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SPEECH GOVERNANCE IS AN AUTOCRACY: THE CASE FOR DEMOCRATIZING FACEBOOK

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ABSTRACT

Current proposals for modifying the landscape of online speech governance would either expand civil liability for social media companies or modify their market imperatives through antitrust law and other regulatory reforms. The leading alternative to changing government regulations that govern online speech is for social media companies to self-regulate, a form of private speech governance most notably embodied in Facebook's new Oversight Board. None of these proposals considers that social media companies have a built-in alternative to public and private regulation: regulation by social media users themselves.

This Article explores the promise of implementing democratic mechanisms for deciding the rules that govern online speech, and first principles for doing so. Although modifying existing public and private regulations continues to be a promising avenue for improving online speech governance, failure to consider democratic reforms obscures social media users' capacity to determine the rules applicable to their own speech. Such reforms would mitigate the free speech concerns that arise when the government regulates speech, while restoring the public's trust that social media companies are capable of governing online speech well.

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INTRODUCTION

The most pressing questions social media pose to democratic societies relate to how social media companies should treat user speech. Commentators from across the ideological spectrum have criticized social media companies for their approach to regulating user speech. On the one hand, many conservative commentators have taken issue with what they perceive as bias in how social media companies treat conservative viewpoints.¹ On the other hand, many liberal and progressive observers believe that social media platforms fail to do enough to promote healthy public discourse.² It seems, then, that few are content with

¹ Their charge is rooted in the belief that social media companies censor, scrutinize, and fact-check conservative voices when these companies fail to do the same for liberal speakers. For instance, conservative media analyst Brent Bozell claims that “every platform in Silicon Valley today is censoring conservatives.” Brian Flood, *Conservative Group Launches Website to Battle Big Tech Companies Over Online Censorship*, FOX NEWS (Sept. 21, 2020), <https://www.foxnews.com/media/online-censorship-conservative-big-tech>. Public officials, including Republican U.S. Senator Ted Cruz, have voiced similar concerns. E.g. Fox Business, *Big Tech is the Biggest Threat to Free Speech: Sen. Cruz*, YOUTUBE, at 02:20 (Oct. 22, 2020), <https://youtu.be/thum10e7B2Q?t=141> (“We have had for several years a growing problem with Big Tech censorship, Big Tech censoring individual Americans, conservatives, views they didn’t want . . .”).

Interestingly, the charge of Internet platform political bias does not merely come from conservatives. A recent study found that “[m]ajorities in both major parties believe censorship is likely occurring . . .” EMILY A. VOGELS ET AL., PEW RSCH. CTR., MOST AMERICANS THINK SOCIAL MEDIA SITES CENSOR POLITICAL VIEWPOINTS 4 (2020), <http://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/>.

² These individuals are concerned with the potential harms that today’s relatively unregulated online speech environments have on democratic functioning, pointing to both the platforms’ willingness to let disinformation spread and the impacts of this lax attitude toward certain speech categories as evidence that someone must govern online speech more firmly. For instance, in the aftermath of the 2016 U.S. presidential election, observers noted that Facebook and other social media platforms had failed to meaningfully address the spread of so-called “fake news” that impeded public discourse on true issues. See, e.g., Max Read, *Donald Trump Won Because of Facebook*, N.Y. MAG.: INTELLIGENCER

the approach social media companies have taken with respect to regulating user speech.

Existing proposals for addressing the challenge of online speech governance rely on either state or private action. State action proposals involve modifying the relationship between the government and Internet companies by adjusting the applicable legal and regulatory regimes. On the left, proposals have included treating social media companies as “information fiduciaries”³ and using law and policy to bring market imperatives in line with public aims.⁴

(Nov. 9, 2016),

<https://nymag.com/intelligencer/2016/11/donald-trump-won-because-of-facebook.html> (“The most obvious way in which Facebook enabled a Trump victory has been its inability (or refusal) to address the problem of hoax or fake news.”).

³ Jack Balkin and Jonathan Zittrain suggest that treating Internet companies as “information fiduciaries” would result in them owing a duty of loyalty to their users, just as doctors and lawyers owe this duty to their clients. E.g. Jack M. Balkin, *Information Fiduciaries in the Digital Age*, BALKINIZATION (Mar. 5, 2014), <https://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html>; Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016); Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/>.

⁴ The most prominent advocate for this view is Lina M. Khan, who has proposed strengthening antitrust scrutiny over the Internet economy and otherwise restricting the means by which Internet companies can monetize their products. See, e.g., Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017) [hereinafter *Amazon’s Antitrust Paradox*] (arguing that contemporary antitrust jurisprudence is insufficient for preventing market power consolidation in the Internet economy); Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325, 333 (2018) (suggesting that structural reforms to reduce market concentration and barring the monetization of user data in certain ways may more effectively limit platform power than today’s regulatory approaches); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019) [hereinafter *Separation of Platforms and Commerce*] (arguing that regulators should enact structural separations to restrict Internet platforms’ monopoly power); Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019) (critiquing Balkin’s information fiduciary concept as being

On the right, commentators have advocated for limiting or repealing Section 230 of the Communications Decency Act (Section 230), which insulates Internet companies from liability for user speech.⁵ In both liberal and conservative visions, then, the solution to the Internet speech governance problem lies in changing the landscape of Internet law and policy to control the actions of social media companies.

The leading alternative to adjusting the current regulatory framework applicable to social media companies is self-regulation. Perhaps recognizing that it currently operates within political crosshairs, Facebook recently created an Oversight Board that adjudicates disputes arising from the platform's decisions to take down user posts.⁶ Facebook claims that the Board is independent and that its decisions are binding on the company.⁷ Since the Oversight Board only just began operations, it is too early to evaluate whether this initiative will successfully placate those on both the left and the right calling for regulatory reform. In any event, the Oversight Board is the leading instance of the changing landscape of private online speech governance.

These two approaches—state regulation and self-regulation—dominate contemporary discourse about online speech governance. Yet neither approach considers that social media platforms have a built-in third source of decision-making authority for how speech should be

underdeveloped and arguing for market structure reforms instead).

⁵ 47 U.S.C. § 230 (2012). The charge that Internet companies censor conservative viewpoints, discussed *supra* note 1, has led to calls to reduce the scope of these companies' immunity from liability for user speech. Notably, President Trump recently issued an Executive Order requesting the FCC to clarify the scope of Internet platform immunity under Section 230 due to the perception that platforms are politically motivated in regulating online speech. *See* Exec. Order No. 13925, 85 Fed. Reg. 34,079 (May 28, 2020) ("Online platforms are engaging in selective censorship that is harming our national discourse. . . . Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias.").

⁶ *See* OVERSIGHT BOARD, <https://www.oversightboard.com> (last visited Nov. 22, 2020).

⁷ Article 4 of the Oversight Board's Charter indicates that "[t]he board's resolution of each case will be binding and Facebook will implement it promptly, unless implementation of a resolution could violate the law." FACEBOOK, OVERSIGHT BOARD CHARTER art. 4, (2019), <https://oversightboard.com/governance/> (click the download icon) [hereinafter *Oversight Board Charter*].

governed: users themselves. What if social media users had a say in the platform rules, policies, and processes that govern their own speech online?

This Article explores the promise of a democratic approach to Internet speech governance. Though this Article argues that a democratic approach would be an auspicious means of solving the online speech governance challenge, it does not endorse any particular structure or method for surveying and implementing the preferences of users. Since each platform has a unique constituency, different business goals, and different political pressures, there is no uniform mechanism that will work for all social media companies. Instead, this Article explains why social media companies should consider adopting a democratic approach to Internet speech governance and offers first principles for doing so. Importantly, this Article does not argue that a democratic approach must be exclusive of other proposals for modifying online speech governance. Rather, democratic reforms are one tool that should be considered in tandem with others to construct a more socially desirable online speech landscape.

In this Article, the phrases “social media platform” and “platform” refer to an Internet service that hosts and disseminates user-generated speech to the public, often on a central feed that is algorithmically individualized for each user. “Social media company” refers to a company that owns and operates a social media platform. “Internet company” is a more expansive category that includes both social media companies and internet-based businesses that are not primarily in the business of operating social media platforms. Unless otherwise noted, “speech” refers to the content that individual or organizational users submit to a social media platform for publication to other users and does not include paid advertising provided to users through social media platforms.

