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Redefining “Misinformation,” “Disinformation,” and “Fake News”: Using Social Science Research to Form an Interdisciplinary Model of Online Limited Forums on Social Media Platforms

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Redefining “Misinformation,” “Disinformation,” and “Fake News”: Using Social Science Research to Form an Interdisciplinary Model of Online Limited Forums on Social Media Platforms

ABSTRACT

“Misinformation,” “disinformation,” and “fake news” have spread division and contention through online social media platforms, resulting in adverse effects to various areas of science, politics, and public health. This Comment takes a deeper look into the underlying motivations and beliefs behind this phenomenon by presenting a cohesive summarization of the empirical evidence gained from social science research. These terms are reclassified as “conflicting information” to deemphasize the considerations of fact or fiction and emphasize the empirical data showing these terms are social signifiers connotating “in-group” and “out-group” divisions. After developing this backdrop of social science research, the current legal proposals for regulating “conflicting information” are scrutinized, including section 230 of the Communications Decency Act, antitrust enforcement, classification of internet service providers as public utilities, and First Amendment limitations of regulating algorithmic data. This Comment then combines the empirical evidence and legal theory to form an interdisciplinary model of online limited forums. After developing a rudimentary view of how online limited forums would operate, it is proposed that a legislative recommendation be embedded into section 230’s “good faith” requirement. This legislative recommendation gives much needed guidance to online platforms trying to navigate the spread of conflicting information, while also bypassing the legal limitations making stricter methods of enforcement untenable.

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INTRODUCTION

On September 1, 2021, an Oklahoma doctor reported to his local news station that Oklahoma emergency rooms were “so backed up that gunshot victims were having hard times getting to facilities” due to an influx of patients overdosing on ivermectin, a controversial COVID-19 treatment.¹ Within twenty-four hours, the story was published by national news outlets Rolling Stone,² Newsweek,³ and the Daily News,⁴ and disseminated via Twitter posts from high-profile media figures.⁵ A mere four days later, the story had to be updated: there was no backup in Oklahoma emergency rooms because of ivermectin overdoses.⁶ The managing director of the Oklahoma Center for Poison and Drug Information stated there were only eleven known cases of ivermectin-related illness in Oklahoma since May of 2021, and all reported only mild symptoms of “nausea, vomiting, diarrhea, and dizziness.”⁷ Even though the articles were updated, conservative media figures took to Twitter, admonishing the “liberal outlets” and stating “[they] know that their readers don’t care at all if they publish fake news as long as it’s done with the right political motives and goals.”⁸

1. Katelyn Ogle, *Patients Overdosing on Ivermectin Backing Up Rural Oklahoma Hospitals, Ambulances*, OKLA. NEWS 4 (Sept. 6, 2021, 23:42 PM), <https://kfor.com/news/local/patients-overdosing-on-ivermectin-backing-up-rural-oklahoma-hospitals-ambulances/> [<https://perma.cc/9RNX-8ZR7>].

2. Peter Wade, *One Hospital Denies Oklahoma Doctor’s Story of Ivermectin Overdoses Causing ER Delays for Gunshot Victims*, ROLLING STONE (Sept. 5, 2021, 8:55 PM), <https://www.rollingstone.com/politics/politics-news/gunshot-victims-horse-dewormer-ivermectin-oklahoma-hospitals-covid-1220608/> [<https://perma.cc/3HBR-TPMS>].

3. Jon Jackson, *Patients Overdosing on Ivermectin Are Clogging Oklahoma ERs: Doctor*, NEWSWEEK (Sept. 2, 2021, 4:43 PM), <https://www.newsweek.com/patients-overdosing-ivermectin-are-clogging-oklahoma-ers-doctor-1625631> [<https://perma.cc/JS8V-Y8K2>].

4. Brandon Sapienza, *Oklahoma Having an Influx of Patients Overdosing on Ivermectin*, DAILY NEWS (Sept. 2, 2021, 7:49 PM), <https://www.nydailynews.com/news/national/ny-oklahoma-hospital-ambulances-patients-coronavirus-ivermectin-20210902-yqrlni-ulrbfcdhahjchdzq2na34-story.html> [<https://perma.cc/G95X-RC5G>].

5. Robby Soave, *The Media Fell for a Viral Hoax About Ivermectin Overdoses Straining Rural Hospitals*, REASON (Sept. 6, 2021, 4:19 PM), <https://reason.com/2021/09/06/ivermectin-overdoses-oklahoma-hospitals-rolling-stone-hoax/> [<https://perma.cc/238T-TWFJ>].

6. *Id.*

7. Sapienza, *supra* note 4 (quoting the managing director of Oklahoma Center for Poison and Drug Information, Scott Schaeffer).

8. Lindsay Kornick, *Rolling Stone Forced to Issue an ‘Update’ After Viral Hospital Ivermectin Story Turns Out to be False*, FOX NEWS (Sept. 6, 2021, 10:24 AM) (quoting journalist, lawyer, and author Glen Greenwald), <https://www.foxnews.com/media/rolling-stone-forced-issue-update-after-viral-hospital-ivermectin-story-false> [<https://perma.cc/UZB4-QRGL>].

This story is just one example of the dichotomous discourse in American politics disseminated daily by traditional news publications, amateur journalists, and individuals on social media outlets such as Twitter, Facebook, and YouTube. A 2019 survey shows that ninety-one percent of Americans believe the country is most divided over politics, and fifty-nine percent are pessimistic that the country can heal its political divisions.⁹ Often termed the “infodemic,”¹⁰ this great divide has led to the proliferation of “misinformation,” “disinformation,” and “fake news,” each side promoting its own version of the “facts” to discredit the other, push its own agenda, and gain political power.

This Comment explores the sensation of widespread misinformation, disinformation, and fake news, transforming the discussion from judgments of what is “true” and “false” and recognizing that the current public discourse reflects a deeper social and political phenomenon of opposing principles seeking to gain control in a shifting cultural landscape. There have been numerous proposals by both legal scholars and legislators that detail ways to stop the spread and harmful effects of misinformation, disinformation, and fake news; however, there is relatively little understanding of its underlying cause. This Comment fills that lack of understanding by adopting an interdisciplinary view that combines both social science research and legal theory. Under this interdisciplinary model, it is proposed that social media companies create limited forums on their platforms to stop widespread dissemination of misinformation, disinformation, and fake news while simultaneously promoting constructive dialogue and respectful debate of these opposing viewpoints.

Part I defines misinformation, disinformation, and fake news by reviewing and comparing the application of these terms by legal scholars and social science researchers. Part II provides a thorough review of social science research, consolidating theoretical perspectives to provide insight and understanding of the underlying causes of misinformation, disinformation, and fake news. Part III briefly discusses how partisan news outlets and social media have impacted the infodemic. Part IV reviews the current legislative and scholarly proposals for changing law to combat the spread of such

9. Maxine Najle & Robert P. Jones, *American Democracy in Crisis: The Fate of Pluralism in a Divided Nation*, PRRI (Feb. 19, 2019), <https://www.prii.org/research/american-democracy-in-crisis-the-fate-of-pluralism-in-a-divided-nation/#page-section-10> [<https://perma.cc/9LZK-999E>].

10. PAHO, UNDERSTANDING THE INFODEMIC AND MISINFORMATION IN THE FIGHT AGAINST COVID-19 1 (2020) (Defining the “[I]nfodemic” as “an overabundance of information—some accurate and some not—that makes it hard for people to find trustworthy sources and reliable guidance when they need it.”).

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information. Finally, Part V unifies the social science framework with current jurisprudence to present a rudimentary design of a social media limited forum model, discussing the incentives to adopt such a model and whether the creation of a limited forum on social media can be legally enforced.

I. WHAT IS “MISINFORMATION,” “DISINFORMATION,” AND “FAKE NEWS”?

Before diving into a thorough discussion of misinformation, disinformation, and fake news, these terms must first be defined. In Subpart A, it is observed that legal scholars typically use similar definitions, focusing on what is “true” versus what is “false” and the underlying intent of the disseminator. Subpart B presents the alternate view of social science researchers that does not make such distinctions, instead consolidating these terms into one working model. Subpart C discusses the views of legal scholars and social science researchers and presents the working definition that will be used throughout the remainder of this Comment.

A. Legal Scholars Defining “Misinformation,” “Disinformation,” and “Fake News”

There are numerous sources of legal research and commentary about misinformation, disinformation, and fake news—some definitions used by legal scholars are included here.¹¹ Charles Corbett states that “misinformation” is just a “verifiably false statement of fact” and that “disinformation” is a “a type of misinformation,” distinguishable because there is an improper motive behind its distribution and actual knowledge that the information was false.¹² He further states that “fake news” can either be

11. See generally Tawanna D. Lee, *Combating Fake News with “Reasonable Standards”*, 43 HASTINGS COMM’N & ENT. L.J. 81, 106 (2021) (proposing the Communications Decency Act (CDA) be amended so that companies are required to employ “reasonable standards” in “monitor[ing], identify[ing], and remov[ing]” fake news if they want to be immune from liability for third-party content posted on their sites); Wayne Unger, *How The Poor Data Privacy Regime Contributes To Misinformation Spread And Democratic Erosion*, 22 COLUM. SCI. & TECH. L. REV. 308, 311 (2021) (proposing stronger internet privacy and security regulations to stop algorithmic dissemination of disinformation and fake news); Dawn Carla Nunziato, *Misinformation Mayhem: Social Media Platforms’ Efforts to Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. 32, 89–98 (2020) (commending the efforts of social media platforms to counter fake news and medical disinformation, arguing that such efforts are in accordance with First Amendment values).

12. Charles R. Corbett, *Chemtrails and Solar Geoengineers: Governing Online Conspiracy Theory Misinformation*, 85 MO. L. REV. 633, 652 (2020).

“misinformation, disinformation, or neither” depending on the intent behind the distribution, the truth of the claims, and the reception of the audience.¹³ Eric Emanuelson, Jr. defines “fake news” as “fictions deliberately fabricated and presented as non-fiction with the intent to mislead recipients into treating fiction as fact or into doubting verifiable fact.”¹⁴ Finally, Lili Levi describes “‘fake news’ as representing a spectrum—both with regard to truth and with regard to disseminators’ intent” that could consist of “fabricated stories” created to “generate advertising revenue” or “achieve political ends of persuasion.”¹⁵

Based on these definitions, it is first noted that misinformation does not require intent, unlike disinformation and fake news. This implies that misinformation is false information that serves no purpose, while disinformation and fake news are disseminated specifically to manipulate and sensationalize certain facts that encourage a viewpoint-central narrative. Fake news is also attributed to promoting a fictional narrative for social, financial, or political gain. Finally, each of these terms requires mass distribution of false assertions.

B. Social Sciences Redefining “Misinformation,” “Disinformation,” and “Fake News”

Some social scientists adopt a different perspective, conceptualizing these terms to reflect the cause behind the phenomena, rather than focusing on its content or effect. Johan Farkas and Jannick Schou deemphasize the element of “intent” and collapse the three terms into a conceptual model that negates distinctions of “true” and “false.”¹⁶ They propose that misinformation, disinformation, and fake news all represent a “floating signifier,” which is a signal that is used by opposing political groups to “construct[] political identities, conflicts and antagonisms.”¹⁷ They hypothesize that these terms have different meanings and serve different functions between groups that are part of a “much larger hegemonic struggle to define the

13. *Id.*

14. Eric Emanuelson, Jr., *Fake Left, Fake Right: Promoting an Informed Public in the Era of Alternative Facts*, 70 ADMIN. L. REV. 209, 218–19 (2018).

15. Lilli Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 232, 245–46 (2017).

16. Johan Farkas & Jannick Schou, *Fake News as a Floating Signifier: Hegemony, Antagonism and the Politics of Falseness*, 25 JAVNOST: PUBLIC 298, 300 (2018) (“[O]ur goal is not to define the correct definition of fake news, but to analy[z]e the different, opposing and conflicting understandings of the concept.”).

17. *Id.*

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shape, purpose and modalities of contemporary politics.”¹⁸ In other words, these terms have different viewpoint-dependent meanings and are being used by groups seeking to gain political and social ideological control.

