 U.S. 1 (1949).

<sup>28</sup> 343 U.S. 250 (1952).

<sup>29</sup> *Terminiello*, 337 U.S. at 3.

various political and racial groups.”<sup>30</sup> Terminiello’s speech “stirred people to anger, invited public dispute, or brought about a condition of unrest.”<sup>31</sup> But that, Justice Douglas said, was exactly what the First Amendment was supposed to invite and protect. A conviction based upon such grounds was inconsistent with the First Amendment and, therefore, the conviction must be set aside.

Justice Jackson, dissenting, said that “in the abstract”<sup>32</sup> no one would disagree with the First Amendment principles set forth in Douglas’s majority opinion. But Justice Jackson observed that there is only a “passing reference to the circumstances of Terminiello’s speech”<sup>33</sup> in Douglas’s opinion. He complained that the matter was adjudicated as if Terminiello was “a modern Demosthenes practicing his Phillippics on a lonely seashore.”<sup>34</sup> But that was not the case. Terminiello gave a speech “that provoked a hostile mob and incited a friendly one, and threatened violence between the two.” He complained that Douglas had “a conception of freedom of speech so rigid as to tolerate no concession to

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 5.

<sup>32</sup> *Id.* at 13 (Jackson, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

society's need for public order.<sup>35</sup> In *Terminiello*, Justice Jackson made some comments which are applicable in the Age of the Internet:<sup>36</sup>

In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment . . . [I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

In the space of just a few years hate speech on the Internet has been associated with mass shootings in places as different and far apart as a church in Charleston, a synagogue in Pittsburgh and a Walmart in El Paso. In each situation, the perpetrator was influenced, motivated, or incited by hate speech on the Internet.

*C. Beauharnais v. Illinois*

In the United States, our respect for the First Amendment makes it difficult to deal with speech which vilifies particular racial, religious, and ethnic groups. A consideration of what we call today hate speech is *Beauharnais v. Illinois*.<sup>37</sup> The Supreme Court, 5-4, per Justice Frankfurter, upheld a 1949

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 36-37.

<sup>37</sup> 343 U.S. 250 (1952).

Illinois criminal libel law which made it a crime to exhibit in a public place a publication which

portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots [.]<sup>38</sup>

Joseph Beauharnais was convicted under the statute for distributing a racist leaflet. Beauharnais was President of an organization called the White Circle League which distributed lithograph leaflets and publications defaming and denigrating Negroes, and advocating for segregation. In addition, the leaflet distributed by Beauharnais contained hateful anti-Negro sentiments. The leaflet set forth a petition to the Mayor and City Council of Chicago “to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro[.]”<sup>39</sup> Beauharnais distributed the leaflets on the streets of Chicago.

Joseph Beauharnais unsuccessfully contended that the Illinois law under which he was convicted violated his constitutionally protected right of freedom of speech. Justice Frankfurter, speaking for the Court, upheld the constitutionality

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<sup>38</sup> *Id.* at 251 (quoting § 224a of Division 1 of the Illinois Criminal Code, Ill. Rev. Stat. 1949, c. 38, § 471).

<sup>39</sup> *Id.* at 252.

of the Illinois statute on the basis of several theories, one of which I have called elsewhere the human dignity theory.<sup>40</sup> Justice Frankfurter said that it was beyond judicial competence<sup>41</sup> “to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community.”

Justice Frankfurter used the human dignity theory in *Beauharnais* when he declared that the Illinois legislature could<sup>42</sup> “warrantably believe that a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.” In light of this, the Court could not deny “that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.”<sup>43</sup>

Justice Black, joined by Justice Douglas, dissented. Reaching back into British history, Justice Black pointed out that the Bill of Rights of 1689 had proclaimed “the Right of the

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<sup>40</sup> See JEROME A. BARRON & C. BARRON DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* (5th ed. 2018).

<sup>41</sup> *Beauharnais*, 343 U.S. at 263.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Subjects to petition the King, and all Commitments and Prosecutions for such petitioning [for the same] are illegal.”<sup>44</sup> Beauharnais and his group were similarly trying to petition the elected representatives.

Justice Black said that labeling the Illinois law at issue a “group libel law” may make the law “more palatable for those who sustain it” but such “sugar-coating does not make the censorship less deadly.”<sup>45</sup> The law of criminal libel provided “for punishment of false, malicious, scurrilous charges against individuals, not against huge groups.”<sup>46</sup> The dissenters said the Illinois law, established a system of state censorship “which is at war with the kind of free government envisioned by those who forced the adoption of our Bill of Rights.”<sup>47</sup>

Time has not been kind to the *Beauharnais* decision. Fourteen years after that decision, in *Garrison v. Louisiana*,<sup>48</sup> Justice Douglas, concurring, took the position the *Beauharnais* should be treated as a discredited decision which should be overruled. He described it as a case which was “decided by the narrowest of margins.” Furthermore, he argued that the case

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<sup>44</sup> *Id.* at 267–68 (Black, J., dissenting).

<sup>45</sup> *Id.* at 271.

<sup>46</sup> *Id.* at 272.

<sup>47</sup> *Id.* at 274.

<sup>48</sup> 379 U.S. 64 (1964).

“should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment.”<sup>49</sup>

*D. Hate Speech—A Protected Speech Category?*

Cases like *Terminiello* and *Beauharnais* show us that the question of how law should treat racist speech is not a new problem. What is interesting about looking at these two cases is that they yielded conflicting results. Today the views of Justices Black and Douglas would likely prevail in the Supreme Court, but not those of Justices Frankfurter and Jackson. Basically, Justice Frankfurter in *Beauharnais* had ruled that the states could experiment and enact a statute to prohibit group libel or hate speech. Justice Black spoke with great passion against the idea:<sup>50</sup>

[N]o legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people.

Indeed, in recent years, the Supreme Court has been very clear that it is averse to creating new categories of unprotected speech. In three cases it has rejected legislation which would have prohibited or punished the following: (1)

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<sup>49</sup> *Id.* at 82 (Douglas, J., concurring).

<sup>50</sup> *Beauharnais*, 343 U.S. at 270 (Black, J. dissenting).



depiction of cruelty to animals for commercial purposes, *U.S. v. Stevens*;<sup>51</sup> (2) the sale or rental of violent video games to minors, *Brown v. Entertainment Merchants Association*;<sup>52</sup> and (3) making false representations that an individual has been awarded U.S. military decorations or medals. *U.S. v. Alvarez*.<sup>53</sup>

As I consider the problem of hate speech, I do so under the backdrop of these cases. Yet I also think back to the facts in *Terminiello*. The scenario there involved a speech with an audience of 800 inside an auditorium in Chicago and a crowd of 1,000 protesters outside. What is the reach of a hate speech website today? Its geographic reach is staggering. A hate speech website whose operators live in the United States can reach individuals everywhere in the nation and, as the shooting in the Mosque in Christchurch, New Zealand illustrates, anywhere in the world.<sup>54</sup>

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<sup>51</sup> 559 U.S. 460 (2010).

<sup>52</sup> 564 U.S. 786 (2011).

<sup>53</sup> 567 U.S. 709 (2012).

<sup>54</sup> Not all hate speech on the Internet is directed at racial and religious groups. In *Dumpson v. Ade*, Judge Rosemary M. Collyer awarded over \$700,000 in compensatory and punitive damages and attorneys fees to Taylor Dumpson, the first African-American student government President at American University for injury suffered because of online hate speech. *Dumpson v. Ade*, 2019 WL 3767171 (D.D.C. Aug. 9, 2019). The suit was brought by her against three defendants, Bryan Ade, Andrew Anglen, and Moonbase Holdings, Inc., who operated a white supremacist website. *Id.* at \*1. One of the defendants urged his online followers on the website to “troll storm” Ms. Dumpson. *Id.* After receiving a barrage of vicious racist messages, “Ms. Dumpson began fearing for her life and suffering physically and mentally.” *Id.* at \*4. The Court concluded that Ms. Dumpson asserted well-pleaded claims against the defendants for interference with places of public accommodation and an educational institution under the D.C. Human Rights Act and for intentional infliction of emotional distress under D.C. law. *Id.* at \*4–5.

### III. TOWARDS A REMEDY

I am not proposing that hate speech as a category should be deemed an unprotected category of speech. I am proposing instead that those who control the Internet platforms on which hate speech websites and postings are published should have to take responsibility for allowing these messages to appear on their platforms. I am asking that the protection from liability, and therefore, the escape from responsibility, that they are now afforded by § 230 should be removed.

#### A. *R.A.V.* and Fighting Words

In the event that the amendment to § 230 that I propose is enacted, a question arises whether it would survive a First Amendment-based challenge. Certainly, the Supreme Court's decision in *R.A.V. v. St. Paul*<sup>55</sup> would be relied on in such a challenge to support the unconstitutionality of such an amendment. *R.A.V.* dealt with a St. Paul, Minnesota ordinance which criminalized placing certain symbols such as a burning

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The defendants failed to file an answer to plaintiff's complaint or, indeed, to otherwise respond to it in any way. *Id.* at \*4. Therefore, the Court entered a default judgment against the defendants for both damages and injunctive relief. *Id.* at \*9. The legal claims asserted by the plaintiff for the online hate speech engaged in by the defendants are illustrative of remedies that may be sought by individuals, or groups, for Internet "troll storms" directed against them. However, since the defendants did not respond to the complaint, the Court did not deal with defenses that otherwise would have been made such as reliance on 47 U.S.C. § 230 and the First Amendment. Whether her suit would have been successful if these defenses had been made is an open question. Since the defendants did not file an answer to the complaint the Court had no occasion to discuss them.

<sup>55</sup> 505 U.S. 377 (1992).

cross or a swastika on public or private property. The defendant had been convicted under the ordinance for placing a burning cross on a black family's yard. The ordinance had been given a savings construction by the Minnesota Supreme Court limiting it to fighting words, an unprotected protected category of expression.<sup>56</sup> The ordinance was limited to fighting words that provoke violence "on the basis of race, color, creed, religion or gender[.]"<sup>57</sup>

The *R.A.V.* Court held, 5-4, per Justice Scalia, that the ordinance was facially unconstitutional because it discriminated against speech content and was fatally under-inclusive. In Justice Scalia's view, the fact that it involved an unprotected category of speech—fighting words—did not save the ordinance. Unprotected categories of speech such as fighting words were not "entirely invisible to the [First Amendment]." The problem the ordinance presented was that it was too selective. The St. Paul ordinance singled out only fighting words which were based on race, color, creed, religion, or gender. The ordinance did not reach fighting words directed to one's political views, union activity, or sexual orientation.

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<sup>56</sup> *Id.* at 381 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

<sup>57</sup> *Id.* at 380.

St. Paul argued the ordinance was necessary to avoid discord and division among its citizens. Therefore, using the strict scrutiny standard to evaluate the ordinance, it served a compelling governmental interest, *i.e.* harmony among its people. However, the Court rejected this argument because there was a content-neutral alternative to St. Paul—that was to proscribe all fighting words.

The four dissenters relying on the overbreadth doctrine concurred with the judgment of the Court that the St. Paul ordinance was invalid. But they sharply disagreed with the Court's rationale. Justice White, concurring, rightly objected that the result obtained by Justice Scalia's analysis would be to reduce the total volume of speech and would do so unnecessarily. To meet the analysis put forth by Justice Scalia the ordinance would have to be broadened to include fighting words about union affiliation, party membership and sexual orientation. But these issues were not the problems St. Paul was confronting. The problem St. Paul was confronting involved a single problem—about race.

Justice Stevens, concurring, noted that the Court objected to “the ‘all-or-nothing-at-all’ nature of the categorical

approach[.]”<sup>58</sup> By this he meant that Justice Scalia objected to the notion that all fighting words are immune from First Amendment. Yet at the same time, Justice Scalia “promptly embraces an absolutism of its own: Within a particular ‘proscribable’ category of expression, the Court holds, a government must either proscribe *all* speech or no speech at all.”<sup>59</sup>

*B. Wisconsin v. Mitchell*

*R.A.V.* was significantly distinguished in *Wisconsin v. Mitchell*.<sup>60</sup> In that case a Wisconsin statute provided for enhanced criminal penalties when the victim of a crime was chosen because of his race. The victim was a white boy who was severely beaten by a group of black men and boys. Pursuant to Wisconsin’s law imposing enhanced criminal penalties for racial bias, a crime which would have merited a two-year sentence was expanded to seven years because the victim was selected because of his race. The Wisconsin Supreme Court held that the enhanced penalty law was overbroad and that it punished “offensive thought.”<sup>61</sup>

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<sup>58</sup> *Id.* at 419.

<sup>59</sup> *Id.*

<sup>60</sup> 508 U.S. 476 (1993).

<sup>61</sup> *Id.* at 482.

The Supreme Court, per Justice Rehnquist, reversed the Wisconsin Supreme Court and upheld the Wisconsin enhanced penalties law. Justice Rehnquist ruled that *R.A.V.* was not on point. The Wisconsin law went beyond punishing expression and punished the underlying conduct. The defense, however, had contended that the rationale behind the law for enhancing the criminal penalties was the perpetrator's motive in selecting the victim which was racial bias.

The Court agreed that a person could not be punished for his abstract beliefs but then observed that motive was, after all, an important factor in determining penalties for criminal conduct. The crime the defendant was being punished for was criminal physical assault and the penalty for that is two years. Yet, when the motive for the crime, racial bias, is considered then the penalty is enhanced to seven years. Furthermore, it is also apparent that the defendant had a racist viewpoint. It seems pretty clear from *R.A.V.* that Justice Scalia believed that racial bias is a viewpoint and as such it receives First Amendment protection. Yet it is at least arguable that the defendant in *Wisconsin* was punished for his racially biased viewpoint.

Hate speech in the form of a burning cross in a black family's backyard is terrifying. But hate speech on a social media platform can be even more terrifying. The interactivity of a social media platform, the camaraderie that it engenders, and the rage that it fosters, provide a means of radicalization unknown to the more traditional media. This proposal removes operators of Internet platforms from the immunity from harms flowing from hate speech which would otherwise be provided by § 230. It does not criminalize anything. The result of this amendment to § 230 would place responsibility on the operators of Internet platforms for the hate speech that appears on those platforms. Hopefully, the result will be to diminish the volume of hate speech on the Internet.

## **CAN ANTITRUST PROTECT THE FOURTH ESTATE FROM THE FOURTH INDUSTRIAL REVOLUTION?**

Andrew I. Gavil\*

It would be strange indeed ... if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.<sup>1</sup>

### **I. INTRODUCTION**

As World War II was ending, the Supreme Court was asked to reconcile the goals of the Sherman Act and the First

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<sup>1</sup> *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945).



Amendment. It found no tension, no need for reconciliation: the free market and a free press shared common ground.

The experience of the War had no doubt heightened the Court's awareness of the central role of the marketplace of ideas in a free society. It, therefore, condemned one of the dominant cooperative news gathering agencies of its time, the Associated Press ("AP"), for refusing to share its content with non-member rivals of its membership. In doing so, the Court rejected AP's assertion that the application of the Sherman Act to its activities would abridge freedom of the press.<sup>2</sup> In the Court's view, the opposite was the case. By requiring AP to share its content the antitrust laws could promote access to the news and its widest possible dissemination. Antitrust enforcement could facilitate the political mission of the First Amendment and the vitality of the free press. Only six years later, the Court warned that newspapers were nevertheless vanishing at an alarming rate,<sup>3</sup> while reiterating the view expressed in *Associated Press* that "[a]

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<sup>2</sup> From the perspective of the Sherman Act, the Court observed, "the exclusive right to publish news" afforded by the AP gave its newspaper members a "competitive advantage" and left newspapers that did not have access at a "competitive disadvantage." *Associated Press*, 326 U.S. at 17–18.

<sup>3</sup> *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 603 (1953) ("...[T]oday, despite the vital task that in our society the press performs, the number of daily newspapers in the United States is at its lowest point since the century's turn...."). With some ups-and-downs, that decline has generally continued. See 5 *Key Takeaways About the State of the News Media in 2018*, PEW RES. CTR. (Jul. 23, 2019) <https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018/> ("[In 2018], U.S. newspaper circulation reached its lowest level since 1940....").

vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society.”<sup>4</sup>

The newspaper business’s continuing struggle to survive since that time has been extensively documented.<sup>5</sup> It is perhaps surprising, therefore, that it continued to come under the watchful eye of the antitrust enforcers of the Justice Department (“DOJ”), but incumbent firms facing new competitive challenges may resort to anticompetitive strategies to thwart those very challenges. From the 1940s until the 1960s, newspapers were the target of DOJ and private antitrust claims, mostly successful, which limited their ability to cooperate,<sup>6</sup> their options for responding to new rivals,<sup>7</sup> and their ability to control the distribution of newspapers to subscribers.<sup>8</sup>

These cases contributed to the establishment of important and largely enduring antitrust principles not only for the

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<sup>4</sup> *Times-Picayune*, 345 U.S. at 602.

<sup>5</sup> For one example of many, see STEVEN WALDMAN, ET. AL., THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 34–57 (Federal Comm. Commission 2011) [hereinafter FCC Report], <https://www.fcc.gov/general/information-needs-communities>. See also PENELOPE MUSE ABERNATHY, THE EXPANDING NEWS DESERT (2018), [https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10\\_14-Web.pdf](https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf); CLARA HENDRICKSON, LOCAL JOURNALISM IN CRISIS: WHY AMERICA MUST REVIVE ITS LOCAL NEWSROOMS (2019), <https://www.brookings.edu/wp-content/uploads/2019/11/Local-Journalism-in-Crisis.pdf>.

<sup>6</sup> *Citizen Publ’g. Co. v. United States*, 394 U.S. 131 (1969).

<sup>7</sup> *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

<sup>8</sup> *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968), *overruled by State Oil Co. v. Khan*, 522 U.S. 3 (1997).

newspaper industry. Those laws have evolved to focus on two kinds of anticompetitive conduct: collusion and exclusion. Both can take many forms and include coordination by rival firms, mergers, restricted distribution, and exclusionary strategies by dominant firms that impedes or entirely bars their smaller rivals from the market. Despite some differences, courts have moved toward a common framework that evaluates the relative strength of evidence of competitive effects, both “anti” and “pro.”<sup>9</sup>

These principles are being tested and questioned anew because of the rapid growth of the digital economy. Critics are asking whether they are adequate to the task of policing the behavior of the largest technology firms to preserve competition. Supporters continue to advocate for the less-interventionist view of antitrust that has taken hold over the last generation. And the once robust press, after many decades of decline, finds itself asking whether the laws once used to limit its conduct can help to protect it from the loss of advertising revenues associated with

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<sup>9</sup> For a discussion of that common framework, see Jonathan B. Baker & Andrew I. Gavil, *Judge Douglas H. Ginsburg and Antitrust Law's Rule(s) of Reason*, in DOUGLAS GINSBURG: AN ANTITRUST PROFESSOR ON THE BENCH, LIBER AMICORUM - VOL. II (Nicolas Charbit, ed., forthcoming 2020) <https://ssrn.com/abstract=3349853> (explaining that the “rule of reason” has become an apt description of the common framework under which most antitrust analysis is conducted). Commentators have also observed that exclusionary conduct can be used to support and perpetuate collusion. See, e.g. Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 536 (2013).

a still-growing digital platform economy.<sup>10</sup> Can the surviving print press of the twenty-first century use the legal and economic principles forged in the twentieth century—principles that they once resisted as defendants—to help shield itself from the competitive challenges of the information age?

In this essay, I look back to look forward. Part II examines a time now hard to imagine: a time when newspapers were prosecuted as monopolists and newsgathering cooperatives as anticompetitive conspiracies. Those cases followed now familiar theories of anticompetitive effect, largely targeting exclusionary strategies by incumbents seeking to fend off new rivals, including new technologies and business models. In this period, key concepts were developed that will be critical today in any effort to use antitrust enforcement against the digital platforms. Part II also includes a brief examination of how the print press was at first limited in its ability to structure its distribution practices, but then may have benefitted from the general loosening of antitrust law's restrictive attitude toward restraints on distribution.

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<sup>10</sup> For a sampling of the range of views, see *Online Platforms and Market Power, Part I: The Free and Diverse Press*, Hearing Before the House Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, 115th Cong. (2019), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2260> [hereinafter House Hearing].

Part III turns to Congressional efforts to resuscitate the press in response to yet another antitrust decision of the Supreme Court, *Citizen Publishing*,<sup>11</sup> which curtailed cooperation between rival newspapers in the form of “joint operating agreements.” Again at the behest of government antitrust enforcers, the Court concluded that newspapers were on the wrong side of antitrust law, this time for establishing cooperative relationships which, the papers argued, were necessary to preserve their very existence. Congress promptly responded with a limited antitrust exemption, opening up new avenues for cooperation, albeit with a degree of government oversight.<sup>12</sup>

Building on the foundation of Parts II and III, Part IV assesses the potential for using the antitrust doctrine that developed to police the press to now police its on-line rivals. It asks whether that doctrine, developed when antitrust was used as a sword against the press, could now serve the press as a shield against the still evolving and expanding digital marketplace. It concludes that although antitrust law enforcement may have a role to play, that role will likely be limited. Antitrust alone cannot save the press. It poses the question whether today’s press

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<sup>11</sup> *Citizen Publ’g. Co. v. United States*, 394 U.S. 131 (1969).

<sup>12</sup> See *infra*, Part III.B.

is suffering more so from a range of long-developing market forces and an excess of competition than from restraints on it, and whether other policy approaches will be necessary to preserve what the Court labeled in *Times-Picayune*, the “chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society.”<sup>13</sup>

## II. WHEN NEWSPAPERS WERE THE ANTITRUST NEWS

As a business model, the traditional print press has always had three critical components: content, advertising, and readers. It has been described, therefore, as a “platform,” with advertisers on one side and readers on the other.<sup>14</sup> Advertisers seek access to readers and readers are attracted by content and to an increasingly lesser extent to advertising.<sup>15</sup> The relationship between advertisers and readers is a critical feature of the business model: advertising rates will vary in proportion to the size of the readership. But for the most part, whether supported financially by advertising revenues alone, like free newspapers, over-the-air radio and television, or a combination of advertising

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<sup>13</sup> *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 602 (1953).

<sup>14</sup> For an explanation of the “platform” nature of the business and the indirect network effects that characterize it, see *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286 (2018). See also Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 544–47 (2016) (describing economics and welfare analysis of free newspapers).

<sup>15</sup> In their heyday “classified ads,” which have now been displaced to a degree by various on-line options, were also an attraction for readers in search of employment, housing, motor vehicles, and many other items for sale.

and subscription fees, newspapers must draw the attention of readers and to do that they must provide content that is valued. Owing to the high costs of generating that content, newspapers have also long sought to cooperate with others to gather and disseminate the news.

Competitive success requires access to all three—to advertisers, content, and readers. It is not surprising, therefore, that anticompetitive conduct in the industry has almost always involved efforts to limit or impede access to one or more of these essential lifelines. In terms of modern exclusion theory, the newspaper model is vulnerable to both input foreclosure (both advertising and content) and customer foreclosure (access to readers).<sup>16</sup> And, to varying degrees, the role of newspapers as organs of free speech that are vital to the functioning of a democratic society has surfaced as a justification for restricting competition.

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<sup>16</sup> For a discussion of the economics of exclusion, see ANDREW I. GAVIL, ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 451–59 (3d ed. 2017). See also Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 *ANTITRUST L.J.* 371, 376–78 (2017) (discussing two exclusion “paradigms” in antitrust law).

*A. Access to Content*

“The heart of the government’s charge” in *Associated Press* was that AP “had by concerted action set up a system of By-Laws which prohibited all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership.”<sup>17</sup> A divided Court concluded that the system was a violation of the Sherman Act, because it provided AP members with a significant competitive advantage and significantly hindered new rivals from entering the newspaper business,<sup>18</sup> an effect that was enabled by the AP’s “collective power.”<sup>19</sup> Importantly, the Court rejected the AP’s argument that because its content was not “indispensable,” its refusal to share that content could not supply the basis for antitrust liability.<sup>20</sup> As already noted, it also rejected AP’s argument that the imposition of antitrust liability would abridge the freedom of the press guaranteed by the First Amendment.<sup>21</sup>

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<sup>17</sup> *Assoc. Press v. United States*, 326 U.S. 1, 4 (1945). For an account of the story behind the case, which involved a clash of Chicago titans Marshall Field III and Robert McCormick, see SAM LEBOVIC, *FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA* 76–84 (2016).

<sup>18</sup> *Id.* at 13–14.

<sup>19</sup> *Id.* at 15.

<sup>20</sup> *Id.* at 18.

<sup>21</sup> *Id.* at 19–20. See also *supra* text accompany note 1. The American Newspaper Publishers Association filed an amicus brief emphasizing that application of the antitrust laws would be “repugnant to the guaranty of a free press as embraced by the First Amendment.” Brief of the American Newspaper Publishers Association as Amicus Curiae, *Assoc. Press v. United States*, 326 U.S. 1 (1945), 1944 WL 42542 at \*5.



*Associated Press* is one in a long line of cases that have prohibited certain types of concerted refusals to deal, which have also been labeled “group boycotts.”<sup>22</sup> Although the case has not been overruled and has subsequently been cited by the Supreme Court,<sup>23</sup> its continued vitality today might be questioned based on other developments in antitrust law. Today’s Court might be more receptive to the AP’s argument that forced sharing of its content can undermine incentives to compete and innovate.<sup>24</sup> Similarly, the Court has disavowed the “essential facilities” doctrine sometimes associated with the decision and others like it, albeit in the context of unilateral, not concerted refusals to deal.<sup>25</sup> As will be discussed in Part III, *infra*, today the desired input might be the “big data” that is generated by some of the largest and most successful digital platforms. Battles may be looming about whether they will be required to share that data

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<sup>22</sup> The treatment of group boycotts as an antitrust violation has been complicated and at times has involved *per se* condemnation for some conduct subject to the label. For a more complete discussion of these cases and the use of the “group boycott” label, see GAVIL, ET AL., *supra* note 16, at 165–70, 600–12.

<sup>23</sup> See, e.g., *Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284, 290 (1985).

<sup>24</sup> One commentator notes that as a consequence of the decision, the AP became even more dominant than it had previously been as it opened its doors to additional members and that doing so may have led to the homogenization of the content offered by newspapers. In the end, therefore, it may have diminished, not increased, the competition between them. See LEBOVIC, *supra* note 17, at 83 (noting that “if all papers relied on the AP service, the information that reached the public would become less diverse, not more diverse” and that by 1966 “84 percent of dailies received their out-of-town news entirely from one of the two remaining services”).

<sup>25</sup> See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410–11 (2004) (questioning prior judicial recognition and continued vitality of the “essential facilities” doctrine in connection with a unilateral refusal to deal in a regulated industry).

with rivals, especially as it relates to product and service development, improved targeting of advertising, and increased access to consumers. To date, however, there has not been any suggestion that they have acted in concert as had the members of the AP.