Part I surveys the current landscape of Internet speech governance, including the applicable law, market structure, and speech policies that platforms have adopted. Since Facebook is the world’s largest social media company, Part I pays particular attention to its policies, decisions, and new Oversight Board.⁸ Part II outlines the democratic approach

⁸ Facebook had 1.82 billion daily active users and 2.74 billion monthly active users in the third quarter of 2020. Press Release, Facebook, *Facebook Reports Third Quarter 2020 Results* (Oct. 29, 2020),

to speech governance and considers possible objections. Finally, Part III discusses possible means of implementing a democratic approach to Internet speech governance.

I. THE CURRENT LANDSCAPE OF INTERNET SPEECH

There are two sets of policies that determine how a person's online speech is governed. First, there are public policies that determine the legal and regulatory environment in which Internet companies operate. This kind of policy has to do with the state's decision to treat the Internet and Internet actors in certain ways. It is also the space where most political commentators and scholars recommend changes to how online speech gets treated. Second, there are private policies—those developed and implemented by social media companies themselves—that determine how a user's post gets treated within the social media platform. Though social media companies develop these private policies in the shadow of public policies, private policies are important sources of decision-making power. They include community guidelines or other terms of use for participating in online discourse, as well as the content moderation decisions social media companies make when removing a post. Together, public and private policies define the current landscape of Internet speech governance.

A. Public Policies

Most current proposals for modifying the way online speech is governed involve modifying public policy. Under current policy, social media companies can largely regulate speech as they see fit due to the immunity granted by Section 230 of the Communications Decency Act⁹ and lax antitrust rules that enable them to capture tremendous market power over communications tools while evading serious scrutiny.

https://s21.q4cdn.com/399680738/files/doc_financials/2020/q3/FB-09.30.2020-Exhibit-99.1.pdf. A comparison of monthly active users for the leading social media platforms through 2018 shows that Facebook is the world's most popular social media platform. See Esteban Ortiz-Ospina, *The Rise of Social Media*, OXFORD MARTIN SCH.: OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media>.

⁹ 47 U.S.C. § 230 (2012).

1. Section 230 and Platform Immunity

Though the Internet's origins date to the 1970s,¹⁰ it did not become widely adopted as a means of private communication until the 1990s. By that time, the first platforms enabled Internet users to communicate online. Early court decisions addressing the legal status of these platforms imported a distinction from First Amendment jurisprudence between speech publishers, which are generally liable for the contents of the speech they publish, and speech distributors, which are generally immune from tort liability.¹¹ Courts found platform liability for user speech where platforms were involved in controlling tortious user speech but not where platforms were ignorant of the contents of user speech.¹² These cases incentivized early Internet companies to refrain from monitoring, editing, or otherwise learning of the contents of user speech. If a platform did so, then it might be subject to liability for any wrongful speech that users made through their platforms.

Recognizing that this trend in the law would either inhibit the growth of the Internet or result in virtually no speech moderation online at all, Congress enacted Section 230 of the Communications Decency Act of 1996.¹³ Section 230 provides Internet platforms with immunity from liability for the contents of user speech, regardless of whether they

¹⁰ Ben Tarnoff, *How the Internet Was Invented*, GUARDIAN (July 15, 2016),

<https://www.theguardian.com/technology/2016/jul/15/how-the-internet-was-invented-1976-arpa-kahn-cerf>.

¹¹ Eugene Volokh, *47 U.S.C. § 230 and the Publisher/Distributor/Platform Distinction*, REASON: VOLOKH CONSPIRACY (May 28, 2020, 11:44 AM), <https://reason.com/volokh/2020/05/28/47-u-s-c-230-and-the-publisher-distributor-platform-distinction>.

¹² *Compare* *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139–42 (S.D.N.Y. 1991) (finding that a platform that did not have knowledge of the contents of user speech was a mere distributor and therefore not liable for a user's tortious speech), *with* *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *4–5 (N.Y. Sup. Ct. May 24, 1995) (holding a platform liable for tortious user speech as a publisher where the platform deleted user posts for "offensiveness and 'bad taste'").

¹³ 47 U.S.C. § 230 (2012). "Congress enacted this statute partially in response to court cases that held internet publishers liable for defamatory statements posted by third parties on message boards maintained by the publishers." *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016).

play a role in moderating user speech.¹⁴ Courts have almost uniformly interpreted this provision broadly, insulating Internet platforms from a litany of claims.¹⁵ Broad as it is, immunity under Section 230 did not extend to criminal, intellectual property, or privacy laws; state laws were also unaffected, except to the extent that they impose platform liability for user speech as such.¹⁶ Though much of the Communications Decency Act was struck down shortly after its enactment, Section 230 and its general grant of platform immunity survive.¹⁷

Section 230 draws the ire of conservative public figures. The Trump Administration, for example, repeatedly targeted Section 230 protections, possibly in retaliation for what it perceived as social media companies' restrictions of conservative viewpoints.¹⁸ For example, President Trump threatened to veto the annual National Defense Authorization Act, a critical piece of legislation for America's defense efforts, if the bill did not include a

¹⁴ No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2012).

¹⁵ See, e.g., *Teatotaler, LLC v. Facebook, Inc.*, 242 A.3d 814, 820 (N.H. 2020); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321–22 (11th Cir. 2006); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). But see Kate Klonick, *The New Governors*, 131 HARV. L. REV. 1598, 1608–09 (2018) [hereinafter *The New Governors*] (describing recent cases that foreground unresolved questions regarding Section 230's scope and protections).

¹⁶ 47 U.S.C. § 230(e) (2012). Section 230 does not impact the scope of Internet platforms' intellectual property liability, but Congress insulated platforms from copyright liability for user posts through Section 512 of the Digital Millennium Copyright Act. See 17 U.S.C. § 512 (2012). Unlike Section 230, however, Section 512 immunity is conditional on the platform lacking actual knowledge of a user's infringement. 17 U.S.C. § 512(c) (2012). When a platform receives notice of a specific instance of user infringement, the platform must "expeditiously" remove the infringing content. *Id.*

¹⁷ *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (striking down portions of the Communications Decency Act restricting "indecent" and "patently offensive" speech on the Internet).

¹⁸ See discussion *supra* note 5.

provision repealing Section 230.¹⁹ The Administration was joined in its calls to limit the scope of Section 230's protections by its Congressional allies.²⁰ The conservative argument presumes that social media companies do not treat all speech equally, and therefore should not receive immunity from suits predicated on user speech. For now, Section 230 continues to limit individuals' ability to sue Internet companies for the speech such companies host.

2. Economic Concentration, Market Dominance, and Antitrust Law

In enacting Section 230, Congress adopted an approach to Internet regulation that restricted law's reach.²¹ With Internet companies' legal liability limited, and in the absence of central planning for the Internet economy, market forces were the only meaningful source of constraint on their operations. Over time, those market forces produced a remarkable degree of consolidation within the social media platform market.²² At the beginning of the millennium, social

¹⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 1, 2020, 9:45 PM), <https://twitter.com/realDonaldTrump/status/1333965375193624578> (archived tweet accessible through <https://www.thetrumparchive.com/>); Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 1, 2020, 9:45 PM), <https://twitter.com/realDonaldTrump/status/1333965375839621120> (archived tweet accessible through <https://www.thetrumparchive.com/>).

²⁰ E.g. Sara Morrison, *The Trump Administration's Flawed Plan to Destroy the Internet as We Know It*, RECODE (June 18, 2020), <https://www.vox.com/recode/2020/6/18/21294331/section-230-bill-barr-josh-hawley-trump-internet-free-speech>.

²¹ See 47 U.S.C. § 230(b) (2012) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."); Paul M. Barrett, *Why the Most Controversial U.S. Internet Law is Worth Saving*, MIT TECH. REV. (Sept. 9, 2020), <https://www.technologyreview.com/2020/09/09/1008223/section-230-internet-law-policy-social-media-misinformation/> ("Drafted in an era of optimism about the internet, Section 230 established a distinctly laissez-faire environment for online business.").