A 2020 study from the University of Wisconsin provides empirical evidence of the “floating signifier” theory and gives insight into how the public uses and interprets the phrase “fake news.”¹⁹ Focusing on 234,893 Twitter posts of opposing political views that referred to “fake news,” researchers found that group-identity pronouns “we” and “our” positively referred to an “ingroup identity,”²⁰ while “they” and “their” negatively referred to the “outgroup.”²¹ According to this study, members on opposing sides of the political debate were defining fake news in a way that allowed them to attack and discredit each other.²² In other words, both sides associated in-group messages with truth and out-group messages with fake news. This supports the “floating signifier” theory that fake news should not be considered in terms of “true” or “false.” Instead, this term should be viewed as a social phenomenon that is being used to articulate the speaker’s viewpoint and “amplify ingroup messages” while attacking the “outgroup” by “defin[ing] falsehood and attribut[ing] blame in accordance with group interests.”²³

18. *Id.*

19. Jianing Li & Min-Hsin Su, *Real Talk About Fake News: Identity Language and Disconnected Networks of the US Public’s “Fake News” Discourse on Twitter*, SOC. MEDIA & SOC’Y, Apr.–June 2020, at 1, 3.

20. *Id.* at 5 (Conservatives made statements such as, “‘We the people are NOT stupid’ and ‘Fake news can’t accept election results It only drives us closer to our President[.]’” (alteration in original)) (discussing statements made by liberals while liberals made statements such as, “‘These far-right propaganda machines have destroyed our country’ and ‘Trump is ALWAYS Fake News! Everything that comes out of his mouth is a lie! Our Democracy depends on Free Press!’”).

21. *Id.* at 5, 7 (Conservatives made statements such as, “‘Fake News Media is a Hate Group. They hate President Trump. They hate America. They hate Israel. They hate unborn babies. They hate God’ and ‘AFTER PRINTING FAKE NEWS WAPO GOT THEIR ASS HANDED TO THEM BY GOP LAWMAKER[.]’” while liberals made statements such as, “‘Trump administration and Sarah Sanders lie to us and then defend their lies. They are the fake news they warn us about’ and ‘Many conservatives have appropriated “fake news” and turned it against any news they see as hostile to their agenda.’”).

22. *Id.* at 10 (“The competing liberal and conservative retweet networks reflect identity biases through selective message amplification as well as self-serving thematic and linguistic choices.”).

23. *Id.* at 12 (“Talking about ‘fake news’ goes beyond elite strategy and becomes a deeply political practice adopted in ordinary citizens’ online discourses.”).

C. Consolidation of “Misinformation,” “Disinformation,” and “Fake News”

The definitions used by legal scholars distinguish “intent,” “truth,” and “falsities” because doing so aligns with the purpose behind both the researchers’ positions and analyses of the topics they review.²⁴ But this Comment makes no conclusions as to content; rather, it recognizes that the use of these terms cannot be attributed to one ideological position or group. To disassociate from “group-identifiers” and sustain objectivity, this Comment will adopt the definition closer to that provided by social science research and make no distinction between misinformation, disinformation, and fake news. After disposing of the more subjective considerations of truth, falsities, and intent, a working definition of these terms arises. This Comment recharacterizes misinformation, disinformation, and fake news as “Conflicting Information,” which is defined as follows: information believed by one group that conflicts with information believed by another group, where each group labels the opposing group’s information as misinformation, disinformation, or fake news.

II. EMPIRICAL EVIDENCE: WHY DO PEOPLE SHARE AND BELIEVE CONFLICTING INFORMATION?

Evidence gained from social science research on conflicting information illustrates how the definitions of “truth” and “fact” are secondary to the core beliefs of each position. Presented here is a panoramic glimpse of the research sociologists and psychologists have gathered. It is acknowledged that researchers typically analyze empirical data from different theoretical perspectives and that they must designate “true” news from “fake” news to conduct their experiments. This Comment focuses less on the underlying theories of each individual study and instead emphasizes the overarching consensus from each study to form a working understanding of what causes dissemination and belief of conflicting information.

Subpart A details how *sharing* conflicting information employs analytical reasoning while *believing* conflicting information employs motivated reasoning. Subpart B provides a critical review of the hypothesis that *believers* of conflicting information do not rely on the authority of “experts.” Finally, Subpart C further develops the concept of motivated reasoning by applying the consensus of research on belief in conspiracy theories to give insight into why individuals believe conflicting information.

24. See sources cited *supra* note 11.

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A. Analytical Reasoning v. Motivated Reasoning

It is first imperative to distinguish between those that *believe* conflicting information and those who *share* conflicting information. While there is cross-over between these groups, research suggests that analytic reasoning relates to dissemination and motivated reasoning relates to belief. Analytic reasoning merely refers to “deliberative reasoning processes” that approach “epistemically suspect beliefs” with “skepticism” and discernment.²⁵ Research suggests that social media users “have a strong preference to only share accurate” information, but it is hypothesized that the “social media context distracts [users] from this preference.”²⁶ This is derived from studies showing that prompting users to think analytically about news headlines prior to sharing resulted in their refusal to share inaccurate headlines.²⁷

Individuals use motivated reasoning when they “process information in a way that protects or enhances their current belief system,” judging “information about their ingroup more positively and information about the outgroup more negatively.”²⁸ The research suggests that *belief* of conflicting information is tied to political identity for both political parties.²⁹ Data consistently reflects that classification of individuals as “liberal” or “conservative” is not indicative of their susceptibility to belief in conflicting information or related conspiracy theories—both groups are equally likely to believe such information.³⁰

25. Gordon Pennycook & David G. Rand, *Lazy, Not Biased: Susceptibility to Partisan Fake News is Better Explained by Lack of Reasoning Than by Motivated Reasoning*, 188 COGNITION 39, 40 (2019) [hereinafter *Lazy, Not Biased*].

26. Gordon Pennycook & David G. Rand, *The Psychology of Fake News*, 25 TRENDS IN COGNITIVE SCI. 388, 395 (2021) [hereinafter *Psychology of Fake News*].

27. *Id.* (“[A]sking participants to rate the accuracy of each headline before deciding whether to share it decreased sharing of false headlines by 51% relative to the baseline condition—suggesting that inattention to accuracy was responsible for roughly half of the misinformation sharing in the experiment.”); *Lazy, Not Biased, supra* note 25, at 47.

28. Angela Anthony & Richard Moulding, *Breaking the News: Belief in Fake News and Conspiracist Beliefs*, 71 AUSTL. J. PSYCH. 154, 159 (2018).

29. *Id.*

30. *Id.* at 155 (describing research on belief in conspiracy theories) (“[T]here is generally no significant difference between left-wing liberals and right-wing conservatives as to who is more inclined to a conspiracist mentality.”); *Lazy, Not Biased, supra* note 25, at 47 (“More analytic individuals were also better able to discern real from fake news regardless of their political ideology, and of whether the headline was Pro-Democrat, Pro-Republican, or politically neutral[.]”); Li & Su, *supra* note 29, at 10; cf. Jon Roozenbeek et al., *Susceptibility to Misinformation About COVID-19 Around the World*, 7 ROYAL SOC’Y OPEN SCI., Oct. 2, 2020, at 1, 11 (reporting the results of a cross-cultural study, finding that “political

However, a recent study from Ohio State University indicates that, while “[l]iberals responded more strongly than conservatives to harmful truths” and were “more prone to accept claims that benefit the ingroup,” conservatives are more likely to believe “falsehoods.”³¹ The researchers note that conservative beliefs in falsehoods were “largely explained by the fact that widely shared falsehoods were systematically more supportive of conservatives’ political positions.”³² Unfortunately, this study does not present these news stories for independent review to assess whether they are “true” or “false.”³³ For this Comment, the Ohio State University study is only considered additional support to the theory that motivated reasoning is inherent in one’s discernment and beliefs about messages favoring the in-group.

B. No Faith in the “Experts”? A COVID-19 Illustration

Another supposed cause for belief in conflicting information is lack of trust in “experts.”³⁴ The COVID-19 pandemic has presented researchers with ripe opportunity to explore this phenomenon, and they have “found that beliefs in conspiracies” related to “the virus are associated with a propensity to reject information from expert authorities.”³⁵ These studies, however, provide an opportunity to showcase that research on conflicting information must deemphasize classifications of factual accuracy and emphasize the underlying belief in conflicting information.

To illustrate, a study on COVID-19 “conspiracy theories” found that thirty-one percent of participants polled in March 2020 believed “the virus was purposefully created” and released.³⁶ These results mirror a similar poll also conducted in March 2020 that found a quarter of Americans believed the virus was developed in a lab.³⁷ Researchers of the study stated

conservatism” was not associated with “higher susceptibility to misinformation” in the United States or the United Kingdom).

31. R. Kelly Garrett & Robert M. Bond, *Conservatives’ Susceptibility to Political Misperceptions*, SCI. ADVANCES, June 2021, at 1, 6.

32. *Id.*

33. *See id.* at 2–3, 7–9.

34. Roozenbeek, *supra* note 30, at 2.

35. *Id.*

36. Joseph E. Uscinski et al., *Why Do People Believe COVID-19 Conspiracy Theories?*, 1 HARV. KENNEDY SCH. MISINFORMATION R., Apr. 2020, at 1, 1.

37. *About Four-In-Ten Americans Say COVID-19 Came About Naturally; About Three-In-Ten Think It Was Created in a Lab. Nearly Half Say a Vaccine Will Be Available in a Year or More*, PEW RSCH. CTR. (Mar. 17, 2020), <https://www.pewresearch.org/journalism/2020/03/18/americans-immersed-in-covid-19-news-most-think-media-are-doing->

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this belief was due to “psychological predisposition to reject expert, authoritative information” and “view major social and political events as the product of conspiracies.”³⁸ But is this an accurate explanation for why individuals believe the virus was lab-created?

When the virus began to spread, scientists claimed the virus originated from bats, which had infected another animal before it was transmitted to humans.³⁹ The earliest speculation was that transmission to humans occurred at a “wet market” in Wuhan, China, which sells live animals to the public.⁴⁰ The Wuhan wet market claim has since been disproven, but the World Health Organization (WHO) still maintains the virus was naturally transmitted to humans by animals and has stated it is “extremely unlikely” the virus was accidentally released from a lab.⁴¹

The alternative belief circulated on social media⁴² after Dr. Francis Boyle, a reputable international lawyer and professor at the University of

fairly-well-covering-it/pj_2020-03-18_coronavirus-news1_0-02/ [https://perma.cc/2H63-7UGC] (surveying American adults between March 10, 2020, and March 16, 2020, finding that 43% believe the virus “came about naturally;” 23% believe it was intentionally created in a lab; 6% believe the virus was made accidentally in a lab; 1% believe the virus didn’t really exist; and 25% being unsure of its origin).

38. Uscinski et al., *supra* note 36, at 2.

39. Reggie Aquilino, *Coronavirus Origin: Where Did Covid-19 Come From?*, ABC7 NEWS (May 14, 2020), <https://abc7news.com/where-did-coronavirus-come-from-originally-what-is-the-cause-of-really-covid/6175783/> [https://perma.cc/5NUD-C8BP].

40. Rafi Letzter, *The Coronavirus Didn’t Really Start at that Wuhan ‘Wet Market’*, LIVE SCI. (May 28, 2020), <https://www.livescience.com/covid-19-did-not-start-at-wuhan-wet-market.html> [https://perma.cc/3WM4-A9FH].

41. DR. PETER K. BEN EMBAREK ET AL., JOINT WHO-CHINA STUDY, WHO-CONVENED GLOBAL STUDY OF ORIGINS OF SARS-CoV-2: CHINA PART 120 (2021).

42. Shirin Ghaffary & Rebecca Heilweil, *Facebook Doubles Down on Removing Coronavirus Conspiracy Theories*, VOX: RECODE (Mar. 4, 2020, 5:15 PM), <https://www.vox.com/recode/2020/1/31/21115589/coronavirus-wuhan-china-myths-hoaxes-facebook-social-media-tiktok-twitter-wechat> [https://perma.cc/V4JL-WZEN].

Illinois College of Law,⁴³ came forward in January of 2020⁴⁴ expressing his view that the spread of the virus was due to a lab leak.⁴⁵ Boyle, who drafted the Biological Weapons Anti-Terrorism Act of 1989,⁴⁶ claimed the virus was a genetically modified bioweapon that escaped from the Wuhan lab, that the Chinese government was trying to cover up its origins, and that the WHO knew about it.⁴⁷ An investigative report by scientists on the nature of the research at the Wuhan lab detailed how a virologist, Shi Zheng Li, experimented and modified the SARS coronavirus to better study its transmission to humans.⁴⁸ This report also details the questionable actions of Chinese officials toward the Wuhan lab at the time of the outbreak.⁴⁹ Further, there are scientists examining the COVID-19 genome and challenging the WHO's narrative that the virus is naturally occurring.⁵⁰ By June of

43. Associated Press, *Francis Boyle, Ali Khamenei: Meet the Superspreaders Behind Top COVID-19 Conspiracy Theories*, BUS. TODAY (Feb. 15, 2021, 12:58 PM), <https://www.businesstoday.in/latest/world/story/francis-boyle-ali-khamenei-meet-the-superspreaders-behind-top-covid-19-conspiracy-theories-287648-2021-02-15> [<https://perma.cc/7T23-P9PX>] [hereinafter BUS. TODAY]; Francis Boyle, ILL. COLL. OF L., <https://law.illinois.edu/faculty-research/faculty-profiles/francis-boyle/> [<https://perma.cc/5N4F-3YYE>] (listing Francis Boyle's career accomplishments such as: representing and advising international bodies on human rights, war crimes, nuclear policy, and bio-warfare; serving as Legal Advisor to the Palestinian Delegation to the Middle East Peace Negotiations; and serving on Board of Directors of Amnesty International and the Advisory Board for Responsible Genetics).