*B. Access to Advertising Revenues*

AP's jealous control of its content was not directed solely at its members' newspaper rivals. By the 1920s, newspapers were being challenged by radio broadcasting for advertisers and the consumers that attracted them, but were also concerned that broadcasters could easily lift their content. As the FCC observed in 2011:

Foreshadowing some of the concerns heard today, print journalists complained that radio stations often lifted copy directly from newspapers, aired stories that didn't go into depth, and hired inexperienced reporters. Newspaper executives tried to undermine competition from radio. The Associated Press, created by the newspaper industry, vowed in 1933 not to sell wire copy to radio stations.<sup>26</sup>

The response of newspapers to the perceived competitive threat of radio led to another important government antitrust challenge, *Lorain Journal Co. v. United States*,<sup>27</sup> a case that remains surprisingly relevant to the application of Section 2 of the

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<sup>26</sup> FCC Report, *supra* note 5, at 35.

<sup>27</sup> 342 U.S. 143 (1950).

Sherman Act and the offense of monopolization.<sup>28</sup> As in *Associated Press*, the case involved conduct that could be labeled a “refusal to deal” or “group boycott.” Also as in *Associated Press*, the challenged conduct arose as a response to new competition, in this instance WEOL, a newly licensed over-the-air radio station that challenged what the Court described as the Lorain Journal’s “substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character.”<sup>29</sup> As the Court put it, “WEOL offered competition by radio in all these fields so that the publisher’s attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper’s monopoly.”<sup>30</sup> In contemporary terms, radio was a disruptive new technology and source of competition based on a different business model<sup>31</sup> that threatened to diminish the market power of the incumbent, Lorain Journal.

The Lorain Journal responded by threatening to refuse to deal with any local merchant who advertised with WEOL and

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<sup>28</sup> 15 U.S.C. § 2 (prohibiting “monopolization” and “attempt to monopolize”).

<sup>29</sup> *Lorain Journal Co.*, 342 U.S. at 147. The Court observed that the Journal had obtained its position after purchasing its sole competing newspaper. The Court also noted that the Journal had itself sought, but failed to secure, a broadcasting license. *Id.* at 146.

<sup>30</sup> *Id.* at 151.

<sup>31</sup> Both newspapers and free over-the-air radio were dependent on advertising revenues. But because it did not also have subscriber income, the radio station was especially vulnerable to conduct that impeded its access to advertisers.

by terminating its relationships with any advertiser who did. It thus used a unilateral threat to refuse to deal to secure a concerted one. As the Court noted, “[t]he program was effective. Numerous Lorain County merchants testified that, as a result of the publisher’s policy, they either ceased or abandoned their plans to advertise over WEOL.”<sup>32</sup> WEOL’s only source of revenue, advertising dollars, was compromised.

The Supreme Court unanimously agreed with the government that Lorain Journal’s conduct violated the Sherman Act as an anti-competitive effort to thwart its emerging rival and maintain its monopoly. It reasoned that the reduction of advertisers willing to use WEOL:

...not only reduced the number of customers available to WEOL in the field of local Lorain advertising and strengthened the Journal's monopoly in that field, but more significantly tended to destroy and eliminate WEOL altogether. Attainment of that sought-for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, interstate and national, as well as local. It would deprive not merely Lorain but Elyria and all surrounding communities of their only nearby radio station.<sup>33</sup>

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<sup>32</sup> *Lorain Journal Co.*, 342 U.S. at 149.

<sup>33</sup> *Id.* at 150.

The Court rejected the Journal's argument that it had a "right" to "select its customers and to refuse to accept advertisements from whomever it pleases," citing to its previous decisions in *Associated Press* and quoting with added emphasis from *United States v. Colgate & Co.*, the Court reasoned:

The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. "*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (Emphasis supplied.)<sup>34</sup>

Three years later, the conduct of a newspaper was once again subjected to antitrust scrutiny by the Supreme Court at the behest of the government, but in this instance, the paper fared better, albeit with a closely divided Court.<sup>35</sup> And as in *Associated Press*, but notably not in *Lorain Journal*, the "freedom of the press" was again argued to be in tension with the antitrust laws.

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<sup>34</sup> *Id.* at 155 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). See also *Kansas City Star Co. v. United States*, 240 F.2d 643, 654–55 (8th Cir. 1957) (affirming criminal convictions under Section 2 for successful efforts by newspaper to use threats of refusals to deal to deprive rivals of advertising revenues).

<sup>35</sup> *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953). Justice Burton authored a dissenting opinion joined by Justices Black, Douglas and Minton. See *id.* at 628 (Burton, J., dissenting).

The Times-Picayune Publishing Company owned and published the morning Times-Picayune and the evening States in New Orleans. According to the Court, following years of consolidation and the acquisition of the States by the Times-Picayune, the two papers along with their main rival, The Item, were the “sole significant newspaper media for the dissemination of news and advertising to the residents of New Orleans.”<sup>36</sup>

The case concerned the Times-Picayune’s policy of selling advertising space for both general display and classified ads as a bundle: advertisers could only purchase ads appearing in both publications. It refused to accept ads for just one paper.<sup>37</sup> Viewing the contracts associated with the policy as “tying,” the district court had concluded that they violated both Sections 1 and 2 of the Sherman Act, because they foreclosed competition for advertising and resulted in higher advertising rates.<sup>38</sup> But the Court reversed, concluding that the government had failed to show that the agreements had the requisite adverse effect on competition.<sup>39</sup>

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<sup>36</sup> *Id.* at 598.

<sup>37</sup> *Id.* at 596–97. For the specifics and evolution of the plan, see *id.* at 598–601.

<sup>38</sup> *Id.* at 601.

<sup>39</sup> *Id.* at 622 (“the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm.”). Justice Burton, who authored the Court’s opinion in *Lorain Journal*, dissented, arguing that the district court’s findings were sufficient to warrant affirmance. He was joined by Justice Black, who wrote the majority opinion for the Court in *Associated Press*, and Justices Douglas and Minton. *Id.* at 628 (Burton, J., dissenting).

As was true of *Associated Press*, the Court appeared to be acutely aware of the challenges being faced by the newspaper industry. But in *Times-Picayune* acknowledging those challenges led the Court's majority to be especially reluctant to condemn the Times-Picayune's practices. The majority opinion quickly voiced its concern for the fate of the daily newspaper and its role in a democratic society, signaling that it had a different view of the utility of the arrangements than did the district court.<sup>40</sup> Before delving into the antitrust issues, it canvassed the available evidence of the decline of the daily newspaper and noted that many other papers had adopted a similar strategy of bundling advertising.<sup>41</sup> And it later carefully distinguished *Lorain Journal*.<sup>42</sup> In effect, even though the paper's policies were directed at and designed to thwart competition, as was true in both *Associated Press* and *Lorain Journal*, the Court viewed it as engaging in nothing more than aggressive competition, not exclusionary conduct.<sup>43</sup>

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<sup>40</sup> *Id.* at 602 ("The daily newspaper, though essential to the effective functioning of our political system, has in recent years suffered drastic economic decline. A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society."). See also *supra* note 3.

<sup>41</sup> *Id.* at 602–04. Those papers included the Times-Picayune's two main rivals, the Item and the Morning Tribune, at whom the policy was directed. *Id.* at 623.

<sup>42</sup> *Id.* at 625.

<sup>43</sup> Five years after its victory in the Supreme Court, the Times-Picayune purchased The Item, making it a complete newspaper monopoly in New Orleans, after which it "immediately increased its advertising rates by 30 percent." LEBOVIC, *supra* note 17, at 146.

*C. Access to Readers*

Printed newspapers also depend for their survival on a cost-effective method of distribution. In the twentieth century, that meant a combination of home delivery, newsstands, and various other retail businesses that included newspapers among their wares. In the mid-1960s, however, antitrust law adopted a skeptical stance toward efforts by suppliers to control their downstream distribution, a stance that came as newspapers were exploring alternative means of distributing papers. The Court's turn toward intolerance flowed in part from its long-standing hostility to minimum resale price maintenance, which it had condemned as early as 1911.<sup>44</sup> In 1967, the Court concluded that non-price restraints on distribution, such as limits on the territories in which independent distributors were authorized to sell, should be similarly condemned as per se unreasonable under the Sherman Act.<sup>45</sup> This set the stage the following year for yet another visit by a newspaper to the Supreme Court.

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<sup>44</sup> *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 406–08 (1911) (supplier's agreements with retailers setting the minimum price they could charge for its products violated Sherman Act), *overruled by* *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

<sup>45</sup> *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379–81 (1967) (holding vertical restrictions on territory, locations, or customers per se unlawful), *overruled by* *Cont'l TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977).



In 1968, the Court considered a newspaper's ability to control the downstream *maximum* retail prices charged by independent distributors in *Albrecht v. The Herald Co.*<sup>46</sup> The antitrust claim was brought not by the government, but by one of The Herald's independent carriers, who challenged the paper's effort to regulate the prices charged by carriers to The Herald's readers. The facts were largely undisputed: The Herald engaged another carrier to solicit away Albrecht's customers when Albrecht sought to charge them more than The Herald's maximum advertised retail prices. With two Justices dissenting, the Court held that the practice was a *per se* violation of the Sherman Act. In the Court's view, whether retail prices were set at a minimum or a maximum level by a supplier was irrelevant. In either instance fixing downstream prices substituted "the perhaps erroneous judgment of a seller for the forces of the competitive market," which "may severely intrude upon the ability of buyers to compete and survive in that market."<sup>47</sup> The holding was a blow to newspapers, however, for as Justice Harlan recognized in dissent, it could allow independent distributors to maximize their own profits by charging above-

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<sup>46</sup> 390 U.S. 145 (1968), *overruled by* *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997).

<sup>47</sup> *Id.* at 152.

maximum prices, which could drive down readership and hence advertising revenues, injuring newspaper-level competition.<sup>48</sup>

*Schwinn* and *Albrecht* together were the high watermark in the Court's hostility toward restrictions on distribution. But along with *Dr. Miles*, *Schwinn* and *Albrecht* would eventually be overruled. In the interim between *Albrecht* and *Sylvania*, the Court had changed. The Warren Court had given way to the Burger Court and five new justices, with different views about the role of antitrust in policing business behavior, had been added to the Court.<sup>49</sup> *Schwinn* was overruled within a decade by *Sylvania*. *Albrecht* remained the law for nearly thirty years until it was overruled in *Khan*. And *Dr. Miles*, the most durable of the three, was overruled after nearly a century in *Leegin*.

Newspapers lurked in the background, however, when the Court changed course with respect to the kinds of vertical, intrabrand, non-price restraints at issue in *Schwinn* and *Sylvania*.

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<sup>48</sup> As the Court would later recognize in overruling *Albrecht*, Justice Harlan correctly observed that "Price ceilings...do not lessen horizontal competition; they drive prices toward the level that would be set by intense competition, and they cannot go below this level unless the manufacturer who dictates them and the customer who accepts them have both miscalculated. Since price ceilings, reflect the manufacturer's view that there is insufficient competition to drive prices down to a competitive level, they have the arguable justification that they prevent retailers or wholesalers from reaping monopoly or supercompetitive profits." *Id.* at 159 (Harlan, J., dissenting).

<sup>49</sup> Only four of the nine Justices who had decided *Albrecht* remained on the Court when *Sylvania* was decided in 1977. For a discussion of the effect of the change in the Court's make-up on antitrust law, see Andrew I. Gavil, *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Court*, 79 ST. JOHN'S L. REV. 553, 561-63 (2005).

In *Noble v. McClatchy Newspapers*,<sup>50</sup> the distributor of the Sacramento Bee, which was published by McClatchy, challenged McClatchy's termination of their dealership when they refused to surrender a portion of their assigned territory and accused it of monopolizing the "publication of daily newspapers of general circulation in the relevant market."<sup>51</sup> Applying *Schwinn*, the Ninth Circuit agreed with the plaintiffs that territorial restrictions should have been treated as per se unlawful by the lower court,<sup>52</sup> but it affirmed the dismissal of their monopolization claim.<sup>53</sup> A petition for a writ of certiorari was pending, however, when the Supreme Court took up *Sylvania*. And in light of its decision in *Sylvania*, the Court granted the petition, vacated the Ninth Circuit's decision, and remanded the case for "further consideration in light of" its decision in *Sylvania*.<sup>54</sup>

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<sup>50</sup> 533 F.2d 1081 (9th Cir. 1975), *petition. for cert. granted and vacated* McClatchy Newspapers v. Noble, 433 U.S. 904 (1977).

<sup>51</sup> *Id.* at 1082, 1086.

<sup>52</sup> *Id.* at 1086–90.

<sup>53</sup> *Id.* at 1090.

<sup>54</sup> McClatchy Newspapers v. Noble, 433 U.S. 904 (1977); *see also* Naify v. McClatchy Newspapers, 599 F.2d 335 (9th Cir. 1977) (dismissing antitrust claims that challenged McClatchy's decision to substitute self-distribution for use of independent distributors just four days after *Sylvania* was decided). McClatchy recently joined the long list of newspaper publishers facing severe financial challenges when it filed for bankruptcy. *See* Taylor Telford, et al., *Newspaper Giant McClatchy Files for Bankruptcy, Hobbled by Debt and Declining Print Revenue*, WASH. POST (Feb. 13, 2020), <https://www.washingtonpost.com/business/2020/02/13/newspaper-giant-mcclatchy-files-bankruptcy-hobbled-by-debt-declining-print-revenue/>; *see also* Paschall v. Kansas City Star Co., 727 F.2d 692 (8th Cir. 1984) (rejecting antitrust challenge to newspaper's decision to switch from independent to direct-distribution).

It is no accident that these twentieth-century antitrust challenges to the newspaper industry focused on the three critical pathways that support publication of the news: generating content, securing advertisers, and distributing the content and advertising to the reading public. Historically, antitrust laws have often been directed at conduct that interferes with such market-specific pathways. In Part III, *infra*, we will consider whether the case law generated in enforcement directed at print journalism remains current and whether it might now be the foundation for any challenges to the digital platforms.

### III. COOPERATIVE PUBLISHING AND THE PERCEIVED NEED FOR ANTITRUST IMMUNITY

#### *A. The Antitrust Analysis of Joint Operating Agreements in Citizen Publishing*<sup>55</sup>

The newspaper business faced one final antitrust challenge at the Supreme Court as the 1960s came to a close. In *Citizen Publishing* the Supreme Court enjoined a joint operating agreement (JOA) between Tucson's only two newspapers of general circulation, The Citizen, an evening paper, and The Star, a morning daily. Under the agreement, each paper was to retain its own corporate identity, as well as its own news and editorial departments, but a new entity, Tucson Newspapers, Inc. (TNI),

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<sup>55</sup> *Citizen Pub. Co. v. United States*, 394 U.S. 131 (1969).

was created to manage all of their production, distribution, and related business.<sup>56</sup> According to the Court, “[t]he purpose of the agreement was to end any business or commercial competition between the two papers.”<sup>57</sup> TNI determined prices for subscriptions and advertising, all profits were pooled, and future competition outside of TNI was prohibited.<sup>58</sup> “All commercial rivalry between the papers ceased.”<sup>59</sup>

The Court readily concluded that the agreement violated the antitrust laws, describing the Sherman Act Section 1 violation as “beyond peradventure.”<sup>60</sup> The Court rejected what it described as the firms’ “only real defense,” that the agreement was necessary to prevent their failure. That “failing company” defense was asserted in response to the claims under Section 2 of the Sherman Act, 15 U.S.C. §2 and Section 7 of the Clayton Act, 15 U.S.C. §18.<sup>61</sup> Citing *Associated Press*, the Court also rejected the argument that application of the antitrust laws to the agreement abridged the First Amendment: “Neither news

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<sup>56</sup> *Id.* at 133–34.

<sup>57</sup> *Id.* at 134.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 135–36. Justice Harlan authored a separate concurring opinion and Justice Stewart, alone, dissented.

<sup>61</sup> *Id.* at 136–40.

gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices. The restraints on competition with which the present decree deals comport neither with the antitrust laws nor with the First Amendment.”<sup>62</sup>

*B. The Newspaper Preservation Act*

Congress responded promptly to *Citizen Publishing*, enacting the Newspaper Preservation Act in 1970,<sup>63</sup> which provided limited exemptions from the federal antitrust laws for newspaper JOAs and established a system of Department of Justice oversight through a review and approval process for JOAs.<sup>64</sup> The Congressional declaration of purpose states:

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter

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<sup>62</sup> *Id.* at 139.

<sup>63</sup> 15 U.S.C. §§ 1801–04.

<sup>64</sup> For a brief review of the history and evolution of JOAs prior to the adoption of the Newspaper Preservation Act, see Mark Fink, Comment, *The Newspaper Preservation Act of 1970: Help for the Needy or the Greedy?*, 1990 DET. COLLEGE L. REV. 93, 97–99. A comprehensive review of the commentary on the Act is beyond the scope of this essay. For one collection, see Eric J. Gertler, Comment, *Michigan Citizens for an Independent Press v. Attorney General: Subscribing to Newspaper Joint Operating Agreements or the Decline of Newspapers*, 39 AM. U.L. REV. 123, 126 & n.12 (1989).

effected in accordance with the provisions of this chapter.<sup>65</sup>

One of its explicit purposes was to allow the JOA prohibited in *Citizen Publishing* to be reinstated.<sup>66</sup> As one court later described it, quoting from the Act's legislative history:

Congress found that "economic conditions have created a situation in which a large majority of American communities have already become one owner newspaper communities."....JOAs accomplished Congress's goal because they allowed newspapers "to reduce costs by combining the economic and business aspects of newspaper production, and at the same time, permitted the newspaper participants to maintain separate editorial and reportorial staffs and independent editorial and news policies."<sup>67</sup>

Although the Act remains in force, the government has on occasion continued to challenge newspaper JOAs that, in its view, do not satisfy its terms.<sup>68</sup> Perhaps more importantly, the decline of newspapers has continued and the Act's antitrust exemption does not appear to have arrested that broader trend in any substantial way. One critic argues that the Act tended to

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<sup>65</sup> 15 U.S.C. § 1801.

<sup>66</sup> H.R. REP. NO. 91-1193, 91st Cong., 2nd Sess., 3547 (1970).

<sup>67</sup> *Hawaii Newspaper Agency v. Bronster*, 103 F.3d 742, 744-45 (9th Cir. 1996) (citations omitted).

<sup>68</sup> See, e.g., *United States v. Daily Gazette Co.*, 567 F. Supp.2d 859 (S.D.W.V. 2008). For an unsuccessful private challenge to a Justice Department decision to approve a JOA, see *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285 (D.C. Cir. 1989).

undermine, not promote free speech, by mistakenly equating less competition with more speech.<sup>69</sup> Few JOAs remain in effect, and litigation has even surfaced by newspapers trying to void them.<sup>70</sup> As will be discussed in Part III, however, once again some in the industry have advocated for antitrust exemptions that would allow some news publishers to pool together and coordinate their negotiations with the major digital platforms.

#### IV. PRESERVING PRINT NEWS IN THE DIGITAL AGE

What has been labeled the “fourth industrial revolution,”<sup>71</sup> combined with globalization, is now disrupting the world’s economies. It has been accompanied by the swift growth of technologies and technology-focused firms that have provided a wide range of new products and services, but which have also challenged policymakers to address myriad concerns, including privacy, data security, the spread of disinformation, and competition.

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<sup>69</sup> See Robbie Steel, Comment, *Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms*, 138 U. PENN. L. REV. 275 (1989). See also Thomas J. Horton, *Daily Newspapers and Antitrust: As Relevant and Crucial to Our Democracy as Ever*, in MEDIA MARKETS AND COMPETITION LAW: MULTINATIONAL PERSPECTIVES 153 (Antonio Bavasso, David S. Evans & Douglas H. Ginsburg, Eds.) (2019) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3544310](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544310) (arguing that the NPA likely led to lower quality journalism and less competitive newspapers).

<sup>70</sup> See Ken Ritter, *Judge Upholds Arbitration in Las Vegas Newspaper Battle*, AP News (Dec. 5, 2019), <https://apnews.com/e57d77d0f91fa7b460fe1aff3c6d178a>.

<sup>71</sup> For one interpretation of the term, see *The Fourth Industrial Revolution*, WORLD ECON. F. <https://www.weforum.org/focus/fourth-industrial-revolution> (last visited July 17, 2020).



The rapid growth of the largest technology-driven companies also has sparked an especially vigorous public debate about the current state and role of antitrust policy.<sup>72</sup> A great deal of attention has focused in particular on Amazon, Apple, Facebook, Google and Microsoft, eliciting strong and contrasting views about their conduct, including their acquisition strategies over the last decade.<sup>73</sup>

The continuing struggles of the newspaper industry have been part of that debate. Although it has fought for decades to fend off competitive challenges for advertising dollars from other media, the internet has presented its greatest competitive challenge yet.<sup>74</sup> The narrow question for this essay is “can antitrust law enforcement help?”

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<sup>72</sup> Numerous public and private agencies have recently undertaken studies and issued extensive reports on competition policy for the digital age. *See, e.g.*, UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (Mar. 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf); JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE & HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA (2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; STIGLER COMMITTEE ON DIGITAL PLATFORMS: FINAL REPORT (Stigler Ctr. 2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>. *See also* JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 97–193 (2019) (proposing revised antitrust rules for the information economy).

<sup>73</sup> In February 2020, the Federal Trade Commission announced a major study of the past non-reportable acquisitions of these five. *See* Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

<sup>74</sup> *See, e.g.*, *Newspapers Fact Sheet*, PEW RES. CTR. (Jul 9, 2019), <https://www.journalism.org/fact-sheet/newspapers/> (providing statistics on trends in newspaper circulation and the decline of advertising revenue). *See also* FCC Report, *supra* note 5, at 39 (“By 2005, the Internet had begun seriously undercutting newspaper revenue. In 2000, total newspaper print advertising amounted to almost

*A. Collusion or Exclusion?*

Any claim today against the digital platforms would likely need to be grounded in claims of collusion or exclusion. Although traditional collusion—some sort of conspiracy between the digital platforms—has not been uncovered, many of the accusations targeted at the large technology-driven firms have claimed that they are “monopolies” and are or have engaged in various exclusionary practices and unlawful acquisition strategies to squelch potential competition.

From the perspective of the newspaper industry, the most consistent target has been their power over advertising, especially Google and Facebook, and on the compensated (or under-compensated) “scraping” of valuable news content.<sup>75</sup> Some argue that they have collectively sucked countless advertising dollars out of the newspaper industry and that they have done so, in part, by free-riding on newspaper content.<sup>76</sup> The critical

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\$48.7 billion. Ten years later, it had plummeted to \$22.8 billion, a loss of more than 50 percent.”).

<sup>75</sup> See House Hearing, *supra* note 10 (statement of David Chavern, President and CEO, News Media Alliance), at 3:

These tech giants use secret, unpredictable algorithms to determine how and even whether content is delivered to readers. They scrape news organizations’ content and use it to their own ends, without permission or remuneration for the companies that generated the content in the first place. They also suppress news organizations’ brands, control their data, and refuse to recognize and support quality journalism.

<sup>76</sup> See House Hearing, *supra* note 10 (statement of David Pitofsky, General Counsel, News Corp.), at 1:

When it comes to news, the companies that invest in original journalism should reap the financial rewards of their creations. Unfortunately, free-riding by the dominant online platforms has

question will be whether the platforms are engaging in the kinds of strategies the newspapers once followed to squelch new competitive threats and whether there are effective remedies that might make a difference for the news. Ironically, are the digital platforms now in the “monopoly” position once enjoyed by newspapers and are they borrowing from their playbook? It may also be the case, however, that newspapers are once again facing a challenge from new technologies and new business models that their legacy business model is not well-equipped to address. Are newspapers seeking the protection of antitrust laws because they are the victims of exclusionary strategies, or are they seeking its protection *from* competition?

Antitrust law enforcement is at its best when the discrete conduct of individual firms or groups of firms is involved and its consequences can readily be observed or predicted. At the other

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resulted in a massive siphoning off of profits, such that the lion's share of online advertising dollars generated off the back of news content goes to the platforms, not to the content creators. As a result, while the tools consumers use to find news on the Internet may continue to develop, there is less and less reliable, quality news for consumers to find.

end of the spectrum are broad societal and market trends that can alter the very terms of competition. If antitrust violations are found, effective remedies, too, are likely to be a challenge for courts to identify and implement. To the extent a court were to conclude that any of the major digital platforms engaged in unlawful anticompetitive conduct, the likeliest remedy would be to enjoin that conduct. Repairing the market—addressing the consequences of the conduct—is theoretically permitted, but has proven to be a difficult road. Structural remedies, such as divestiture of specified assets, and the total dissolution of a company—a true “break-up”—are rare and the current standards of proof are demanding.<sup>77</sup> Any proposal to break them up will have to explain how such a remedy would be proportional to any violation and would not deprive consumers of the benefits that have fueled their growth.<sup>78</sup>

For these reasons and because concerns about the digital platforms go well-beyond competition issues, case-by-case enforcement, albeit of value, will typically not be a sufficient response to the larger trends.<sup>79</sup> Antitrust enforcement could not

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<sup>77</sup> See, e.g., *United States v. Microsoft Corp.*, 253 F.2d 34, 105–07 (D.C. Cir. 2001) (reversing order that Microsoft be broken up as a remedy for its violations of antitrust law).

<sup>78</sup> *Id.* at 106.

<sup>79</sup> See, e.g., House Hearing, *supra* note 10, at 5 (statement of Gene Kimmelman, President and CEO, Public Knowledge: “Even if the Federal Trade Commission (FTC) and Department of Justice (DOJ) enforce the antitrust laws to the fullest...that may not be enough to generate competitive digital markets in a timely fashion.”).

have helped the horse-and-buggy, the rotary phone, carbon paper, or cassette tapes—and it would have been a misuse of antitrust law if it had been used to do so. Competition policy, broadly conceived, is more likely to be useful during such transformative periods, but policymakers often find it difficult to strike the best balance between regulation and reliance on markets.

*B. Adaptive Strategies for Competing in the Information Age*

The New York Times topped five million subscribers in early 2020 and announced a goal to reach a subscription base of 10 million by 2025.<sup>80</sup> Facebook reportedly has a membership of more than 2 billion.<sup>81</sup> Although the competitive health of the Times appears to be on the upswing, it has an atypically broad-based subscriber base, and even so is and is likely to remain a limited competitor for Facebook when it comes to advertising revenue. As one recent study of the relationship between newspapers and digital platforms concluded, the “answer” for most newspapers, therefore, probably does not lie in recuperating some of its lost share of digital advertising, but rather in changing

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<sup>80</sup> Marc Tracy, *The New York Times Tops 5 Million Subscriptions as Ads Decline*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/business/new-york-times-earning.html>.