²² *Separation of Platforms and Commerce*, *supra* note 4, at 976 ("A handful of digital platforms exert increasing control over key arteries of American commerce and communications.").

networking sites competed with each other for dominance.²³ However, in recent years just a handful of social media companies account for the vast majority of online communications.²⁴ This list of companies certainly includes Facebook, Twitter, and Google (which owns YouTube), though it may include others.²⁵ The list's precise makeup is irrelevant; the point is that just a few social media companies wield outsized influence over the Internet speech landscape.

Deregulated Internet markets naturally produce a marketplace where few companies wield incredible power over online speech. First, platforms exhibit features of natural monopolies, which means that in the long run we can expect there to be fewer and fewer platforms. This is a result of platforms' network effects, which mean that they become more useful the more users they have.²⁶ In other words, a significant part of the largest social media platforms' value proposition is that they can connect one user to myriad other users. Smaller platforms lack this consumer appeal, which creates a high barrier to entry for new market participants. Therefore, smaller platforms have a more difficult time entering the social media market.

Since social media platforms' natural monopoly qualities mean that we can expect to see fewer social media platforms, those surviving exercise substantial market power.²⁷

²³ Sam Thielman, *MySpace: Site That Once Could Have Bought Facebook Acquired by Time Inc*, GUARDIAN (Feb. 11, 2016), <https://www.theguardian.com/technology/2016/feb/11/myspace-time-inc-facebook-acquisition-ownership> (highlighting the fall of MySpace, a once-dominant social media platform, alongside the rise of Facebook).

²⁴ In particular, between its flagship platform and subsidiaries, Facebook has a "near-monopoly" over online communications, accounting for as much of 80% of the social media market by one metric. FIONA M. SCOTT MORTON & DAVID C. DINIELLI, ROADMAP FOR AN ANTITRUST CASE AGAINST FACEBOOK 11 (2020), <https://www.omidyar.com/wp-content/uploads/2020/06/Roadmap-for-an-Antitrust-Case-Against-Facebook.pdf>.

²⁵ Though Amazon and Apple are important Internet companies, their products and services are not in the business of hosting and disseminating user speech to the public.

²⁶ NICK SRNICEK, PLATFORM CAPITALISM 24–25 (2016); Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771, 1787 (2012).

²⁷ See *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 126 (7th Cir. 1982) (describing how natural monopoly markets

Additionally, the largest social media platforms benefit from the psychological and practical difficulties in moving from one platform to another.²⁸ For users to leave Facebook completely, for instance, they must make the decision to forego connection with their social network, discover how to delete their Facebook account, and then go about completing those tasks. Moreover, they cannot easily recreate their experience on Facebook by using other platforms. Since social media platforms have both natural monopoly tendencies and users tend to be locked-in to using them, social media companies can exert control over users and user speech without much influence from market forces.

Of course, there are multiple social media companies, and these companies do compete for users' attentions. Moreover, consumer dissatisfaction with the leading platforms may be creating market space for new competitors. Parler, a social media network created to cater to conservative social media users unhappy with what they perceive as Facebook and Twitter's restrictions on rightwing speech, is such an example.²⁹ There are also numerous examples of social media platforms that cater to niche

may begin with many competitors but "eventually there will only be a single company").

²⁸ Waller, *supra* note 26, at 1789 (describing the psychological and practical difficulties of leaving a social media platform as its "stickiness").

²⁹ In the aftermath of the 2020 U.S. Presidential Election, during which Facebook and Twitter flagged many claims from President Trump and other conservative sources, at least 4.5 million people created Parler accounts. John Matze, *A Letter from CEO John Matze*, PARLER (Nov. 10, 2020), <https://news.parler.com/email-letters/20201010-parler-aletterfromceojohn-matze> [<https://web.archive.org/web/20201111030652/https://news.parler.com/email-letters/20201010-parler-aletterfromceojohn-matze>]; see also Kaya Yurieff, *Conservatives Find Home on Social Media Platforms Rife with Misinformation*, CNN: BUSINESS (Nov. 14, 2020, 11:18 AM), <https://www.cnn.com/2020/11/14/tech/parler-app-conservatives/index.html>; Mike Isaac & Kellen Browning, *Fact-Checked on Facebook and Twitter, Conservatives Switch Their Apps*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/11/technology/parler-rumble-newsmax.html>. Parler describes itself as a "free speech platform" that enables users to "express yourself openly." PARLER, <https://parler.com/auth/access> (last visited Nov. 22, 2020).

audiences, like Twitch for gamers and LinkedIn for professional networkers. The social media market is not the textbook case of monopoly power, where only one company is capable of existing within the market.

Yet, to the extent that there is competition within the social media market, that competition is insufficient to meet the challenges of social media's market concentration as it pertains to online speech. As an initial matter, Facebook the corporation controls several of Facebook the platform's leading competitors, like Messenger, WhatsApp, and Instagram. Facebook has acquired at least 85 other companies since it launched in 2004.³⁰ According to a 2020 U.S. House of Representatives report, "Facebook's internal documents indicate that the company acquired firms it viewed as competitive threats to protect and expand its dominance in the social networking market."³¹ By doing so, Facebook is demonstrating a commitment to maintaining dominance through acquisition even if it cannot do so through innovation. Second, niche social networks are just that: niche. They are not designed to supplant Facebook, Twitter, and Google's dominance as the predominant sites of public discourse. Though there are many social media companies, each fills a particular role in the digital speech ecosystem. Only a handful of platforms are used by enough people for their policies to have an effect on people's ability to speak online.

Though it is evident that a few social media companies like Facebook, Twitter, and Google wield incredible market power, they have, until recently, evaded antitrust scrutiny. In a now famous law review article, FTC Chair Lina M. Khan argues that the current dominant antitrust framework fails

³⁰ STAFF OF H. SUBCOMM. ON ANTITRUST, COM., AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 150 (2020) [hereinafter HOUSE INVESTIGATION OF COMPETITION]. One technology blogger has tracked 72 separate acquisitions. Ramzeen A V, *72 Facebook Acquisitions – The Complete List (2020)! [Infographic]*, TECH WYSE 'RISE TO THE TOP' BLOG (June 17, 2019), <https://www.techwyse.com/blog/infographics/facebook-acquisitions-the-complete-list-infographic/> [https://web.archive.org/web/20201229204235/https://www.techwyse.com/blog/infographics/facebook-acquisitions-the-complete-list-infographic/].

³¹ HOUSE INVESTIGATION OF COMPETITION, *supra* note 30.

to meet the needs of the Internet economy.³² For decades, antitrust law prioritized consumer welfare, which came to mean lower prices and greater output. Khan critiques this approach because it fails to stop market dominance in the Internet economy.³³ Simply put, if a company keeps prices low, then it is likely to escape antitrust scrutiny today even as it amasses a worrying amount of market power. Since social media companies are free for consumers in the sense that they charge consumers no money to use, they are unlikely to receive rigorous antitrust scrutiny under current law.

Regulators recently started signaling that they may be more critical of leading Internet companies' market dominance. For example, in October 2020 the U.S. Department of Justice brought an antitrust suit against Google challenging the company's practices involving its search engine.³⁴ Not long thereafter a bipartisan coalition of state attorneys general filed a separate antitrust suit that also pertains to Google's practices in the online search and advertising markets.³⁵ However, these cases are unlikely to scrutinize Google's social media operations.

A December 2020 filing of twin state and federal antitrust lawsuits against Facebook may be more promising.³⁶ The lawsuits are the most robust use of antitrust law to challenge

³² *Amazon's Antitrust Paradox*, *supra* note 4, at 716–17. For evidence of the article's fame, see David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html> (“The paper got 146,255 hits, a runaway best-seller in the world of legal treatises. That popularity has rocked the antitrust establishment, and is making an unlikely celebrity of Ms. Khan in the corridors of Washington.”).

³³ See *Amazon's Antitrust Paradox*, *supra* note 4, at 737–39.

³⁴ See Steve Lohr, *What Is Happening with the Antitrust Suit Against Google?*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/technology/antitrust-google.html>.