44. BUS. TODAY, *supra* note 43.42

45. *Id.*; Robert Skopec, *Coronavirus is a Biological Warfare Weapon*, 12 J. VACCINES & VACCINATION, no. 466, Feb. 25, 2021, at 1, 1.

46. Francis Boyle, *supra* note 43; see also 10 U.S.C. §§ 175–78 (defining terms related to biological warfare and expanding the scope of persons to be criminally liable for illegally buying, selling, or manufacturing toxic biological agents).

47. Skopec, *supra* note 45.45, at 1.

48. Dr. Vinod Kumar Goyal & Chandrika Sharma, *The Novel Coronavirus 2019: A Naturally Occurring Disaster or a Biological Weapon Against Humanity: A Critical Review of Tracing the Origin of Novel Coronavirus 2019*, J. ENTOMOLOGY & ZOOLOGY STUD., May 2, 2020, at 1, 2–3.

49. *Id.*

50. Nobel Winning Scientist Claims Covid-19 Virus Was Man-Made in Wuhan Lab, MINT (Apr. 19, 2020, 7:15 PM), <https://www.livemint.com/news/world/nobel-winning-scientist-claims-covid-19-virus-was-man-made-in-wuhan-lab-11587303649821.html> [<https://perma.cc/DDU6-LDKK>]; Aanchal Nigam, 'Never Been Found Naturally': Rare Genome Indicates COVID-19 Is Man Made, Say US Experts, REPUBLICWORLD.COM (June 7, 2021, 7:52 PM), <https://www.republicworld.com/world-news/us-news/never-been-found-naturally-rare-genome-indicates-covid-19-is-man-made-say-us-experts.html> [<https://perma.cc/6C6Y-SD9G>].

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2021, fifty-eight percent of Americans believed the virus originated from the Wuhan lab, with forty-two percent believing the virus was man-made.⁵¹

When considering the underlying belief that COVID-19 was lab-created, it is difficult to discount the authority-driven background of claims that the virus came from a lab. The lab-creation theory may not originate with the authority of the WHO, but it is information provided by those with specialized knowledge and expertise in biological disease. It is presumptuous to conclude that believers of alternate theories are “psychological[ly] predispose[ed]” to reject “authoritative information.”⁵² However, the disposition to believe such information may be attributable to motivated reasoning. Therefore, discussing the motivations behind affirming one’s ideological constructs is warranted.

C. Borrowing from Conspiracy Theory Research: Motives Behind Belief

Research in conspiracy theory belief has found that feelings of “disenfranchisement and disadvantage” could be markers for beliefs in conflicting information.⁵³ In a cumulative review of the scientific literature on the psychological disposition of conspiracy theorists, three primary motives are discovered: epistemic, existential, and social.⁵⁴ These three motives can be applied to explain the proliferation and belief of conflicting information.

Epistemic motives are those that seek “causal explanations” when one faces uncertainty and confusion.⁵⁵ When significant events occur for which there is no satisfactory explanation, conspiracy belief provides “internally consistent explanations that allow” for ideological stability.⁵⁶ When believers experience the distress of uncertainty, their conspiratorial beliefs are strengthened.⁵⁷ Returning to the COVID-19 example, the belief in an alternative view of the virus’s origin could be considered a rejection of the shifting and unsatisfactory explanations by the approved “experts.” The

51. Kathy Frankovic, *Most Americans Now Believe the Coronavirus Originated from a Laboratory in China*, YOUGOVAMERICA (June 2, 2021, 1:30 PM), <https://today.yougov.com/topics/politics/articles-reports/2021/06/02/most-americans-now-believe-coronavirus-originated-> [<https://perma.cc/R2BH-WEGD>] (finding only 13% of Americans believe the virus “occurred naturally and mutated to a human infection” while 24% remain unsure how the virus originated).

52. Uscinski et al., *supra* note 36, at 2.

53. Anthony & Moulding, *supra* note 28, at 155.

54. Karen M. Douglas et al., *The Psychology of Conspiracy Theories*, 26 CURRENT DISTINCTIONS PSYCH. SCI. 538, 538 (2017).

55. *Id.*

56. *Id.* at 539.

57. *Id.*

believer then accepts the alternative view to create consistency in an increasingly uncertain world.

Existential motives seek stability that fulfills the existential motive of feeling safe, secure, and in control.⁵⁸ Rejection of “official narratives” is a form of control that can compensate for feelings of powerlessness and anxiety.⁵⁹ Research also indicates that “lack of sociopolitical control” correlates to belief in conspiracy theories, as does the inability to control outcomes.⁶⁰ Belief in conflicting information about COVID-19 should not be surprising considering the politicization of the illness, lack of control over government mandates, and rising death tolls.⁶¹

Finally, there are social motives that influence belief in conspiracy theories reflecting “the desire to belong and to maintain a positive image of the self and the in-group.”⁶² This suggests that in-group identity can contribute to belief in conspiracy theories where the social motivations of the group are frustrated, such as losing a political election or being economically disadvantaged.⁶³ The social motivation behind conflicting information comes full circle to the University of Wisconsin study discussing in-group identifiers using “fake news” as a “floating signifier.”⁶⁴ The in-group feels disenfranchised and attacked by their “perceived enemies” and thus develops their own perception of reality to cope with the assaults of the out-group.⁶⁵

The empirical evidence supports that belief in conflicting information is more indicative of one’s power struggle against the world rather than the legitimacy of the information believed. Because accuracy is not as important to the individual as control and belonging, legal scholars and social scientists should seek to study conflicting information from a neutral position that focuses on underlying beliefs. However, while belief origin is paramount to understanding individual susceptibility to conflicting information, it is not the primary cause of the infodemic.⁶⁶

58. *Id.*

59. *Id.*

60. *Id.*

61. P. Sol Hart et al., *Politicization and Polarization in COVID-19 News Coverage*, 42 *SCI. COMM’N* 679, 680–81 (2020).

62. Douglas et al., *supra* note 5454, at 540.

63. *Id.*

64. Li & Su, *supra* note 19, at 3.

65. Douglas et al., *supra* note 54, at 540.

66. *Cf.* Jesper Strömbäck et al., *News Media Trust and Its Impact On Media Use: Toward a Framework for Future Research*, 44 *ANNALS INT’L COMM’N ASS’N* 139, 151 (2020) (“[T]he transformation into high-choice media environments has brought with it a host of new and exacerbated challenges threatening to undermine news media trust . . . [A]lthough there are important differences across countries and media environments, there are more

III. TRADITIONAL NEWS OUTLETS AND SOCIAL MEDIA: THE ORIGIN OF THE “INFODEMIC”

The central “function of news media is to ‘aid citizens in becoming informed’” and serve the democratic purpose of ensuring they are “free and self-governing.”⁶⁷ To achieve this purpose, it is imperative that citizens trust news media outlets.⁶⁸ The broadest definition of “news media trust” refers to citizens’ reliance on news outlets to gain information in “situations of uncertainty.”⁶⁹ However, the technological advancements of the digital age provide “instantaneous access to information . . . allow[ing] ideas to be shared and formerly inaccessible regions to be connected.”⁷⁰ Consequently, people are less dependent on news media for information.⁷¹ This has led to the rise of alternative and partisan news sites and the spread of conflicting information through modern-day internet algorithms.⁷²

This shift to online information dissemination has borne the “post-truth” age, whereby “objective facts” are cast aside in favor of subjective perspectives.⁷³ Subpart A briefly discusses the role of traditional news outlets and their encouragement of the divisive beliefs behind conflicting information. Subpart B highlights how online information is disseminated by sophisticated algorithms that are tailored to provide individualized content that only serves to reinforce the beliefs of its users.

A. Traditional News Outlets Contributing to Polarization and Politicization

At a 2017 panel about fake news, CNN senior media and politics reporter, Dylan Byers, stated that journalists have become biased and that mainstream news outlets have lost hold of the “common narrative in the

so-called non-mainstream and partisan media that compete with traditional news media.”); see also *infra* Part III(A) and note 79.

67. *Id.* at 139 (internal citation omitted).

68. *Id.*

69. *Id.* at 142.

70. Joanna M. Burkhardt, *Combating Fake News in the Digital Age*, 53 LIBR. TECH. REPS. 1, 8 (2017).

71. Strömbäck et al., *supra* note 67, at 140.

72. *Id.*

73. *Lazy, Not Biased*, *supra* note 25, at 38 (“The Oxford Dictionary declared ‘post-truth’ to be the word of the year in 2016 and defined it as such: ‘relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.’”).

middle.”⁷⁴ This is not just opinion. In a 2020 study on COVID-19 news reports, researchers analyzed over 22,000 news articles and broadcasts from March to May of 2020 to determine the extent of politicization and polarization of the virus.⁷⁵ The results showed that news articles highly politicized COVID-19 and that both articles and broadcast reports on COVID-19 were highly polarizing.⁷⁶ Such politicization and polarization can influence the public to trust “political elites over experts” and “cause individuals to fear social ostracization” from their in-groups “if they express contrasting beliefs.”⁷⁷ Researchers also note that a “high degree of politicization and polarization can create a polluted science communication environment”⁷⁸

Explanations for the increasing politicization and polarization of news media reports have yet to reach a consensus.⁷⁹ While this topic alone is worthy of thorough discussion, it is beyond the scope of this Comment. This Comment simply recognizes that mainstream media has contributed to the divisive viewpoints that reinforce belief of conflicting information.

B. Social Media Influence: The Modern-Day Algorithm

Whether it be lack of trust in traditional news media, a desire to stay connected to the in-group, or both, more people are turning to social media to receive information.⁸⁰ However, the information being received is

74. Benjamin Mullin, *What Causes Fake News, and What Are Its Solutions? Journalists from NPR, CNN and the Founder of PolitiFact Weigh In*, POYNTER (May 4, 2017), <https://www.poynter.org/ethics-trust/2017/what-causes-fake-news-and-what-are-its-solutions-journalists-from-npr-politifact-and-cnn-weigh-in/> [<https://perma.cc/4LKZ-4SNW>].

75. P. Sol Hart et al., *supra* note 61, at 683 (analyzing broadcasts from ABC, CBS, and NBC and gathering articles from national and regional newspapers, including USA Today, The Washington Post, and The New York Times).

76. *Id.* at 691.

77. *Id.*

78. *Id.* at 691–92.

79. See Yariv Tsfaty et al., *Causes and Consequences of Mainstream Media Dissemination of Fake News: Literature Review and Synthesis*, 44 ANNALS INT’L COMM’N ASS’N 157, 164, 168 (2020) (finding that journalists focus on “attitude-confirming” news narratives, rather than “disconfirming information”); see also Chris J. Vargo & Lei Guo, *Networks, Big Data, and Intermedia Agenda Setting: An Analysis of Traditional, Partisan, and Emerging Online U.S. News*, 94 JOURNALISM & MASS COMM’N Q. 1031, 1048 (2017) (discussing how mainstream reports are increasingly influenced by partisan websites); Strömbäck et al., *supra* note 66, at 151 (finding that mainstream news outlets were the greatest disseminators of “false” news stories because of their efforts to combat the information).

80. Strömbäck et al., *supra* note 66, at 140; Burkhardt, *supra* note 7070, at 6–7 (speaking to internet use, not necessarily social media); Elad Klein & Joshua Robison, *Like, Post,*

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filtered through modern-day algorithms designed to optimize the consumer experience by personalizing the internet to users’ specific interests. At their core, algorithms are merely instructions to a computer that enable it to perform tasks, such as calculating a math equation or sending an email.⁸¹ But the modern-day algorithm is far more sophisticated.