<sup>81</sup> See *Number of monthly active Facebook users worldwide as of 1st quarter 2020*, STATISTA, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (last visited July 17, 2020).

its business model to move away from reliance on advertising revenue to a combination of subscription income and public support.<sup>82</sup> Similarly, the FCC's 2011 Report observed:

Perhaps we have not gone from an era when newspapers could be profitable to one in which they cannot, but rather from an era when newspapers could be wildly profitable to one in which they can be merely moderately profitable or break even. It is an important distinction, because it means that certain public policy remedies—for instance, making it easier for newspapers to reestablish themselves as nonprofit entities—might be more fruitful than in the past. Or it may mean that wealthy individuals—entrepreneurs and philanthropists—will view newspaper ownership in a different light than most corporate leaders have: not as a profitmaking venture, but as a way to provide an important civic benefit that will help to sustain democracy.<sup>83</sup>

Some newspapers and news organizations are also exploring reliance on a non-profit model.<sup>84</sup> Local journalism is facing an

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<sup>82</sup> See PROTECTING JOURNALISM IN THE AGE OF DIGITAL PLATFORMS 3 (Stigler Ctr. 2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/media---report.pdf> [hereinafter Stigler Media Report] (“This report sees the seismic shift in the advertising dollars to the online world as an opportunity to create a news ecosystem supported more by paid subscriptions and public funding, and less by advertising.”).

<sup>83</sup> FCC Report, *supra* note 5, at 56; see also House Hearing, *supra* note 10, at 5 (statement of Kimmelman):

...[T]he exploding digital marketplace has effectively wiped out the market for print classified and display advertising. Because digital advertising is much cheaper, can be more personally targeted, and fits well with today's disaggregated news delivery, it is hard to imagine that the newspaper and news media industry could replace its lost print advertising online, even if all ad revenue flowed back to journalism. Therefore, the financing of quality news in the digital market will require new sources of revenue far beyond advertising to remain a positive force for democracy.

<sup>84</sup> See, e.g., Stigler Media Report, *supra* note 82, at 28–29. See also *Local and Nonprofit News*, KNIGHT FOUND., <https://knightfoundation.org/topics/local-and-nonprofit-news/> (collecting resources and guides for the non-profit business model). In 2019, it was reported, the Salt Lake Tribune became the first “legacy” newspaper to make that change. See *‘Salt Lake Tribune’ Becomes 1st Legacy Newspaper to Change to Nonprofit Structure*, NPR (Nov. 12, 2019), <https://www.npr.org/2019/11/12/778632543/salt-lake-tribune-becomes-first-legacy-newspaper-to-change-to-non-profit-structu>.

especially acute crisis and may require unique solutions tailored to the needs of local reporting, including public funding.<sup>85</sup>

In addition to revisiting the basics of its business model, the newspaper industry is already evolving to adapt to these new competitive circumstances in other ways, including new forms of procompetitive cooperation. For example, in 2010, the Associated Press secured a favorable Business Review Letter from the Justice Department indicating that the government would not challenge AP's plan "to develop and operate a voluntary news registry (the "Registry") to facilitate the licensing and Internet distribution of news content created by the AP, its members, and other news originators."<sup>86</sup> Similarly, the Knight Foundation has suggested a variety of ways that journalists and publishers could use artificial intelligence (AI) to their competitive advantage.<sup>87</sup> Many such proposals and others were examined and endorsed in the Stigler Center's 2019 Media Report.<sup>88</sup>

Broader technology industry regulation that might benefit newspapers may also be in the offing, albeit for reasons not

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<sup>85</sup> See, e.g., HENDRICKSON, *supra* note 5.

<sup>86</sup> See *Response to Associated Press's Request for Business Review Letter*, U.S. DEP'T OF JUSTICE (Mar. 31, 2010), <https://www.justice.gov/atr/response-associated-press-request-business-review-letter>.

<sup>87</sup> Paul Cheung, *Journalism's Superfood: AI?*, KNIGHT FOUND. (Nov. 21, 2019), <https://knightfoundation.org/articles/journalisms-superfood-ai/>.

<sup>88</sup> Stigler Media Report, *supra* note 82.

limited to competition. For example, the Stigler Center's Media Report discusses regulations to address media concentration,<sup>89</sup> and to increase transparency and accountability.<sup>90</sup> Some have also advocated for the creation of a new, industry-specific regulator.<sup>91</sup>

There is reason to be cautious, if not skeptical, however, of proposals to provide antitrust immunity for collective negotiations between news publishers and online platforms.<sup>92</sup> The challenges of the news business long pre-date the information age and consumers could well be the losers if reforms do little more than immunize news publishers from

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<sup>89</sup> *Id.* at 43–46.

<sup>90</sup> *Id.* at 46–54.

<sup>91</sup> House Hearing, *supra* note 10, at 6 (statement of Kimmelman: “Ultimately we cannot rely on antitrust alone to address the problems of platform power. We need a sector-specific regulator with expertise in how digital platforms operate and authority to affirmatively promote competition.”).

<sup>92</sup> See H.R. 2054, 106th Congress (2019–20), <https://www.congress.gov/bill/116th-congress/house-bill/2054/text>. For a sampling of contrasting views of the legislation, see Matt Stoler, *Tech Companies Are Destroying Democracy and the Free Press*, N.Y. TIMES (Oct. 17, 2019), <https://www.nytimes.com/2019/10/17/opinion/tech-monopoly-democracy-journalism.html>; Margaret Sullivan, *Google and Facebook Sucked Profits from Newspapers, Publishers are Finally Resisting*, WASH. POST (Jun. 5, 2019), [https://www.washingtonpost.com/lifestyle/style/google-and-facebook-sucked-profits-from-newspapers-publishers-are-finally-resisting/2019/06/04/d5fa2aaa-86de-11e9-98c1-e945ae5db8fb\\_story.html](https://www.washingtonpost.com/lifestyle/style/google-and-facebook-sucked-profits-from-newspapers-publishers-are-finally-resisting/2019/06/04/d5fa2aaa-86de-11e9-98c1-e945ae5db8fb_story.html); Alec Stapp, *Google and Facebook Didn't Kill Newspapers: The Internet Did*, TECHDIRT (Oct. 25, 2019), <https://www.techdirt.com/articles/20191024/13182743257/google-facebook-didnt-kill-newspapers-internet-did.shtml>; and Chris Jennewein, *Newspaper Preservation Act is Bad News for Journalism in America*, TIMES OF SAN DIEGO (Jun. 12, 2019), <https://timesofsandiego.com/opinion/2019/06/12/newspaper-preservation-act-is-bad-news-for-journalism-in-america/> (“The legislation would effectively allow a handful of large newspaper groups and their affiliated online publishing operations to control how Google, Facebook and Twitter display news content. The result would be a news cartel that excludes broadcast television, cable news and the growing numbers of independent local news publishers.”).



scrutiny by allowing them to extract higher prices from digital platforms.<sup>93</sup>

## V. CONCLUSION

Newspapers have faced competitive challenges from evolving technology since at least the advent of radio. From being the focus of antitrust law enforcement when newspapers were the incumbents seeking to use their competitive advantage to ward off those challenges, many newspapers now find themselves struggling to compete with today's digital platforms. The internet surely has amplified their precarious position in the marketplace, but the challenges of the digital age are not limited to newspapers. As I have argued, however, although antitrust law enforcement should play a role when exclusionary conduct is uncovered, it will not provide a complete response to the long-festered challenges of the news industry. Other options will be needed to preserve the free press.

Newspapers are not cassette tapes. They serve a public function that goes well beyond being just any product or service.

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<sup>93</sup> House Hearing, *supra* note 10, at 8 (statement of Kimmelman) (footnote omitted):  
We do not believe this problem will be solved by allowing more consolidation of power, whether among platforms or media. And we believe exceptions to the antitrust laws should be a tool of last resort, if they are ever used. Enabling excess market power to challenge the existing dominant platforms does nothing to address the long term need to develop market forces that promote strong local journalism, and does nothing to reduce any undue market power that may have made current market conditions worse.

They play an outsized role in a democratic society and it is now well-documented that they are at risk in the twenty-first century. Newspapers are losing the competition for the attention of the American reader. Winning back that attention is a societal challenge that goes beyond antitrust policy alone and will require broader strategies to refresh the product, reimagine the business model, and win back customers.

# THE MODERN FIGHT FOR MEDIA FREEDOM IN THE UNITED STATES

Jonathan Peters\*

## I. INTRODUCTION

The First Amendment as a subject is challenging and provocative, and scholarly and popular understandings of it are changing.<sup>1</sup> New communication technologies are pushing lawyers, judges, and scholars to revisit, and sometimes rethink, old legal doctrines and concepts.<sup>2</sup> In the area of privacy, we have

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<sup>1</sup> See, e.g., Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Aug. 21, 2019), <https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment>; Kate Klonick, *Facebook v. Sullivan*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Oct. 1, 2018), <https://knightcolumbia.org/content/facebook-v-sullivan>; Frederick Schauer, *The Hostile Audience Revisited*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Nov. 2, 2017), <https://knightcolumbia.org/content/hostile-audience-revisited>; Jeremy Waldron, *A Raucous First Amendment, Wild, Boisterous, and Raucous Free Speech*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Aug. 21, 2019), <https://knightcolumbia.org/content/a-raucous-first-amendment-1>; Tim Wu, *Beyond First Amendment Lochnerism: A Political Process Approach*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Aug. 21, 2019), <https://knightcolumbia.org/content/beyond-first-amendment-lochnerism-a-political-process-approach>; Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Sept. 1, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete>.

<sup>2</sup> See, e.g., *Daivson v. Randall*, 912 F.3d 666 (4th Cir. 2019); *Knight First Amend. Inst. at Colum. U. v. Trump*, 928 F.3d 226 (2d Cir. 2019).

to think today about encryption<sup>3</sup> and a website's terms of service.<sup>4</sup> In the area of copyright, we have to think about peer-to-peer file sharing<sup>5</sup> and the licenses granted by iTunes.<sup>6</sup> In the area

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<sup>3</sup> See, e.g., Joshua Benton, *Here Are 12 Principles Journalists Should Follow to Make Sure They're Protecting their Sources*, NIEMANLAB (Jan. 16, 2019, 11:00 AM), <https://www.niemanlab.org/2019/01/here-are-12-principles-journalists-should-follow-to-make-sure-theyre-protecting-their-sources/>; Kate Krauss, *Time for Journalists to Encrypt Everything*, WIRED: OPINION (Mar. 10, 2017, 10:30 AM), <https://www.wired.com/2017/03/time-journalists-encrypt-everything/>; Spencer Woodman, *Five Digital Security Tools to Protect Your Work and Sources*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS: BLOG (Jan. 29, 2018), <https://www.icij.org/blog/2018/01/five-digital-security-tools-to-protect-your-work-and-sources/>.

<sup>4</sup> See, e.g., Ian MacDougall, *Soon You May Not Even Have to Click on a Website Contract to be Bound by its Terms*, PROPUBLICA (May 20, 2019), <https://www.propublica.org/article/website-contract-bound-by-its-terms-may-not-even-have-to-click>; New York Times Editorial Board, *How Silicon Valley Puts the 'Con' in Consent*, N.Y. TIMES: OPINION (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/opinion/internet-facebook-google-consent.html>; Charlie Warzel & Ash Ngu, *Google's 4,000-Word Privacy Policy is a Secret History of the Internet*, N.Y. TIMES: THE PRIVACY PROJECT (July 10, 2019), <https://www.nytimes.com/interactive/2019/07/10/opinion/google-privacy-policy.html>.

<sup>5</sup> See, e.g., Richard Conniff, *Steal This Book? There's a Price*, N.Y. TIMES: OPINION (Sept. 15, 2019), <https://www.nytimes.com/2019/09/15/opinion/book-piracy.html>; Guillermo Contreras, *Alleged 'Copyright Troll' Claims Unnamed San Antonians Are Stealing Porn Movies*, SAN ANTONIO EXPRESS-NEWS (July 18, 2019, 3:44 PM), <https://www.expressnews.com/news/local/article/Alleged-copyright-troll-claims-unnamed-San-14106219.php>; Ben Gilbert, *Facebook Now Blocks People from Sharing Links to Notorious Piracy Site The Pirate Bay*, BUS. INSIDER (Sept. 30, 2019, 10:20 AM), <https://www.businessinsider.com/facebook-blocks-users-from-linking-to-the-pirate-bay-2019-9>.

<sup>6</sup> See, e.g., Harmeet Kaur, *Now That iTunes Is Going Away, Here's What Will Happen to Your Music and Movies*, CNN: BUSINESS (June 6, 2019, 2:24 PM), <https://www.cnn.com/2019/06/06/tech/apple-explains-itunes-changes-trnd/index.html>; David Lazarus, *Column: When You Buy Digital Content On Amazon Or iTunes, You Don't Exactly Own It*, L.A. TIMES (May 13, 2016, 3:00 AM), <https://www.latimes.com/business/lazarus/la-fi-lazarus-digital-content-20160513-snap-story.html>; Mike Masnick, *You Don't Own What You've Bought: Apple Disappears Purchased Movies*, TECHDIRT (Sept. 12, 2018, 10:37 AM), <https://www.techdirt.com/articles/20180912/09473640628/you-dont-own-what-youve-bought-apple-disappears-purchased-movies.shtml>.

of sexual expression, we have to think about sexting,<sup>7</sup> revenge porn,<sup>8</sup> and deep fakes.<sup>9</sup>

This is the emerging state of play for First Amendment law in our modern media landscape, in which PBS has a Pinterest board,<sup>10</sup> the Associated Press once built a partnership with other news organizations to collect royalties from aggregators,<sup>11</sup> and the “people formerly known as the audience,” as New York University’s Jay Rosen once put it,<sup>12</sup> regularly perform journalistic acts using their own smartphones.<sup>13</sup> This is

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<sup>7</sup> See, e.g., John A. Humbach, “Sexting” and the First Amendment, 37 HASTINGS CONST. L.Q. 433 (2010); Robert D. Richards & Clay Calvert, *Prosecuting Obscenity Cases: An Interview With Mary Beth Buchanan*, 9 FIRST AMEND. L. REV. 56 (2010); Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1 (2009).

<sup>8</sup> See, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Alix Iris Cohen, *Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech*, 70 U. MIAMI L. REV. 300 (2015); Deanna Paul, *Is Revenge Porn Protected by the Constitution? Some States Might Say Yes*, WASH. POST (May 19, 2019, 11:07 AM), <https://www.washingtonpost.com/nation/2019/05/19/is-revenge-porn-protected-by-constitution-some-states-might-say-yes/>.

<sup>9</sup> See, e.g., Jesselyn Cook, *Here’s What It’s Like To See Yourself In A Deepfake Porn Video*, HUFFINGTON POST (June 23, 2019, 7:00 AM), [https://www.huffpost.com/entry/deepfake-porn-heres-what-its-like-to-see-yourself\\_n\\_5d0d0faee4b0a3941861fced](https://www.huffpost.com/entry/deepfake-porn-heres-what-its-like-to-see-yourself_n_5d0d0faee4b0a3941861fced); Tom Simonite, *Most Deepfakes Are Porn and They’re Multiplying Fast*, WIRED (Oct. 7, 2019, 10:00 AM), <https://www.wired.com/story/most-deepfakes-porn-multiplying-fast/>; James Vincent, *New AI Deepfake App Creates Nude Images of Women in Seconds*, THE VERGE (June 27, 2019, 6:23 AM), <https://www.theverge.com/2019/6/27/18760896/deepfake-nude-ai-app-women-deepnude-non-consensual-pornography>.

<sup>10</sup> PBS, PINTEREST, <https://www.pinterest.com/pbsofficial/> (last visited Oct. 17, 2019).

<sup>11</sup> Rick Edmonds, *AP, 28 News Orgs Launch Newsright to Collect Licensing Fees from Aggregators*, POYNTER (Jan. 5, 2012), <https://www.poynter.org/reporting-editing/2012/ap-28-news-orgs-launch-newsright-to-collect-licensing-fees-from-aggregators/>.

<sup>12</sup> Jay Rosen, *The People Formerly Known as the Audience*, PRESS THINK (June 27, 2006), [http://archive.pressthink.org/2006/06/27/pp1\\_frmr.html](http://archive.pressthink.org/2006/06/27/pp1_frmr.html).

<sup>13</sup> See, e.g., David Uberti, *Philando Castile, Facebook Live, and a New Chapter for Citizen Journalism*, COLUM. JOURNALISM REV. (July 7, 2016), [https://www.cjr.org/analysis/philando\\_castile\\_minnesota\\_facebook\\_live.php](https://www.cjr.org/analysis/philando_castile_minnesota_facebook_live.php); Mike Isaac & Sydney Ember, *Live Footage of Shootings Forces Facebook to Confront New Role*,

a media industry in which the gathering, production, and distribution of content is widely dispersed,<sup>14</sup> and the ongoing challenge for First Amendment law is to keep up—to breathe life into the freedoms of speech and press, no matter the media of the day.

Public-opinion research shows that most Americans support the freedoms of speech and press, but nearly one-third think they go too far,<sup>15</sup> and roughly a quarter of Americans think “the president should have the authority to close news outlets engaged in bad behavior,” including 43 percent of Republicans.<sup>16</sup> Courts have confronted these idiosyncrasies daily, for decades, in cases involving people who say things that are different, offensive, or unwelcome.<sup>17</sup> That is because the real power of the

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N.Y. TIMES (July 8, 2016), [https://www.nytimes.com/2016/07/09/technology/facebook-dallas-live-video-breaking-news.html?\\_r=0](https://www.nytimes.com/2016/07/09/technology/facebook-dallas-live-video-breaking-news.html?_r=0); Trevor Timm, *People Who Film Police Violence Are Citizen Journalists. We Stand With Them*, GUARDIAN (Aug. 10, 2016, 1:52 PM), <https://www.theguardian.com/commentisfree/2016/aug/10/filming-police-violence-citizen-journalists-first-amendment>.

<sup>14</sup> Leonard Downie Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (2009), [https://archives.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php](https://archives.cjr.org/reconstruction/the_reconstruction_of_american.php).

<sup>15</sup> *The 2019 State of the First Amendment*, FREEDOM FORUM INSTITUTE, 3-4 (2019), <https://www.freedomforuminstitute.org/wp-content/uploads/2019/06/SOFAreport2019.pdf>.

<sup>16</sup> *American's Views on the Media*, IPSOS (Aug. 7, 2018), <https://www.ipsos.com/en-us/news-polls/americans-views-media-2018-08-07>.

<sup>17</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012); *Snyder v. Phelps*, 562 U.S. 443 (2011); *United States v. Stevens*, 559 U.S. 460 (2010); *Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); *Miller v. California*, 413 U.S. 15 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969); *Roth v. United States*, 354 U.S. 476 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Abrams v. United States*, 250 U.S. 616 (1919).

First Amendment is not in the protection it gives to popular speech but rather to unpopular speech.<sup>18</sup> Under the First Amendment, particularly its broad modern judicial interpretations, certain types of speech that are unlawful in other countries, even in other democracies, are protected in the United States.<sup>19</sup>

That is why the late writer Anthony Lewis, who covered the U.S. Supreme Court for *The New York Times* and founded the field of legal journalism,<sup>20</sup> once said that Americans are more free to say what they think, and to think what they will, than any other people in the world.<sup>21</sup> Whether or not that is true, Americans do have a large amount of expressive freedom, which is part of an evolving First Amendment story, one moved along by judicial and legislative trial and error.<sup>22</sup> And that process is ongoing. Our current moment is critical for freedom of expression. The president has been denouncing the press in

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<sup>18</sup> Nina Totenberg, *High Court Asked to Limit Military Funeral Protests*, NPR: MORNING EDITION (Oct. 6, 2010, 12:02 AM), <https://www.npr.org/templates/story/story.php?storyId=130357711>. According to ACLU Legal Director Steven Shapiro, “The First Amendment really was designed to protect a debate at the fringes. You don’t need the courts to protect speech that everybody agrees with, because that speech will be tolerated. You need a First Amendment to protect speech that people regard as intolerable or outrageous or offensive—because that is when the majority will wield its power to censor or suppress....” *Id.*

<sup>19</sup> ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* ix-xv (2007).

<sup>20</sup> Richard Reuben, *The Art, Craft, and Future of Legal Journalism: A Tribute to Anthony Lewis*, 79 MO. L. REV. 849, 850 (2014).

<sup>21</sup> See LEWIS, *supra* note 19, at ix.

<sup>22</sup> *Id.* at x-xii.

rallies and speeches and on Twitter, and other elected officials have been parroting his rhetoric.<sup>23</sup> Reporters are being assaulted<sup>24</sup> and arrested<sup>25</sup> covering protests—and sued by the wealthy.<sup>26</sup> Meanwhile, Facebook and YouTube have adopted policies and practices making it more difficult to produce quality journalism,<sup>27</sup> and in general public opinion of the press is desperately low.<sup>28</sup> A recent survey revealed that many Americans are poorly informed about the First Amendment.<sup>29</sup> Over a third cannot name any rights that it guarantees.<sup>30</sup>

<sup>23</sup> See, e.g., Jonathan Peters, *Trump Twitter Spreadsheet Tracks “a Perpetual Campaign against the Press”*, COLUM. JOURNALISM REV. (Dec. 21, 2017), [https://www.cjr.org/united\\_states\\_project/trump-twitter-spreadsheet-press-attacks.php](https://www.cjr.org/united_states_project/trump-twitter-spreadsheet-press-attacks.php); Jonathan Peters, *Trump and Trickle-down Press Persecution*, COLUM. JOURNALISM REV. (Spring 2017), [https://www.cjr.org/local\\_news/trump-and-trickle-down-press-persecution.php](https://www.cjr.org/local_news/trump-and-trickle-down-press-persecution.php).

<sup>24</sup> See, e.g., Peter Sterne & Jonathan Peters, *‘Put the Camera Down’: Covering Protests Has Become the Riskiest Job in Journalism*, COLUM. JOURNALISM REV. (Fall 2017), [https://www.cjr.org/special\\_report/covering-protests-threats-press-freedom-tracker.php](https://www.cjr.org/special_report/covering-protests-threats-press-freedom-tracker.php).

<sup>25</sup> See, e.g., Jonathan Peters, *When a Journalist Is Arrested Covering a Protest, What Should the News Outlet Do?*, COLUM. JOURNALISM REV. (Oct. 2, 2017), [https://www.cjr.org/united\\_states\\_project/protest-arrests-journalism-st-louis.php](https://www.cjr.org/united_states_project/protest-arrests-journalism-st-louis.php).

<sup>26</sup> See, e.g., Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html>; Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html>; NOBODY SPEAK: TRIALS OF THE FREE PRESS (Netflix 2017), <https://www.netflix.com/title/80168227>.

<sup>27</sup> See, e.g., Mathew Ingram, *Youtube Takedowns Are Making It Hard to Document War Crimes*, COLUM. JOURNALISM REV. (Oct. 24, 2019), [https://www.cjr.org/the\\_media\\_today/youtube-takedowns-war-crimes.php](https://www.cjr.org/the_media_today/youtube-takedowns-war-crimes.php); Mathew Ingram, *The Facebook Armageddon: The social network’s increasing threat to journalism*, COLUM. JOURNALISM REV. (Winter 2018), [https://www.cjr.org/special\\_report/facebook-media-buzzfeed.php](https://www.cjr.org/special_report/facebook-media-buzzfeed.php).

<sup>28</sup> *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POL’Y CTR. UNIV. PA. (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*



Other recent surveys have shown that a majority of daily newspaper editors feel that financial constraints are making it difficult for news organizations to go to court to protect First Amendment rights,<sup>31</sup> that 84 percent of Americans say the press is critical to democracy but only 28 percent feel the press is actually performing its role well,<sup>32</sup> and that Democrats are 47 points more likely than Republicans to support the press's watchdog role.<sup>33</sup> Individual journalists cannot do their jobs if the institution of the press is delegitimized or if the legal protections for that institution are not understood. That is a problem of massive proportions because "a free press, however imperfect, is the lifeblood of a healthy democracy, one in which journalists are both benefactors and beneficiaries of the First Amendment—protecting and relying on its freedoms to inform their communities and enable democratic participation."<sup>34</sup>

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<sup>31</sup>Jonathan Peters, *Survey: Editors See Media Losing Ground as Legal Advocate for 1st Amendment*, COLUM. JOURNALISM REV. (Apr. 21, 2016), [https://www.cjr.org/united\\_states\\_project/knight\\_survey\\_editors\\_first\\_amendment.php](https://www.cjr.org/united_states_project/knight_survey_editors_first_amendment.php).

<sup>32</sup>Jessica Estepa, *Gallup/Knight Survey: Americans Believe Media Matters, But Don't Think It's Doing Its Job*, USA TODAY (Jan. 16, 2018, 12:01 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/01/16/gallup-knight-survey-americans-believe-media-matters-but-dont-think-its-doing-its-job/1033956001/>.

<sup>33</sup>Michael Barthel & Amy Mitchell, *Americans' Attitudes About the News Media Deeply Divided Along Partisan Lines*, PEW RES. CTR. (May 10, 2017), <https://www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines/>.

<sup>34</sup>Jonathan Peters, Opinion, *The Newspaper Ad that Changed Everything*, CNN (Nov. 20, 2017, 7:52 AM), <https://www.cnn.com/2017/11/20/opinions/new-york-times-v-sullivan-impact-opinion-peters/index.html>.

To put all of these comments in concrete terms, this essay addresses four discrete issues in the modern fight for media freedom in the United States. The first is fake news. The second is press rights at protests. The third is freedom of information. And the fourth is how tech platforms have evolved into serious threats to journalism. These issues are explored below in both practical and theoretical terms.

## II. FAKE NEWS

Fake news means everything and nothing. Dictionaries have added the term to their pages, and its usage, according to researchers, has grown more than 350 percent since 2016.<sup>35</sup> President Donald Trump claimed recently to have invented the term,<sup>36</sup> and there is no doubt that he has popularized it.<sup>37</sup> Trump has tried time and again to engage in character assassination of the press as an institution, referring to any report that he simply does not like as fake news.<sup>38</sup> In a television interview with CBS's

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<sup>35</sup> Summer Meza, 'Fake News' Named Word of the Year, NEWSWEEK (Nov. 2, 2017, 12:33 PM), <https://www.newsweek.com/fake-news-word-year-collins-dictionary-699740>.

<sup>36</sup> Jane E. Kritley, *Getting to the Truth: Fake News, Libel Laws, and "Enemies of the American People,"* 43 HUMAN RTS. MAG. (Oct. 2018), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-ongoing-challenge-to-define-free-speech/getting-to-the-truth/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/getting-to-the-truth/).

<sup>37</sup> *Id.*

<sup>38</sup> Margaret Sullivan, Perspective-Opinion, *The Term 'Fake News' Has Lost All Meaning. That's Just how Trump Wants It.*, WASH. POST (Apr. 4, 2018, 6:00 AM), <https://www.washingtonpost.com/lifestyle/style/the-term-fake-news-has-lost-all->

Lesley Stahl, before the cameras were turned on, Trump explained why he routinely attacks the press, saying: “You know why I do it? I do it to discredit you all and demean you all so that when you write negative stories about me, no one will believe you.”<sup>39</sup>

The term fake news made its first known appearance in the American press in 1890, when *The Cincinnati Commercial Tribune* published a story under the headline “Secretary Brunnell declares fake news about his people is being telegraphed over the country.”<sup>40</sup> Long before that, the concept of fake news (actual fake news: stories that are demonstrably false) was with us even if the term was not. In 1782, to drum up support for American independence, Ben Franklin created a fake issue of a real Boston newspaper, and one fake story in it accused the British of hiring Native Americans to scalp colonial women, children, and soldiers.<sup>41</sup> In 1835, the penny press surged in popularity, and it brought to news consumers the Great Moon Hoax, a widely

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meaning-thats-just-how-trump-wants-it/2018/04/03/ce102ed4-375c-11e8-8fd2-49fe3c675a89\_story.html.