³⁵ See Lauren Feiner, *Google Hit with Its Third Antitrust Lawsuit Since October, This Time by a Bipartisan Coalition of States*, CNBC (Dec. 17, 2020, 2:56 PM), <https://www.cnbc.com/2020/12/17/google-faces-a-third-government-antitrust-lawsuit.html>.

³⁶ Complaint, *FTC v. Facebook, Inc.*, No. CV 20-3590 (JEB), 2021 WL 2643627 (D.D.C. June 28, 2021); Complaint, *New York v. Facebook, Inc.*, No. CV 20-3589 (JEB), 2021 WL 2643724 (D.D.C. June 28, 2021).

the power of a social media company to date and may result in Facebook's breakup.³⁷ However, it is too early to claim that the suits represent a turning point for structural scrutiny of social media companies. First, the cases may be litigated for years before concluding. Until then, Facebook will continue to exercise the full measure of its power. Early indications suggest that the antitrust cases will not be resolved for a long time. The FTC suit against Facebook was dismissed in June 2021, leading the FTC to file an amended complaint in August 2021.³⁸ The state antitrust suit was dismissed as well in June 2021.³⁹ The district court's decision to dismiss the case is now on appeal to the D.C. Circuit.⁴⁰ Second, regulators will need to explain why they are now challenging Facebook's control despite approving its acquisitions of Instagram and WhatsApp only a few years ago.⁴¹ Indeed, this problem is part of why the district court dismissed the state antitrust suit.⁴² Finally, regulators will need to make a strong showing that Facebook made competitive acquisitions "with the express purpose of killing off the competition" and that "[c]onsumers and the social media market would have been better off without the

³⁷ Cecilia Kang & Mike Isaac, *U.S. and States Say Facebook Illegally Crushed Competition*, N.Y. TIMES (July 28, 2021), <https://www.nytimes.com/2020/12/09/technology/facebook-antitrust-monopoly.html>.

³⁸ Brent Kendall, *Facebook Hit with New Antitrust Suit from Federal Trade Commission*, WALL ST. J. (Aug. 19, 2021, 4:37 PM), <https://www.wsj.com/articles/facebook-hit-with-renewed-antitrust-lawsuit-as-ftc-tries-again-11629387483>.

³⁹ Memorandum Opinion, *New York v. Facebook, Inc.*, 2021 WL 2643724.

⁴⁰ Notice of Appeal, *New York v. Facebook, Inc.*, 2021 WL 2643724.

⁴¹ Mike Isaac & Cecilia Kang, *'It's Hard to Prove': Why Antitrust Suits Against Facebook Face Hurdles*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2020/12/10/technology/facebook-antitrust-suits-hurdles.html>.

⁴² See Memorandum Opinion, *supra* note 39, at 2. The district court invoked the equitable doctrine of laches to justify its decision to dismiss the state antitrust suit. This doctrine denies relief to parties that fail to invoke their rights. The district court reasoned that regulators waited too long to bring the antitrust suit and offered no justification for the delay, such that it would be improper to subject Facebook to suit now. As the district court noted, however, laches does not apply to the federal government and so this doctrine does not bar the FTC suit.

mergers.”⁴³ Proving these elements to the extent needed to convince the district court that the appropriate remedy is to break Facebook up will be a tall order. Unless and until these cases change the current antitrust framework, the contemporary regulatory approach will remain one of non-interference with corporate aims.

Section 230 immunity and the current dominant antitrust approach insulate Internet companies from regulatory and legal challenges to their business decisions, including their decisions regarding the treatment of online speech. The scope of that insulation is one of contemporary politics’ most urgent questions.⁴⁴ Without public policies that govern online speech, control over online speech has been ceded almost entirely to Internet companies themselves.

B. *Private Policies*

When a user posts on a social media platform, at least three different mechanisms govern the post’s treatment. The first mechanism—pre-publication governance—acts on social media posts before they are published to other users. It includes platform policymaking, pre-publication moderation, and algorithmic sorting to determine where and how the post will appear on another user’s news feed. The second mechanism is an initial post-publication enforcement of platform speech policies, such as the removal of a post because it contains copyrighted content. The final mechanism includes any appeals processes a social media company has created to review initial post-publication enforcement decisions. Together, these mechanisms determine both the bounds of permissible user speech and how user speech gets treated on a platform. Since Facebook is the world’s largest social media platform, and most existing literature on the subject describes its governance policies, this Subpart pays particular attention to Facebook’s approach to speech governance.⁴⁵

⁴³ Isaac & Kang, *supra* note 41.

⁴⁴ See generally *Breaking the News: Censorship, Suppression, and the 2020 Election Before the S. Comm. on the Judiciary*, 116th Cong. (2020), <https://www.judiciary.senate.gov/meetings/breaking-the-news-censorship-suppression-and-the-2020-election>.

⁴⁵ For information regarding Facebook’s importance as an online communications platform, see discussion *supra* note 8.

1. Pre-Publication Governance

The most important lever for governing online speech is a platform's speech policies. These policies resemble legislation in that they proscribe certain kinds of user posts. Thus, speech policies define the outer bounds of the platform's speech environment. If a platform sought to ban misinformation, for example, the most effective way to begin would be to add a statement to that effect to its user policies. Crucially, platforms generally develop their own user policies.⁴⁶

Facebook's Community Standards make the company's commitment to free expression clear.⁴⁷ The company modeled its approach to free expression on American First Amendment jurisprudence and free speech norms,⁴⁸ yet in some instances, its policies are more restrictive than the First Amendment. For example, Facebook's Community Standards bar posts that contain "credible threats of violence."⁴⁹ But the government can only bar incitement where the speech is directed to producing imminent lawless action and is likely to do so.⁵⁰ In this area and others, Facebook's policy is more restrictive than First Amendment jurisprudence.

Facebook has historically been reluctant to place strong content-based restrictions on the speech it permits on its

⁴⁶ E.g., Monika Bickert, *Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process*, FACEBOOK (Apr. 24, 2018), <https://about.fb.com/news/2018/04/comprehensive-community-standards/> ("The content policy team at Facebook is responsible for developing our Community Standards.").

⁴⁷ *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/introduction> (last visited Nov. 25, 2020) ("The goal of our Community Standards has always been to create a place for expression and give people a voice. This has not and will not change. Building community and bringing the world closer together depends on people's ability to share diverse views, experiences, ideas and information.").

⁴⁸ *The New Governors*, *supra* note 15, at 1621 ("American lawyers trained and acculturated in American free speech norms and First Amendment law oversaw the development of company content-moderation policy.").

⁴⁹ Richard Allan, *Hard Questions: Where Do We Draw the Line on Free Expression?*, FACEBOOK (Aug. 9, 2018), <https://about.fb.com/news/2018/08/hard-questions-free-expression>.

⁵⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

platforms through its community guidelines. Yet the company has recently responded to public pressure to prevent the spread of information that causes certain social harms. For example, during the period leading up to and following the November 2020 U.S. election, Facebook banned political and issue-based advertisements from its platforms.⁵¹ In doing so, Facebook acquiesced to widespread concerns that election-related misinformation would spread during the crucial, but contentious, period immediately following the election. Similarly, Facebook has started banning content that denies the occurrence of the Holocaust,⁵² as well as pages and accounts related to the conspiracy theory QAnon.⁵³ Though well-intentioned, these efforts to address harmful online speech only serve to underscore that Facebook has the unilateral authority to decide what speech is permissible on its platforms. These efforts are reactive to public pressures, not proactive in addressing online speech's possible real-world harms. The company's control over its platforms' Community Standards is a pre-publication design choice that reifies Facebook's continued power over online speech.

Pre-publication governance also includes decisions that occur after a user submits a post, but before it is published to other users' news feeds. Most of these decisions are automated, and include (1) screening out posts containing content identical to known improper content, and (2) geoblocking to prevent post publication in jurisdictions where the post's content is illegal.⁵⁴ Once a post passes through these automated processes, the platform's

⁵¹ Mike Isaac, *Facebook Widens Ban on Political Ads as Alarm Rises over Election*, N.Y. TIMES (Mar. 3, 2021), <https://www.nytimes.com/2020/10/07/technology/facebook-political-ads-ban.html>.

⁵² Sheera Frenkel, *Facebook Bans Content About Holocaust Denial from Its Site*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/10/12/technology/facebook-bans-holocaust-denial-content.html>.