Companies such as Google and Facebook collect data on user habits, interests, and preferences to program algorithms to provide users’ social media feed with content that reflects their interests. The purpose of the algorithm is to generate more user engagement by filtering newsfeeds so that users are only exposed to information that reinforces their individual beliefs and worldview.⁸² Everything a user is exposed to on social media is controlled by algorithms, which not only maximize user interest, but also influence, predict, and manipulate user behavior.⁸³

The algorithm-driven technology behind social media interactions is a key component of internet users’ information exposure, creating ideological silos of political and cultural divides that lack diversified viewpoints. In October of 2021, a former Facebook employee turned whistleblower came forward with “thousands of pages of company documents” illustrating the company is aware its algorithms “sow division and undermine[]

and Distrust? How Social Media Use Affects Trust in Government, 37 POL. COMM’N 46, 46 (2020).

81. Lee Rainie & Janna Anderson, PEW RSCH. CTR., *Code-Dependent: Pros and Cons of the Algorithm Age 2*, (Feb. 8, 2017), <https://www.pewresearch.org/internet/2017/02/08/code-dependent-pros-and-cons-of-the-algorithm-age/> [<https://perma.cc/NP6U-6GNU>].

82. *See id.* at 13–14; *see also* Guillaume Chevillon, *The Power of Persuading: Can and Should We Regulate AI Algorithms?*, OECD.AI (Mar. 11, 2021), <https://oecd.ai/wonk/central-authority-regulate-algorithms> [<https://perma.cc/9BBA-SBF2>]; SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 186–87 (2019) (“There have been myriad revelations of Google and Facebook’s manipulations of the information that we see. For now I’ll simply point out that Google’s algorithms, derived from surplus, select and order search results, and Facebook’s algorithms, derived from surplus, select and order the content of its News Feed. In both cases, researchers have shown that these manipulations reflect each corporation’s commercial objectives.”).

83. *See* Lewis Mitchell & James Bagrow, *Do Social Media Algorithms Erode Our Ability to Make Decisions Freely? The Jury Is Out*, THE CONVERSATION (Oct. 11, 2020, 3:00 PM), <https://theconversation.com/do-social-media-algorithms-erode-our-ability-to-make-decisions-freely-the-jury-is-out-140729> [<https://perma.cc/2T4E-M2V4>] (discussing the predictability of user-generated content on Twitter) (“We found data from eight or nine friends was enough to be able to predict someone’s tweets just as well as if we had downloaded them directly Indeed, 95% of the potential predictive accuracy that a machine learning algorithm might achieve is obtainable *just* from friends’ data.”).

democracy.”⁸⁴ The whistleblower, Frances Haugen, was a data scientist for Facebook who studied how the platform’s algorithms “amplified misinformation and w[ere] exploited by foreign adversaries.”⁸⁵ Facebook, however, denies any wrongdoing, with CEO Mark Zuckerberg stating it was “disheartening” for the internal research and documents presented to be “taken out of context and used to construct a false narrative.”⁸⁶

These reports, however, have reenergized bipartisan agreement that something must be done to rein in Facebook and other companies using “algorithms that drive popular features.”⁸⁷ The discussion of internet regulation has been ongoing for years, but Congress has yet to intervene. While this whistleblower may be the catalyst toward change, it remains unclear how to create effective legal regulations that will address the harms social media presents. While certain harms, such as tortious conduct or online bullying, may find grounds for legal action in American jurisprudence, combating conflicting information presents a unique problem for which legal solutions are lacking.

IV. WHAT ARE THE CURRENT LEGAL PROPOSALS?

When it comes to the internet and social media, one thing is abundantly clear: the current law is ill-equipped to exert cohesive and appropriate constructs into which the internet can fit. There has not been meaningful legislation of internet regulation since the Telecommunications Act of 1996,⁸⁸ when the internet was in its infancy and the “World Wide Web” was a budding concept of unknown implications. Now that those implications have been realized, the outdated paradigms lawmakers use to regulate ever-evolving innovations fall short.

This Part reviews the current struggles lawmakers face in trying to fit the square peg of the internet into the circular hole of law. Subpart A presents a thorough discussion of the Communications Decency Act (CDA)

84. Bobby Allyn, *Here Are 4 Key Points from the Facebook Whistleblower’s Testimony on Capitol Hill*, NPR (Oct. 5, 2021, 9:30 PM), <https://www.npr.org/2021/10/05/1043377310/facebook-whistleblower-frances-haugen-congress> [<https://perma.cc/65HQ-QQ2J>].

85. *Id.*

86. *Id.*

87. *Id.*

88. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; (codified as amended in scattered sections of 47 U.S.C.); *see also* Ev Ehrlich, *A Brief History of Internet Regulation*, PROGRESSIVE POL’Y INST., Mar. 2014, at 1, 7 (“[T]he 1996 Act left behind a trail of controversies that have made up most of the telecommunications policy agenda since then.”).

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and calls for its reformation by the executive, legislative, and judicial branches. Subpart B focuses on the size of these major social media platforms, briefly discussing both the antitrust litigation seeking to put an end to their monopoly and the proposals advocating for regulation by redefining them as “public utilities.” Finally, Subpart C reviews First Amendment issues raised in the regulation algorithmic output.

A. Section 230 of the Communications Decency Act

The law most loved by social media enterprises—and most hated by nearly everyone else—is section 230 of the Communications Decency Act.⁸⁹ Section 230 is dear to social media websites because it gives them complete liability protection for third-party content posted on their platforms.⁹⁰ It is not only their shield, but their sword,⁹¹ as they can effectively wield section 230 to cut down the viewpoints, beliefs, and information they do not agree with.⁹² Because of the centrality of social media platforms

89. 47 U.S.C. § 230; see Mike Curley, *Inside The ‘Battleground For The Internet’s Soul’: Section 230*, LAW 360 (Aug. 30, 2021, 11:33 AM), <https://www.law360.com/articles/1416582/inside-the-battleground-for-the-internet-s-soul-section-230> [<https://perma.cc/S3PG-GKFY>].

90. See generally *Gonzalez v. Google LLC*, 2 F.4th 871, 880 (9th Cir. 2021) (affirming district court’s ruling that § 230 shields Google from liability for terrorist attacks under the Anti-Terrorism Act for failing to properly screen and remove recruitment videos posted on YouTube by the terrorist organization ISIS); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016) (dismissing plaintiff’s ten defamation-related claims against Facebook because § 230 protected Facebook’s failure to remove sexually explicit photos of plaintiff posted by another user), *aff’d*, 700 F. App’x 588 (9th Cir. 2017); *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 151 (Cal. Ct. App. 2009) (affirming lower court’s ruling that § 230 provided immunity to MySpace in a claim for negligence and strict product liability for failing to “implement reasonable, basic safety precautions” to protect minors from being sexually assaulted by adult users).

91. Ashley Ulrich, *The Internet’s Wild West: Section 230 and Why Platforms Don’t Owe You Anything*, THE BLOG (May 20, 2020), <https://blog.jipel.law.nyu.edu/2020/05/the-internets-wild-west-section-230-and-why-platforms-dont-owe-you-anything/> [<https://perma.cc/EE6Z-WHAJ>].

92. See generally *Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360, 377–83 (Cal. Ct. App. 2021) (ruling that Twitter could not be held liable for breach of contract, promissory estoppel, and unfair competition under § 230 for removing posts that expressed disapproval of transgender individuals); *Wilson v. Twitter*, No. 3:20-CV-0054, 2020 U.S. Dist. LEXIS 104910, at *1–2 (S.D. W. Va. June 16, 2020) (finding that Twitter was immune under § 230 from claims brought under the Civil Rights Act for removing derogatory content posted about homosexuals); *Sikhs for Just. “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1096 (N.D. Cal. 2015) (dismissing plaintiff’s anti-discrimination and contract claims against Facebook because Facebook had § 230 immunity when it blocked access to plaintiff’s page

toward the promotion, and censorship, of conflicting information, proposals to modify, update, or even repeal section 230 is a passionately debated legislative issue. Before a review of these current legislative efforts, a productive discussion first requires understanding the significance of this statute and, more importantly, its application.

1. *What is Section 230 and How Does it Work?*

Passed as part of the 1996 Telecommunications Act,⁹³ section 230 is Congress's response to a New York Supreme Court decision that found an internet service provider (ISP) liable as a publisher in a defamation lawsuit.⁹⁴ In *Stratton Oakmont v. Prodigy Services Co.*, the court reasoned the ISP fit the definition of "publisher"⁹⁵ because it maintained control over the content of its online bulletin board by screening posts and deleting those it found to be in "bad taste."⁹⁶ Congress quickly took note of the dangers inherent in ISPs declining to regulate content for fear of liability.⁹⁷ Envisioning the online proliferation of child pornography, coercion of minors, and other objectionable material, the language of what would become section 230 was introduced to the House Commerce Committee a mere five weeks after the *Stratton Oakmont* decision.⁹⁸

in India that opposed forced conversions to Hinduism, organized political advocacy campaigns, and promoted human rights), *aff'd*, 697 Fed. App'x 526 (9th Cir. 2017).

93. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); *see also* Sara L. Zeigler, *Communications Decency Act of 1996*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1070/communications-decency-act-of-1996> [<https://perma.cc/P6ZA-Q55K>].

94. *Stratton Oakmont Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *16-18 (N.Y. Sup. Ct. May 24, 1995).

95. *Id.* at *6-7 (distinguishing between publisher and distributor) ("A finding that Prodigy is a publisher is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims, because one who repeats or otherwise publishes a libel is subject to liability as if he had originally published it. In contrast, distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue. A distributor, or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault." (first citing *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 61 (S.D.N.Y. 1991); then citing *Auvil v. CBS 60 Minutes*, 800 F. Supp. 135, 139 (E.D. Wash. 1992); and then citing *Misut v. Mooney*, 475 N.Y.S.2d 233 (N.Y. Sup. Ct. Apr. 23, 1984)).

96. *Stratton Oakmont Inc.*, 1995 N.Y. Misc. LEXIS 229, at *10.

97. *See* Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995) (proposing to give ISPs liability protection for information provided on their websites by third parties).

98. *Id.*; *see also* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) ("One of the specific purposes of [section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar

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Section 230 highlights the congressional findings that the internet offers a “forum for a true diversity of *political discourse*, unique opportunities for cultural development, and a myriad of avenues for intellectual activity.”⁹⁹ The government’s stated policy is to “promote the continued development of the internet”¹⁰⁰ by “maximiz[ing] user control over what information is received by individuals, families, and schools,”¹⁰¹ and “remov[ing] disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”¹⁰² The statute makes clear that ISPs are not considered “publisher[s]” or “speaker[s]” of third-party content.¹⁰³ Rather, they are protected from civil liability for editing, controlling, or censoring material “in *good faith*” that is “consider[ed] to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”¹⁰⁴

Given the policy was to encourage more user control over exposure to certain kinds of content, it is interesting how broadly courts have interpreted section 230 in defamation claims against ISPs.¹⁰⁵ The Fourth Circuit’s controversial decision in *Zeran v. America Online, Inc.* found that immunity under section 230 not only applies to claims against ISPs as “publishers,” but also as “distributors.”¹⁰⁶ This meant that ISPs were not only immune

decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”).

99. 47 U.S.C. § 230(a)(3) (emphasis added).

100. 47 U.S.C. § 230(b)(1).

101. 47 U.S.C. § 230(b)(3).

102. 47 U.S.C. § 230(b)(4); *see also* § 230(b)(5) (“It is the policy of the United States . . . to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”)

103. 47 U.S.C. § 230(c)(1).

104. 47 U.S.C. § 230(c)(2)(A) (emphasis added). Note that ISPs are still protected for *failing* to edit, control, or censor information. *Compare* § 230(c)(1), *with* § 230(c)(2).

105. *See generally* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (finding § 230 immunity not only applied to ISPs as publishers of information, but also as distributors); *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959, 966–67 (N.D. Cal. 2016) (finding § 230 immunity applied to Twitter in claims brought under the Telephone Consumer Protection Act); *Force v. Facebook, Inc.*, 934 F.3d 53, 72 (2d Cir. 2019) (finding § 230 was not narrowed or repealed by the Anti-Terrorism Act and that § 230 immunity was not barred by the presumption against extraterritorial application of federal statutes), *cert. denied*, 140 S. Ct. 2761 (2020).