<sup>39</sup> *Leslie Stahl: Trump Admitted mission to “Discredit” Press*, CBS NEWS (May 23, 2018, 5:39 AM), <https://www.cbsnews.com/news/lesley-stahl-donald-trump-said-attacking-press-to-discredit-negative-stories/>.

<sup>40</sup> *The Real Story of “Fake News”*: *The Term Seems to have Emerged Around the End of the 19th Century*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news> (last visited Oct. 20, 2019).

<sup>41</sup> Robert G. Parkinson, *Fake news? That’s a very old story.*, WASH. POST (Nov. 25, 2016), [https://www.washingtonpost.com/opinions/fake-news-thats-a-very-old-story/2016/11/25/c8b1f3d4-b330-11e6-8616-52b15787add0\\_story.html](https://www.washingtonpost.com/opinions/fake-news-thats-a-very-old-story/2016/11/25/c8b1f3d4-b330-11e6-8616-52b15787add0_story.html).

shared fake story about an astronomer who reportedly observed unicorns on the moon.<sup>42</sup>

There was discussion at the First Constitutional Convention of the press's power and its record of publishing falsehoods—and yet the founders later converged around the speech and press freedoms found in the First Amendment.<sup>43</sup> As one commentator put it, they recognized that “truth cannot be centrally planned” and that it is often impossible to distinguish normatively good and bad exercises of press freedom, so the system they designed put trust in public judgment.<sup>44</sup> The problem is that the framers never could have anticipated the effects of bots and artificial intelligence on the marketplace, where ideas are supposed to compete on their merits but increasingly are weaponized by special interests who use new technologies to flood the marketplace with certain ideas to make them seem more salient and accepted than they actually are.<sup>45</sup> That is a

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<sup>42</sup> Kevin Young, *Moon Shot: Race, A Hoax, and the Birth of Fake News*, THE NEW YORKER (Oct. 21, 2017), <https://www.newyorker.com/books/page-turner/moon-shot-race-a-hoax-and-the-birth-of-fake-news>.

<sup>43</sup> Jarrett Stepman, *We Already Have a Solution to Fake News: It's Called the First Amendment*, THE HERITAGE FOUND. (Oct. 9, 2017), <https://www.heritage.org/insider/fall-2017-insider/we-already-have-solution-fake-news-its-called-the-first-amendment>.

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., Merritt Baer, *Do Russian-Backed Bots Qualify for Free Speech*, DAILY BEAST (Oct. 27, 2017, 9:33 AM), <https://www.thedailybeast.com/do-russian-backed-bots-qualify-for-free-speech>; Laurent Sacharoff, *Do Bots Have First Amendment Rights?*, POLITICO (Nov. 27, 2018), <https://www.politico.com/magazine/story/2018/11/27/bots-first-amendment-rights-222689>; Jared Schroeder, *Are Bots Entitled to Free Speech*, COLUM. JOURNALISM REV. (May 24, 2018), <https://www.cjr.org/innovations/are-bots-entitled-to-free>.

perversion of the marketplace as it was conceived,<sup>46</sup> and right now an urgent question is what to do about it.

For one, news consumers, social media companies, and news organizations need to take steps to be market correctors. Consumers should support good journalism and those producing it, social media companies should reduce the financial incentives for people to produce fake news, and news organizations should be faithful to their principles and should call out fake news and its sources. Journalism's first obligation is to truth, and its highest loyalty is to the public.<sup>47</sup> And because journalists are both beneficiaries and benefactors of the marketplace, they have a responsibility to protect it from bad actors, while being careful

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speech.php; Zeynep Tufekci, *It's the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018, 6:00 AM), <https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/>.

<sup>46</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he theory of our Constitution” is that “the ultimate good desired is better reached by free trade in ideas,” and “the best test of truth is the power of the thought to get itself accepted in the competition of the market....”); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–24 (2008) (stating that the metaphor of a “market” in ideas “conceptualized the purpose of free speech so powerfully that” the Abrams dissent “revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech.”); JOHN MILTON, *AREOPAGITICA* 58 (Richard C. Jebb ed., Cambridge Univ. Press 1918) (1644) (“And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”); JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in 18 COLLECTED WORKS OF JOHN STUART MILL 213, 229 (John M. Robson ed. 1977) (“[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”).

<sup>47</sup> Walter Dean, *The Elements of Journalism*, AM. PRESS INST., <https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/elements-journalism/> (last visited Oct. 20, 2019).

how they do so. When reporting on a lie, for example, it is best to limit its description, because repeating misinformation can reinforce it.<sup>48</sup> That is especially true when the misinformation offers a simpler explanation than the truth.<sup>49</sup> Giving news consumers novel and credible information can be effective in debunking misinformation, too.<sup>50</sup> The new information allows people to update their understanding of an event, enabling them to some degree to justify to themselves why they fell for the falsehood in the first place.<sup>51</sup> Those are just two easy things that journalists and news organizations could do to address the scourge of fake news.

More broadly, thinking of the phrase fake news the way Trump does (to mean any story he simply dislikes), this is all part of the administration's illiberal and rhetorical campaign against the press as an institution.<sup>52</sup> Trump alone has posted more than

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<sup>48</sup> Maia Szalavitz, *Why Misinformation Sticks and Corrections Can Backfire*, TIME (Sep. 20, 2012), <http://healthland.time.com/2012/09/20/why-misinformation-sticks-and-corrections-can-backfire/>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., Julia Arciga, *Trump Says 'Press' is 'Truly the Enemy of the People'*, DAILY BEAST (Apr. 5, 2019, 3:53 PM), <https://www.thedailybeast.com/trump-says-press-is-truly-the-enemy-of-the-people>; Christal Hayes, *'They Go out of their Way to Cover Me Inaccurately': Trump Hits Media on World Press Freedom Day*, USA TODAY (May 3, 2019, 5:43 PM), <https://www.usatoday.com/story/news/politics/2019/05/03/president-trump-hits-news-media-world-press-freedom-day/1091153001/>; Ezra Klein, *'Enemy of the People': How Trump Makes the Media into the Opposition*, VOX (Oct. 30, 2018, 1:50 PM), <https://www.vox.com/policy-and-politics/2018/10/30/18039990/trump-media-sanders-press-fake-news-enemy-people-bombing>; Rem Rieder, *The World is Watching Trump's Attacks on the Press*, CNN (Aug. 27, 2017, 12:07 PM), <https://www.cnn.com/2017/08/27/politics/donald-trump-media/index.html>; Jim

1,300 tweets critical of the press since declaring his candidacy in 2015.<sup>53</sup> Trump has threatened to open up libel laws, lacking the authority to do so.<sup>54</sup> He called BuzzFeed a “failing pile of garbage” in a news conference.<sup>55</sup> He has accused the press of inciting violence<sup>56</sup> and of fabricating sources<sup>57</sup>—of airing fake news and of being fake news.<sup>58</sup> He has called journalists the

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Rutenberg, Column, *Trump's Attacks on the News Media are Working*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/business/media/trumps-attacks-news-media.html>; Brian Stelter, *Why Trump's Constant Attacks on an Independent Press are So Dangerous*, CNN (Sep. 2, 2019, 5:20 PM), <https://www.cnn.com/2019/09/02/media/trump-press-attacks-media/index.html>.

<sup>53</sup> Peters, *supra* note 23.

<sup>54</sup> See, e.g., Michael M. Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws*, N.Y. TIMES (Jan. 10, 2018),

<https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html>; John Wagner, *Trump Suggests Libel Laws Should be Changed After Uproar over Woodward Book*, WASH. POST (Sep. 5, 2018, 3:07 PM), [https://www.washingtonpost.com/politics/trump-suggests-libel-laws-should-be-changed-after-uproar-over-woodwards-book/2018/09/05/9c00f2be-b02b-11e8-9a6a-565d92a3585d\\_story.html](https://www.washingtonpost.com/politics/trump-suggests-libel-laws-should-be-changed-after-uproar-over-woodwards-book/2018/09/05/9c00f2be-b02b-11e8-9a6a-565d92a3585d_story.html).

<sup>55</sup> Louis Nelson, *Trump: Buzzfeed is a 'Failing Pile of Garbage'*, POLITICO (Jan. 11, 2017, 12:36 PM), <https://www.politico.com/story/2017/01/trump-presser-slams-buzzfeed-233483>.

<sup>56</sup> See, e.g., Laura Egan, *Trump: 'The Fake News is Creating Violence'*, NBC NEWS (Nov. 2, 2018, 3:47 PM), <https://www.nbcnews.com/politics/white-house/trump-fake-news-creating-violence-n930576>.

<sup>57</sup> See, e.g., Seung Min Kim, *Trump Falsely Accuses the New York Times of Making up a Source. It was an Official who Briefed Reporters*, WASH. POST (May 26, 2018, 7:29 AM), [https://www.washingtonpost.com/politics/trump-falsely-accuses-the-new-york-times-of-making-up-a-source-it-was-an-official-who-briefed-reporters/2018/05/26/2d055a60-612c-11e8-8c93-8cf33c21da8d\\_story.html](https://www.washingtonpost.com/politics/trump-falsely-accuses-the-new-york-times-of-making-up-a-source-it-was-an-official-who-briefed-reporters/2018/05/26/2d055a60-612c-11e8-8c93-8cf33c21da8d_story.html); Rebecca Morin, *Trump Accuses 'Fake News' Media of Making up Sources*, POLITICO (May 28, 2017, 8:59 AM), <https://www.politico.com/story/2017/05/28/trump-fake-news-media-238894>.

<sup>58</sup> See, e.g., *Trump to CNN Reporter: You are Fake News*, CNBC NEWS (Jan. 11, 2017), <https://www.cnn.com/video/2017/01/11/trump-to-cnn-reporter-you-are-fake-news.html>; Tamara Keith, *President Trump's Description of What's 'Fake' is Expanding*, NPR, (Sep. 2, 2018, 7:02 AM), <https://www.npr.org/2018/09/02/643761979/president-trumps-description-of-whats-fake-is-expanding>; Brett Samuels, *Trump Accuses 'Fake News Media' of Trying to Hurt the Economy*, THE HILL (Aug. 15, 2019, 1:22 PM), <https://thehill.com/homenews/administration/457575-trump-accuses-fake-news-media-of-trying-to-hurt-the-economy>.

“enemy of the people.”<sup>59</sup> Compared to other presidents, Trump is an unprecedented threat to press freedom.<sup>60</sup> Specifically, I do not worry as much about the administration’s impact on the actual freedoms of speech and press as much as I do its impact on the norms surrounding them.<sup>61</sup> They are under significant duress from the loud, nonstop drumbeat to erode not only public trust in the institutional press but also in the principle that facts matter and are knowable, which is at the foundation of our First Amendment tradition’s marketplace of ideas and of our democratic republic itself.<sup>62</sup>

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<sup>59</sup> See, e.g., *Trump: ‘Fake News Media’ is ‘the Real Enemy of the People’*, DAILY BEAST (Jul. 19, 2018, 10:44 AM), <https://www.thedailybeast.com/trump-fake-news-media-is-the-real-enemy-of-the-people>.

<sup>60</sup> See *CPJ Chairman says Trump is Threat to Press Freedom*, COMM. TO PROTECT JOURNALISM (Oct. 13, 2016, 12:30 PM), <https://cpj.org/2016/10/cpj-chairman-says-trump-is-threat-to-press-freedom.php>; Tess Bonn, *Press Freedom Defense Fund Leader Says Trump Poses Unprecedented Threat to Journalists*, THE HILL (Nov. 19, 2018), <https://thehill.com/hilltv/rising/417440-press-freedom-defense-fund-leader-says-trump-poses-unprecedented-threat-to>.

<sup>61</sup> See, e.g., Ronnell Anderson Jones & Sonja R. West, *Don’t Expect the First Amendment to Protect the Media*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/opinion/dont-expect-the-first-amendment-to-protect-the-media.html>; Ronnell Anderson Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. ONLINE 47 (2017); Isaac Chotiner, *Would President Trump Kill Freedom of the Press?*, SLATE (Mar. 14, 2016, 3:47 PM), <https://slate.com/news-and-politics/2016/03/donald-trump-vs-the-media-how-he-could-curtail-freedom-of-the-press-as-president.html>; Jonathan Peters, *What Trump Could (and Couldn’t) Do to Restrict Press Freedom if Elected*, COLUM. JOURNALISM REV. (Oct. 27, 2016), [https://www.cjr.org/united\\_states\\_project/donald\\_trump\\_lawsuits\\_press\\_freedom.php](https://www.cjr.org/united_states_project/donald_trump_lawsuits_press_freedom.php).

<sup>62</sup> See Bernard Avishai, *Democracy and Facts in the Age of Trump*, THE NEW YORKER (Dec. 29, 2017), <https://www.newyorker.com/news/daily-comment/democracy-and-facts-in-the-age-of-trump> (“The implicit social contract that underpins democracy didn’t come about spontaneously. It grew steadily ... as a counterpart to the advances made by the scientists and the entrepreneurs of the Enlightenment, which, in turn, coaxed citizens to reject both the dogma of priests and the authority of princes. ... [People] didn’t always agree—the principle of tolerance was a tribute to inevitable differences in perspective—but that didn’t discredit the ideal of democracy’s reliance on facts. Indeed, self-government was only possible because citizens *could* argue themselves into founding the institutions that facilitated the



With that in mind, protecting the marketplace and the public interest demands the ordinary doing of good journalism and sometimes the extraordinary suspension of normal relations with the White House.<sup>63</sup> If an official, for example, is known to make demonstrably false claims, he or she should not be an invited guest on news programs.<sup>64</sup> If the White House revokes a reporter's press pass without due process, the reporter should sue, as CNN did.<sup>65</sup> That is what our current moment demands. It may not be "an occasion for dancing in the streets," as Professor Meiklejohn famously said after *New York Times Co. v. Sullivan* came down,<sup>66</sup> but it is an opportunity for the press, through the ordinary and extraordinary, to serve the public interest and, in doing so, to protect its legitimacy.

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changes that the facts warranted. ... Principles of action derived from facts were, in short, what the commonwealth had, well, in common. This process couldn't have worked if facts were treated as things that people just cherry-picked to justify their prejudices."); William Davies, *The Age of Post-Truth Politics*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/24/opinion/campaign-stops/the-age-of-post-truth-politics.html> ("Facts hold a sacred place in Western liberal democracies.").

<sup>63</sup> Jay Rosen, *It's Time for the Press to Suspend Normal Relations with the Trump Presidency*, PRESS THINK (June 25, 2018, 2:18 PM) <http://pressthink.org/2018/06/its-time-for-the-press-to-suspend-normal-relations-with-the-trump-presidency/>.

<sup>64</sup> *Id.*

<sup>65</sup> See, e.g., Brian Stetler, *CNN sues President Trump and top White House aides for barring Jim Acosta*, CNN BUSINESS (Nov. 13, 2018, 5:47 PM), <https://www.cnn.com/2018/11/13/media/cnn-sues-trump/index.html>; Jennifer Rubin, *Five Takeaways from Friday's CNN-White House Ruling*, WASH. POST (Nov. 19, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/11/16/five-takeaways-from-fridays-cnn-white-house-ruling/>; Scott Nover, *Trump Restores Acosta's Pass But Issues 'Rules' for Reporters*, ATLANTIC (Nov. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/11/trump-reverses-courts-and-restores-jim-acostas-pass/576244/>.

<sup>66</sup> Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 n.125 (1964) (quoting Alexander Meiklejohn).

### III. PRESS RIGHTS AT PROTESTS

The next stop in the modern fight for media freedom in the United States is a protest, which happens to be the most dangerous place to be a journalist in America.<sup>67</sup> In 2017, police arrested at least 33 journalists, the majority of them at protests,<sup>68</sup> where police occasionally used a controversial “kettling” technique to take people en masse.<sup>69</sup> In 2018, police arrested at least 10 journalists, again the majority at protests;<sup>70</sup> and reflecting broader trends in the industry, most of them were freelancers.<sup>71</sup> Notably, journalists arrested at protests are often not charged or see any charges dropped before trial,<sup>72</sup> and what they typically stand accused of are vague, flexible offenses like “obstruction of

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<sup>67</sup> Sterne & Peters, *supra* note 24..

<sup>68</sup> U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/arrest-criminal-charge/> (last visited Oct. 22, 2019).

<sup>69</sup> See, e.g., Jim Salter, *Lawsuits Filed Over St. Louis Police ‘Kettling’ Practice*, AP NEWS (Sept. 18, 2018), <https://apnews.com/117d6c28721d466baa3c5fc3d636650a>; Stephanie Sugars, *Journalist Covering Protests in US Risk Getting Caught Up in Police Kettling Tactic*, COMM. TO PROTECT JOURNALISTS: BLOG (Mar. 15, 2018, 3:15 PM), <https://cpj.org/blog/2018/03/journalists-covering-protests-in-us-risk-getting-c.php>.

<sup>70</sup> U.S. PRESS FREEDOM TRACKER, *supra* note 68..

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., Jonathan Peters, *Why the Charges against Wesley Lowery and Ryan Reilly in Ferguson Are Absurd*, COLUM. JOURNALISM REV. (Aug. 13, 2015), [https://www.cjr.org/united\\_states\\_project/wesley\\_lowery\\_ryan\\_reilly\\_ferguson.php](https://www.cjr.org/united_states_project/wesley_lowery_ryan_reilly_ferguson.php); Jonathan Peters, *More Than 20 Months After Ferguson, Ryan Reilly and Wesley Lowery are Still Facing Charges in St. Louis County*, COLUM. JOURNALISM REV. (Apr. 19, 2016), [https://www.cjr.org/united\\_states\\_project/ryan\\_reilly\\_wesley\\_lowery\\_ferguson\\_charges.php](https://www.cjr.org/united_states_project/ryan_reilly_wesley_lowery_ferguson_charges.php); Niraj Chokshi, *Ferguson-related Charges Dropped against Washington Post and Huffington Post Reporters*, WASH. POST (May 19, 2016, 4:00 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/05/19/ferguson-related-charges-dropped-against-washington-post-and-huffington-post-reporters/>.

a government function.”<sup>73</sup> But even if charges are not filed or get dropped, an arrest is still a big deal. The same goes for a detainment. They both send a chilling message: “Gather the news at your peril.”<sup>74</sup> This is especially true for freelance and independent journalists who generally lack institutional and legal resources.<sup>75</sup>

There were also dozens of physical assaults on journalists at protests in 2017 and 2018.<sup>76</sup> The majority were committed not by the police but by protestors<sup>77</sup> who disliked or distrusted the press, or simply did not want the press recording videos and photos wherever they were.<sup>78</sup> Many of the protestors were

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<sup>73</sup> See, e.g., U.S. PRESS FREEDOM TRACKER, *Reporter Jack Smith IV Charged With Obstruction at Standing Rock* (May 23, 2017), <https://pressfreedomtracker.us/all-incidents/reporter-jack-smith-iv-charged-obstruction-standing-rock/>; Kelsey Sutton, *Criminal Charges Against ‘Mic’ Reporter Dismissed*, MIC (Dec. 7, 2017), <https://www.mic.com/articles/186661/criminal-charges-against-mic-reporter-dismissed>.

<sup>74</sup> Jonathan Peters, *Journalists in Ferguson: Know Your Rights*, COLUM. JOURNALISM REV. (Aug. 21, 2014), [https://archives.cjr.org/united\\_states\\_project/press\\_rights\\_in\\_ferguson.php](https://archives.cjr.org/united_states_project/press_rights_in_ferguson.php).

<sup>75</sup> David Uberti, *New Survey Reveals Everything You Think About Freelancing Is True*, COLUM. JOURNALISM REV. (Feb. 17, 2015), [https://archives.cjr.org/behind\\_the\\_news/new\\_survey\\_reveals\\_everything.php](https://archives.cjr.org/behind_the_news/new_survey_reveals_everything.php).

<sup>76</sup> U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/physical-attack/> (last visited Oct. 22, 2019).

<sup>77</sup> *Id.*

<sup>78</sup> See, e.g., U.S. PRESS FREEDOM TRACKER, *Portland Mercury Reporter Kelly Kenoyer Shoved While Filming Patriot Prayer Rally* (July 11, 2018), <https://pressfreedomtracker.us/all-incidents/portland-mercury-reporter-kelly-kenoyer-shoved-while-filming-patriot-prayer-rally/>; U.S. PRESS FREEDOM TRACKER, *Oregonian Reporter Eder Campuzano Injured While Documenting Protest* (Aug. 13, 2018), <https://pressfreedomtracker.us/all-incidents/oregonian-reporter-eder-campuzano-injured-while-documenting-protest/>; U.S. PRESS FREEDOM TRACKER, *Protesters Smack Away NBC News Reporter Cal Perry’s Camera in Charlottesville* (Aug. 15, 2018), <https://pressfreedomtracker.us/all-incidents/protesters-smack-away-nbc-news-reporter-cal-perrys-camera-charlottesville/>; U.S. PRESS FREEDOM TRACKER, *CBS Producer Shoved by Police While Covering Protest in Washington, D.C.* (Aug. 14, 2018), <https://pressfreedomtracker.us/all-incidents/cbs-producer-shoved-police-while->

political extremists.<sup>79</sup> (To be clear, these numbers do not include assaults that occurred away from protests—for example, the time that Montana congressional candidate Greg Gianforte, now Rep. Greg Gianforte, “body slammed” a reporter who tried to interview him,<sup>80</sup> or the time an Alaska state senator slapped a reporter in the state capitol.<sup>81</sup>)

There were also a dozen incidents in 2017 and 2018 in which the police seized (and, in some cases, searched) a journalist’s equipment, including cellphones and cameras.<sup>82</sup> Behind these data points are a number of chilling stories. First, *St. Louis Post-Dispatch* reporter Mike Faulk was “knocked down, pinned to the ground, pepper-sprayed, arrested, held in jail for 13 hours, and charged with a misdemeanor—all at the hands of St. Louis police” because he dared to document the protests following the acquittal of Jason Stockley, the white police officer

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covering-protest-washington-dc/; U.S. PRESS FREEDOM TRACKER, *Independent Journalist Files Assault Charges Following May Day Protests* (May 30, 2019), <https://pressfreedomtracker.us/all-incidents/independent-journalist-files-assault-charges-following-may-day-protests/>.

<sup>79</sup> See *supra* note 80.

<sup>80</sup> Emily Cochrane, ‘That’s My Kind of Guy,’ Trump Says of Republican Lawmaker Who Body-Slammed a Reporter, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/trump-greg-gianforte-montana.html>.

<sup>81</sup> Reid Wilson, *Alaska State Senator Slaps Reporter Over Story*, THE HILL (May 5, 2017), <https://thehill.com/homenews/state-watch/332071-alaska-state-senator-slaps-reporter-over-story>.

<sup>82</sup> U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/equipment-search-seizure-or-damage/> (last visited May 12, 2020).

who fatally shot Anthony Lamar Smith, a black man, in 2011.<sup>83</sup>

“Although Faulk was wearing press credentials and told the arresting officers he was a reporter, he was zip-tied and taken in, along with some 100 protesters rounded up for failing to disperse.”<sup>84</sup> Second, in Charlottesville in 2018, Taylor Lorenz, a reporter for *The Hill*, was “recording the aftermath of a deadly car attack when a shirtless man approached and told her to stop.”<sup>85</sup> She identified herself as a reporter, and “[h]e walked behind her and [then] punched her in the head.”<sup>86</sup> Finally, the most serious injury to a reporter at a protest, so far, occurred at Standing Rock:

Independent journalist Jon Ziegler, who streams most of his coverage via YouTube, was recording an aggressive police action against protesters when non-lethal rounds hit his leg and hand. Ziegler was likely known to police because he had been covering Standing Rock for some time. In fact, an officer called out his name before he was shot. A rubber bullet shattered a bone in his finger, requiring emergency reconstructive surgery, a follow-up surgery, and months of physical therapy.<sup>87</sup>

Notably, Rep. Eric Swalwell (D-CA) introduced in 2018 a bill—the Journalist Protection Act—to make it a federal crime

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<sup>83</sup> Jonathan Peters, *When a Journalist is Arrested Covering a Protest, What Should the News Outlet Do?*, COLUM. JOURNALISM REV. (Oct. 2, 2017), [https://www.cjr.org/united\\_states\\_project/protest-arrests-journalism-st-louis.php](https://www.cjr.org/united_states_project/protest-arrests-journalism-st-louis.php).

<sup>84</sup> *Id.*

<sup>85</sup> Sterne & Peters, *supra* note 24..

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

to assault a journalist.<sup>88</sup> Although it did not pass, it would have amended the chapter of the federal code that includes penalties for assaults against government officials, including judges, prosecutors, and members of Congress.<sup>89</sup> The bill had symbolic and practical value, but my overall opinion of it was mixed.<sup>90</sup> Its protections were mostly redundant, and the bill missed an opportunity to put forward a much-needed<sup>91</sup> federal shield law to protect journalists from the compelled disclosure of their sources and unpublished materials.<sup>92</sup>

The bill was symbolically important because it underscored that a free press is democratically essential,<sup>93</sup> and it

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<sup>88</sup> Press Release, Eric Swalwell, Representative, *Swalwell Introduces the Journalist Protection Act* (Feb. 5, 2018), <https://swalwell.house.gov/media-center/press-releases/swalwell-introduces-journalist-protection-act>.

<sup>89</sup> 18 U.S.C. §§ 111-119 (2012 & Supp. 2017); Journalist Protection Act, H.R. 4935, 115th Cong. § 2 (2018).

<sup>90</sup> Jonathan Peters, *The Time is Right for the Journalist Protection Act. But We Need a Federal Shield Law*, COLUM. JOURNALISM REV. (Feb. 9, 2018), [https://www.cjr.org/united\\_states\\_project/journalist-protection-act.php](https://www.cjr.org/united_states_project/journalist-protection-act.php).

<sup>91</sup> H.R. 4935, *supra* note 89; see, e.g., Gabe Rottman, *The Trump Administration's Pursuit of Ali Watkins Proves We Need Federal Shield Law Now*, DAILY BEAST (June 9, 2018, 10:04 PM), <https://www.thedailybeast.com/the-trump-administrations-pursuit-of-ali-watkins-proves-we-need-federal-shield-law-now>; Clarence Page, *Trump's War Against Leakers Show Why We Need a 'Shield Law'*, CHI. TRIB. (June 12, 2018), <https://www.chicagotribune.com/columns/clarence-page/ct-perspec-page-trump-sessions-espionage-act-cpj-0613-20180612-story.html>; Danielle McLean, *SPJ Calls on Congress to Pass Strong Federal Shield Law*, QUILL MAG. (Mar. 12, 2019), <https://www.quillmag.com/2019/03/12/spj-calls-on-congress-to-pass-strong-federal-shield-law/>; Paul Fletcher, *Sessions' Testimony Prompts New Federal Shield Law Bill Protecting Journalists*, FORBES (Nov. 29, 2017), <https://www.forbes.com/sites/paulfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists/#607db9ec4912>.