⁵³ Sheera Frenkel, *Facebook Amps Up Its Crackdown on QAnon*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/technology/facebook-qanon-crackdown.html>.

⁵⁴ *The New Governors*, *supra* note 15, at 1636–37 (describing PhotoDNA, a picture-recognition algorithm that can screen for banned images such as known instances of child pornography, and geoblocking).

algorithms determine when and in what contexts a post will appear on another user's feed.

Importantly, Facebook has almost no *ex ante* means of enforcing its Community Standards. Rather, due to the volume of posts and users on its platforms, the company largely relies on "ex post flagging by other users and review by human content moderators against internal guidelines."⁵⁵ In other words, the Community Standards are first principles, but a post can easily appear on another user's news feed before the post's platform policy violation is discovered and remedial action is taken. The Community Standards are the benchmark against which posts are evaluated for impropriety.

2. Post-Publication Enforcement

Once a post is published, other users and some internal employees at Facebook have the ability to flag a post for violating Facebook's Community Standards.⁵⁶ Flagging sends a post into Facebook's review process, where internal Facebook moderators determine whether the post does, in fact, violate platform policy.⁵⁷ Moderators can confirm that the post violates a policy, reverse the initial decision to flag the post, or send the case up for further review.⁵⁸ If the post is removed from Facebook, the posting user is automatically signed out of Facebook. At the next login, the user is informed that the post violated Facebook's Community Standards and is asked to review the Standards.⁵⁹ Punishment gradually escalates for repeat offenders, ultimately resulting in the possibility of a user being banned from the platform.⁶⁰

3. Enforcement Appeals

Since 2018, Facebook users have had the ability to appeal moderation decisions pertaining to particular posts and those that result in the takedowns of user pages or profiles.⁶¹

⁵⁵ *Id.* at 1638.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1639–41 (chronicling the three-tier internal review process that adjudicates flagged posts).

⁵⁸ *Id.* at 1647.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1647–48.

⁶¹ Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2434 (2020) [hereinafter *The Facebook Oversight*]

What happens during the internal Facebook appeals process remains opaque, though Facebook has started publishing transparency reports that detail the number of post takedowns, user appeals, and the number of reversals on appeal.⁶²

Having exhausted Facebook's internal appeals process, a user (either the original poster or the user that flagged a post for review) can appeal to the independent Facebook Oversight Board.⁶³ Facebook itself may also request Board review of a moderation decision.⁶⁴ Currently, the Board has limited subject-matter jurisdiction; its governing documents limit its review powers to appeals from decisions Facebook has made to take down single user-generated, non-paid advertising posts.⁶⁵ The Board is a structurally and legally independent entity that Facebook funds through a trust.⁶⁶ Though Facebook has selected the Board's initial membership, Facebook intends for the Board to ultimately be tasked with determining its own composition.⁶⁷

The Board has discretion over the decisions it reviews.⁶⁸ When its five-member Case Selection Committee decides that the Board should review a decision, a five-member panel is convened to consider the case.⁶⁹ The panel hearing a case is expected to explain its decisions and concurring and dissenting opinions are permitted.⁷⁰ The entire Board then reviews the panel's decision and decides whether to rehear the case.⁷¹ After a decision is published, the Board's

Board]; see also *How to Appeal*, ONLINECENSORSHIP.ORG, <https://onlinencensorship.org/resources/how-to-appeal> (last visited Nov. 25, 2020).

⁶² See *Community Standards Enforcement Report*, FACEBOOK, <https://transparency.facebook.com/community-standards-enforcement> (last visited Nov. 25, 2020). Note that figures from Q2 and Q3 2020 are artificially low because the 2020 COVID-19 pandemic reduced Facebook's review capacity, requiring the company to temporarily halt its normal appeals process.

⁶³ *Oversight Board Charter*, *supra* note 7, art. 2 §1.

⁶⁴ *Id.*

⁶⁵ *The Facebook Oversight Board*, *supra* note 61, at 2470.

⁶⁶ See *Oversight Board Charter*, *supra* note 7, art. 5.

⁶⁷ *The Facebook Oversight Board*, *supra* note 61, at 2460–61.

⁶⁸ *Oversight Board Charter*, *supra* note 7, art. 2, § 1.

⁶⁹ *The Facebook Oversight Board*, *supra* note 61, at 2471–72.

⁷⁰ *Id.* at 2472.

⁷¹ FACEBOOK, OVERSIGHT BOARD BYLAWS art. 1, § 3.1.8 (2021), <https://oversightboard.com/sr/governance/bylaws> (scroll down

“resolution ... will be binding and Facebook will implement it promptly, unless implementation of a resolution could violate the law.”⁷²

Though most of the Oversight Board’s operations and decisions will likely pertain to adjudicating discrete disputes over user posts, the Board’s Charter permits it to include policy guidance in its opinions, and to issue separate policy guidance if Facebook so requests.⁷³ However, the Charter expressly provides that the Board’s policy guidance is advisory.⁷⁴ As a result, Facebook will continue to exercise complete rulemaking authority over permissible speech on the platform, even as it cedes some adjudicatory authority to the Oversight Board. For example, in its first decisions, the Board recommended that Facebook change or clarify some of its Community Standards.⁷⁵ However, it is impossible to determine whether Facebook has modified its community standards in response to an Oversight Board decision; revised versions of Community Standards do not specify the reason for revision.⁷⁶ Thus, it is difficult to evaluate whether the Oversight Board is having any meaningful impact over policymaking. Moreover, Facebook has chosen the current Board members, and the incumbents will choose their

to “Quick Links” and follow the “Download” hyperlink under “Bylaws and Code of Conduct”).

⁷² *Oversight Board Charter*, *supra* note 7, art. 4.

⁷³ *Id.* art. 3, §§ 4, 7.3.

⁷⁴ The Board’s Charter specifies five separate times that any policy recommendations the Board makes are advisory. *See id.* Introduction; *id.* art. 3, §§ 4, 7.3; *id.* art. 4; *id.* art. 5, § 1.

⁷⁵ *Case Decision 2020-004-IG-UA*, OVERSIGHT BOARD. (Jan. 28, 2021), <https://oversightboard.com/decision/IG-7THR3SI1/> (recommending that Facebook clarify its breast cancer awareness exception to its nudity policies); *Case Decision 2020-005-FB-UA*, OVERSIGHT BD. (Jan. 28, 2021), <https://oversightboard.com/decision/FB-2RDRCVQ/> (suggesting that Facebook define key terms in its Dangerous Individuals and Organizations policy and provide a public list of dangerous individuals and organizations); *Case Decision 2020-006-FB-FBR*, OVERSIGHT BOARD (Jan. 28, 2021), <https://oversightboard.com/decision/FB-XWJQBU9A/> (recommending that Facebook create a clearer “Community Standard on health misinformation”).

⁷⁶ *E.g.*, *Dangerous Individuals and Organizations*, FACEBOOK, <https://transparency.fb.com/policies/community-standards/dangerous-individuals-organizations/> (last visited Sept. 22, 2021).

successors. Thus, to the extent that the Board has any input on policy, its input is likely to continue to align with Facebook's institutional concerns.

The Oversight Board's early operations suggest that the structural safeguards put in place to ensure the Board's independence may yet succeed. Of its first five adjudications, the Board reversed Facebook's initial moderation decisions in four cases.⁷⁷ Yet the Board's limited appellate jurisdiction over certain moderation decisions allows Facebook to preserve its power over the bounds of permissible speech on its platforms. Other platforms lack even an Oversight Board equivalent. Social media companies consequently possess virtually unchecked power with respect to online speech governance. Public policy does little to curb their power over speech decisions;⁷⁸ monopolization insulates them from market forces that might shape their policies and decisions;⁷⁹ and the most significant attempt yet to willingly give up any control over online speech excludes policymaking. The current landscape of online speech governance is one of complete corporate control.

II. A DEMOCRATIC APPROACH TO INTERNET SPEECH GOVERNANCE

Existing proposals for modifying online speech governance would do so by adjusting either public or private policy. But doing either would leave power over online speech in the hands of elite actors: either the government or Internet companies. This Part argues that platforms should consider decentralizing power over speech governance by enabling social media users themselves to have a say in how their speech is regulated online.