106. *Zeran*, 129 F.3d at 332–33 (“[O]nce a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this

from liability for editing or removing content, like the traditional publisher, but also that they were now immune from neglecting to edit or remove content after notice that such content was tortious.¹⁰⁷ This ruling alone has brought numerous calls for reform.¹⁰⁸

2. Case Illustration of Section 230

Murphy v. Twitter offers a brief illustration of how section 230 is applied to social media companies that censor content.¹⁰⁹ Meghan Murphy, a freelance journalist, started a Twitter account in 2011¹¹⁰ and used the platform to post her conservative views on transgenderism, criticizing transgender activists' demands for equal access to services typically catered toward biological women.¹¹¹ In 2018, Twitter permanently suspended Murphy's account for violating its "Hateful Conduct Policy."¹¹² Murphy brought claims against Twitter for breach of contract, promissory estoppel, and unfair competition, alleging that she received no notice about the

respect, [the plaintiff] seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability—the publisher role.”); *see also* 47 U.S.C. § 230(c)(1).

107. *Zeran*, 129 F.3d at 332; Patricia Spiccia, Note, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 401 (2013) (“[I]nstead of expending time and money to self-regulate, many ISPs chose to do nothing while still benefitting from the immunity shield that section 230 provides, thereby defeating the primary purpose of the statute.” (citation omitted)).

108. *See generally, e.g.*, Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL’Y 553, 557–58 (2018) (advocating to amend § 230 to prevent ISP immunity when sex-trafficking activities occur on their platforms); Natalie Annette Pagano, *The Indecency of the Communications Decency Act § 230: Unjust Immunity for Monstrous Social Media Platforms*, 39 PACE L. REV. 511, 535–38 (2018) (advocating for amendment of § 230 and ending the broad immunity that prevents ISPs from being liable for defamatory and harmful content); Joanna Schorr, Note, *Malicious Content on the Internet: Narrowing Immunity Under the Communications Decency Act*, 87 ST. JOHN’S L. REV. 733, 754–59 (2013) (advocating to narrow the test for ISP immunity in *Zeran*); Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL’Y 863, 879–82 (2010) (arguing that Congress did not intend to limit all forms of vicarious liability under § 230).

109. *Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360 (Cal. Ct. App. 2021).

110. *Id.* at 363–64.

111. *Id.* at 364 (detailing Murphy’s criticism of a transgender activist’s efforts to prohibit funding of a women’s shelter because it only served biological females); *Id.* at 365–66 (detailing Murphy’s criticism of a transgender activist suing female estheticians that refused to perform Brazilian waxes on individuals with male genitalia).

112. *Id.* at 365–66.

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changes made to Twitter’s Hateful Conduct Policy in 2018.¹¹³ The court found that her claims were “barred by the broad immunity conferred by the CDA” because Twitter is an ISP that is “not liable for its editorial decisions to block content.”¹¹⁴

As applied to considerations of conflicting information, the significance of the power disparity between social media platforms and its users is obvious when viewed through a critical lens. Twitter decided Murphy’s statements qualified as “hateful conduct” based on its own views and policies.¹¹⁵ At the same time, Twitter states the purpose of its platform is to “serve the public conversation.”¹¹⁶ Murphy’s claims for breach of contract and promissory estoppel call into question whether these policies are being exercised in “good faith” pursuant to the purpose of section 230, as Twitter’s evolving bylaws seem to undercut its stated purpose. Further, a public ISP like Twitter should wield its section 230 power in a manner that promotes “diversity of political discourse” and “cultural development.”¹¹⁷ The primary point here is not whether Murphy’s claims, or those of similarly situated plaintiffs, would have been successful on the merits, but rather that section 230 is so broadly interpreted that it ensures the claims’ failure.¹¹⁸

3. *Calls for Reform*

All branches of the federal government have recognized that section 230 has turned the internet into the “wild west” of information

113. *Id.* at 366–67.

114. *Id.*

115. *Id.* at 366–67 (“As adopted in 2015, Twitter’s Hateful Conduct Policy stated: ‘Hateful conduct: You may not promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease. We also do not allow accounts whose primary purpose is inciting harm towards others on the basis of these categories.’”) (“[I]n late October 2018, Twitter . . . add[ed] a provision that prohibited ‘targeting individuals with repeated slurs, tropes or other content that intends to dehumanize, degrade or reinforce negative or harmful stereotypes about a protected category. This includes targeted misgendering or deadnaming of transgender individuals.’”).

116. *The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/48GL-327A>].

117. 47 U.S.C. § 230(a)(3).

118. *Contra Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099, (9th Cir. 2009) (holding the CDA blocked plaintiff’s claim against Yahoo for negligent undertaking because it could not be held liable as publisher or speaker of defamatory content, but that it could be held liable under a claim of promissory estoppel for a *separate* promise made by Yahoo’s Director of Communications that the defamatory content would be removed.).

distribution.¹¹⁹ While everyone agrees the law should be reined in, no one can agree which lasso to use.¹²⁰ Democrats want to lessen immunity of ISPs and incentivize companies to censor more content viewed as damaging—specifically hateful, derogatory, libelous, *and* misinformation, disinformation, and fake news.¹²¹ Republicans, on the other hand, want to lessen ISP immunity to *disincentivize* the censorship of conservative viewpoints—arguing that First Amendment rights of Americans should be protected, even in the private sector.¹²² Both parties have proposed legislation reflecting these contrary beliefs.¹²³

One bill proposed by Democrats is the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act (SAFE TECH Act),¹²⁴ which would amend section 230 to abolish ISP immunity for claims that allege online harassment “or intimidation based, in whole or in part, on sex (including sexual orientation and gender identity), race, color, religion, ancestry, national origin, or physical or mental disability brought under Federal or State law.”¹²⁵ Another popular democratic proposal is the Protecting Americans from Dangerous Algorithms Act, which would prevent immunity in civil rights or terrorism claims where the ISP used an algorithm to spread harmful content.¹²⁶ Under this proposal, an ISP would be prohibited from using its algorithmic model to “rank, order, promote, recommend, amplify, or similarly alter the delivery or display of information . . . provided to a user of the service if the information is directly relevant to the claim.”¹²⁷ As discussed in Subpart C below, the First Amendment presents many legal constraints to the regulation of algorithmic restrictions on search results.

119. Ulrich, *supra* note 91.

120. See Megan Anand et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021, 5:45 AM), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> [<https://perma.cc/2Q44-9685>].

121. See Curley, *supra* note 89; see also Marguerite Reardon, *Democrats and Republicans Agree that Section 230 is Flawed*, CNET (June 21, 2020, 5:00 AM), <https://www.cnet.com/news/democrats-and-republicans-agree-that-section-230-is-flawed/> [<https://perma.cc/RA4X-XEHB>].

122. Reardon, *supra* note 121.

123. Anand et al., *supra* note 120.

124. Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act, H.R. 3421, 117th Cong. (2021).

125. *Id.*

126. Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. (2021).

127. *Id.*

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While some Republicans have made modest proposals to merely take away ISP immunity as distributors of information,¹²⁸ others have made more radical suggestions. The Curbing Abuse and Saving Expression in Technology Act (CASE-IT Act) would prohibit section 230 immunity for market-dominant ISPs that fail to follow First Amendment policies when moderating content, permitting civil action for such failures.¹²⁹ A more extreme proposal is the 21st Century Foundation for the Right to Express and Engage in Speech Act (FREE Speech Act), which would repeal section 230 altogether and reclassify certain internet platforms as “common carriers.”¹³⁰ This classification would prohibit discrimination against individual users based on class identification, political affiliation, religion, or location and take away an ISP’s immunity for using algorithms that “give any undue or unreasonable preference or advantage to any particular person, class of persons, political or religious group or affiliation, or locality.”¹³¹ The following Subpart discusses the implications of ISP common carriage, or public utility classification, in further detail.¹³²

There has been at least one bipartisan bill introduced—the Platform Accountability and Consumer Transparency Act (PACT Act)—that would only allow section 230 protection for ISPs that provide clear and transparent policy guidelines explaining permissible content and enforcement policies.¹³³ This Act would provide a short timeline to remove illegal content once notice was given, modifying the distributor immunity of *Zeran*.¹³⁴ When content is removed, the ISP must notify the user, give a clear explanation, and establish an appeals process.¹³⁵ Perhaps the most novel

128. See Stop Shielding Culpable Platforms Act, H.R. 2000, 117th Cong. (2021) (“This ill-conceived precedent . . . has resulted in online platforms having little to no responsibility to act as a ‘good Samaritan,’ even when moderating illicit material.”).

129. Curbing Abuse and Saving Expression In Technology Act, H.R. 285, 117th Cong. (2021) (creating a civil cause of action; allowing information content providers that suffered adverse treatment to bring suit against dominant ISPs that violated the content provider’s First Amendment rights).

130. 21st Century Foundation for the Right to Express and Engage in Speech Act, S. 1384, 117th Cong. § 232(c)(1) (2021).

131. *Id.* at § 232(c)(1)(C).

132. See *infra* Part IV(B).

133. Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. §§ 5–6 (2021).

134. *Id.* § 5(c)(1)(A)(i) (“[I]f a[n] [ISP] receives notice of illegal content or illegal activity . . . the provider shall remove the content or stop the activity not later than 4 days after receiving the notice, subject to reasonable exceptions, including concerns about the legitimacy of the notice.”).

135. *Id.* § 5(c)(2)(A)(i).

innovation of the PACT Act is the establishment of call centers to address user concerns and the requirement that ISPs issue biannual accountings of complaints filed by users.¹³⁶

The executive branch has also acknowledged the power section 230 provides to ISPs by making its own recommendations regarding regulation. During the Trump Administration, the former president issued an executive order voicing his concerns over the power of larger ISPs to “shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.”¹³⁷ While “much of” the executive order was precatory,¹³⁸ it did call on the Federal Communications Commission (FCC), Federal Trade Commission (FTC), the Department of Justice, and the Attorney General’s office to investigate the current interpretation of section 230 and ensure its application “properly reflects the narrow purpose of the section”¹³⁹ When President Biden took office, however, he overturned this executive order.¹⁴⁰ Although Biden has not reissued an order regarding section 230, during his presidential campaign he made it clear that he believed the law should be revoked and that ISPs should be held liable for “propagating falsehoods they know to be false”¹⁴¹

The Supreme Court has yet to address the broad application of section 230; however, Justice Thomas recently wrote a concurring opinion in a denial of certiorari, questioning whether the immunity lower courts have provided to ISPs has any basis in the statute’s textual interpretation or congressional intent.¹⁴² One of the primary themes in Justice Thomas’s argument is whether ISPs are editing, removing, or censoring information in

136. *Id.* §§ 5(a)(2)(C)(i); 5(d).

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

138. VALERIE C. BRANNON ET AL., CONG. RSCH. SERV., LSB10484, UPDATE: SECTION 230 AND THE EXECUTIVE ORDER ON PREVENTING ONLINE CENSORSHIP 3 (2020).

139. Exec. Order No. 13,925, 85 Fed. Reg. at 34,081.

140. Exec. Order No. 14,029, 86 Fed. Reg. 27,025, 27,025 (May 14, 2021).

141. The Editorial Board, *Joe Biden: Former Vice President of the United States*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html> [<https://perma.cc/GM5Q-6L8A>] (transcribing an interview with Joe Biden conducted on Dec. 16, 2019).

142. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 13–17 (2020) (Thomas, J., concurring) (questioning the abolishment of distinction between publisher and distributor liability for ISPs; the possible lack of good faith by discriminatory edits; the reorganization and redistribution of content with added commentary; and product-defects claims that threatened online safety and encouraged illegal behaviors).

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good faith.¹⁴³ Although Justice Thomas did not believe *Malwarebytes, Inc. v. Enigma Software Group USA, LLC* was the appropriate case to review section 230, he made it clear that the Court should take up the issue in the appropriate case.¹⁴⁴

Evidently, all branches of the federal government recognize the significance of section 230, the powerful immunity it provides, and that it is the primary obstacle in the way of meaningful internet reformation and ISP regulation. While it is likely the statute will one day be modified, or even repealed, it is not yet obvious when such change will occur.¹⁴⁵ There are far too many competing viewpoints on section 230 and a lack of common ground between the opposing sides. However, section 230 is not the only avenue being considered to deal with the harms of conflicting information.

B. Antitrust and Public Utilities

When discussing censorship and control over internet content, companies such as Google and Facebook are, quite literally, the elephants in the room.¹⁴⁶ Some legal scholars and legislative actors are increasingly advocating for stricter antitrust regulation of these big companies,¹⁴⁷ while others propose that the public utilities doctrine should be applied to these large ISPs.¹⁴⁸ Although both approaches have traditionally been used to economically regulate monopolies, proponents of each believe their preferred regulations could have significant consequences on social media dissemination

143. *Malwarebytes*, 141 S. Ct. at 16–17 (“[B]y construing § 230(c)(1) to protect *any* decision to edit or remove content, courts have curtailed the limits Congress placed on decisions to remove content.”) (citations omitted).