<sup>92</sup> See generally Jonathan Peters, *Shield Laws and Journalist's Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), [https://www.cjr.org/united\\_states\\_project/journalists\\_privilege\\_shield\\_law\\_primer.php](https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php).

<sup>93</sup> Press Release, Eric Swalwell, *supra* note 88 ("It represents a clear statement that assaults against people engaged in reporting is unacceptable, and helps ensure law enforcement is able to punish those who interfere with newsgathering.").

had practical value because it would have created dual jurisdiction, allowing the federal government to prosecute if a state refused to do so (e.g., for political reasons), or if a state prosecution failed to obtain a conviction.<sup>94</sup> But state prosecutors have not demonstrated a broad reluctance to file charges in cases involving journalist victims, and there has not been a critical mass of failed prosecutions.<sup>95</sup> As a result, the bill was functionally redundant and even an unwise expenditure of political capital. The bill was leveraging the press's social influence of the moment, springing from the popular reactions to anti-press rhetoric and behavior making news around the country.<sup>96</sup> That capital would have been better spent on a federal shield bill, an area where the law does not already provide meaningful protection.<sup>97</sup> There is no federal shield law, and the First Amendment offers highly inconsistent protections against compelled disclosure (none at all, in some places).<sup>98</sup>

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<sup>94</sup> Peters, *supra* note 92.

<sup>95</sup> *Id.*

<sup>96</sup> Press Release, Eric Swalwell, *supra* note 88 (“During his campaign and since taking office, President Trump has created a climate of extreme hostility to the press by describing mainstream media outlets as ‘a stain on America,’ ‘trying to take away our history and our heritage,’ and ‘the enemy of the American People.’ He tweeted a GIF video of himself body-slammimg a person with the CNN logo superimposed on that person’s face, and retweeted a cartoon of a ‘Trump Train’ running over a person with a CNN logo as its head.”).

<sup>97</sup> Jonathan Peters, *Shield Laws and Journalist’s Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), [https://www.cjr.org/united\\_states\\_project/journalists\\_privilege\\_shield\\_law\\_primer.php](https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php).

<sup>98</sup> *Id.*

This is a major problem calling out for legislative action. Despite the adoption of guidelines designed to make it difficult to subpoena journalists,<sup>99</sup> the U.S. Department of Justice has served subpoenas on plenty of them and has spent years trying to force some journalists to comply.<sup>100</sup> Federal investigators have also secretly seized phone records of journalists and editors.<sup>101</sup> Moreover, as attorney general, Jeff Sessions bragged about the DOJ's many ongoing leak investigations,<sup>102</sup> and at their respective Senate confirmation hearings both Sessions and William Barr, currently the attorney general, equivocated when asked if they would guarantee that journalists would not be jailed

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<sup>99</sup> 28 C.F.R. § 50.10 (2019).

<sup>100</sup> See, e.g., Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), <https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html>; Sarah Ellison, *What was New York Times Reporter James Risen's seven-year legal battle really for?*, VANITY FAIR (Mar. 17, 2015), <https://www.vanityfair.com/news/2015/03/james-risen-anonymous-source-government-battle>; James Risen, *The Biggest Secret: My Life as a New York Times Reporter in the Shadow of the War on Terror*, INTERCEPT (Jan. 03, 2018), <https://theintercept.com/2018/01/03/my-life-as-a-new-york-times-reporter-in-the-shadow-of-the-war-on-terror/>.

<sup>101</sup> Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013), <https://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html>.

<sup>102</sup> Callum Borchers, *Jeff Sessions Might Subpoena Journalists to Reveal Leakers. Mike Pence Once Fought Against That*, WASH. POST (Aug. 04, 2017, 1:58 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/08/04/jeff-sessions-might-subpoena-journalists-to-reveal-leakers-mike-pence-once-fought-against-that/>; Josh Gerstein & Madeline Conway, *Session: DOJ Reviewing Policies on Media Subpoenas*, POLITICO (Aug. 04, 2017, 11:42 AM), <https://www.politico.com/story/2017/08/04/doj-reviewing-policies-on-media-subpoenas-sessions-says-241329>.



for protecting their sources.<sup>103</sup> To the extent the press has any, its political capital should be spent here.

#### IV. FREEDOM OF INFORMATION

Next up in the modern fight for media freedom in the United States is government secrecy. A few years ago, I conducted an interview series about First Amendment issues for the *Harvard Law & Policy Review*, talking with lawyers, scholars, and others who have made a mark on free expression, people like Rod Smolla, who won the landmark case *Virginia v. Black* at the Supreme Court;<sup>104</sup> William Bennett Turner, who argued three cases at the Supreme Court, including two under the First Amendment (*Procunier v. Martinez* and *Houchins v. KQED*);<sup>105</sup> David Goldberger, who won four First Amendment cases at the Supreme Court, including *National Socialist Party of America v.*

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<sup>103</sup> Peter Sterne, *Session 'Not Sure' Whether He Would Prosecute Journalists*, POLITICO (Jan. 10, 2017, 4:49 PM), <https://www.politico.com/blogs/on-media/2017/01/sessions-not-sure-whether-he-would-prosecute-journalists-233431>; Erik Wemple, *William Barr On Jailing Journalists: 'I Know There Are Guidelines in Place'*, WASH. POST (Jan. 15, 2019, 2:34 PM), <https://www.washingtonpost.com/opinions/2019/01/15/william-barr-jailing-journalists-i-know-there-are-guidelines-place/>.

<sup>104</sup> Jonathan Peters, *Rod Smolla: Most Off-Campus Internet Speech will be Ruled Beyond the Reach of Public Schools*, HARV. L. & POL'Y REV. (Dec. 05, 2012), <https://harvardlpr.com/2012/12/05/rod-smolla-most-off-campus-internet-speech-will-be-ruled-beyond-the-reach-of-public-schools/> (hereinafter "Smolla Interview").

<sup>105</sup> Jonathan Peters, *Q&A with Bill Turner*, HARV. L. & POL'Y REV. (Aug. 08, 2013), <https://harvardlpr.com/2013/08/08/q-a-with-bill-turner/> (hereinafter "Turner Interview").

*Village of Skokie* and *McIntyre v. Ohio Elections Commission*,<sup>106</sup> Martin Garbus, the former ACLU legal director whose clients in private practice included Nelson Mandela and Daniel Ellsberg,<sup>107</sup> and Lee Bollinger, the president of Columbia University and a prolific First Amendment scholar.<sup>108</sup> Among other questions, I asked all of the respondents to identify the most serious threat at the time to free expression. What they said was fascinating, in part, because their answers varied so widely. One said there was “no great threat” because “First Amendment doctrine is very stable.”<sup>109</sup> Another said it was “ignorance” and “the indifference to how and why we protect civil liberties.”<sup>110</sup> And yet another said it was the *Citizens United* case, because it perverted the marketplace of ideas.<sup>111</sup>

I had not thought about that series for years, but not long ago, as I took stock of the cases I had covered for the *Columbia*

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<sup>106</sup> Jonathan Peters, *Ten Questions on Free Speech with David Goldberger, The First Amendment Lawyer who Won Skokie, McIntyre And Other SCOTUS Cases*, HARV. L. & POL'Y REV. (July 07, 2012), <https://harvardlpr.com/2012/07/20/ten-questions-on-free-speech-with-david-goldberger-the-first-amendment-lawyer-who-won-skokie-mcintyre-and-other-scotus-cases/>.

<sup>107</sup> Jonathan Peters, *Martin Garbus: Citizens United Is the Most Serious Threat Today to Free Speech, and “There Are Two First Amendments”*, HARV. L. & POL'Y REV. (Nov. 05, 2012), <https://harvardlpr.com/2012/11/05/martin-garbus-citizens-united-is-the-most-serious-threat-today-to-free-speech-and-there-are-two-first-amendments/> (hereinafter “Garbus Interview”).

<sup>108</sup> Jonathan Peters, *Lee Bollinger: “We Can Expect Censorship Anywhere to be Censorship Everywhere”*, HARV. L. & POL'Y REV. (Mar. 15, 2012), <https://harvardlpr.com/2012/03/15/lee-bollinger-we-can-expect-censorship-anywhere-to-be-censorship-everywhere/>.

<sup>109</sup> Peters, *Smolla Interview*, *supra* note 104.

<sup>110</sup> Peters, *Turner Interview*, *supra* note 105.

<sup>111</sup> Peters, *Garbus Interview*, *supra* note 107.

*Journalism Review* as its press freedom correspondent, my mind wandered to a variation of the question I had asked in that series: *What is the most serious threat today to a free press in the United States?* It is not a simple question because the answer depends on how you define “most serious” and “threat” and “free press.” Trump would be a good choice. So would press rights at protests, or fake news and social media. But for me what has occupied most of my writing time in the last three years have been government attempts to shield information and events from public view.<sup>112</sup> It is, put differently, the fight for freedom of information.<sup>113</sup>

Take these examples. A township sued a citizen who requested public records to obtain relief from its duty to respond—and even asked for attorney’s fees.<sup>114</sup> State lawmakers tried hard to kill a program designed to help citizens resolve public-records disputes without litigating.<sup>115</sup> Other lawmakers used Sunshine Week to propose bills to make it more difficult for

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<sup>112</sup> *Archive of Columns by Jonathan Peters*, COLUM. JOURNALISM REV., <https://www.cjr.org/author/jonathan-w-peters> (last visited Oct. 17, 2019).

<sup>113</sup> See generally, *The Basics: Using Freedom of Information Law*, REP. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/news-media-and-law-spring-2014/basics-using-freedom-inform/>.

<sup>114</sup> Jonathan Peters, *When Governments Sue Public-Records Requesters*, COLUM. JOURNALISM REV. (June 30, 2015), [https://www.cjr.org/united\\_states\\_project/when\\_governments\\_sue\\_public\\_record\\_requesters.php](https://www.cjr.org/united_states_project/when_governments_sue_public_record_requesters.php)

<sup>115</sup> Jonathan Peters, *Why Ohio’s New ‘Sunshine Audits’ Could Be Important*, COLUM. JOURNALISM REV. (Apr. 23, 2015), [https://www.cjr.org/united\\_states\\_project/ohio\\_sunshine\\_audits.php](https://www.cjr.org/united_states_project/ohio_sunshine_audits.php).

citizens to obtain law-enforcement records.<sup>116</sup> A police chief prohibited a citizen from taking photos of public records as he reviewed them.<sup>117</sup> States went to great lengths to keep secret their capital-punishment protocols.<sup>118</sup> A city sued one of its citizens for copyright infringement after he posted to YouTube several edited clips of city council meetings that the city made available as public records.<sup>119</sup> The list goes on.

It is nothing new, of course, for government agencies and officials to try to minimize their exposure and public scrutiny. But it is worrisome the resources and creativity that the government expends to parry the press and public. The shrinking budgets of newspapers, historically the most likely to litigate to compel the disclosure of records, only amplifies that worry.<sup>120</sup> A

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<sup>116</sup> Jonathan Peters, *It's Sunshine Week –but Some States Have a Funny Way of Celebrating*, COLUM. JOURNALISM REV. (Mar. 19, 2015), [https://www.cjr.org/united\\_states\\_project/sunshine\\_week\\_mugshots\\_recording\\_cops.php](https://www.cjr.org/united_states_project/sunshine_week_mugshots_recording_cops.php).

<sup>117</sup> Jonathan Peters, *Nice Try, Government Officials, but This Time the Law Is on the Citizen's Side*, COLUM. JOURNALISM REV. (Aug. 27, 2015), [https://www.cjr.org/united\\_states\\_project/government\\_officials\\_can\\_get\\_creative.php](https://www.cjr.org/united_states_project/government_officials_can_get_creative.php).

<sup>118</sup> Jonathan Peters, *Why Larry Flynt's Latest Court Victory is Good for the Media*, COLUM. JOURNALISM REV. (Apr. 09, 2015), [https://www.cjr.org/united\\_states\\_project/larry\\_flynt\\_missouri\\_death\\_penalty.php](https://www.cjr.org/united_states_project/larry_flynt_missouri_death_penalty.php).

<sup>119</sup> Peters, *supra* note 117.

<sup>120</sup> See, e.g., Jon Allsop, *Another Brutal week for American Journalism*, COLUM. JOURNALISM REV. (July, 02, 2019), [https://www.cjr.org/the\\_media\\_today/media\\_layoffs\\_the\\_vindicator.php](https://www.cjr.org/the_media_today/media_layoffs_the_vindicator.php); Nathan Bomey, *Newspapers, Digital News Operations Hit with Layoffs as Disruption*, USA TODAY (Aug. 01, 2019, 9:30 AM), <https://www.usatoday.com/story/money/2019/08/01/newspaper-layoffs-digital-journalism-job-cuts-pew-research-center/1877757001/>; Elizabeth Grieco, Nami Sumida, & Sophia Fedeli, *About a Third of Large U.S. Newspapers have Suffered Layoffs Since 2017*, PEW RES. CTR. (July 23, 2018), <https://www.pewresearch.org/fact-tank/2018/07/23/about-a-third-of-large-u-s-newspapers-have-suffered-layoffs-since-2017/>; Kristen Hare, *Report: The Number of*

Knight Foundation study released last year showed that roughly half of freedom-of-information experts believe access to information has gotten worse in the last four years, and nearly 90 percent said it would get worse under President Trump.<sup>121</sup> They were right.<sup>122</sup>

It is a cliché to say that the disruption of newspapers and other traditional publishers has also created opportunities for independent journalists and startups. But, equally importantly, that disruption has significant implications for the legal landscape in which journalism is produced.<sup>123</sup> Established news

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*Multiple Layoffs at Newspapers Nearly Doubled From 2017 To 2018*, POYNTER (Aug. 01, 2019), <https://www.poynter.org/reporting-editing/2019/report-the-number-of-multiple-layoffs-at-newspapers-nearly-doubled-from-2017-to-2018/>; Gerry Smith, *Journalism Job Cuts Haven't Been this Bad Since the Recession*, BLOOMBERG (July, 01, 2019, 5:00 AM), <https://www.bloomberg.com/news/articles/2019-07-01/journalism-layoffs-are-at-the-highest-level-since-last-recession>.

<sup>121</sup> David Cuillier, *Forecasting Freedom of Information: Why it Faces Problems – and How Experts Say They Could Be Solved*, KNIGHT FOUND. (Mar. 2017), <https://www.knightfoundation.org/reports/forecasting-freedom-of-information> (Full disclosure: I was one of the experts interviewed).

<sup>122</sup> Camille Fassett, *The Freedom of Information Act Is Getting Worse Under the Trump Administration*, FREEDOM OF THE PRESS FOUND. (Mar. 14, 2019), <https://freedom.press/news/freedom-information-act-getting-worse-under-trump-administration/> (“Departments from the Justice Department to the EPA and the Interior have been hit by huge increases in FOIA lawsuits under the Trump administration.”). According to Alex Howard, an open government advocate, “Lawsuits are significant because that’s generally a tell that affirmative disclosure isn’t where it should be, and that FOIA officers aren’t releasing information upon request. It’s a capacity issue, a political will issue, a training issue, and a funding issue.” *Id.*

<sup>123</sup> Jonathan Peters, *The Biggest Threat to Press Rights May Be a Failure to Understand Them*, COLUM. JOURNALISM REV. (Oct. 24, 2014), [https://archives.cjr.org/united\\_states\\_project/jeff\\_hermes\\_qa\\_legal\\_needs\\_of.php](https://archives.cjr.org/united_states_project/jeff_hermes_qa_legal_needs_of.php). According to Jeff Hermes, deputy director of the Media Law Resource Center, “Most established media organizations have institutional knowledge that helps them judge when they’re on thin ice, allowing them to consult legal counsel only when it’s most needed. Startups typically don’t have the resources to keep a bunch of lawyers on retainer, and many of them don’t yet have the institutional knowledge that helps

organizations tend to have institutional knowledge that can guide their pursuit of public records and their presence at open meetings, and so on, while independent journalists and startups typically do not have the resources to have lawyers on retainer—and many do not yet have the institutional knowledge to guide them.<sup>124</sup>

## V. TECH PLATFORMS AND JOURNALISM

In October 2019, Facebook founder and CEO Mark Zuckerberg delivered a speech at Georgetown University in which he defended the platform as a champion of free expression.<sup>125</sup> He said Facebook should not be an arbiter of speech.<sup>126</sup> He criticized countries like China that restrict digital technologies.<sup>127</sup> He said that using “your voice helps people come together,” citing sources as diverse as Frederick Douglass, the Vietnam War, Martin Luther King, Jr., the Black Lives Matter and #MeToo movements, and the landmark First Amendment case *Schenk v. United States*.<sup>128</sup> He defended the

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them make the thin-ice judgments. So it's usually smart to think in advance about whom you'd call if an issue arose.” *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Mark Zuckerberg, *Standing for Voice and Free Expression*, FACEBOOK (Oct. 17, 2019), <https://www.facebook.com/notes/mark-zuckerberg/standing-for-voice-and-free-expression/10157267502546634/>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

platform's policy decision not to fact-check political ads, saying, "I don't think it's right for a private company to censor politicians or the news in a democracy."<sup>129</sup> And while acknowledging Facebook's power, Zuckerberg said the more important reality is that his company has "decentralized power by putting it directly into people's hands," which "at scale is a new kind of force in the world—a Fifth Estate."<sup>130</sup>

Reactions to the speech were generally negative. Kara Swisher, editor of *Recode*, called it "pretty thin intellectually."<sup>131</sup> Jillian York, international director of freedom of expression for the Electronic Frontier Foundation, a nonprofit organization dedicated to digital civil liberties, said Zuckerberg's remarks offered little more than "contradictions, unsubstantiated postulations, and a *Cliff Notes* version of free speech history."<sup>132</sup> Writing in *The New Yorker*, Masha Gessen said Zuckerberg is "symptomatic of our collective refusal to think about speech and the media in complicated ways";<sup>133</sup> and Andrew Marantz's

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Michel Martin, *Kara Swisher's Take On Mark Zuckerberg's 'Free Speech' Speech*, NPR, (Oct. 20, 2019), <https://www.npr.org/2019/10/20/771755317/kara-swisher-s-take-on-mark-zuckerberg-s-free-speech-speech>.

<sup>132</sup> Jillian C. York, *Mark Zuckerberg's Promise to Respect Free Expression Is So Far Just Empty Words*, VICE (Oct. 17, 2019, 2:58 PM), [https://www.vice.com/en\\_us/article/mbmk7b/mark-zuckerbergs-promise-to-respect-free-expression-is-so-far-just-empty-words](https://www.vice.com/en_us/article/mbmk7b/mark-zuckerbergs-promise-to-respect-free-expression-is-so-far-just-empty-words).

<sup>133</sup> Masha Gessen, *Mark Zuckerberg Doesn't Know What the First Amendment Is For*, THE NEW YORKER (Oct. 22, 2019), <https://www.newyorker.com/news/our-columnists/mark-zuckerberg-doesnt-know-what-the-first-amendment-is-for>.

column ran under the headline “Mark Zuckerberg Still Doesn’t Get It.”<sup>134</sup> Marantz went on to say that Zuckerberg’s “thesis was that free speech is good,” while the largely unanswered “question is whether free speech is the only good worth pursuing.”<sup>135</sup>

Facebook’s and Zuckerberg’s roughhewn approach to free expression is of a piece with its approach to journalism. The platform announced that it would drive \$300 million over three years into various journalism projects, including several nonprofits that focus on local reporting.<sup>136</sup> Facebook is also developing a news tab for publishers<sup>137</sup> that will be overseen by a team of journalists<sup>138</sup> and will offer news organizations up to \$3 million to license their editorial content.<sup>139</sup> Plus, the Facebook Journalism Project offers live and online courses to train

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<sup>134</sup> Andrew Marantz, *Mark Zuckerberg Still Doesn’t Get It*, THE NEW YORKER (Oct. 19, 2019), <https://www.newyorker.com/news/daily-comment/mark-zuckerberg-still-doesnt-get-it>.

<sup>135</sup> *Id.*

<sup>136</sup> Mathew Ingram, *Facebook Says It Plans to Put \$300M into Journalism Projects*, COLUM. JOURNALISM REV. (Jan. 15, 2019), [https://www.cjr.org/the\\_new\\_gatekeepers/facebook-journalism-funding.php](https://www.cjr.org/the_new_gatekeepers/facebook-journalism-funding.php).

<sup>137</sup> Craig Timberg, *Facebook to offer ‘News’ tab for users—and pay (some) publishers for their work*, WASH. POST (Oct. 23, 2019, 12:12 PM), <https://www.washingtonpost.com/technology/2019/10/23/facebook-offer-news-tab-users-pay-some-publishers-their-work/>.

<sup>138</sup> Max Willens, *Facebook tries again by hiring journalists to staff its news tab*, DIGIDAY (Aug. 20, 2019), <https://digiday.com/media/facebook-tries-hiring-journalists-staff-news-tab/>.

<sup>139</sup> Benjamin Mullin and Sahil Patel, *Facebook Offers News Outlets Millions of Dollars a Year to License Content*, WALL STREET J. (Aug. 8, 2019, 6:37 PM), <https://www.wsj.com/articles/facebook-offers-news-outlets-millions-of-dollars-a-year-to-license-content-11565294575>.



journalists in how to leverage social tools to in their reporting.<sup>140</sup>

But these efforts, however laudable, do not change the fact that news is not a core focus for the company and that its firm grip on ad dollars and eyeballs is an existential threat to journalism's sustainability. In 2018, Facebook and Google together commanded nearly 60 percent of the U.S. internet advertising market, up 3 percent from the year before.<sup>141</sup> Along the way, Facebook has been moving the algorithmic goalposts of the News Feed, at times making it more difficult for news content to be shared widely.<sup>142</sup> As my *Columbia Journalism Review* colleague Mathew Ingram put it recently:

Facebook's relationship with the media has been a classic Faustian bargain: News outlets want to reach [its billions of users], so they put as much of their content as they can on the network. Some ... are favored by the company's all-powerful (and completely mysterious) algorithm, giving them access to a wider audience to pitch for subscriptions or the pennies ... of ad revenue they receive from the platform. But while many media outlets continue to pander to Facebook, even some of the digital-media entities that have catered to the company seem to be struggling. ....

...Facebook's dominance of social distribution, and the power it gives the company to command

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<sup>140</sup> *Welcome to the Facebook Journalism Project*, FACEBOOK JOURNALISM PROJECT, <https://facebookjournalismproject.com/about/>.

<sup>141</sup> Sheila Dang, *Google, Facebook have tight grip on growing U.S. online ad market: report*, REUTERS (June 5, 2019), <https://www.reuters.com/article/us-alphabet-facebook-advertising/google-facebook-have-tight-grip-on-growing-u-s-online-ad-market-report-idUSKCN1T61IV>.

<sup>142</sup> Mathew Ingram, *The Facebook Armageddon*, COLUM. JOURNALISM REV. (Winter 2018), [https://www.cjr.org/special\\_report/facebook-media-buzzfeed.php](https://www.cjr.org/special_report/facebook-media-buzzfeed.php).

attention, represents a direct threat to media companies. It's about control. As digital advertising continues to decline as a source of revenue thanks to Google and Facebook, many media companies are having to rely increasingly on subscriptions. But the readers they want ... are all on Facebook consuming content for free.<sup>143</sup>

To be clear, Facebook is not the only social media platform that has an uneasy relationship with journalism. Every 30 seconds, a female reporter or politician is harassed or abused on Twitter.<sup>144</sup> That platform has also made it harder for academic researchers to tap into its application programming interfaces ("API") and its data, with the effect of limiting how well the researchers can act as sources for journalists on urgent issues of public concern, such as election security.<sup>145</sup> YouTube is complicating efforts to document and report on war crimes, by removing videos of human rights violations if they contain graphic depictions of violence.<sup>146</sup> The website's recommendation algorithm has been notorious, too, as an engine of misinformation and far-right radicalization, a place where

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<sup>143</sup> *Id.*

<sup>144</sup> Mathew Ingram, *Every 30 Seconds, A Female Journalist or Politician Is Harassed on Twitter*, COLUM. JOURNALISM REV. (Dec. 19, 2018), [https://www.cjr.org/the\\_media\\_today/female-journalists-harassed-twitter.php](https://www.cjr.org/the_media_today/female-journalists-harassed-twitter.php).

<sup>145</sup> Jeff Hemsley, *Social Media Giants Are Restricting Research Vital to Journalism*, COLUM. JOURNALISM REV. (July 11, 2019), [https://www.cjr.org/tow\\_center/facebook-twitter-api-restrictions.php](https://www.cjr.org/tow_center/facebook-twitter-api-restrictions.php).

<sup>146</sup> See Mathew Ingram, *YouTube Takedowns Are Making It Hard to Document War Crimes*, COLUM. JOURNALISM REV. (Oct. 24, 2019), [https://www.cjr.org/the\\_media\\_today/youtube-takedowns-war-crimes.php](https://www.cjr.org/the_media_today/youtube-takedowns-war-crimes.php).

hoaxes and actual fake news rank high on the recommended list and have more success than quality journalism.<sup>147</sup>

Behind these problems is the reality that social media platforms and news organizations have decidedly different missions and interests *and* that the platforms generally have not thought systematically or coherently about their relation to free expression and journalism in the digital public sphere. In other words, they have failed to develop a clear theory of platform governance vis-à-vis free expression and journalism. And one is needed now more than ever:

For one, a functioning theory can bridge the widening gap of expectations between what a platform permits and what the public [and press] expects. Practically, an overarching theory can also help navigate evolving social norms, [because p]latforms make policy decisions based on contemporary norms. . . . Finally, and crucially, we need a theory to help direct and hold accountable the automated systems that increasingly govern speech online. These systems will embed cultural norms into their design, and enforce them through implicit filters we cannot see.<sup>148</sup>

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<sup>147</sup> Mathew Ingram, *YouTube's secret life as an engine for right-wing radicalization*, COLUM. JOURNALISM REV. (Sept. 19, 2018), [https://www.cjr.org/the\\_media\\_today/youtube-conspiracy-radicalization.php](https://www.cjr.org/the_media_today/youtube-conspiracy-radicalization.php); Mathew Ingram, *YouTube has done too little, too late to fight misinformation*, COLUM. JOURNALISM REV. (Apr. 4, 2019), [https://www.cjr.org/the\\_media\\_today/youtube-misinformation.php](https://www.cjr.org/the_media_today/youtube-misinformation.php).

<sup>148</sup> Nabiha Syed, *Real Talk About Fake News: Towards A Better Theory for Platform Governance*, 127 YALE L.J. FORUM 337, 357 (2017) (alteration added).

A cohesive theory would take into consideration the central feature of social media platforms: they are powerful private actors in the networked public square and generally unconstrained by the First Amendment's limits.<sup>149</sup> They dominate in ad dollars and eyeballs, and they conduct private speech regulation by creating and enforcing policies regarding user content, ultimately deciding what content may be posted, when to remove content, and how to display and prioritize content using algorithms.<sup>150</sup> The platforms are developing a de facto free-speech jurisprudence, against the background of their business interests and self-professed democratic values.<sup>151</sup> They have a shared responsibility to help protect—through their policies and practices, guided by a coherent theory of platform governance—our fast-changing marketplace of ideas, in which journalism remains a democratically important institution.