A. *Social Media's Separation of Powers Problem*

Just as government power exists in legislative, executive, and judicial forms, a social media company's power has legislative, executive, and judicial dimensions. With regard to legislative functions, social media companies craft policies that determine which speech is permissible and

⁷⁷ Elizabeth Dwoskin & Craig Timberg, *Facebook's New 'Supreme Court' Overturns Firm in First Rulings*, WASH. POST (Jan. 28, 2021, 10:26 AM), <https://www.washingtonpost.com/technology/2021/01/28/facebook-oversight-board-cases/>.

⁷⁸ See *supra* Part I.A.

⁷⁹ See *supra* Part I.A.2.

impermissible on their platforms. With regard to executive functions, social media companies have officers and employees that apply their policies. With regard to judicial functions, social media companies interpret and apply their policies to specific instances of speech and adjudicate challenges to those decisions.

Though liberal governments are accountable to their citizenries, whereas social media companies' directors owe fiduciary duties to their stockholders,⁸⁰ the analogy between them is fitting since it accurately depicts both the types of power social media companies exert when making decisions and the kinds of decisions social media companies must make. In practice, these companies must decide what speech to permit on their platforms and how to treat speech that is permitted, when and how they will enforce their policies, and what to do when a user challenges a post's takedown.

Liberal governments separate the various forms of political power into discrete branches or offices. In the United States, for instance, sovereign power is divided between three coequal branches: the Presidency, the Congress, and the Supreme Court. In contrast, many social media companies—particularly those controlled by their founders, resemble an autocracy. For example, Mark Zuckerberg is both Facebook's CEO and its controlling shareholder, and can exert a great deal of control over Facebook's leadership and decisions.⁸¹ Even those social media companies without a dominant founder exerting a substantial presence tend to concentrate the various forms of political power within small groups of people. As legislative actors, these small groups have final say over platform policies. As executive actors, they set the company's vision, determine the company's strategy for implementing that vision, and oversee employees that help implement that vision. As judicial actors, they have authority to review an adjudication involving a user or user speech.

⁸⁰ *E.g.*, *Lofland v. Cahall*, 118 A. 1, 7–8 (Del. 1922) (recognizing that corporate directors owe the duties of fiduciaries to the corporation's stockholders under Delaware corporate law (citation omitted)).

⁸¹ *See* Deepa Seetharaman & Emily Glazer, *Mark Zuckerberg Asserts Control of Facebook, Pushing Aside Dissenters*, WALL ST. J. (Apr. 28, 2020, 4:49 PM), <https://www.wsj.com/articles/mark-zuckerberg-asserts-control-of-facebook-pushing-aside-dissenters-11588106984>.

Since they owe a fiduciary duty to shareholders, the directors' ultimate aim is to maximize corporate value. And since the largest social media companies do not charge users for their platforms, these companies often make money by selling advertising space on its platforms to other companies.⁸² Therefore, social media companies maximize their value by (1) growing the number of users on their platforms, and (2) increasing the amount of time users spend on their platforms, thereby maximizing advertising revenues. In exercising their powers—whether by setting policy, applying policy, or reviewing moderation decisions—directors must make decisions with an eye toward value maximization using these means, as opposed to performing their role with the predominant aim of serving the public.

Since a handful of social media companies dominate today's online speech environment, and each of which is controlled by a small number of powerful individuals who must direct their efforts toward value maximization, social media companies' power over the digital public sphere is deeply worrying. Indeed, there is reason to suspect that this concentration of power over online communications in actors whose incentives are not aligned with the public good is weakening the public's trust in social media companies.

For instance, Facebook's exercise of power is currently drawing intense scrutiny from across the political spectrum, with calls to weaken Section 230 and impose greater regulatory oversight.⁸³ Simultaneously, many rightwing social media users perceive Facebook as hostile toward conservative viewpoints, and are therefore migrating to Parler, a platform that specifically caters to conservative viewpoints.⁸⁴ Both the growing threat of greater governmental scrutiny and ongoing consumer dissatisfaction suggest vexation with how Facebook makes decisions.

Facebook's Oversight Board may be a response to these challenges. In creating the Board, Facebook is tacitly recognizing that the concentration of the various forms of power within its leaders may be counterproductive to its business aims as the company faces greater pressures from users and the government. Devolving some of its judicial power to a purportedly independent body is probably an

⁸² MORTON & DINIELLI, *supra* note 24, at 3 (noting that social media's business model relies on advertising to generate revenues in the absence of user fees).

⁸³ For discussion on this point, see *supra* notes 1–4.

⁸⁴ For discussion on this point, see *supra* note 29.

attempt to stay calls for regulatory reform while rebuilding the public's trust that it is capable of governing online speech well.

Yet vesting some judicial power in a separate body while retaining complete executive and legislative power will almost certainly be an insufficient remedy to social media's separation of powers problem. Policy is more encompassing than adjudication. In a content moderation case, the arbiter evaluates a specific post and decides whether it should be permitted on the social media platform or removed. Even if moderation decisions carry precedential weight, they do not result in policy that applies to all users and posts. There is a material difference between the Oversight Board deciding that a particular instance of speech is improper and Facebook's Community Standards deciding that an entire category of content is beyond the bounds of speech permissible on the platform. Policy sets the rules that all users must follow to be able to post on the platform, and all posts must comply with policy to be permitted. A policy banning a certain kind of misinformation, for example, provides recourse against all posts containing the misinformation. This is true even for platforms like Facebook that rely heavily on ex post user flagging to identify and remedy policy violations. Adjudication does not establish the sweeping rules that policymaking does. Moreover, adjudication is a slower process that involves procedural constraints. Policymaking, on the other hand, is an efficient means of defining the bounds of permissible speech on a social media platform.

To solve social media's separation of powers problem, then, at least some policymaking authority will need to move from the control of platforms themselves to another entity. Though there may be a limited role for the state to play in regulating online speech, the state should not directly do so in most instances. In the United States, such a regulation would raise First Amendment concerns.⁸⁵ Therefore, the best candidate for speech governance devolution is the collection of social media users themselves.

B. Democratic Models for Social Media Speech Governance

Social media users are a ripe untapped source of decision-making authority for the policies applicable to online speech. Collectively, they avoid the constitutional and philosophical challenges of having the government decide which speech is permissible online and in what

⁸⁵ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

contexts. Since, together, they form a segment of the public, they also avoid the concern that social media companies have incentives that fail to align with the public good. Democratizing online speech policymaking can rebuild the public's trust in social media platforms as socially beneficial discursive sites.

A social media platform can implement a democratic model for speech policymaking in several ways, including some form of voting mechanism, a qualitative comment mechanism, or an iterative process wherein the platform bans speech after a certain proportion of users objects to that kind of speech. This Subpart first addresses general considerations relevant to any democratic mechanism for user policy input and then assesses three possible mechanisms.

1. General Considerations

First, platforms will need to decide how to determine which policy issues are subject to democratic input. They may choose the issues on which users provide input themselves, or they may open the process to nominations from users.

Second, platforms can choose to make users' democratic participation mandatory or optional for continued use of the platform.

Third, platforms would need to determine how to solicit user input. Platforms could display a request for users to provide input on a policy problem at the top of a user's news feed when the user accesses the platform. Alternatively, platforms can email the addresses on file for its users seeking their input, just as they do currently when they modify their Terms of Use or other consumer agreements.

Fourth, platforms will need to decide whether to restrict democratic input on policymaking to user speech, or to permit voting on permissible advertisements as well. Social media companies may be reluctant to cede control over advertising to users because they have a market incentive to secure as many kinds of advertisements as possible to appeal to the widest range of users.⁸⁶ However, they may have incentive to cede some control anyway, particularly as

⁸⁶ See MORTON & DINIELLI, *supra* note 24, at 3.

jurisdictions become increasingly critical of platforms' use of user data for the purposes of targeted advertising.⁸⁷

Fifth, platforms will need to determine whether voting on a particular issue will result in a global change to the Community Standards, or if there will be jurisdiction-specific community standards the contents of which are decided solely by users in a given jurisdiction. Geoblocking based on a user's current IP address enables platforms to implement different systems of rules depending on the user's location. Facebook, for example, already geoblocks as a form of pre-publication moderation to prevent content that is illegal in a jurisdiction from appearing on the News Feeds of users in that jurisdiction.⁸⁸ Similarly, platforms could apply different sets of community standards in different jurisdictions.