144. *Id.* at 14.

145. See Jeffrey D. Neuburger, *Group of Democratic Senators Release Latest CDA Reform Bill*, NAT’L L. REV. (Feb. 16, 2021), <https://www.natlawreview.com/article/group-democratic-senators-release-latest-cda-reform-bill> [<https://perma.cc/65KP-DMQU>].

146. See David McLaughlin, *U.S. DOJ Ready to Sue Google Antitrust Lawsuit Over Ad-Tech Business*, BLOOMBERG (Sept. 2, 2021, 4:47 PM), <https://www.bloomberg.com/news/articles/2021-09-01/u-s-doj-readying-google-antitrust-lawsuit-over-ad-tech-business> [<https://perma.cc/EXD7-GZA4>]; Cat Zakrzewski, *Rulings in Facebook, Apple Antitrust Cases Show How Tough It Is to Define a Monopoly in the Age of Big Tech*, WASH. POST (Sept. 10, 2021, 6:45 PM), <https://www.washingtonpost.com/technology/2021/09/10/gonzalez-zrogers-epic-apple-facebook-bigtech-monopoly/> [<https://perma.cc/XMH5-BSA6>].

147. Bill Baer & Caitlin Chin, *Addressing Big Tech’s Power Over Speech*, BROOKINGS (June 1, 2021), <https://www.brookings.edu/blog/techtank/2021/06/01/addressing-big-techs-power-over-speech/> [<https://perma.cc/SSU3-98ZP>].

148. See *infra* note 160.

and content.¹⁴⁹ However, the uphill battle of antitrust regulation and difficulties associated with public utilities classification only further illustrates the legal complexities presented by the problem of conflicting information.

1. Antitrust

Antitrust law is specifically designed to break apart monopolies and ensure that private companies remain accountable to the public and do not inhibit fair market competition.¹⁵⁰ Proponents seeking to regulate the control that ISPs have over the content of information believe that antitrust crackdowns will open the door to competition, encouraging ISPs to exercise heightened scrutiny over the information they disseminate.¹⁵¹ The argument is that antitrust regulation, which primarily focuses on the economic impacts of large businesses controlling the market, would indirectly affect content distribution by creating diverse avenues of information to the public.¹⁵²

While breaking up larger social media companies will have downstream effects on content diversification, the reality is that American antitrust law is failing to dismantle these social media giants.¹⁵³ Two recent lawsuits decided by the D.C. Circuit have dismissed claims brought by the FTC and forty-four states, as well as the District of Columbia, that Facebook is violating antitrust laws by “us[ing] its monopoly power to eliminate or destroy competitors in order to maintain its market dominance.”¹⁵⁴ In *FTC v. Facebook, Inc.*, the court was clear that, “whatever it may mean to the public, ‘monopoly power’ is a term of art under federal law with a precise economic meaning: the power to profitably raise prices or exclude competition in a properly defined market.”¹⁵⁵

149. See *supra* note 147. Cf. *infra* notes 173–76 and accompanying text (discussing the significance of companies like Google and Facebook as “informational infrastructures” and how classification of these companies as public utilities would be subject to algorithmic regulation that promotes a “search neutrality,” which would disallow biased search results).

150. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1630–31 (2018) (citations omitted).

151. Baer & Chin, *supra* note 147.

152. *Id.*

153. Zakrzewski, *supra*, note 146.

154. *New York v. Facebook, Inc.*, No. 20-3589 (JEB), 2021 U.S. Dist. LEXIS 127227, at *18 (D.D.C. June 28, 2021); see also *FTC v. Facebook, Inc.*, No. 20-3590 (JEB), 2021 U.S. Dist. LEXIS 119540, at *1 (D.D.C. June 28, 2021).

155. *FTC*, 2021 U.S. Dist. LEXIS 119540, at *40 (“[T]he FTC alleges only that Facebook has ‘maintained a dominant share of the U.S. personal social networking market (in excess of 60%) since 2011, and that ‘no other social network of comparable scale exists in the

Legislators have proposed bills to amend applications of current anti-trust enforcement and update the law to specifically target “Big Tech.”¹⁵⁶ Critics, however, wisely point out that going against large social media companies frustrates capitalist ideals of supply and demand because consumers prefer larger social media platforms to make significant connections with the world—which, after all, is the primary goal of online social networks.¹⁵⁷ Regardless, it seems unlikely the litigation battering ram will burst through the stronghold of current antitrust principles and, even if it does, it will not be for years to come.¹⁵⁸ Nor is it expected that meaningful legislation will be passed any time soon to combat the power of social media

United States.’ That is it. These allegations—which do not even provide an estimated actual figure or range for Facebook’s market share at any point over the past ten years—ultimately fall short of plausibly establishing Facebook holds market power.”) (citations omitted); see also *Facebook*, 2021 U.S. Dist. LEXIS 127227, at *41.

156. Kelly Anne Smith & Benjamin Curry, *Big Tech in Crosshairs as Congress Takes up Antitrust Reform*, FORBES ADVISOR (Mar. 15, 2021, 8:15 AM), <https://www.forbes.com/advisor/investing/big-tech-antitrust-reform/> [<https://perma.cc/2C6Z-HEWR>] (“There’s growing bipartisan agreement that more needs to be done to reign [sic] in Big Tech companies—specifically Facebook, Google and Amazon—which many argue have become too powerful.”); see also Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021).

157. Gregory Day, *Monopolizing Free Speech*, 88 FORDHAM L. REV. 1315, 1358–59 (2020) (“Consumers of a social media platform, for instance, benefit as a platform’s network grows with additional users. Once the platform achieves a critical size, it becomes almost impossible for upstart companies to replicate the dominant firm’s network—i.e., network effects. As an example, users would likely prefer one Facebook to six smaller platforms equaling Facebook’s cumulative size.”); Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 8 (2001) (“If the network characteristic of a good is significant, then consumers will be attracted to the firm with the largest market share. In the absence of interconnection or compatibility, consumers will receive a larger network benefit from choosing the good or service that has the largest number of other users.”).

158. Bill Baer, *How Senator Klobuchar’s Proposals Will Move the Antitrust Debate Forward*, BROOKINGS (Feb. 8, 2021), <https://www.brookings.edu/blog/techtank/2021/02/08/how-senator-klobuchars-proposals-will-move-the-antitrust-debate-forward/> [<https://perma.cc/8FE3-RX4R>] (“[E]ven if the allegations against Facebook and Google are proven . . . it is unclear whether those behaviors would violate current antitrust law—at least as the courts today interpret it The trial in the consolidated action against Google won’t begin until September 2023—almost 3 years after the filing of the complaints that involve allegations of misconduct going back many years. Delays in the trial schedule are likely and appeals inevitable. That is a long time for the American public to wait.”).

conglomerates, as bipartisan support to enact more extreme measures is improbable.¹⁵⁹

2. Public Utilities

Another proposal attempting to tackle the “bigness” of social media networks suggests reclassifying ISPs as public utilities.¹⁶⁰ The public utilities doctrine serves a similar purpose as antitrust law in that it seeks to hold monopolies accountable to the public in their control of the market.¹⁶¹ However, the public utilities doctrine is not concerned with breaking up big companies.¹⁶² Rather, legislative classification of a company as a “public utility” occurs when the goods produced are so essential that it is beneficial for the public to regulate its cost and distribution, such as water or electricity.¹⁶³ A company classified as a public utility is encouraged to be a monopoly *under the public control* because it is considered the most economically efficient way to ensure that such essential goods are supplied in proportion to the demand.¹⁶⁴

The idea of social media providers being regulated as a public utility began with arguments for “net neutrality,” which would see broadband providers, such as AT&T or Comcast, being considered the common carriers,

159. Claude Marx, *Partisan Splits on Capitol Hill Over Antitrust Likely, But Less Rancor Between DOJ, FTC*, MLEX (Nov. 9, 2020, 9:25 AM), <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/partisan-splits-on-capitol-hill-over-antitrust-likely-but-less-rancor-between-doj-ftc> [<https://perma.cc/N66S-HY8Q>] (“At a time when once arcane issues involving antitrust are making headlines, including whether the laws are even adequate to rein in tech giants, it’s doubtful a newly elected Congress will succeed in tackling such big matters.”).

160. See 21st Century Foundation for the Right to Express and Engage in Speech Act, S. 1384, 117th Cong. (2021); see also Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 *Yale J.L. & Tech.* 391, 398 (2020); Rahman, *supra* note 150, at 1625; Benjamin H. Winters, Note, *A Clear and Present Danger: The Need for Regulated Accountability for Online Service Providers to Preserve and Promote Free Speech, Notice, and Due Process*, 25 *CARDOZO J. EQUAL RTS. & SOC. JUST.* 161, 175–76 (2018).

161. Rahman, *supra* note 150, at 1634.

162. See *id.* (“[P]ublic utility regulation covered the most troubling forms of private power: where the firm could not be broken up into smaller entities on an antitrust model, and where the private actors therefore retained control of a necessity upon which many depended.”).

163. Song Bac Toh, *The Argument for the Internet As A Utility: Is it Time to Change How it’s Delivered?*, FORBES (June 17, 2020, 8:10 AM), <https://www.forbes.com/sites/forbestechcouncil/2020/06/17/the-argument-for-the-internet-as-a-utility-is-it-time-to-change-how-its-delivered/?sh=43b658567729> [<https://perma.cc/LY2F-E4AW>].

164. Rahman, *supra* note 150, at 1636–37.

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or public utilities, of the internet.¹⁶⁵ This is a natural corollary from the current classification of “telecommunication services” as public utilities under the Telecommunications Act of 1996.¹⁶⁶ However, in 1996 the full breadth of the internet could only be guessed, and lawmakers were hesitant to impose such regulations on competing market innovations.¹⁶⁷ Although efforts by the FCC have failed to effectively create net neutrality,¹⁶⁸ it has not stopped recommendations to apply the public utilities doctrine to large social media platforms, such as Google and Facebook.

K. Sabeel Rahman has arguably presented the most cohesive model for the modern-day public utility, advocating that the doctrine be reconfigured to focus “not in the economic sense of being nonrival and nonexcludable, but in a broader social sense of comprising the basic *infrastructure* of modern society.”¹⁶⁹ He believes considerations of economic production, the effects of the goods and services, and the potential for consumer exploitation should define whether a company can be considered a public utility.¹⁷⁰

Rahman argues that Google and Facebook are “online-enabled [informational] infrastructure for the modern economy”¹⁷¹ and describes how these ISPs fit the prototype for the modern public utility, stating:

Google and Facebook are increasingly part of our informational infrastructure, shaping the distribution of and access to news, ideas, and information upon which our economy, culture, and increasingly politics depend on. As information platforms, Google and Facebook represent new forms of infrastructure But this creates a vulnerability among users who could be

165. David McCabe, *Why Regulating Google and Facebook Like Utilities is a Long Shot*, AXIOS (Sept. 22, 2017), <https://www.axios.com/why-regulating-google-and-facebook-like-utilities-is-a-long-shot-1513305664-9a388f01-f71a-4b45-8844-fec8b74d95d6.html> [https://perma.cc/RN48-2WS3].

166. Rahman, *supra* note 150, at 1649; *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 71 (codified as amended 47 U.S.C. § 254) (discussing standard practices to ensure the promotion of universal access to telecommunications services).

167. Ehrlich, *supra* note 88, at 6–7.

168. Michelle Castillo & Todd Haselton, *The FCC Has Reversed a 2015 Rule That Could Change How You Access and Pay for Internet Service*, CNBC (Dec. 14, 2017, 3:43 PM), <https://www.cnbc.com/2017/12/14/fcc-reverses-open-internet-order-governing-net-neutrality.html> [https://perma.cc/QR9V-MDRW] (reporting on the FCC’s vote to eliminate the 2015 requirement that broadband service providers treat all internet “traffic as equal,” foregoing traffic prioritization, due to “investment decline,” lack of innovation, and lack of growth).