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<sup>149</sup> See Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—or Lack Thereof—to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989 (2017).

<sup>150</sup> Jonathan Peters, *All the News That's Fit to Leak*, in TRANSPARENCY 2.0: DIGITAL DATA AND PRIVACY IN A WIRED WORLD 117, 117–29 (Charles N. Davis & David Cuillier eds., 2014).

<sup>151</sup> *Id.*

## LIMITS OF THE FIRST AMENDMENT AND ANTITRUST LAW IN PLATFORM GOVERNANCE AND MEDIA REFORM

Robert G. Picard\*

Growing dissatisfaction with the current state of mass communication in the United States and other nations has produced demands for media reform, governance of digital platforms, public intervention to support public interest information and news, increasing diversity and pluralism in ownership and content, and fostering a robust and informed public sphere in the service of democracy.<sup>1</sup> These are laudable objectives, but simplistic responses will not deliver them.

Some argue that an expanded perspective of the First Amendment, stronger application of antitrust law and deliberate structural regulation of media are bases on which U.S. media reform, control of digital platforms, and journalism support should be built.<sup>2</sup> Their arguments are based in the purpose of the

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<sup>1</sup> Leonard Downie Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. 4 (October 19, 2009); ROBERT W. MCCHESENEY & VICTOR PICKARD, *WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS: THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT* (2011); Robert W. McChesney, *Journalism is dead! Long live journalism? Why Democratic Societies will need to Subsidize Future News Production*, J. OF MEDIA BUS. STUD., 13(3), 1–8 (2016); JULIA CAGE, *SAVING THE MEDIA* 95 (2016).

<sup>2</sup> Adam Candeub, *Media Ownership Regulation, the First Amendment and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1611 (2007-2008); Clay Calvert, *Bailing Out the Newspaper Industry: A Not-So-Joking Public Policy and First Amendment Analysis*, 40 MCGEORGE L. REV. 661, 671 (2009); Nick Gamse, *Legal Remedies for Saving Public Interest Journalism in America*, 105 NW. U. L. REV. 329, 336 (2011); Victor Pickard, *Reclaiming a Progressive First Amendment to Save Journalism*, in JOURNALISM HISTORY (2019).

First Amendment to support democratic expression and the use of antitrust to halt private actions that may interfere with that expression. This reliance on the two legal approaches raises fundamental questions about whether the First Amendment and antitrust mechanisms can effectively address economic conditions affecting journalism, consolidated media ownership, and corporate constraints on communications.

The First Amendment, of course, protects freedom of expression in various forms from inappropriate governmental constraint. Its primary purpose is to ensure that voices of citizens are not restrained by government, an essential requirement for democracy to function.<sup>3</sup> Antitrust law and competition policy were established to protect markets from inappropriate private constraints and to promote competition. Their primary purposes are to halt actions that harm markets, competitors, and consumers.<sup>4</sup> The First Amendment and antitrust law fundamentally address different concerns and challenges and differing sources of constraints. One is specifically concerned with expression. The other is not.

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<sup>3</sup> NOAH FELDMAN & KATHLEEN SULLIVAN, *FIRST AMENDMENT LAW* 5 (7th ed. 2019).

<sup>4</sup> E. THOMAS SULLIVAN, ET AL., *ANTITRUST LAW, POLICY, AND PROCEDURE: CASES, MATERIALS, PROBLEMS* 1 (7th ed. 2014).

Before directly addressing whether these two protections provide effective bases for solving contemporary media structural and operational challenges, it is important to consider contemporary discussions about the need to save journalism and undertake media reforms.

The financial crisis affecting journalism today may be contemporarily salient, but the challenges of media serving democratic needs and the public sphere are hardly new developments. The U.S. media system's ability to serve democratic needs was hindered by one-newspaper cities becoming the norm in the 1920s, by rampant commercialism of broadcasting that pushed public interest aside in the second half of the twentieth century, by the disappearance of almost all remaining separately owned daily newspapers in cities by the end of the century, and by the rapid development of a few enormous firms controlling critical digital infrastructure and platforms in the new millennium.

In addition, policy changes and decisions during the past five decades have diluted minority ownership preferences in broadcasting,<sup>5</sup> relaxed policies to allow increased newspaper

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<sup>5</sup> W. LaNelle Owens, *Inequities on the Air: The FCC Media Ownership Rules - Encouraging Economic Efficiency and Disregarding the Needs of Minorities*, 47 HOW. L.J. 1037, 1038 (2002-2004); Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235, 236 (2004-2005).

television cross ownership,<sup>6</sup> generated large newspaper chains and media conglomerates, permitted enormous consolidation in broadcast ownership,<sup>7</sup> and facilitated a reduction local content production.<sup>8</sup> All these actions diminished opportunities for expression, debate, and diversity in the public sphere. The public sphere represents space in which social developments, issues, and matters of governance are discussed and determined. Its scope and the extent to which it is inclusive, affords participation, and provides equality and equity affects its democratic performance.<sup>9</sup> Concerns about the future of journalism and reforming media structures and operations are fundamentally grounded in ensuring that an active, expansive, and effective public sphere is afforded and maintained.

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<sup>6</sup> Judith C. Aarons, *Cross-Ownership's Last Stand - The Federal Communication Commission's Proposal Concerning the Repeal of the Newspaper/Broadcast Cross-Ownership Rule*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 317, 336 (2002-2003); Jonathan A. Obar, *Beyond Cynicism: A Review of the FCC's Reasoning for Modifying the Newspaper/Broadcast Cross-Ownership Rule*, 14 COMM. L. & POL. 479, 480 (2009); Alicia Flarity, *David slays Goliath: the fight against the FCC's recent relaxation of the newspaper-broadcast cross-ownership rule*, 61 BAYLOR L. REV. 261, 262 (2009).

<sup>7</sup> Enrique Armijo, *Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justifications for the 2003 Media Ownership Rule Changes*, 82 N.C. L. REV. 1482, 1501 (2003-2004); Rachel M. Stilwell, *Which Public - Whose Interest - How the FCC's Deregulation of Radio Station Ownership Has Harmed the Public Interest, and How We Can Escape from the Swamp*, 6 LOY. L.A. ENT. L. REV. 369, 371 (2005-2006).

<sup>8</sup> Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL'Y STUD. J. 372, 380 (2001); Kristine Martens, *Restoring Localism to Broadcast Communications*, 14 DEPAUL-LCA J. ART & ENT. L. REV. 285, 288 (2004); Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 333 (2004-2005).

<sup>9</sup> JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 85 (Polity 1989); see also Antje Gimmler, *Deliberative Democracy, the Public Sphere and the Internet*, 27 PHIL. & SOC. CRITICISM 21, 22 (2001); ALAN MCKEE, *THE PUBLIC SPHERE: AN INTRODUCTION* 35 (Cambridge Univ. Press 2005).



Many discussions of potential remedies for current conditions are underinformed by or disregard previous efforts to support journalism and media, advocating for interventions that have previously been employed without consideration of their effectiveness and efficacy. In the U.S. and elsewhere, policymakers have used direct and indirect subsidies, large-scale tax exemptions, and a variety of other policy tools to support journalism and journalism enterprises since the 1950s.<sup>10</sup> Those efforts have produced mixed success in their limited objectives of legacy media, and none have been decidedly beneficial in producing or maintaining the broader democratic public sphere desired, despite decades of state intervention.

We are once again discussing the challenges of journalism and potential remedies to address journalism sustainability challenges. There is little recognition of the limits of traditional tools in producing broader results and there is a naïve belief that

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<sup>10</sup> Robert G. Picard, *State Intervention in U.S. Press Economics*, 30 GAZETTE 3, 3 (1982); Robert G. Picard, *Patterns of State Intervention in Western Press Economics*, 62 JOURNALISM Q. 3, 3 (1985); Robert G. Picard, *Free Press and Government: The Ignored Relationships of U.S. Newspapers in MEDIA STRUCTURE AND THE STATE: CONCEPTS, ISSUES, MEASURES* 133, 134 (K. E. Gustafsson ed., Göteborg Univ. 1995); Paul Murschetz, *State Support for the Daily Press in Europe: A Critical Appraisal: Austria, France, Norway and Sweden Compared*, 13 EUR. J. OF COMM. 291 (1998); Robert G. Picard, *Issues and Challenges, in the Provision of Press Subsidies*, in PRESS SUBSIDIARIES IN EUROPE 211, 211 (Isabel Fernandez Alonso, et al., eds., Generalitat de Catalunya 2007); Mart Ots & Robert G. Picard, *Press Subsidies*, in OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION (Jon Nussbaum et al. eds., Oxford Univ. Press 2018); Mart Ots, *Efficient Servants of Pluralism or Marginalized Media Policy Tools? The Case of Swedish Press Subsidies*, 33 J. OF COMM. INQUIRY 376 (2009); STATE AID FOR NEWSPAPERS: THEORIES, CASES, ACTIONS 52 (Paul Murschetz ed., Springer 2013).

addressing journalism sustainability and structural issues alone will produce the expansive public sphere needed for effective democratic engagement and participation. A closer look at the First Amendment and antitrust law as potential solutions reveals constraints on their fitness for purpose.

### **I. THE LIMITS OF FIRST AMENDMENT AND ANTITRUST LAW**

Many hoping for change and policy reform cite the fundamental democratic ideals and principles and the protections of freedom of expression that the First Amendment affords as the bases for action. Although the ideals and principles of freedom of expression provide bases for arguing for intervention, the First Amendment itself does not. The First Amendment is a specific and narrow provision designed to limit government constraints on expression.<sup>11</sup> It does not directly address constraints created by private entities, economics, or consumer choice. Attempting to use the First Amendment as a solution to private infringements on expression misconstrues the purpose of the amendment and the history of related adjudication.

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<sup>11</sup> John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 573; EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 1 (6th ed. 2016).

The First Amendment thus cannot be relied upon as the fountain of actions to support journalism and media because it was not created as an affirmative expression measure. Although the First Amendment provides extensive protection against intrusion of government on expression, it does not place an affirmative obligation on government to facilitate and enlarge that expression.<sup>12</sup> As much as we might like, it does not provide means to halt the intrusion of private companies on expression.

With all due respect to Professor Jerome Barron and others who have argued for an affirmative First Amendment right over the past fifty years,<sup>13</sup> it remains an asserted and not a recognized right. To believe that the theory can be the basis for solving today's challenges is wishful thinking. It may well be possible to construct legislative and administrative policies and law that restrict private intrusion on expression and constrain the abilities of platforms to reduce speech. Relying on courts to fabricate and recognize an affirmative First Amendment right in the foreseeable future is unrealistic, however.

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<sup>12</sup> Jack M. Balkin, *The Future of Free Expression in the Digital Age*, 36 PEPP L. REV. 427, 427–28 (2008-2009).

<sup>13</sup> Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641, 1654 (1967); Jerome A. Barron, *Emerging First Amendment Right of Access to the Media*, 37 GEO. WASH. L. REV. 487, 489 (1968-1969); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 794 (1980-1981); Charles A. Reich, *Affirmative Action for Ideas*, 38 CASE W. L. REV. 632, 634 (1987-1988).

Some argue that competition policy and antitrust law can be used to help pursue the objectives of freeing expression from private constraints and solve challenges presented by mergers and acquisitions in media that may harm “the marketplace of ideas.”<sup>14</sup> They believe antitrust authorities should not be precluded from considering other factors and that there is support in legislative intent and legal rulings for antitrust to be given consideration to the effects of mergers on the First Amendment concerns involving marketplace of ideas and democracy.<sup>15</sup>

Others have sought to free newspapers from antitrust liability by allowing them to cooperatively negotiate terms and prices with digital platforms through the Journalism Competition and Preservation Act,<sup>16</sup> following a path of antitrust exemption for newspapers created in the 1970s in an effort to save editorial voices.<sup>17</sup> This raises significant questions about whether free expression is best served through protective

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<sup>14</sup> See, e.g., *U.S. v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) (“Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas.”).

<sup>15</sup> Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L. J. 249, 249 (2001); Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 137 (2009-2010).

<sup>16</sup> Journalism Competition and Preservation Act of 2018, H.R. 5190, 115th Congress (2017-2018).

<sup>17</sup> 15 U.S.C. § 1801 (2011); See generally JOHN C. BUSTERNA & ROBERT G. PICARD, JOINT OPERATING AGREEMENTS: THE NEWSPAPER PRESERVATION ACT AND ITS APPLICATION (1993).

exemptions from competition or by finding ways to increase competition and competitive behavior.

The marketplace of ideas has always been an imperfect and contested metaphor. It has become more problematic since political philosophers of the seventeenth century adapted terminology from market economics to explain democratic needs. Today, the marketplace is cluttered and dominated by commercial concerns, making the self-correcting principle of truth prevailing in the marketplace questionable.<sup>18</sup> Applying antitrust market-based principles to ideas is unproven, but it has been a First Amendment rationale for press freedom since Justice Oliver Wendell Holmes Jr. employed it in his dissent in *Abrams v. United States* in 1919.<sup>19</sup> Attempting to use antitrust law to address the marketplace of ideas presents enormous challenges because it must deal with a market unlike commercial markets. There are no known and accepted tools and means of analysis for measuring the “idea market.”

Antitrust law exists to restrict and remediate anticompetitive practices and the growth of market power that affects competitors and consumers. Antitrust law relies upon

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<sup>18</sup> Robert Schmuhl & Robert G. Picard, *The Marketplace of Ideas*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE PRESS 141, 147–48 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

<sup>19</sup> See 250 U.S. 616, 629–31 (1919) (Holmes, J., dissenting).

quantifiable evidence of competitive effects on price, quantity, and quality and market power and analyses focus on current competition conditions but do not effectively project future conditions.<sup>20</sup> Concepts of democratic needs, citizenship, information, and expression are absent in the formulation of competition policy and antitrust law and their application and do not effectively address current situations, much less future conditions. Efforts to use these approaches to preserve competition and multiple competing owners in media and communications have failed or have produced ineffectual results because of constraints in the application of fundamental bases of existing law.

Although there are non-economic objectives for antitrust actions,<sup>21</sup> courts and antitrust authorities have focused on market efficiency and economic evidence—such as price effects—in evaluating acquisitions, mergers, and company behavior. They have been generally resistant to non-economic evidence,<sup>22</sup> in

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<sup>20</sup> Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 Antitrust L.J. 1, 2 (2012).

<sup>21</sup> Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1077 (1979); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2009); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406–07 (2013).

<sup>22</sup> See, e.g., William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207 (2003); see also Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 853 (2014).

good part because existing merger guidance does not provide effective methods for measuring other types of competitive effects.

A significant underlying challenge results from the analysis of market power, which requires a relevant market definition based on product characteristics and the geographic area in which trade occurs. The methods for doing so have been debated,<sup>23</sup> but the U.S. antitrust authorities established standards in the 1980s and later combined them in joint merger guidelines.<sup>24</sup> Firms that own 1,000 radio stations or 100 newspapers in different locations in the United States generally will not meet market power limits because they are almost always found to participate in 1,000 *separate* radio markets and 100 *separate* newspaper markets rather than a single national market. This is compounded because their price and competitive effects in the local markets are difficult to empirically establish.

This issue of local versus national markets developed through business practices and national policy that historically

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<sup>23</sup> William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 938 (1981); Thomas G. Krattenmaker, et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 248 (1987); Richard Schmalensee, *Another Look at Market Power*, 95 HARV. L. REV. 1789, 1793 (1982); George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L. REV. 807, 809–11 (1992); Jonathan B. Baker & Timothy Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 ANTITRUST L. J. 3, 4–5 (1992); Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 32 (2014).

<sup>24</sup> U.S. DEP'T OF JUST. AND F.T.C., HORIZONTAL MERGER GUIDELINES 1 (2010).

made most U.S. media local operations. For the entire history of the United States, newspapers were established in individual cities, towns, and counties to serve their populations and local commercial interests. Many printers and papers in the Midwest and West were originally subsidized by local merchants, members of town councils, and local governments to promote communities and commerce.<sup>25</sup> Newspapers were tightly tied to the communities by readers needing local information and by the provision of local advertising.

Congress and the Federal Communications Commission specifically designed radio, and then television broadcast policies, to create local stations that produced some local content and operated in highly defined geographical broadcast signal service areas.<sup>26</sup> When cable television systems developed, they were authorized with the same localism approach, requiring specific authorization to serve individual cities and counties.<sup>27</sup>

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<sup>25</sup> William A. Katz, *The Western Printer and His Publications, 1850–90*, 44 J.Q. 708 (1967); BARBARA L. CLOUD, *THE BUSINESS OF NEWSPAPERS ON THE WESTERN FRONTIER* (1992).

<sup>26</sup> Alan G. Stavitsky, *The Changing Conception of Localism in U.S. Public Radio*, 38 J. BROADCASTING AND ELECTRONIC MEDIA 19, 20 (1994); Gigi B. Sohn and Andrew Jay Schwartzman, *Broadcast Licensees and Localism: At Home in the “Communications Revolution*, 47 FED. COMM. L.J. 383, 388 (1994); Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL’Y STUD. J. 372, 373 (2001); CHRISTOPHER ALI, *MEDIA LOCALISM: THE POLICIES OF PLACE* (2017).

<sup>27</sup> John W. Witt, *CATV [Community Antenna Television] and Local Regulation*, 5 CAL. W.L. REV. 30, 32 (1968); James A. Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501, 506–07 (1977); Linda A. Rushnak, *Cable Television Franchise Agreements: Is Local, State or Federal Regulation Preferable?*, 33 RUTGERS COMPUTER & TECH. L.J. 41, 46–47 (2006).



Only satellite television and the internet were designed for larger regional and national geographic markets.

Over time, owners purchasing newspapers, broadcasters, and cable systems across the nation removed local ownership from many communities. That issue is only rarely addressable using market power concerns because of the relevant market issue. Even when a national market definition is appropriate for consideration of media activities, defining the relevant product market and showing market power through traditional tests is difficult. The multiplicity of providers of news, information, and advertising in different forms across varying platforms makes establishing appropriate concentration measures difficult, and the measurement of price and other competitive effects is challenging and debatable.

Mergers and acquisitions have spurred concern by many observers. There is a visceral reaction by media critics to any such consolidation. Many individuals interested in media and democracy argue that mergers and acquisitions concentrate media ownership, reduce diversity and pluralism, and harm public information and the public sphere.<sup>28</sup> There is a great deal

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<sup>28</sup> See generally ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (New Press 1999); C. EDWIN BAKER, *MEDIA, MARKETS AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2007); VICTOR PICKARD, *AMERICA'S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM* (2015).

of evidence supporting their views, but in most countries competition policy and antitrust law rarely have the competency to deal with those issues.

Part of the problem is that mergers and acquisitions are not anti-competitive in and of themselves in economic and market terms. This presents difficulties in the use of antitrust law to stop them. Consolidation can indeed produce increased costs for consumers and make survival more difficult for other firms;<sup>29</sup> however, consolidation can also produce cost savings for firms and consumers, increase productivity, and may improve firms' sustainability and competitiveness and thus keep more firms in a market.<sup>30</sup>

Projecting which outcome will occur is difficult because the ultimate consequences of a merger or acquisition are never guaranteed. Determining how a single merger or acquisition, however large, will ultimately affect the public sphere is even more uncertain.

When large companies exist because of market success and consumer choice, application of antitrust and competition

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<sup>29</sup> RUTH COHEN & P. LESLEY COOK, *EFFECTS OF MERGERS*, (Reprt ed. 2003); Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, 11 *ANTITRUST* 21, 22 (1997).

<sup>30</sup> THE ECONOMICS OF CORPORATE GOVERNANCE AND MERGERS (Klaus Gugler & B. Burcin Yurtoglu eds., 2008); David T. Scheffman & Mary Coleman, *Quantitative Analyses of Potential Competitive Effects from a Merger*, 12 *GEO. MASON L. REV.* 319, 324 (2003).

policy is difficult unless it involves specific proscribed activities. *United States v. Alcoa* made clear that becoming or being a monopoly is not the same as monopolizing.<sup>31</sup> Whether concentration results from choices in the market or from mergers and acquisitions, antitrust authorities and courts must determine if the attendant market power reduces market efficiency or is used to increase prices and profits, constrains investment by others, or reduces innovation.

Even when evidence of market constraints is found, antitrust actions breaking up established firms are difficult and extraordinary. Enforcement is more likely to be negotiated in merger approval, seek divestiture of operations acquired in a previous merger or acquisition that subsequently prove problematic to competition or to seek regulatory oversight of those activities.<sup>32</sup>

Divestment may support economic competition objectives but does not necessarily support objectives in the marketplace of ideas. Even when voluntary divestment has occurred in media and communications firms without antitrust

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<sup>31</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>32</sup> William J. Baer & Ronald C. Redcay, *Solving Competition Problems in Merger Control: The Requirements of an Effective Divestiture Remedy*, 69 GEO. WASH. L. R. 915, 916 (2000-2001); E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565, 573, 610 (2001-2002); John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979, 980 (2012).

law or competition policy intervention, the results have been acquisitions and operations by other commercial entities that have not enhanced the public sphere.

Traditional competition law and market analysis are thus not likely to be the solution to concerns about media and democracy. They may be a part of an overall solution but cannot be conceived as the primary element because many concerns about the state of media today are not the result of issues addressed by competition and antitrust laws.

## **II. THE URGENT CHALLENGE OF PLATFORM GOVERNANCE**

Despite its limitations, antitrust law can be useful in addressing some current media concerns, especially those involving digital markets. This is important because the dominant vehicles for conveying information and ideas in society are changing. Propelling those changes are dominant digital platforms that are compounding their power by monopolizing data and advertising across digital services including search engines, social networks, content aggregation, and ecommerce. Data is often used to lock in consumers, advertisers, and partners to products and services, creating conditions in which breaking away will decrease the ability of

consumers, advertisers, and partners to communicate and access desirable information.

Data are critical across digital market segments and perhaps should be considered a separate market. Data are the driver of all business and revenue models in the individual segments and certainly compounds market power in those segments.

Network economics provide immense advantages to large platform firms, affecting consumer and advertiser choices and creating market power that makes it nearly impossible for content providers to effectively negotiate use of their content on those platforms. The scale and scope of these firms and their activities far exceed monopolies and oligopolies in legacy media and telecommunications firms, in part because of the enormous financial resources created by investors in stock markets.

Companies such as Apple and Microsoft have market capitalizations exceeding \$1 trillion.<sup>33</sup> Alphabet, Amazon, and Google have market capitalizations exceeding \$800 billion, and

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<sup>33</sup> Market capitalizations described are as of November 2019. *See Apple, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/AAPL/fundamental/market-cap> (last visited July 2020) (showing Apple's market capitalization since 2016); *Microsoft Corp.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/MSFT/fundamental/market-cap> (last visited July 2020) (showing Microsoft's market capitalization since 2016).

Facebook has market capitalization of \$550 billion.<sup>34</sup> By comparison, AT&T has a market capitalization of \$288 billion, Disney \$260 billion, Comcast \$202 billion, and Gannett \$1 billion.<sup>35</sup> Even leading firms such as WalMart, Exxon Mobil, and Bank of America have market capitalizations below \$300 billion.<sup>36</sup> These massive financial resources provide the leading

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<sup>34</sup> Market capitalizations described are as of November 2019. *See Alphabet, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/GOOG/fundamental/market-cap> (last visited July 2020) (showing Alphabet's, which own's Google, market capitalization since 2016); *Amazon.com Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/AMZN/fundamental/market-cap> (last visited July 2020) (showing Amazon's market capitalization since 2016); *Facebook, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/FB/fundamental/market-cap> (last visited July 2020) (showing Facebook's market capitalization since 2016).

<sup>35</sup> Market capitalizations described are as of November 2019. *See AT&T, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/T/fundamental/market-cap> (last visited July 2020) (showing AT&T's market capitalization since 2016); *The Walt Disney Company*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/DIS/fundamental/market-cap> (last visited July 2020) (showing Disney's market capitalization since 2016); *Comcast Corp.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/CMCSA/fundamental/market-cap> (last visited July 2020) (showing Comcast's market capitalization since 2016); *New Media Inv. Group*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/GCI/fundamental/market-cap> (last visited July 2020) (showing New Media Investment Group's, which owns Gannett, market capitalization since 2016).

<sup>36</sup> Market capitalizations described are as of November 2019. *See Walmart, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/WMT/fundamental/market-cap> (last visited July 2020) (showing Walmart's market capitalization since 2016); *Exxon Mobile Corp.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/XOM/fundamental/market-cap> (last visited July 2020) (showing Exxon's capitalization since 2016); *Bank of America*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/BAC/fundamental/market-cap> (last visited July 2020) (showing Bank of America's market capitalization since 2016).

digital players the ability to acquire any firms with innovative and potentially competitive technologies and services, and to spread into multiple lines of business. These practices make it nearly impossible for competitors to arise or for consumers and content providers to effectively exercise countervailing power through the market. No jurisdiction or policy domain alone can govern these firms and platforms. Although oversight will require multistate and multinational actions and employment of multiple types of policies, antitrust can play a vital role.

When the founders conceived the First Amendment, the most powerful existing institution was government, so they created protections against governmental interference with expression in order to support self-governance. Today, digital firms and platforms are every bit as powerful an influence on expression. They structure its presentation, they convey it, and they increasingly control it through company policies and actions that constrain expression and both the marketplace of ideas and the economic markets surrounding it. Platform companies employ policies, for example, to determine the types and range of ideas and opinions presented, the language used in that expression, and who is permitted to continue using the

platform. These content moderation choices align their activities more with publishing than acting as a common carrier.

Solutions for digital monopolies and more antitrust enforcement of mergers and acquisitions and business practices are warranted and must be sought. Structural and behavioral remedies should be considered. New regulations such as consumer data portability, interoperability requirements to counter network effects, or treating them as regulated monopolies or public utility are needed.

Antitrust enforcement, however, remains the focus of contentious debates about how enforcement should deal with high-tech industries and issues of innovation, cooperation among firms, and anti-competitive actions involving intellectual property.<sup>37</sup> Addressing the challenges of antitrust enforcement involving digital firms and platforms must be supported by better policy and legislative action, probably including more flexibility in regulation that will allow adjustment to future changes in

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<sup>37</sup> ILKKA RAHNASTO, *INTELLECTUAL PROPERTY RIGHTS, EXTERNAL EFFECTS, AND ANTITRUST LAW: LEVERAGING IPRs IN THE COMMUNICATIONS INDUSTRY* (2003); Herbert Hovenkamp, *Antitrust and Innovation: Where We are and Where We Should Be Going*, 77 ANTITRUST L.J. 749, 749–50 (2011); Marshall Leaffer, *Patent Misuse and Innovation*, 10 J. HIGH TECH. L. 142, 147 (2010); David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERK. TECH. L.J. 729, 765 (2001); Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 314 (2012).



industry products and services, business configurations, and business models.

Policymakers and regulators should focus on digital players' conduct in dealing with content producers and seek transparency about advertising pricing, revenue, and its division. Increased privacy rights and consumer protections to reduce misuse and abuse of personal surveillance and the asymmetrical power of suppliers and consumers in media and communication markets should be sought. Some of these issues can be addressed with antitrust law because they involve specific conduct of digital firms, and antitrust application is traditionally conduct-specific in its approach.