Sixth, platforms will need to establish input eligibility criteria. They could choose to restrict democratic participation to a certain subset of users, or they could open participation to any interested user. If the only eligibility criterion for participating is having an account on the social media platform, then the platform opens itself up to the risk that bots, trolls, and other bad actors will skew the results and limit the efficacy of legitimate users' participation in the democratic process. One possible solution would be for platforms to require democratic participants to undergo a more rigorous identity verification process than is needed to create an account on the platform.

Seventh, platforms will need to decide whether democratic decisions are ever reviewable. Pure digital democracy would enforce the will of voting users, but platforms can moderate majoritarian rule through some form of policy review process. In Facebook's case, reviewing

⁸⁷ E.g., Diane Coyle, *We Need Tougher Scrutiny of Big Tech's Data Use and Deals*, FIN. TIMES (Mar. 12, 2019), <https://www.ft.com/content/7694b4fa-440c-11e9-b83b-0c525dad548f> (describing efforts in the U.K. to increase governmental scrutiny of "Big Tech" in part because of Internet companies' use of data); see also Paul Mozur et al., *A Global Tipping Point for Reigning in Tech Has Arrived*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/20/technology/global-tipping-point-tech.html> (highlighting more general efforts in China, Europe, Australia, the U.K., India, Russia, Myanmar, and Cambodia to challenge Internet companies' power).

⁸⁸ *The New Governors*, *supra* note 15, at 1636–37 (describing the geoblocking process user posts on Facebook go through pre-publication).

and approving user referenda might be another role for the Oversight Board.

Eighth, platforms will need to determine whether the foregoing decisions are to be general guidelines for how democratic decisions get made, or if instead the platform will decide the applicable rules on an ad hoc basis. The former is more easily administrable and facilitates clarity for users, while the latter enables platforms to select the best approach for a particular situation.

Ninth, platforms will need to determine how to measure success, both of the democratic processes they have chosen to implement, and the policies chosen democratically themselves.

Finally, platforms will need to decide if, when, how, and by whom democratically-enacted policies can be changed. Should users initially fail to strike a successful balance of policies that protect speech rights while controlling speech the user community deems harmful, platforms will need to determine the conditions under which stakeholders can again try to strike a successful balance. Implicit in this design choice is a decision regarding how long to let a particular policy choice last before deciding that it has failed along the platform's metrics of success.

Together, these general considerations will determine the makeup of the democratic user community, the issues in which users can have democratic input, and the processes for implementing and reviewing users' democratic policy choices. The remainder of this Subpart examines three mechanisms for soliciting user input.

2. Mechanisms for Soliciting User Input

i. Voting-Based Policy Input

The most obvious mechanism for soliciting user input on policy choices is through a vote. Voting is democracy in its purest form, where the outcome of a vote of the electorate yields the chosen outcome. A voting system would present eligible users with two or more solutions to a given policy question. After a set window of time for users to submit their votes, the vote would close, and its results assessed.

A platform could choose to present only two policy options to voters for a given referendum, or it could present more. The benefit of the former option is that the vote will always express the preference of a majority of the voters. The benefit of the latter is that it allows for platforms to give users more voting options, which provides for more nuanced decision-making. Some form of ranked choice voting may produce both benefits. Under such a system, voters rank the presented policy options in their order of preference. If no option receives an outright majority of first

choice selections, then the least-preferred option is removed. On the second tabulation, the votes of voters whose first choice option had been removed instead would count toward their second choice option. The process continues until one policy option receives more than 50 percent of the vote.

Implementing a voting process by itself is probably insufficient to rebuild the public's trust in social media platforms. Even if a platform provides contextual information regarding the policy options alongside a digital ballot, there is no guarantee that users will read the information or understand the implications of their selection. Successful direct democracy initiatives require time, attention, and investment on the part of those asked to participate.⁸⁹ Particularly since a democratic means of online speech governance would occur in a nongovernmental context, direct democracy may be a large ask for social media users.

Moreover, the designers of a voting-based means of policymaking would need to consider why past attempts to implement such systems have failed. Facebook briefly experimented with limited user referenda starting in 2009, and extremely low user turnout ultimately led the company to shutter the program.⁹⁰ In designing voting-based policymaking systems, social media companies will need to consider ways of boosting user participation and developing norms surrounding democratic participation.

Despite their evident challenges, direct user policymaking systems would be an improvement upon social media companies' current policymaking approach, which lacks any form of regulatory or public oversight. If our concern is with the power of corporations to dictate the makeup of the online speech landscape—a concern seemingly shared across the political spectrum—then direct public input into online speech rules would mitigate that concern.

⁸⁹ For a thorough discussion of the promises and pitfalls of direct democracy, *see generally* RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* (2002).

⁹⁰ Kate Klonick, *Inside the Making of Facebook's Supreme Court*, *NEW YORKER* (Feb. 12, 2021), <https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court>.

ii. *Qualitative Policy Input*

Platforms that do not wish to have their users vote directly on policy may choose to provide users with a means of giving qualitative input on policymaking decisions. This user-provided qualitative input would form part of the platforms' decision-making process. The largest benefit of this mechanism for platforms is that it preserves their ultimate control over policy. The tradeoff is that it is a more limited form of democratization than voting mechanisms, and it may not completely address the separation of powers concerns raised above.⁹¹

Such an approach would resemble the notice-and-comment rulemaking structure that American administrative agencies employ.⁹² Notice-and-comment rulemaking allows members of the public to provide arguments for or against adopting a particular rule; the agency must consider the public's comments before finalizing the rule. Similarly, a qualitative input mechanism will enable social media users to provide arguments and counterarguments to a proposed policy that platforms would need to consider before putting a policy into effect.

As with voting, qualitative participation opportunities will not completely resolve the online speech governance challenge. Notice-and-comment rulemaking in the administrative law context disproportionately benefits interested parties, who have an economic incentive to weaken proposed regulations before their enactment.⁹³ A similar public procedure for deciding online speech rules may be dominated by parties who perceive their ability to speak freely as being most at risk under a proposed rule. For instance, if Facebook were to propose a rule banning misinformation from the platform outright, Facebook may

⁹¹ For a discussion of social media's separation of powers problem, see *supra* Part II.A.

⁹² See 5 U.S.C. § 553(b)–(c) (2012) (requiring federal agencies to publish notice of a proposed rule in the Federal Register and to permit the public to respond to the proposed rule).

⁹³ See, e.g., Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 558 (2015) ("In practice, of course, public participation might deviate sharply from both majoritarian and deliberative ideals, with moneyed interests wielding disproportionate influence."); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 464, 477–78 (2012) (noting empirical findings that "industry interests dominate the rulemaking process in a number of important areas of social regulation, with no public interest representation at all in many rulemakings.").

be inundated with comments from individuals that share misinformation outraged that their free ability to do so is at risk. This occurrence would skew the qualitative information Facebook receives through the process.

Though a notice-and-comment analog for proposed online speech rules may not produce completely egalitarian policymaking, such a system would be a net improvement relative to the current corporate-controlled approach. Even if interested parties are more vocal than the average user in their support or opposition to a proposed rule, they will still provide social media companies with useful information regarding user preferences, the impacts of the proposed rule on online speech, and the advantages and disadvantages of adopting the proposed rule. Perhaps more importantly, social media companies would be signaling that they are willing to engage with other stakeholders on policy choices. This demonstration of good faith alone may help companies rebuild public trust in their capacity to govern online speech.

iii. Behavior-Based Policy Input

A third mechanism for soliciting democratic input is to rely on user behavior to inform policy development. Under this mechanism, perhaps, users could be asked to flag content that bothers them for various reasons. Then, platforms could evaluate whether a sufficient number of users has objected to a particular kind of speech such that it should be banned. Behavior-based mechanisms may resemble Reddit's "upvote" and "downvote" system, through which users signal their approval or disapproval of a post, thereby determining that post's placement. Twitter recently experimented with a similar mechanism for Tweets within a thread in order to determine which replies are the most useful in a conversation.⁹⁴

Before implementing a behavior-based policy mechanism, a platform would need to decide how many user objections a kind of speech would need to accrue before becoming actionable, select the metrics it would use in evaluating user behaviors, and determine whether users would have an opportunity to respond to the inferences it draws from their behaviors. Under such a mechanism, users would have the ability to inform a platform's understanding of a particular post, which can then help a platform in crafting policy. Platforms would continue to control policy,

⁹⁴ Sarah Perez, *Twitter Tests Reddit-Style Upvote and Downvote Buttons*, TECHCRUNCH (July 21, 2021), <https://techcrunch.com/2021/07/21/twitter-tests-reddit-style-upvote-and-downvote-buttons/>.

though they would have more user input in doing so. Thus, this mechanism is the weakest form of democratization. Still, it goes beyond the status quo by allowing users to make their objections to particular kinds of content on the platform clear.