169. Rahman, *supra* note 150, at 1641.

170. *Id.*

171. *Id.* at 1668.

excluded from access, or, *more troublingly, may be consuming a tainted or manipulated information stream.*¹⁷²

Rahman applies a regulatory scheme promoting “search neutrality,” which would regulate search results to ensure there are no discriminatory practices, branded products, or information that is algorithmically promoted above other retailers.¹⁷³ This, in turn, ensures a “public obligation” against varying forms of discrimination that may result.¹⁷⁴ The unlikelihood of a “public option,” which would be considered a private competitor to Google and Facebook, is mitigated by the equality of information that would derive from algorithmic regulation.¹⁷⁵

While the public utilities doctrine seems tempting to apply to social media enterprises, it comes with major pitfalls. First, Congress is currently at a standstill when it comes to CDA reform, a much less invasive method of regulation than reclassifying the entire internet regime. It is highly unlikely to reach a consensus as to whether platforms such as Google or Facebook should be classified as a public utility. Second, social media platforms are free and open to all—negating the fundamental purpose of a public utility classification, which is controlling cost and distribution of essential goods.¹⁷⁶ Third, while Rahman makes a convincing argument that these platforms make up the “infrastructure” of information dissemination, public utility classification raises concerns of what entity gets to decide the algorithmic method of information dissemination in search results. The idea of a government regulatory agency placing restrictions on the type of content or information presented in search queries raises serious First Amendment concerns.

172. *Id.* at 1669 (emphasis added).

173. *Id.* at 1672, 1675 (“[Facebook and Google’s] path to dominance is subtle in part because it can masquerade as being consumer-friendly: initially the aggregation of services and users on the platform simply makes the platform more desirable and useful for consumers, but once competitors are sufficiently weakened, these platforms can increase prices as monopolies or monopsonies.”).

174. *Id.* at 1677.

175. *Cf. id.* at 1673 (“A public competitor to Google may seem a little farfetched, but consider the wide and growing use of what is termed peer production in the digital universe—not for profit collaborations, the best known of which is Wikipedia.”).

176. Toh, *supra* note 163.

C. *The First Amendment: Commercial Speech and the Modern-Day Algorithm*

As previously discussed, a predominant cause of conflicting information stems from social media platforms’ algorithmic programs that continually validate a user’s ideological position. While this issue is vital to the topic of information dissemination, advocating for algorithmic regulation is like climbing a sheer cliff with few footholds. There are numerous considerations involved in proposals to regulate the modern-day algorithm.¹⁷⁷ However, this Comment only touches on the one most relevant to this discussion: social media companies’ apparent inoculation under the commercial speech doctrine for its algorithmic distribution of information.¹⁷⁸

This apparent inoculation comes from the Court’s decision in *Sorrell v. IMS Health Inc.*¹⁷⁹ In *Sorrell*, pharmaceutical companies sued the Attorney General of Vermont to challenge a statute prohibiting pharmacies from selling doctors’ prescribing behaviors to data mining companies that sold reports to pharmaceutical manufacturers.¹⁸⁰ The Vermont statute, however, only prohibited dissemination to data mining companies; prescriber-identifying information could still be provided for research, education, or care management purposes.¹⁸¹ The Court declared the law unconstitutional under the First Amendment because Vermont was engaged in content- and speaker-based restrictions by disallowing prescriber-identifying information for marketing purposes.¹⁸²

177. See generally Gina-Gail S. Fletcher, *Deterring Algorithmic Manipulation*, 74 VAND. L. REV. 259, 318–21 (2021) (discussing a framework for algorithmic regulation that would punish programmers for resulting harms on the financial market, rather than the intention that created the algorithm, as such intent is often impossible to detect); Charlotte A. Tschider, *Beyond the “Black Box”*, 98 DENV. L. REV. 683, 710–13 (2021) (discussing the idea of transparency in algorithmic programming in contradistinction to the creators’ trade secret protection); Christina M. Claxton, Note, *Private Offerings in the Age of Surveillance Capitalism and Targeted Advertising*, 74 VAND. L. REV. 1187, 1213–17 (2021) (discussing the influence of “targeted advertising” on the consumer marketplace and its influence on securities investments); Dan Feldman & Eldar Haber, *Measuring and Protecting Privacy in the Always-On Era*, 35 BERKELEY TECH. L.J. 197, 227–43 (2020) (discussing the potential for algorithms to be programed as a solution to data privacy concerns).

178. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011).

179. *Id.*

180. *Id.* at 561.

181. *Id.* at 559–60.

182. *Id.* at 570–71 (“Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment

The Court found that Vermont failed to show it had a “substantial governmental interest” that was “proportional to the resulting burdens placed on speech,” and that “the law [did] not seek to suppress a disfavored message.”¹⁸³ Even though the statute allowed doctors to consent to the sale of their information, the Court found that information could still be used by “speakers whose message the State supports.”¹⁸⁴ As to Vermont’s argument that the doctor-patient relationship was undermined by allowing pharmaceutical companies to influence treatment decisions, the Court stated, “[i]f pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it.”¹⁸⁵

Sorrell presents a stumbling block to the regulation of internet algorithms and the information they distribute. Should the government begin dictating the parameters of algorithm information distributed by Google search results, for example, it runs the risk of restricting Google’s First Amendment rights and “suppress[ing] a disfavored message.”¹⁸⁶ If the law tries to impede the use of user data for advertisements or newsfeeds absent user consent, while still allowing content recommendations regardless of user consent,¹⁸⁷ it runs the risk of promoting “speakers whose message the State supports.”¹⁸⁸ Finally, attempting to set boundaries on targeted marketing, including targeted newsfeeds, can easily be shot down because “the fear that speech might persuade provides no lawful basis for quieting it.”¹⁸⁹

Sorrell provides a brief spotlight on the Court’s treatment of data collection and dissemination as a form of speech. In recognition of the larger

purposes The State has imposed content- and speaker-based restrictions on the availability and use of prescriber-identifying information. So long as they do not engage in marketing, many speakers can obtain and use the information [The statute] imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify the application of heightened scrutiny.”)

183. *Id.* at 572 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662–63 (1994)).

184. *Id.* at 574 (“To obtain the limited privacy allowed by [the statute], Vermont physicians are forced to acquiesce in the State’s goal of burdening disfavored speech by disfavored speakers.”).

185. *Id.* at 576 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

186. *Id.* at 572 (citing *Turner Broad. Sys., Inc.*, 512 U.S. at 662–63).

187. *Cf.* Jennifer M. Logg et al., *Do People Trust Algorithms More Than Companies Realize?*, HARV. BUS. REV. (Oct. 26, 2018), <https://hbr.org/2018/10/do-people-trust-algorithms-more-than-companies-realize> [<https://perma.cc/44CA-NAUU>] (discussing studies showing people prefer optimization of algorithmic recommendations).

188. *Sorrell*, 564 U.S. at 574.

189. *Id.* at 576 (citing *Brandenburg*, 395 U.S. at 447).

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problem of computer data collection, the Court acknowledged that it “presents serious and unresolved issues with respect to personal privacy.”¹⁹⁰ However, the Court makes clear that, “[i]n considering how to protect those interests . . . the State cannot engage in content-based discrimination to advance its own side of a debate.”¹⁹¹

V. SOLUTIONS AND RECOMMENDATION

Conflicting information continues to sow discord among the American political parties, stifling bipartisan solutions to increasingly divisive issues. While COVID-19 is illustrated here, conflicting information affects public discourse of other topics such as climate change,¹⁹² political elections,¹⁹³ and gun control.¹⁹⁴ Although the harms and division created by conflicting information persist, as discussed in this Comment, effective legal solutions are clouded by political loyalties and restrained by current jurisprudence.

This Part proposes a compromise that would see social media companies adopt American free speech principles by creating limited forums for discussion of conflicting information on its platforms. This solution would simultaneously prohibit the spread of conflicting information (which will satisfy the concerns of more liberal constituents) while providing an outlet of expression and promoting users’ free speech (which will satisfy more conservative constituents). Subpart A presents a cohesive theory derived from social science research to support the proposal that creation of limited forums on social media sites are the best option to combat conflicting information. Subpart B discusses how limited forums on social media can be

190. *Id.* at 579.

191. *Id.* at 579–80.

192. *E.g.*, Carolyn Gramling, *Climate Change Disinformation is Evolving. So Are Efforts to Fight Back*, SCIENCE NEWS (May 18, 2021, 9:00 AM), <https://www.sciencenews.org/article/climate-change-disinformation-denial-misinformation> [<https://perma.cc/4VG5-ELGA>].

193. *E.g.*, Matt Vasilogambros, *Disinformation May Be the New Normal, Election Officials Fear*, PEW (Sept. 21, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/21/disinformation-may-be-the-new-normal-election-officials-fear> [<https://perma.cc/C5US-N47R>].

194. *E.g.*, Chris Ladd, *Ten Lies Distort the Gun Control Debate*, FORBES (Oct. 6, 2017, 5:05 PM), <https://www.forbes.com/sites/chrisladd/2017/10/06/ten-lies-distort-the-gun-control-debate/?sh=50f728161fad> [<https://perma.cc/AV5F-AE3H>]; *see also* Charles C.W. Cooke, *How Media Misinformation About Mass Murderers is Harming Us*, NRA AM.’S 1ST FREEDOM (Jan. 26, 2020), <https://www.americas1stfreedom.org/articles/2020/1/26/how-media-misinformation-about-mass-murderers-is-harming-us> [<https://perma.cc/4882-3RDW>] (discussing an alternate viewpoint of how mass shootings are rare occurrences that are misrepresented in the media as an everyday danger).

designed to both promote online discourse of conflicting information while also controlling its widespread dissemination. Finally, Subpart C discusses social media companies' incentives for adopting the limited forum construct and the potential of legal enforcement.

A. Using Social Science Research to Understand the Best Methods of Regulating Conflicting Information

Conflicting information not only raises questions of internet regulation, but it is also a social and psychological phenomenon. A primary purpose of this Comment is to bring social science research to the forefront so that legal scholars and legislatures can operate with a clear understanding of the underlying causes of conflicting information. These empirical findings should guide the efforts of private companies and legislatures to combat the harmful effects of conflicting information. This Subpart briefly summarizes the observations gained from research that has provided the underlying theory of why limited forums on social media platforms are the best method of regulation.

The main takeaway of the social science research is that there is a difference between the *sharing* of conflicting information and the *belief* of conflicting information. This indicates that regulatory efforts should adopt strategies that target each distinction. For those that share the information, prompting the user that such information has been flagged as "false" or making the sharing process more time consuming may be the key to stopping its dissemination. The goal here is for regulatory efforts to make users contemplate the information they are disseminating as people share conflicting information "because they fail to stop and reflect about the accuracy of what they see on social media."¹⁹⁵

As for those with sincerely held beliefs in conflicting information, research indicates that censorship will only strengthen their viewpoints. The belief of conflicting information often originates from sources that appear reputable and are posted to a user's social media page, which can then be widely distributed by the social media algorithm. The belief is then further reinforced by "in-group" and "out-group" mentality that divides the world into categories of "us" versus "them." For social media companies and legislatures to declare conflicting information as "true" or "false" only perpetuates these categories and disenfranchises the group that believes the "false" information. This disenfranchisement causes believers to cling to their "in-group" and view the "out-group," in this case the parties that seek to censor the information, as their oppressors.

195. *The Psychology of Fake News*, *supra* note 26, at 399.

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To combat belief in conflicting information, it is imperative that each view is respected as a valid position. This is not to say that social media companies or legislators must agree with the conflicting information—there can still be an agreement to disagree. The companies and legislators can still take an official position on a given topic. But it must be recognized that erasing the conflicting view from a platform will have the opposite effect intended—it will reinforce the belief and strengthen the divide between the perceived “in-group” and “out-group.”

B. Creating Limited Forums on Social Media Platforms

Given the conclusions drawn from social science research, this Comment takes the novel position that social media companies should create limited forums within their platforms where discussion of divisive issues may be contained. Presented here is a rudimentary design of an online limited forum model that operates as a starting point to strike a balance in the contentious debates surrounding online regulation of conflicting information.

The limited forum concept is derived from the public forum doctrine, which details the regulation of private speech on government-owned or government-controlled property.¹⁹⁶ Some government property, “such as streets, sidewalks, and parks” are considered “traditional public forums,” and they are generally open to the public for assembly, debate, and “expressive conduct” regarding all issues.¹⁹⁷ In contrast, a government may create a “limited public forum” that is designated for topic-specific discussions.¹⁹⁸ In a limited public forum, the government may not discriminate on the basis

196. *E.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (“[T]he Court has adopted a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.”).

197. *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019) (citing *Am. Civ. Liberties Union v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005)).