### III. DOES THE FIRST AMENDMENT CONSTRAIN ACTION?

Digital practices and copyright are increasingly reinforcing private constraints on access to information, reducing the ability of the public to be informed participants in society.<sup>38</sup>

Some might question whether the First Amendment limits the government's ability to use antitrust law or other policy to address private infringements on expression. A balance

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<sup>38</sup> Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 358 (1999).

between First Amendment prohibitions of government restraints on expression and government policies that promote expression has developed, however. That balance, established in jurisprudence, particularly involving broadcasting, permits policies -designed to serve the clear public purposes of increasing expression and its availability if they are narrowly tailored to achieve this government interest. In *Associated Press v. United States*, the Supreme Court established that the First Amendment does not protect private restraint of trade in information.<sup>39</sup> Likewise, the Court decided in *Red Lion Broadcasting Co. v. FCC* that there are public benefits from availability of diverse information, ideas, and opinions to which the public has a right.<sup>40</sup> And in *Metro Broadcasting, Inc. v. FCC* the Supreme Court ruled that policy promoting minority ownership in broadcasting serves important governmental interests.<sup>41</sup>

Many additional policy options for supporting journalism and a robust mediated public sphere exist including public media, subsidies, and philanthropy. Identifying the policy domains, mechanisms, and tools that can be employed and

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<sup>39</sup> 326 U.S. 1, 20 (1945).

<sup>40</sup> 395 U.S. 389–90 (1969).

<sup>41</sup> 497 U.S. 547, 566 (1991).

developing the public support and political will to employ them will be required.

*A. A Wider Array of Actions will be Required*

Reforming the structure of journalism—and indeed all media provision—will require complex, coordinated policies across domains, ranging from competition policy to industrial policy, from innovation policy to privacy policy, and from labor policy to media and communications policy. It cannot be accomplished merely by asking competition authorities to strengthen enforcement of existing laws or by inducing legislatures to subsidize journalism organizations.

The challenges of journalism and democratic needs are systemic rather than discrete issues that can be dealt with by employing simplistic policy solutions. They are based in political, economic, and social arrangements; means of participation provided; and power afforded in governance. Addressing conditions or influences in one part of the system will rarely alter conditions or influence in others.

Many observers are suggesting policy tools such as structural intervention, subsidies, tax benefits, and operational interventions before fully defining the breadth of the policy

problem, the principles that should guide policymakers, the objectives, and the mechanisms that will be employed. If the policy tools are determined before the problems, principles, objectives, and mechanisms are clarified, the policy almost always leads to inadequacy or failure.

To effectively pursue media reform and policy action, a comprehensive policy problem statement and a set of solutions need to be developed rather than addressing multiple and disparate issues separately. Clearly, presentations of the primary principles and objectives for approaching the problems must be presented. These principles and objectives might include supporting startups; bringing new owners into media and journalism; providing preferences for ownership by smaller firms; helping smaller firms acquire capital to provide desired services; making charitable status for journalism non-profits easier as sought through the Saving Local News Act;<sup>42</sup> emphasizing local, community, and minority media; supporting independent journalism; and breaking up unhealthy conglomerates. These will help inform choices of the proper mechanisms and tools to overcome the challenges.

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<sup>42</sup> Saving Local News Act of 2019, H.R. 3126, 116th Cong. (2019).

This is not an easy task, nor will it be a short-term activity. It will require serious policy research, analysis, and sustained advocacy for multiple policies. The coordinated advocacy groups and policy networks necessary to undertake and continue extensive and effective advocacy do not yet exist.

One must also recognize the political realities of policymaking. Because of general distrust toward the media today, the public and Congress cannot be expected to support federal intervention that would benefit the media. There is some evidence that more political will exists at local and state levels, however, and some activities to support journalism and promote and protect the public sphere are emerging there.<sup>43</sup>

Ultimately, society must ask whether public intervention should be the only approach used to reform media. Might placing greater effort into private actions be quicker and less burdensome than trying to promote state actions? Might media reform be sought through private activities involving socially conscious investment funds; media venture funds; corporate social responsibility programs; journalism cooperatives; or some

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<sup>43</sup> New Jersey, for example, has established a state fund to support local journalism. See Rick Rojas, *News from Your Neighborhood: Brought to You by the State of New Jersey*, N.Y. TIMES (July 30, 2018) <https://www.nytimes.com/2018/07/30/nyregion/nj-legislature-community-journalism.html>.

forms of private-public partnerships that can be pursued more rapidly?

Simultaneous public and private action will be necessary. Addressing the challenges limiting attainment of a robust public sphere requires broad initiatives across society, not merely governmental intervention. Policies requiring affirmative governmental action to promote expression and diverse media ownership should be sought, but they must be founded outside the First Amendment and enacted within media and communication policy and other policy domains. New media and communications ownership structures can be pursued but will require significant revision of existing antitrust law and its application, as well as changes in media policy, industrial policy, tax policy, and a host of related policies.

Efforts to expand antitrust law to specifically address concerns about the marketplace of ideas and democratic considerations are needed in order to include measures in antitrust guidelines and practices and to seek beneficial approaches in other areas of policy. These will conflict with entrenched beliefs and practices of liberalization of ownership of media and communications in Congress and the Federal Communications Commission. Achieving significant change or

reform of media and communications will require overcoming the well-entrenched neoliberal market-based philosophy that had driven deregulation, privatization of services, reduction in government spending, and free trade for several decades and significantly influenced media and communications policy and policy in related areas.<sup>44</sup>

First Amendment and antitrust mechanisms can be used to facilitate part of that change, but their abilities to address fundamental issues in the public sphere are limited. Many issues will have to be addressed by the Federal Communications Commission and Congress. These issues include implementing and enforcing policies promoting media pluralism and diversity; controlling media and communications ownership; restraining intellectual property rights involving information; reducing protections afforded to online platforms in statutes; providing and enforcing tangible consumer rights in transactions with information service providers; and creating extensive privacy rights appropriate for the digital age.

Actions must be guided by the two fundamental questions: freedom for what? and freedom from what? Freedoms

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<sup>44</sup> See generally DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (Oxford Univ. Press reprint ed. 2007); DES FREEDMAN, THE POLITICS OF MEDIA POLICY (2008); SEAN PHELAN, NEOLIBERALISM, MEDIA AND THE POLITICAL (Palgrave Macmillan 2014).

must be sought that provide a robust public sphere supporting democratic activity. To achieve conditions in which media and communications support citizen needs for information and democratic participation will require freedom from public and private constraints that harm it and promulgating requirements that they serve citizens. These are lofty and normative aspirations, but they require rational and practical actions and policies in their pursuit.

Ultimately, making journalism sustainable and achieving successful media reform will depend upon whether there is political will to achieve the requisite changes. That remains an open and significant question.

#### IV. CONCLUSIONS

The First Amendment and antitrust law afford inadequate means for pursuing platform governance and media reform and cannot be exclusively relied upon because of limitations established on their use through statute, jurisprudence, and practice. Advancing First Amendment and antitrust conceptualizations and applications conducive to robust platform governance and advancing media reform might be possible in the remote future, but absent consequential change



in the construction, interpretation, and implementation of the Constitution and existing statutes that approach will not be efficacious.

More plausible and expeditious support for the governance and reform objectives is feasible through policymaking based in legislation and administrative rulemaking, supporting private initiatives to reform communications firms and structures, and harnessing public pressure to induce better behavior by platform companies and media firms. Those opportunities should not be discounted.

**INFORMATION, COMMUNITY, AND CHANGE:  
A CALL FOR A RENEWED CONVERSATION ABOUT FIRST  
AMENDMENT RATIONALES**

Jared Schroeder\*

**I. INTRODUCTION**

The information individuals consume creates a world for them. As a world-making, raw material used for constructing each person's reality, the nature of information plays a profound role in our *being in the world*.<sup>1</sup> When we think of information in this way, as a building block of reality, the flow of information and the rationales we construct for freedom of expression are of crucial concern. Yet, as the nature of information, how it reaches each person, its content, and its form, as well as the ways people interact with others and understand themselves, have shifted in fundamental ways in the twenty-first century, our understandings and rationales for freedom of expression have remained primarily rooted in Enlightenment-funded assumptions about the interaction that occurs between individuals, information, and society.<sup>2</sup>

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<sup>1</sup> See MARTIN HEIDEGGER, BEING & TIME 26–27 (John Macquarrie & Edward Robinson, trans., 1962). Heidegger referred to being as *Dasein*. *Id.* Castells explained, “Meaning is constructed in society through the process of communicative action.” See MANUEL CASTELLS, COMMUNICATION POWER 12 (2009).

<sup>2</sup> See Toni M. Massaro, Helen Norton & Margot E. Kaminski, *SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2489–91 (2017); see also Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427 (2009). Both articles, which deal with technology and the First Amendment, associate Enlightenment assumptions with contemporary free expression rationales.

There is good reason for this. The United States' free expression tradition, the precedential history of which finds itself one hundred years old this year, was born of certain assumptions and constructed via a long, gradual march of precedents.<sup>3</sup> The Framers of the nation's founding documents were children of the Enlightenment.<sup>4</sup>

Similarly, the Supreme Court's most powerful and most used tool for rationalizing First Amendment safeguards for free expression, the marketplace of ideas metaphor, has come to embody Enlightenment-based assumptions about the nature of truth and the rationality of individuals. As Justice Holmes explained, "the best test of Truth is the power of the thought to get itself accepted in the competition of the market."<sup>5</sup> He referred to this assumption as the "theory of our Constitution."<sup>6</sup> While Justice Holmes was more influenced by pragmatism than the

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<sup>3</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See also *Reno v. ACLU*, 521 U.S. 844 (1997); *Texas v. Johnson*, 491 U.S. 397 (1989); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Near v. Minnesota*, 283 U.S. 697 (1931), for examples of the gradual development of free expression rationales.

<sup>4</sup> Fred S. Siebert, *The Libertarian Theory*, in *FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO*, 40–41 (Fred S. Siebert, Theodore Peterson, and Wilbur Schramm, eds., 1956); Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 *HOFSTRA L. REV.* 1, 2 (2012); Lyrrisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 *U. ILL. L. REV.* 799, 811 (2010).

<sup>5</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

<sup>6</sup> *Id.*

Enlightenment,<sup>7</sup> his marketplace concept has become associated with Enlightenment though.<sup>8</sup> The assumptions of Enlightenment ideas, which emphasize the rationality of the individual, the generally universal nature of truth, and the construction of a society that benefits the individual, align with a democratic approach to government that is based on the principle that rational people can govern themselves. These assumptions have been much-used tools as the Supreme Court's most famed free-expression-focused justices, such as Justices Holmes, Black, Brennan, and Douglas, wove them into the landmark rationales for First Amendment protections.<sup>9</sup>

Such assumptions about the necessity of information for rational individuals and its sanctity as a public good have become almost sacrosanct. They have become so set apart that as the nature of the information that constructs our worlds changes, it is almost as if we must ask permission to lift the veil, gaze upon the foundations of these First Amendment principles

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<sup>7</sup> M. H. Fisch, *Justice Holmes, the Prediction Theory of Law, and Pragmatism*, 39 J. PHIL. 85, 85 (1942); Paul L. Gregg, *Pragmatism of Mr. Justice Holmes*, 31 GEO. L.J. 262, 262 (1943).

<sup>8</sup> RICHARD A. SCHWARZLOSE, *THE MARKETPLACE OF IDEAS: A MEASURE OF FREEDOM OF EXPRESSION* 1 (1989); Philip M. Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, 49 J. COMM. 151, 153–54 (1999).

<sup>9</sup> See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). See also *Texas v. Johnson*, 491 U.S. 397 (1989); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (Black, J., concurring); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Dennis v. United States* 341 U.S. 494, 579 (1951) (Black, J., dissenting), 581 (Douglas, J., dissenting), for examples of opinions that supported free expression by these justices.

and ask if these are still the bedrock assumptions on which to construct a free society. This is particularly true in legal circles, where many often find any suggestion that the existing paradigm might require revision blasphemous. First Amendment scholarship has, in many ways, constructed high walls around a series of rationales. Such rationales are not the First Amendment itself, but reasons, assumptions, and ideas that have been constructed as interpretations of the amendment's meanings. While the forty-five words that comprise the First Amendment have never changed, the interpretations and the reasons that are used to support them have—and they can do so again.

This essay outlines the parameters for a conversation that lowers these walls and examines how free expression has come to be rationalized. It asks that we, in an era of revolutionary change in communication, community, and self, dig down to the foundations of our free expression rationales and ask if they are still the bedrock on which to construct a free society. In an era when a reality television star is President, hate groups flourish

online,<sup>10</sup> hate crimes are increasing,<sup>11</sup> artificially intelligent actors are influencing human discourse,<sup>12</sup> and falsity travels six times faster than truth in virtual spaces, how should free expression be rationalized?<sup>13</sup> If we were forced to start anew, would we devise the same system? Are the changes that have taken place merely incremental shifts, which do not warrant revisions to how free expression is understood or are they substantive enough to call for new rationales for First Amendment safeguards? Europe has gone a different way, promising similar safeguards to free expression, but rationalizing them in substantially different ways.<sup>14</sup> At the same time, Justice Elena Kagan concluded at the end of the Supreme Court's 2018 term that conservatives were "weaponizing the First

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<sup>10</sup> Michael Edison Hayden, *US Civil Rights Groups Worry Anti-Muslim Sentiment is Fueling Right-Wing extremism*, ABC NEWS (June 12, 2017), <https://abcnews.go.com/US/us-civil-rights-groups-worry-anti-muslim-sentiment/story?id=47840271>; Liam Stack, *Over 1,000 Hate Groups Are Now Active in United States, Civil Rights Group Says*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/hate-groups-rise.html>.

<sup>11</sup> Adeel Hassan, *Hate-Crime Violence Hits 16-Year High, FBI Reports*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html>.

<sup>12</sup> Yuriy Gorodnichenko, Tho Pham & Oleksandr Talvera, *Social Media, Sentiment and Public Opinions: Evidence from #Brexit and #USElection*, NAT'L BUREAU OF ECON. RES. (May 2018), <http://www.nber.org/papers/w24631>.

<sup>13</sup> Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146 (2018) (discussing the speed at which falsity travels online).

<sup>14</sup> See e.g., *Mouvement Raëlien Suisse v. Switzerland*, App. No. 16354/06 Eur. Ct. H.R. 20 (2012); *Hertel v. Switzerland*, App. No. 59/1997/843/1049 Eur. Ct. H.R. 32 (1998).

Amendment,” expanding its scope so it can be used to strike down economic and social policies.<sup>15</sup>

This essay does not contend that the foundational assumptions for democratic discourse *must* be changed. It does, however, emphasize that paradigmatic shifts in how individuals communicate and understand others and themselves requires that the heralded foundational rationales of free expression be reevaluated. Such an effort is not concerned with policy questions, such as the place of Communications Decency Act Section 230 or whether the government should regulate deepfakes. These are important symptoms for which *how* we rationalize free expression is central to the discussion, but here the focus is on foundational assumptions. Are the rationales that were developed in the eighteenth century and applied to free expression rights in the twentieth century still the building blocks needed to safeguard democratic discourse in the twenty-first century?

To set the parameters for such a discussion, this essay lays out three areas around which such a discussion can be centered. Part II considers changes in the flow of information and how individuals have come to understand themselves and others in

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<sup>15</sup> *Janus v. AFSCME*, 138 S. Ct 2448, 2501 (2018) (Kagan, J., dissenting).

the networked era. Part III examines the foundational assumptions of the marketplace of ideas rationale for freedom of expression. As the Supreme Court's primary tool for communicating why it has understood the First Amendment as safeguarding free expression, its building blocks are crucial to the discussion. Part IV briefly considers European rationales for free expression, thus providing fodder for different perspectives regarding the meaning of freedom of expression.

## II. CHANGE

The development and widespread adoption of networked communication tools has fundamentally changed the way individuals communicate. By placing what amounts to a printing press within the reach of anyone with access to an Internet connection, information has moved from a relatively rare, commonly professionally provided and localized resource to something that is abundant and often globally sourced. Such a change has meant information shifted from a "professional structuring of worldview,"<sup>16</sup> which was the case when news organizations acted as gatekeepers to provide relatively common sets information to audiences, to a participatory culture where each person engages in a constant series of "voluntary,

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<sup>16</sup> CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 65 (2008).



temporary, and tactical affiliations, reaffirmed through common intellectual enterprises.”<sup>17</sup>

In this sense, individuals have entered a choice-rich environment that has come to shift how they interact with others and understand themselves. The explosion of information sources, particularly since the emergence of social media during Web 2.0, has made information and network decisions a significant part of citizens’ lives.<sup>18</sup> Faced with countless potential information sources through which to garner world-building information, individuals have constructed generally homogenous, echo chamber intentional networks, thus limiting their exposure to broad spectrums of people, ideas, and organizations.<sup>19</sup> As a result, individuals have come to understand others and themselves in fundamentally different ways than they did in the twentieth century.

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<sup>17</sup> HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 27 (2006).

<sup>18</sup> Younghee Noh, *Imagining Library 4.0: Creating a Model for Future Libraries*, 41 J. ACAD. LIBRARIANSHIP 786, 789–90 (2015). Web 1.0 was characterized by massive information searchability and availability. Web 2.0 added increased content creation opportunities for citizen publishers, particularly via social media outlets. Web 3.0, the current wave, built upon these advancements, simpler connections between data and knowledge. Web 4.0, the symbiotic web, will be characterized by increasingly meaningful interactions between humans and AI.

<sup>19</sup> MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 3–4 (2d ed. 2000); W. Lance Bennett & Shanto Iyengar, *A New Era of Minimal Effects? The Changing Foundations of Political Communication*, 58 J. COMM. 707, 720 (2008); Itai Himelboim, Stephen McCreery & Marc Smith, *Birds of a Feather Tweet Together: Integrating Network and Content Analyses to Examine Cross-Ideology Exposure on Twitter*, 18 J. COMPUTER-MEDIATED COMM. 154, 166–71 (2013).

*A. Community*

The nature of communities, how they are defined and their characteristics, have shifted in the networked era. Traditional community groups, such as bowling leagues, Lions Clubs, Boy Scouts, and veterans' organizations, have seen their memberships decline.<sup>20</sup> Church, synagogue, and mosque membership has dropped twenty percent in the U.S. since 1998.<sup>21</sup> As these foundational, socializing institutions have struggled, individuals have become parts of countless online groups.<sup>22</sup> Such a shift from physical, local groups to global, virtual communities brings a wave of crucial changes in the ways individuals understand themselves and others. Scholars have found online groups do not accrue the same amount of social capital as in-person groups.<sup>23</sup> If social capital is the primary currency that flows through and holds together communities, then the conclusion that physical communities generate more trust, relationship, reciprocity, and meaningful human engagement

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<sup>20</sup> ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 15–17 (2000).

<sup>21</sup> Jeffrey M. Jones, *U.S. Church Membership Down Sharply in Past Two Decades*, GALLUP (April 18, 2019), <https://news.gallup.com/poll/248837/church-membership-down-sharply-past-two-decades.aspx>.

<sup>22</sup> JENKINS, *supra* note 17, at 26–28; Meredith Conroy, Jessica T. Feezell & Mario Guerrero, *Facebook and Political Engagement: A Study of Online Political Group Membership and Offline Political Engagement*, 28 *COMPUTERS HUM. BEHAV.* 1535, 1539 (2012).

<sup>23</sup> Caroline Haythornthwaite, *Strong, Weak, and Latent Ties and the Impact of New Media*, 18 *THE INFO. SOC'Y* 385, 386 (2002); PUTNAM, *supra* note 20, at 18–21.

than online communities is significant.<sup>24</sup> This is particularly true in a democratic social structure that assumes that generally rational individuals will engage with one another as part of self-government. Something important happens when the relationships individuals hold with one another are diminished in trust and reciprocity and, at the same time, broadened in potential scope by the global and instantaneous networks. As media scholar Henry Jenkins explained, “The new knowledge culture has arisen as our older forms of social community are breaking down, our rooting in physical geography is diminished, . . . our allegiances to nation-states are being redefined.”<sup>25</sup>

Jenkins lauded the potential for knowledge communities to benefit from collective intelligence to come together online and solve problems and address concerns.<sup>26</sup> What he did not account for, however, was the fragmented nature of online spaces. When individuals have the power to curate the information sources they encounter and the individuals they connect with online, the potential pools of knowledge that communities hold can be winnowed to only answers that align with dominant beliefs and “truths” in that virtual group. By

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<sup>24</sup> PUTNAM, *supra* note 20, at 19.

<sup>25</sup> JENKINS, *supra* note 17, at 27.

<sup>26</sup> *Id.* at 27–28.

tailoring the people, ideas, and information they encounter, individuals also reduce the potential collective intelligence within their communities. Thus, rather than deep pools of community intelligence from which to draw from in discourse with others, many virtual communities have turned into mostly vacant marketplaces where only a limited range of ideas are available.

Historically, traditional news organizations have worked as “general-interest intermediaries,” which provided the public with a set of common information.<sup>27</sup> From that provision of general information, individuals could conduct discourse and come to conclusions about the world around them. In place of these intermediaries, individuals structure echo-chamber-based networks that generally reinforce their existing beliefs.<sup>28</sup> Thus, it has become possible for communities to believe significantly different truths. On social media, it is possible to find entire communities that believe President Obama was born in Kenya, and therefore never legally president. At the same time, many other groups concluded the “birther” movement was a conspiracy. The two groups believe fundamentally different

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<sup>27</sup> CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 41 (2017).

<sup>28</sup> Himelboim, McCreery & Smith, *supra* note 19, at 166–71; CASTELLS, *supra* note 19, at 3–4; Bennett & Iyengar, *supra* note 19, at 720.

truths and order their worlds based upon those opposing realities. This ability to tailor information flows, thus narrowing the range of potential ideas and “truths,” combined with the diminished social capital, raises questions about traditional rationales for free expression. These changes in communication lead to communities that are more extreme and less tolerant. Sociologist Manuel Castells concluded this type of breakdown in interaction and trust means “social groups and individuals become alienated from each other, and see the other as a stranger, eventually as a threat. In this process, social fragmentation spreads, as identities become more specific and increasingly difficult to share.”<sup>29</sup> Legal scholar Cass Sunstein communicated similar concerns, but added that such online community dynamics tend to lead to extreme behavior. He explained, “Repeated exposure to an extreme position, with the suggestion many people hold it, will predictably move those exposed, and likely predisposed, to believe in it.”<sup>30</sup>

This concern has been magnified by the growing presence of bots within virtual spaces. The bots, which frequently cannot be discerned from human actors, can artificially amplify certain ideas, making them seem more prominent and more accepted.

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<sup>29</sup> CASTELLS, *supra* note 19, at 3.

<sup>30</sup> SUNSTEIN, *supra* note 27, at 77.

They can also drown out human ideas by the sheer number of bot-based accounts and the volume of messages they communicate. Bots frequently capitalize on the echo chambers intentional networks individuals create, sharing false and misleading information that is likely to be accepted as truthful because it aligns with accepted narratives within the community.<sup>31</sup>

Finally, Castells' and Sunstein's concerns are buttressed by the solidarity that those who hold extreme views find online. Absent networked technologies, those who have held extreme views have often been ostracized in their physical, geographic communities. The global, instantaneous nature of virtual communities allows these individuals to find solidarity and support for their ideas with others online. Once emboldened by this newfound online solidarity, those who hold extreme views act out these identities in local, physical spaces.<sup>32</sup>

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<sup>31</sup> Samuel Woolley, *We're Fighting Fake News AI Bots by Using More AI. That's a Mistake*, MIT TECH. REV. (Jan. 8, 2020), <https://www.technologyreview.com/2020/01/08/130983/were-fighting-fake-news-ai-bots-by-using-more-ai-thats-a-mistake/>; *How Fake Twitter Accounts Spread Misinformation and Distort Conversation*, MARKETPLACE (Aug. 19, 2019), <https://www.marketplace.org/shows/marketplace-tech/how-fake-twitter-accounts-spread-misinformation-and-distort-conversation/>.

<sup>32</sup> MANUEL CASTELLS, NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE 5–7 (2015) .

*B. Self*

Networked technologies are changing how individuals understand themselves in democratic society. These changes manifest in different ways, but each of them influences how individuals encounter, understand, and engage with information and expression with others. Sociologist and psychologist Sherry Turkle has raised concerns about the ways networked technologies are changing people's perceptions of themselves and of others.<sup>33</sup> She explained that networked communication tools give the impression that each person is instantaneously connected with others, but those interactions are less meaningful than how individuals have communicated in the past.<sup>34</sup> Further, "Face-to-face conversation unfolds slowly. It teaches patience. We attend to tone and nuance. When we communicate on our digital devices, we learn different habits."<sup>35</sup> She found people simplify their statements when communicating via networked technology. Nuance is limited because "we dumb down our communications."<sup>36</sup> Other habits include a lack of empathy and people's inability to present themselves as they are, since texting and social-network-based messages allow individuals to carefully

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<sup>33</sup> SHERRY TURKLE, *ALONE TOGETHER* 1–17 (2011).

<sup>34</sup> *Id.*

<sup>35</sup> SHERRY TURKLE, *RECLAIMING CONVERSATION* 35 (2015).

<sup>36</sup> *Id.*

craft how they represent themselves to others in ways that have not been possible in physical spaces. She explained, “[W]e are tempted to present ourselves as we would like to be. Of course, performance is part of any meeting, anywhere, but online and at our leisure, it is easy to compose, edit, and improve as we revise.”<sup>37</sup>

Communication scholar Zizi Papacharissi termed this alternative version of the physical identity the “networked self.”<sup>38</sup> She emphasized that online forums allow individuals to create profiles, including a chosen name and image, and create a dynamic where the self is validated via intentionally selected virtual communities.<sup>39</sup> Efforts to project a certain version of the self online are encouraged not only by the ability to edit and revise messages, but by the architectures of networked spaces themselves. Social media firms construct their spaces to maximize interaction and engagement, via joining or following individuals or groups and “liking” or “favoriting” content.<sup>40</sup> By doing so, the companies increase the amounts and types of data

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<sup>37</sup> *Id.* at 4.

<sup>38</sup> Zizi Papacharissi, *Conclusion: A Networked Self*, in *THE NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES* 304 (Zizi Papacharissi ed., 2010).

<sup>39</sup> *Id.* at 304–05.

<sup>40</sup> JOSÉ VAN DIJCK, *THE CULTURE OF CONNECTIVITY* 31 (2013).



they can sell or use for advertising. Such architectures, however, have social consequences.<sup>41</sup>

In terms of Facebook, new media scholar José van Dijck explained, “Facebook wants you to share information with as many people as possible . . . Facebook’s protocols guide users through its preferred pathways; they impose hegemonic logic onto a mediated social practice.”<sup>42</sup> These virtual forum designs encourage more shallow interaction and incentivize individuals to communicate content that will receive more affirmation. Thus, certain behaviors, particularly those that are seen as encouraged by the virtual communities a person is part of, are likely to be repeated and even exaggerated, while ideas that are not perceived as popular will not be posted. While such social temperature-taking occurs in physical spaces, the commonly homogenous nature of online networks can lead individuals to go to greater extremes in their efforts to cultivate their networked identities.