3. The Value of Democratic Process

Whether social media platforms accomplish democratization by letting users vote on policy proposals, by having a meaningful opportunity to weigh in on policy proposals, or through user preference expression in the ordinary course of using the platform, developing mechanisms for user input regarding online speech policy will promote confidence that platforms are acting in the public's interest when they make decisions that impact online discourse. Doing so will also facilitate transparency regarding how and why platforms make the policy choices they do.

As a result, platforms may avoid legislative or regulatory actions that would curtail their power, such as: bans on certain forms of monetization; segregation of various business segments; and, ultimately, breakup of the largest Internet companies. Devolving at least some policymaking authority to users will solve social media's separation of powers problem by ensuring that decisions with enormous impact on public discourse are made, at least in part, by the public itself. Finally, though no mechanism for democratization would solve all of the challenges of governing speech online, a flawed democratic policymaking process is surely preferable to a flawed nondemocratic one.

C. Democracy and Speech Regulation

Democratizing speech governance may be an unusual proposal since speech in liberal societies is not generally subject to democratic concerns.⁹⁵ The political function of

⁹⁵ As John Stuart Mill wrote:

Let us suppose, therefore, that the government is entirely at one with the people, and never thinks of exerting any power of coercion unless in agreement with what it conceives to be their voice. But I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate.

speech in liberal societies is to enable the citizenry to debate ideas publicly so as to discover for themselves which ideas constitute truth.⁹⁶ For instance, the First Amendment evinces an almost complete unwillingness to let democratic processes restrict speech.⁹⁷ Democratically-enacted laws that curtail citizens' ability to decide for themselves the truth must pass strict scrutiny, which is a rigorous form of judicial review under which a law must be narrowly tailored to serve a compelling state interest, in order to survive.⁹⁸ One could argue, then, that subjecting online speech to a democratic process is an antiliberal proposal.

Yet a democratic process that determines the rules applicable to speech in the limited setting of social media is distinguishable from lawmaking by a democratically-elected legislature. First, as a constitutional matter, the First Amendment does not limit the speech policies social media companies can enact. Because the First Amendment has a state action requirement, the fundamental restriction on governmental speech restrictions does not prevent private parties from enacting speech-restrictive policies. Second, the state is sovereign, while social media companies are not.⁹⁹ The state's sovereign power makes it a particularly problematic source of speech regulation since it can single out disfavored speakers for exclusion from equal participation in the political community.¹⁰⁰ As important as

JOHN STUART MILL, *ON LIBERTY* (1859), *reprinted in* ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS 19 (Mark Philp & Frederick Rosen eds., Oxford Univ. Press, 2nd ed. 2015).

⁹⁶ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (reasoning that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

⁹⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.").

⁹⁸ See, e.g., *Carey v. Brown*, 447 U.S. 455, 461–62 (1980) (striking down a ban on residential picketing that exempted labor picketing under strict scrutiny since there was no compelling justification for distinguishing one class of picketing from others).

⁹⁹ Try as they might.

¹⁰⁰ E.g., *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) ("[A] law disfavoring ideas that offend discriminates based on viewpoint, in violation of the First Amendment." (citation omitted) (internal quotation marks omitted)).

social media platforms are to the contemporary public sphere, the greatest punishment one can receive from a social media company is a ban on using its services.¹⁰¹ Such exclusion is a far cry from the kind of political exclusion that justifies restricting the policies state actors can implement.

III. IMPLEMENTING DIGITAL DEMOCRACY

The impetus for developing a model for democratic participation in online speech policymaking can either come from the government or from social media companies themselves. In the former instance, Congress could modify Section 230 to condition immunity from liability for user speech on the devolution of some policymaking authority to users themselves. This means of incentivizing Internet companies to democratize speech policy would avoid the First Amendment problems of direct speech regulation since social media companies would have the choice not to comply. Companies whose models rely on user-generated speech will nonetheless experience enormous pressure to comply because of the important benefits Section 230 affords them.¹⁰²

Internet platforms could also choose to democratize speech policymaking on their own initiative. There may be good business reasons for platforms to voluntarily restrict their own power over online speech. First, doing so could increase consumer confidence and trust in the leading platforms, thereby stemming an exodus of users to

¹⁰¹ *Cf. Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (striking down a state ban on sex offenders from using social media sites as violating the First Amendment due to these sites' vital importance today as vehicles for speech). Though *Packingham* bars the government from banning people from social media platforms, the Court did not restrict social media companies from banning people from their platforms. Nor could the Court do so under the state action doctrine. *Cf. Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) ("But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.").

¹⁰² Making Section 230 immunity conditional on devolving some policymaking powers is similar to the structure of Section 512's copyright infringement safe harbor conditions. Though Internet platforms are not required to take down allegedly infringing works when they receive notice that they are hosting an infringing work, the law strongly compels them to do so. Otherwise, they are liable for the user's infringement.

competing platforms that are perceived as more trustworthy. For instance, if Facebook were more democratic, users may have less reason to migrate to Parler. Second, democratizing speech policymaking may end calls for more disruptive regulatory proposals, or at least weaken support for such proposals. Each of these benefits creates a strong business justification for social media companies to voluntarily relinquish some power over online speech.

CONCLUSION

In the aftermath of the 2020 U.S. presidential election, faced with the decision of whether to reduce the uncontrolled spread of misinformation regarding the election's results, Facebook modified its news feed algorithm to enhance the importance of journalistic quality in the algorithm's decision-making.¹⁰³ Some Facebook employees wanted to make this change permanent, calling the modified news feed "nicer" than the normal one where extreme partisan outlets like Breitbart News and Occupy Democrats receive a substantial amount of space.¹⁰⁴ Other employees and managers were concerned that any change Facebook makes to the news feed algorithm to reduce objectionable content may hurt Facebook's growth.¹⁰⁵ Their concerns were valid. The company recently conducted an experiment to test whether a machine-learning algorithm trained to predict posts that users would consider "bad for the world" could reduce the visibility of objectionable content on a user's news feed.¹⁰⁶ The algorithm succeeded in limiting the objectionable content, but the experiment "also lowered the number of times users opened Facebook."¹⁰⁷ Ultimately, the latter camp won the day.¹⁰⁸

Social media executives are currently balancing an impossible array of considerations: their fiduciary duty to

¹⁰³ Kevin Roose, Mike Isaac & Sheera Frenkel, *Facebook Struggles to Balance Civility and Growth*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2020/11/24/technology/facebook-election-misinformation.html>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Kevin Roose, *Facebook Reverses Postelection Algorithm Changes that Boosted News from Authoritative Sources*, N.Y. TIMES (Dec. 16, 2020, 8:17 PM), <https://www.nytimes.com/2020/12/16/technology/facebook-reverses-postelection-algorithm-changes-that-boosted-news-from-authoritative-sources.html>.

shareholders; the public pressure to control misinformation, hate speech, and other objectionable content; the political backlash that comes from taking steps to police these harmful forms of speech; and the desire to avoid regulation. Democratizing online speech governance will lighten these executives' load. More importantly, devolving policymaking authority to users themselves will better align the incentive structures for online speech governance by joining these structures to public aims. If the function of free speech is to promote democracy, there may be no superior way for protecting free speech online than democracy itself.