Papacharissi concluded self-representation becomes challenging in social networks because individuals, while they control their immediate connections, cannot know their

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 31. See also, Erving Goffman, *The Presentation of Self in Everyday Life*, in *SOCIOLOGY: EXPLORING THE ARCHITECTURE OF EVERYDAY LIFE* 128-39 (David M. Newman and Jodi O’Brien, eds., 2013).

secondary audiences.<sup>43</sup> Individuals might also struggle to craft nuanced messages that will align with the perceived expectations within the multiple communities in which they take part. Papacharissi found, “The process of self-presentation is complicated in the context of SNSs that combine a variety of audiences, of variable privacy or publicity, into a single crowd of spectators observing the same performance, but from a variety of vantage points.”<sup>44</sup> As a result, individuals frequently limit the depth of their ideas, trading nuance for simplified versions that are more likely to succeed across their different communities. While such a shift might appear minor, repeating this process countless times each day, as well as receiving messages from others via these circumstances, can lead to changes in how individuals think of themselves and engage with others.

Finally, consistent exposure to ideas that a person’s virtual communities frame as negative or harmful can lead individuals to construct defensive identities. Castells found such identities “function as a refuge and solidarity, to protect against a hostile outside world.”<sup>45</sup> Thus, people turn their online communities into communes, which become safe places that

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<sup>43</sup> Papacharissi, *supra* note 38, at 307–08.

<sup>44</sup> *Id.*

<sup>45</sup> MANUEL CASTELLS, THE POWER OF IDENTITY 68 (2010).

reinforce identity-forming characteristics of faith, nationhood, and ethnicity against what is perceived as a deconstruction of the world as they understand it.<sup>46</sup> Within the online echo chambers, narratives are often rewritten to reinforce dominant beliefs, thus leading to religious fundamentalism, nationalism, and racism.<sup>47</sup> Castells emphasized these communities “do not reason, they believe.”<sup>48</sup> Thus, online discourses represent a departure from the types of expectations of rationality and the assumptions of community that are traditionally found within the free-expression rationales discussed in the next section.

### III. THE MARKETPLACE

Since Justice Holmes introduced the marketplace concept into the Supreme Court’s lexicon in 1919, the metaphor has become justices’ primary tool for communicating how they understand freedom of expression.<sup>49</sup> Justices from a variety of judicial philosophies, across several decades, have employed the metaphor in a broad spectrum of First Amendment cases.<sup>50</sup> In

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<sup>46</sup> *Id.* at 68–69.

<sup>47</sup> *Id.* at 68–70.

<sup>48</sup> *Id.* at 69–70.

<sup>49</sup> Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 188–89 (1972).

<sup>50</sup> W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q., 40, 40 (1996).

this regard, the marketplace approach has become foundational to *how* the First Amendment has been interpreted in the United States. The approach's cornerstone place in free expression, however, has not included a definition from the Court. Justices have never explicitly defined its meaning, though it is generally understood as assuming that truth will succeed and falsity will fail when rational citizens have access to information that is substantially unmolested by the government.<sup>51</sup>

Such a definition places significant trust in Enlightenment-based assumptions regarding human rationality, the nature of truth, and the place of the individual in society. Similar ideas are at the foundations of Enlightenment thinker John Milton's work. In *Areopagitica*, he wrote, "Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter."<sup>52</sup> He also contended "opinion in good men is but knowledge in the making," thus carving out crucial building blocks of what has become contemporary marketplace theory.<sup>53</sup> Enlightenment

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<sup>51</sup> *Id.* See also, LOUIS MENAND, THE MARKETPLACE OF IDEAS 13–14 (2010); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6 (1989).

<sup>52</sup> JOHN MILTON, AREOPAGITICA AND OF EDUCATION 50 (George H. Sabine ed., 1951).

<sup>53</sup> *Id.* at 45.

thinkers assumed rational individuals are generally capable of making sense of the world around them and truth will be discovered when people and ideas are free. Such assumptions have come to be married to the marketplace approach— a construct that has in many ways become synonymous with free expression in the United States.

*A. The Marketplace and the Court*

While Enlightenment assumptions have come to form the bedrock of marketplace theory, justices have seldom directly associated the two in the Court's decisions. In *Central Hudson Gas & Elec. Co. v. Public Service Commission*, however, a skeptical Chief Justice Rehnquist explicitly cited Milton, as well as Adam Smith, in his dissent, which questioned the Court's wisdom in the commercial speech case.<sup>54</sup> He contended, "From the Court's frequent reference to the 'marketplace of ideas,' which was deemed analogous to the commercial market in which a laissez-faire policy would lead to optimum economic decision-making under the guidance of the 'invisible hand.'"<sup>55</sup>

In many instances, however, justices have inferred Enlightenment assumptions in their uses of the marketplace approach to rationalize their reasoning. In *Lamont v. Postmaster*

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<sup>54</sup> 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting).

<sup>55</sup> *Id.*

*General* in 1965, Justice Brennan contended postal service guidelines threatened the free exchange of ideas. He explained, “The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”<sup>56</sup> Similarly, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board* in 1991, the Court used the marketplace metaphor to rationalize striking down a state law that limited the ability of criminals to profit from book deals that discussed their crimes.<sup>57</sup> The Court reasoned the law “raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace . . . . The First Amendment presumptively places this sort of discrimination beyond the power of the government.”<sup>58</sup> Similarly, in a 1953 case in which a House committee sought records of who purchased large quantities of a controversial author’s book, Justice Douglas characterized the publisher as bidding “for the minds of men in the market place of ideas.”<sup>59</sup> In each of these instances, justices struck down laws that they understood as government intrusions

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<sup>56</sup> *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

<sup>57</sup> 502 U.S. 105, 116 (1991).

<sup>58</sup> *Id.*

<sup>59</sup> *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring).

upon the flow of information. Justices communicated that such limitations would impede generally rational individuals' search for truth.

In other situations, justices explicitly associated the marketplace as the embodiment of the First Amendment's free expression safeguards. In its decision to uphold the FCC's fairness doctrine in 1969, the Court reasoned, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."<sup>60</sup> Justice White, dissenting in *First National Bank of Boston v. Bellotti* in 1978, contended that the Court's decision to strike down a law that limited corporate speech risked "seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas."<sup>61</sup> Finally, in the Court's deeply divided *Citizens United v. FEC* decision in 2010, both Justice Kennedy's opinion for the Court and Justice Stevens' dissent called upon the marketplace approach.<sup>62</sup> Justice Kennedy contended that the federal law that limited "electioneering communications"<sup>63</sup> during certain periods could keep important ideas *from* the marketplace, thus

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<sup>60</sup> *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

<sup>61</sup> 435 U.S. 765, 810 (1978) (White, J., dissenting).

<sup>62</sup> 558 U.S. 310 (2010).

<sup>63</sup> *Id.* at 321.

robbing citizens of the chance to evaluate the ideas.<sup>64</sup> Conversely, Justice Stevens found the law *protected* the marketplace.<sup>65</sup> Stevens reasoned the law, “reflects a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral ‘marketplace’ of ideas . . . the marketplace in which the actual people of this Nation determine how they will govern themselves.”<sup>66</sup> In these cases, justices communicated understandings that they conceptualized the marketplace as an embodiment of the free-expression promises made in the First Amendment.

#### *B. Problems and Criticisms*

Despite widespread judicial support for understandings that place the marketplace and its assumptions at the center of how the First Amendment is conceptualized, legal scholars have identified significant concerns within the foundational building blocks of the theory. Many of these concerns provide important fodder for discussions about how the First Amendment can or should be understood in the networked era. Most of the criticisms deal with the Enlightenment-based assumptions that have become the foundations of the theory. Historian David

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<sup>64</sup> *Id.* at 335–36 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

<sup>65</sup> *Id.* at 473–75 (Stevens, J., dissenting).

<sup>66</sup> *Id.* at 473.



Hollinger, in weighing the contributions and problems with Enlightenment thought, encapsulated many of the criticisms of marketplace theory. He explained, the Enlightenment “blinded us to uncertainties of knowledge by promoting an ideal of absolute scientific certainty.”<sup>67</sup> He continued, “the Enlightenment, it seems, has led us to suppose that all people are pretty much alike.”<sup>68</sup> Legal scholar Jerome Barron was less circumspect in criticizing the marketplace and its assumptions. He concluded, “Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the ‘marketplace of ideas’ is freely accessible.”<sup>69</sup> He concluded, if a marketplace of ideas once existed, it was long gone.<sup>70</sup>

Marketplace theory critics have delved specifically into these concerns. First Amendment scholar C. Edwin Baker emphasized, “the assumptions upon which the classic marketplace of ideas theory rests are almost universally rejected.”<sup>71</sup> He emphasized “truth is not objective.”<sup>72</sup> Absent the objective truth assumption, the theory struggles and, thus, the

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<sup>67</sup> David E. Hollinger, *The Enlightenment and the Genealogy of Cultural Conflict in the United States*, in *WHAT’S LEFT OF THE ENLIGHTENMENT* 7, 8 (Keith Michael Baker & Peter Hanns Reill eds., 2001).

<sup>68</sup> *Id.* at 9.

<sup>69</sup> Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967).

<sup>70</sup> *Id.*

<sup>71</sup> BAKER, *supra* note 51, at 12.

<sup>72</sup> *Id.*

marketplace's Enlightenment-funded rationales for First Amendment-based free-expression safeguards falter. Legal scholar Stanley Ingber explained, "In order to be discoverable, however, truth must be an objective rather than subjective, chosen concept."<sup>73</sup> He continued, "if truth is not [objective], the victory of truth in the marketplace is but an unprovable axiom."<sup>74</sup>

Legal scholar Frederick Schauer communicated similar concerns about the truth assumptions of the theory, explaining, "our increasing knowledge about the process of idea transmission, reception, and acceptance makes it more and more difficult to accept the notion that truth has some inherent power to prevail in the marketplace of ideas . . . ."<sup>75</sup> Finally, Baker explained, "if truth is subjective, if it is chosen or created, an adequate theory must explain why and how the usually unequal advocacy of various viewpoints leads to the 'best choice.'"<sup>76</sup>

The fundamental criticisms about the truth rationales of the marketplace approach connect with related concerns about the rationality and social structure assumptions that were imported from Enlightenment thought and baked into the

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<sup>73</sup> Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 15 (1984).

<sup>74</sup> *Id.*

<sup>75</sup> Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 777 (1986).

<sup>76</sup> BAKER, *supra* note 51, at 6.

foundations of the theory. People do not receive messages in the same ways. Information and “truth” do not reach communities, particularly in the twenty-first century, with the same frequency and intensity. Similarly, individual and community identity characteristics, such as ethnic, national, socioeconomic, and faith influences, as well as traits that develop as part of individuals’ networked-selves, make it unlikely, even if presented with significant evidence, that certain groups will agree with others regarding *the* truth.<sup>77</sup> Taken together, these concerns about the marketplace approach’s foundational assumptions raise questions regarding the theory’s ability to persist, as is, as the primary tool for how the Supreme Court articulates how it rationalizes free expression.<sup>78</sup>

### *C. The Holmes Truth*

Finally, Justice Holmes, though he introduced the marketplace concept into the precedential record, did not generally accept Enlightenment-founded assumptions regarding truth.<sup>79</sup> Justice Holmes, on numerous occasions, explicitly

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<sup>77</sup> See *infra* Part II.B.

<sup>78</sup> Philip M. Napoli, *What If More Speech Is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 103–04 (2018); Jared Schroeder, *Marketplace Theory in the Age of AI Communicators*, 17 FIRST AMEND. L. REV. 22, 60–64 (2018).

<sup>79</sup> See Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 456–58 (1988); see also, Jared Schroeder, *The Holmes Truth: Toward a Pragmatic, Holmes-Influenced Conceptualization of the Nature of Truth*, 7 BR. J. AM. LEG. STUD. 169, 177–80 (2018).

rejected the existence of absolute truth. In a letter to friend and political theorist Harold Laski in 1929, Justice Holmes concluded, “absolute truth is a mirage.”<sup>80</sup> Eleven years earlier, the year before his historic opinions in cases such as *Schenck v. U.S.* and *Abrams v. U.S.*, he wrote, “Certitude is not the test of certainty. We have been cock-sure of many things that were not so.”<sup>81</sup> Rather pragmatically, Justice Holmes instead conceptualized truth as transitory, something shaped by experience and the individual’s best efforts to make sense of the world.

Late in his life, in letters to friends, Justice Holmes declared he was a “bettabilitarian.”<sup>82</sup> He explained that the best any person can do is *bet* on what is true and therefore order their lives around such wagers.<sup>83</sup> Justice Holmes used similar language in his dissent in *Abrams*, concluding, “Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.”<sup>84</sup> Thus, while Justice Holmes did not include any citations in the dissent in which he

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<sup>80</sup> OLIVER WENDELL HOLMES, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 107 (Richard A. Posner ed., 1992).

<sup>81</sup> Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

<sup>82</sup> HOLMES, *supra* note 80, at 108; David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 474, n.78 (1994); Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 12 (1948).

<sup>83</sup> HOLMES, *supra* note 80, at 108; Cohen, *supra* note 82, at 12 (1948).

<sup>84</sup> *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting).

introduced the marketplace concept into the Court's vocabulary, his other writings indicate he did not accept foundational building blocks of the Enlightenment assumptions that have come to be the primary assumptions of the approach. Such a recognition, alongside how the Court has used the metaphor and scholarly concerns regarding its assumptions provide substantial fodder for discussing how free expression is conceptualized in the twenty-first century.

#### IV. EUROPE'S APPROACH

The Supreme Court has constructed a series of rationales for how we should understand the forty-five-word, absolutely phrased First Amendment. While other human rights documents make similar promises regarding free expression,<sup>85</sup> jurists in other regions have come to construct substantially different rationales for such safeguards. The existence of alternately constructed conceptualizations of free expression provide yet another avenue through which conversations regarding how

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<sup>85</sup> See, e.g., European Convention on Human Rights, Sept. 3, 1953, art. 10 [hereinafter ECHR]; Universal Declaration on Human Rights, Dec. 10, 1948, Preamble; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 19; Convention on the Elimination of All Forms of Racial Discrimination, art. 5, March 7, 1966.

rationales for such safeguards can be situated in light of twenty-first-century changes in information, community, and self.

In this regard, the European Union's system provides a useful contrast to US conceptualizations of free expression. The United States shares significant philosophical influences with the bloc, and both have strong statements regarding free expression in their foundational documents. Article 10 of the European Convention of Human Rights promises "[e]veryone has the right to freedom of expression," including the right "to hold opinions and to receive and impart information and ideas without interference by public authority."<sup>86</sup> Unlike the First Amendment, however, a second section of the article indicates such freedoms come with "responsibilities," including those that "are necessary in a democratic society."<sup>87</sup> The second section, along with the historical forces that led to its inclusion, has led EU courts to come to significantly different free-expression rationales, particularly in the twenty-first century.

Article 10 was written "[i]n the context of effective political democracy *and* respect for human rights . . ."<sup>88</sup> Such a

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<sup>86</sup> ECHR, art. 10, § 1.

<sup>87</sup> ECHR, art. 10, § 2.

<sup>88</sup> Monica Macovei, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights*, COUNCIL OF EUROPE 1, 6 (2004), <http://rageuniversity.org/PRISONESCAPE/UK%20ANTI-TERROR%20LAW/Freedom%20of%20Expression%20European%20Rights.pdf> (emphasis added).

two-fold concern for democracy and human rights illustrates the alternative foundational assumptions the EU model is constructed upon. Within such a context and wording, European jurists have constructed free expression rationales that account for human dignity, pluralism, and public safety.<sup>89</sup> They have also positioned the government as more of a custodian of the information marketplace than as an unwelcome participant.<sup>90</sup> The European Court of Human Rights (“ECtHR”) in 2013, for example, upheld a UK law that allowed the government’s Broadcast Clearance Centre “(BACC”) to limit advertisements that were “wholly or mainly of a political nature.”<sup>91</sup> The ECtHR reasoned the law’s intent, “to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process,” acted in the best interest of society and was a “minimum impairment of the right of expression.”<sup>92</sup>

The year before, in *Mouvement Raëlien Suisse v. Switzerland*, the ECtHR upheld the right of Swiss officials to deny a

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<sup>89</sup> *Mouvement Raëlien Suisse v. Switzerland*, App. No. 16354/06, Eur. Ct. H.R. 20 (2012); *Hertel, v. Switzerland*, App. No. 59/1997/843/1049, Eur. Ct. H.R. 32 (1998); *Animal Defenders International v. United Kingdom*, App. No. 48876/08 Eur. Ct. H.R. 39 (2013).

<sup>90</sup> *Steel and Morris v. U.K.*, App. No. 68416/01 Eur. Ct. H.R. 30 (2005); *Mouvement Raëlien Suisse*, No. 16354/06 Eur. Ct. H.R. at 9 (quoting ¶ 5.6 from the Swiss Federal Court’s decision to dismiss the appeal in 2005); *Instytut Ekonomichnykh Reform v. Ukraine*, App. No. 61561/08 Eur. Ct. H.R. 13 (2016).

<sup>91</sup> *Animal Defenders*, No. 48876/08 Eur. Ct. H.R. at 3.

<sup>92</sup> *Id.* at 5–6.

controversial religion the right to place its posters in public.<sup>93</sup>

While the posters did not involve any illegal material, the Internet address it displayed, the court reasoned, could lead people to ideas that worked against public health and morals.

The court reasoned Article 10 allows state officials to limit “matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.”<sup>94</sup> The court articulated

similar concerns in *Hertel v. Switzerland* in 1998. In *Hertzlel*, a commercial appliance group sought an injunction against a researcher who published conclusions that microwaves were dangerous to public health. In rejecting the appliance group’s request, the court emphasized, “Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment.”<sup>95</sup> The court continued,

however, by considering the consumer groups’ arguments, that the “demands of pluralism, tolerance, and broadmindedness without which there is no ‘democratic society.’”<sup>96</sup> Thus, in rationalizing its decision to uphold the author’s rights, the court

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<sup>93</sup> *Mouvement Raëlien Suisse*, No. 16354/06 Eur. Ct. H.R. at 4.

<sup>94</sup> *Id.* at 20.

<sup>95</sup> *Hertel, v. Switzerland*, App. No. 59/1997/843/1049, Eur. Ct. H.R. 32 (1998).

<sup>96</sup> *Id.*



communicated concern for not only the flow of information, but the well-being of society.

*Hertel* also illustrates the ECtHR's expectation that information be a public good. Such an approach, which is different than the U.S. courts' assumption that information is generally *inherently* a public good, marks a significant contrast between the systems' approaches. In *Hertel*, the court explicitly concluded Article 10's statement that limitations that are "necessary in a democratic society" means the government must present a 'pressing social need'" in order to limit expression.<sup>97</sup> In other words, if the information is found to harm, rather than benefit, society, it can be limited. In *Aquilina v. Malta*, a 2011 defamation application involving a journalist, the court emphasized the importance of a free press, but qualified those conclusions explaining "the press must not overstep certain bounds" and journalists' "duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities— information and ideas on all matters of public interest."<sup>98</sup>

Six years earlier, in *Steel and Morris v. U.K.*, the court rationalized protecting activists' rights to circulate negative, controversial information about a corporation because, "[t]he

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<sup>97</sup> *Id.* at 31–32.

<sup>98</sup> *Aquilina & Others v. Malta*, App. No. 28040/08, Eur. Ct. H.R. 10 (2011).

issues raised in the leaflet were matters of public interest and it was essential in a democracy that such matters be freely and openly discussed.”<sup>99</sup> Similarly, in *Instytut Ekonomichnykh Reform v. Ukraine* in 2016, the court upheld a publisher’s right to communicate negative information about political leaders during a Constitutional crisis. In doing so, the court reasoned that “[f]reedom of expression is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any section of the community.”<sup>100</sup> Ultimately, the outcomes in all three applications were likely exactly as they would have been in similar situations in US courts. Crucially, however, the rationales were different. The ECtHR jurists considered public health, community, and society at large, as well as the information’s nature as a public good—something valuable to discourse or an informed public.

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<sup>99</sup> *Steel & Morris v. U.K.*, App. No. 68416/01 Eur. Ct. H.R. 27 (2005).

<sup>100</sup> *Instytut Ekonomichnykh Reform v. Ukraine*, App. No. 61561/08 Eur. Ct. H.R. 13 (2016).

## V. CONCLUSIONS

Absent information, democracy cannot function. This essay, in light of the world-building characteristics of information and the paradigmatic shift in its nature in the networked era, as well as substantial changes in the natures of community and self, contends, however sacrosanct, it is time to re-examine *what* free expression means in the United States. Such a conversation does not suggest we take an editor's pen to the First Amendment. Instead, this essay has examined a series of concerns that, ideally, could represent the parameters of a constructive discussion about the future of *how* we understand freedom of expression.

Importantly, the forty-five words of the First Amendment have always required interpretation. Within those interpretations are potential shades of meaning. Such competing potential interpretations were evidenced in the Court's opinions in *Citizens United*. Justice Kennedy contended the law must be struck down because it *limited* the flow of information.<sup>101</sup> Justice Stevens, in his dissent, contended the law *protected* freedom of expression.<sup>102</sup> Similarly, in *Central Hudson*, Chief Justice Rehnquist questioned the court's wisdom in extending First Amendment protections to

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<sup>101</sup> *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

<sup>102</sup> *Id.* at 473 (Stevens, J., dissenting).

commercial speakers.<sup>103</sup> He emphasized, “Two ideas are here at war with one another, and their resolution, although it be on a judicial battlefield, will be a very difficult one.”<sup>104</sup> He continued, “The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement . . . .”<sup>105</sup> Thus, this essay’s contention that significant change in communication and, as a result, community and individual understandings, is merely a call to lay bare differences in understandings that have long existed.

*A. A Conversation About Change, Not Tech*

Unlike differences between judicial philosophies, this discussion is catalyzed by the liquid nature of networked technologies’ development and the fundamental aspects of the revolution they represent.<sup>106</sup> New networked technology-related advancements are appearing, one after the other, before law or our legal philosophies have any chance to conceptualize the changes they bring about. At no point during the networked era

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<sup>103</sup> Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York, 447 U.S. 557, 595 (1980) (Rehnquist, C.J., dissenting).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 598.

<sup>106</sup> This metaphor is influenced by ZYGMUNT BAUMAN, LIQUID MODERNITY 2–6 (2000).

have technological advancements solidified long enough to allow for a period of reflection and reconstitution of legal rationales. Adding to the impact of this constant-change dynamic, the present revolution is characterized by information. Castells compared the networked revolution to the Industrial, rather than to other advancements in communication technology. He explained, “What characterizes the current technological revolution is not the centrality of knowledge and information, but the application of such knowledge and information to knowledge generation . . . in a cumulative feedback loop.”<sup>107</sup>

As with the Industrial Revolution, the current shift constitutes a change that goes beyond simple technological advancements. Instead, it represents shifts in society, community, and self that are comparable to the Industrial Revolution changes that affected individuals’ relationships as they moved from more pastoral communities to large cities where customs, relationships, and norms were less known.<sup>108</sup> It was during the same period, 1880 to 1920, that the Supreme Court provided its initial interpretation of the First Amendment,

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<sup>107</sup> CASTELLS, *supra* note 19, at 31.

<sup>108</sup> Charles Hirschman & Elizabeth Mogford, *Immigration and the American Industrial Revolution From 1880 to 1920*, 38 SOC. SCI. RES. 897, 897 (2009).

as well as introduced the marketplace of ideas metaphor.<sup>109</sup> For these reasons, conversations regarding free-expression rationales in the networked era should be framed as parts of massive *social* rather than *technological* change.

*B. Focus Attention on the Marketplace*

As the Court's most dominant tool for rationalizing free expression safeguards, adjustments to the metaphor's primary building blocks could help revise and rationalize free expression safeguards in light of the massive changes in communication, community, and self in the networked era. The marketplace theory's assumptions, which evolved alongside free expression rationales during the twentieth century, have come to be founded in Enlightenment assumptions about truth, rationality, and the structure of society.<sup>110</sup> Scholars have questioned the validity of these assumptions, particularly the expectation that generally rational individuals will identify objective truth, which will emerge and succeed as falsity fails. Replacing these assumptions with approaches that recognize individuals encounter information and make meaning differently, and that truth *emerges* via discourse, could help refocus free expression rationales on

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<sup>109</sup> See *Schenck v. United States*, 249 U.S. 47 (1919); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>110</sup> See *supra* Part III.

safeguarding the flow of information, rather than protecting a competition between truth in falsity and that generally assumes each person is similar and receives information in comparable ways.<sup>111</sup>

Though scholars have long communicated concerns regarding the theory's underlying foundations, networked communication tools have made each of the problems more concerning. The fragmented, polarized nature of the choice-rich networked environment makes it even less likely that individuals will encounter a range of ideas or come to the same "truth." The networked environment creates a multiverse of ideologically, rather than governmentally, limited marketplaces where only certain ideas are available in the competition between truth and falsity. Furthermore, Justice Holmes, though he introduced the marketplace concept into the nation's legal lexicon, did not ascribe to Enlightenment assumptions. His ideas regarding truth and rationality related far more closely to pragmatism, which understands truth to be personal and subjective, rather than generally universal and objective. Such an approach, a shift to a more pragmatic, discourse-based approach to the Court's

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<sup>111</sup> See Jared Schroeder, *Toward a Discursive Marketplace of Ideas: Reimagining the Marketplace Metaphor in the Era of Social Media, Fake News, and Artificial Intelligence*, 52 *FIRST AMEND. STUD.* 38, 53–55 (2018).

primary tool for communicating how it understands freedom of expression is an example of the type of adjustments that might come from a conversation about how the First Amendment should be understood in the networked era.

*C. Consider Elements of European Approaches*

Finally, conversations about how free expression is rationalized in the United States would benefit from discussing the approaches that have taken hold in the European Union. While accounting for public health and morals, and arranging free-expression rationales so they consider, rather than assume, whether information is generally a public good, might seem unlikely candidates in the US system, their presence in the EU has created a more malleable system that is capable of adapting to technological change. This adaptability is the fruit of the public health and morals approaches, as well as the place of the government as a custodian, rather than an unwanted actor, within the flow of information. While present American rationales do not allow for significant action regarding AI, particularly deepfakes, for example, and their influence on



political discourse, the EU model has allowed the bloc to begin to safeguard its discourse from such non-human actors.<sup>112</sup>

While this essay does not endorse any one idea, it does contend that information is a world-building material for citizens in a democratic society and, thus, changes to that information and how individuals understand themselves and others require that we carefully consider how free expression is rationalized. To that end, this essay has not advocated for a specific new theory of the First Amendment, but has instead outlined potential avenues that might guide constructive discussion. Each of the avenues discussed bears the potential to inform and guide important questions about how free expression should be rationalized in the United States in the twenty-first century.

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<sup>112</sup> European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rule on Robotics, EUR. PARL. DOC. P8\_TA(2017)0051 (2017).