198. *See Cornelius*, 473 U.S. at 800, 803–04 (“[The Court will not] infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.” (citing *Jones v. N.C. Prisoners’ Lab. Union*, 433 U.S. 119 (1977))) (“In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum. Accordingly, [the Court has] held that military reservations and jailhouse grounds do not constitute public fora.” (first citing *Greer v. Spock*, 424 U.S. 828 (1976); and then citing *Adderley v. Florida*, 385 U.S. 39 (1966))).

of viewpoint, so long as the topic being discussed fits the objectives of the forum.¹⁹⁹

For the purposes of creating a limited forum on social media platforms, the same standard of viewpoint neutrality would apply since the entire purpose of an online limited forum is to allow a place for discussion of different views on divisive issues. However, the judicial standards imposed on the government's creation of limited platforms would be inapplicable.²⁰⁰ The only standard by which the social media company would be measured would be detailed in its user agreement and community guidelines.

Facebook is used here as an example of how the limited forum model could be implemented on a social media platform. On Facebook, there are distinctions between user profiles, user pages, and user groups.²⁰¹ Profiles are the users' personal platforms; pages are utilized primarily for businesses or organizations; groups are created to communicate "shared interests with certain people."²⁰² These distinctions suggest that creating a limited forum for discussion of certain topics on a platform like Facebook is possible.

The creation of online limited forums should be topic-specific. Using COVID-19 as an example, potential topics for limited forum pages could be "COVID-19 Origins," "Ivermectin Treatments," or "COVID-19 Vaccines." The limited forum should be Facebook-created because the company is in the best position to know which conflicting information is most spread and shared over its platform. The limited forum would be open to all, much like a user page for businesses or organizations.²⁰³ However, the primary constraint is that information from the limited forum page could not be shared on a user's personal profile, group, or another user page. If a

199. *See id.* at 800 ("Access to a nonpublic forum, however, can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983))).

200. *Id.* ("[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.").

201. *What's the Difference Between a Profile, Page and Group on Facebook?*, FACEBOOK: HELP CENTER, <https://www.facebook.com/help/337881706729661> [<https://perma.cc/2E6-ST4P>].

202. *Id.*

203. Marissa Perino, *How to Make a Facebook Business Page Private by Unpublishing It, so That You Can Make Edits or Revamp the Page*, BUS. INSIDER (July 24, 2020, 3:15 PM), <https://www.businessinsider.com/how-to-make-facebook-business-page-private> [<https://perma.cc/47BS-3LW9>] ("[T]here's no option to make a Facebook business page permanently private to only certain people, as the point of a business page is to promote something to the public.").

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user attempts to post an article from the limited forum elsewhere, only a link to the forum page will be provided, not the article or its content. In other words, content from the limited forum page would have restricted sharing capacity.

The implications of this system are two-fold. First, it contains the conflicting information to a specific platform and stops widespread dissemination, effectively putting a roadblock to the *sharing* aspect of conflicting information. Second, it simultaneously provides believers of conflicting information a platform to express and discuss those views freely, providing their own independent research and sources for others on the limited forum to review—effectively validating their right to *believe* the information.

One potential issue is that users often share articles, posts, or sources from websites outside of Facebook on their profiles, pages, or groups. This is likely the most difficult hurdle of the limited forum proposal—though it is not impossible to overcome. As previously detailed, social media algorithms are sophisticated categorization tools that could flag information using a combination of keywords to indicate such content belongs on a specific limited forum. When a user tries to post such information to his or her personal page, the article would be “flagged” by the algorithm and moved to the limited forum covering that topic. Once the article is flagged and moved to the limited forum, a link to the forum will appear on the user’s profile, page, or group, indicating where the article has been placed. If a user wants to contest the flagged article, he or she can notify Facebook to request a review of the algorithmic designation.

Another potential problem is user preference. For example, some users may be unhappy with the inability to share conflicting information to their personal profiles, as these profiles are considered a means of self-expression in the digital world.²⁰⁴ To address these concerns, Facebook can create a “user-override” that would allow them to share conflicting information on their profiles. This user-override can be designed as a step-by-step procedure with a series of prompts the user must engage with before such information can be shared. These prompts can include warnings that the information may not be accurate, verification that the article itself is to be shared instead of the forum link, and whether the user wants to share the link to the forum with the article. In other words, overriding the limited forum designation of conflicting information would be a time-consuming process. This user-override system could also be applied when a user is trying to share conflicting information on their non-public

204. Erica R. Bailey et al., *Authentic Self-Expression on Social Media is Associated with Greater Subjective Well-Being*, NATURE COMMUNICATIONS, Oct. 6, 2020, at 1, 2.

profiles or newsfeeds, thereby ensuring the content is viewed by only those with access to the user's private, personal profile.²⁰⁵ The user-override process considers users' preferences while also combating the *sharing* of conflicting information by urging users to *think* about what they are sharing and why they are sharing it.

Another positive aspect of topic-designated limited forums is that many community guideline violations would be contained within the limited forum. This would allow Facebook content monitors to focus attention on one specific page to control harmful or abusive content, rather than monitoring numerous pages at once.²⁰⁶ It also facilitates the ultimate purpose of the limited forum, which is to promote open discussion of contrary viewpoints to help achieve common ground and understanding with the opposition.

Though Facebook is the most ubiquitous, it is not the only company under fire for its role in the promulgation of conflicting information—social media platforms such as YouTube, Twitter, and TikTok have all been hard-pressed to stop the flow of conflicting information on their platforms.²⁰⁷ While initiating a limited forum on these other platforms may be unrealistic, the *spirit* of the limited forum may be implemented in other ways. For example, YouTube could create its own symposiums, inviting experts in various fields with differing viewpoints to engage in an open, rational, and peaceful discussion of a given topic, such as the debate regarding COVID-19 being a naturally occurring or man-made virus. YouTube can still censor the *spread* of conflicting information, such as scientific falsities promoted by users without the appropriate credentials or educational background; however, it can validate the *belief* of conflicting information by allowing the discussion to be held by qualified individuals with opposing views.

It is recognized that this is an idealistic proposal—and it is meant to be. The objective here is to create a starting point that promotes reconciliation of the goals expressed by each side in this debate: the desire to stop

205. *What Audiences Can I Choose From When I Share on Facebook?*, FACEBOOK: HELP CENTER, <https://www.facebook.com/help/211513702214269> [<https://perma.cc/SRQ6-7EFZ>] (detailing how the settings of “Public,” “Friends,” “Only Me,” or “Custom” allow users to control who sees the information disseminated on their profiles and timelines).

206. *See Facebook Community Standards*, META: TRANSPARENCY CTR., <https://transparency.fb.com/policies/community-standards/?from=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards> [<https://perma.cc/W6H5-7ZDU>].

207. Kaveh Waddell, *On Social Media, Only Some Lies Are Against the Rules*, CONSUMER REPS. (Aug. 13, 2020), <https://www.consumerreports.org/social-media/social-media-misinformation-policies/> [<https://perma.cc/RYX4-P7SG>].

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the harmful effects of conflicting information balanced against the desire to protect individual expression and promote American free speech values. While a limited forum on social media platforms strikes a middle ground, there must be incentive for social media companies to implement such a model. The next Subpart contemplates such incentives and discusses the potential for enforcement.

C. Incentivizing Social Media Limited Forums and the Potential of Legal Enforcement

This Subpart answers two of the foremost concerns with creating limited forums on social media platforms: whether social media companies have any incentive to implement such a model of their own volition and whether such a model could be legally enforced. Section (i) explains that social media companies do have the incentive to implement the limited forum model outside of legal enforcement. Section (ii) proposes that a legislative recommendation, as opposed to regulation, may be enough to encourage compliance.

1. Company Incentives for Self-Regulation

Social media companies have been under fire for encouraging and propagating the spread of conflicting information, with over seventy percent of Americans believing these companies play a role in widespread dissemination.²⁰⁸ Facebook has been a primary target, especially after whistleblower Frances Haugen released “The Facebook Papers,” creating the “most intense and wide-ranging crisis” the company has ever faced,²⁰⁹ causing its stock price to drop and leading many to call for a change in Facebook’s leadership.²¹⁰ The Facebook Papers reveal the company’s

208. Amanda Seitz & Hannah Fingerhut, *Americans Agree Misinformation Is a Problem, Poll Shows*, AP NEWS (Oct. 8, 2021), <https://apnews.com/article/coronavirus-pandemic-technology-business-health-misinformation-fbe9d09024d7b92e1600e411d5f931dd> [<https://perma.cc/L4JC-9DE4>] (“According to the poll, 79% of Republicans and 73% of Democrats said social media companies have a great deal or quite a bit of responsibility for misinformation.”).

209. Clare Duffy, *The Facebook Papers May Be the Biggest Crisis in the Company’s History*, CNN BUS. (Oct. 25, 2021, 7:57 AM), <https://www.cnn.com/2021/10/25/tech/facebook-papers/index.html> [<https://perma.cc/KCW9-HFAW>]; *see also supra* Part III(B).

210. Paul R. La Monica, *Analysis: Wall Street Sends a Clear Message to Facebook*, CNN BUS. (Oct. 25, 2021, 10:56 PM), <https://www.cnn.com/2021/10/25/investing/facebook-papers-stock/index.html> [<https://perma.cc/4AY4-MZD2>] (“[Facebook’s] stock fell 5% this past Friday alone and is now more than 15% below the peak price it hit earlier this

awareness that its algorithms “steer users to content that sow divisions” and that some users were “gaming the system” by posting “outrageous” content to increase user engagement and manipulate the algorithm to make posts go viral.²¹¹

It is not difficult to conclude that social media companies have significant incentive to make changes to the way their platforms disseminate information, nor is it farfetched that they would independently adopt a limited forum model. Not only would this model appease critics against the spread of conflicting information, but it would also appeal to those voicing concerns over users’ freedom of speech. The cost of implementing such a system would likely be minimal, as the tools necessary are readily available, including the current ability to distinguish between profiles, pages, and groups, as well as the sophisticated algorithms that can filter and categorize information. Most important, adopting such a model would repair social media companies’ image and restore public faith that these companies are actively working toward creating a balanced and enjoyable experience for its users.

2. *Are Limited Forums on Social Media Legally Enforceable?*

Although social media companies are incentivized to self-regulate, there is a question of whether the law can impose such restrictions. These private companies have First Amendment rights protecting the information they disseminate, making it difficult for legislatures to enact meaningful regulation of conflicting information that would not be considered “content-based discrimination” by the courts.²¹² However, the proposed method of legal enforcement in this Comment would bypass First Amendment concerns and allow for recommendations to be made through section 230 modifications.

Section 230 is the primary form of protection social media companies use to stave off litigation regarding content regulation, or lack thereof, on its platforms. The debate surrounding the modification of section 230 mirrors the opposing views between proponents that want to censor conflicting information and those wanting greater protections for user speech. The proposal of limited forums on social media platforms strikes that balance

year Investors, lawmakers, advertisers and users are increasingly furious with Facebook, signaling it might be time for a change in leadership.”).

211. Musadiq Bidar, *Facebook Researchers Saw How Its Algorithms Led to Misinformation*, YAHOO!NEWS (Oct. 25, 2021), <https://news.yahoo.com/facebook-researchers-saw-algorithms-led-125850576.html> [<https://perma.cc/2PVE-SEGU>].

212. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011).

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between these opposing views. But how should section 230 be modified to accommodate online limited forums?

The current congressional proposals for section 230 modification all have their merits—however, none will be fully capable of battling conflicting information. The SAFE TECH Act is a worthwhile venture that seeks to end online discrimination and harassment, but would do little to stop the dissemination of conflicting information.²¹³ The proposed bills Protecting Americans from Dangerous Algorithms Act, the CASE-IT Act and the 21st Century FREE Speech Act all pose significant First Amendment concerns as each attempts to restrict private social media companies’ control over the information disseminated on their platforms.²¹⁴ The PACT Act is most aligned with the limited forum concept as it would hold companies to the standards and policies set forth in their user agreements and community guidelines, which is the same standard under which an online limited forum would be measured.²¹⁵

This Comment goes a step further, focusing on the initial purpose underlying the creation of section 230. The congressional findings in section 230 are that the internet is a “forum for a true diversity of political discourse . . . and myriad avenues for intellectual activity.”²¹⁶ This speaks to the heart of why regulation of conflicting information is such a difficult topic. The desire to stop the spread of harmful information is balanced with the desire to ensure “diversity” of viewpoints.²¹⁷ As Justice Thomas explains, the emphasis should be placed on the requirement that these companies edit, control, or censor information in *good faith*.²¹⁸ And that is the standard proposed here: that social media companies cannot obtain section 230 immunity without first showing they acted in good faith. But how do companies exercise their power in good faith?

To give social media companies guidance on how to exercise “good faith” when they edit, control, or censor information, the legislature can

213. Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act, H.R. 3421, 117th Cong. (2021).

214. Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. (2021); Curbing Abuse and Saving Expression In Technology Act, H.R. 285, 117th Cong. (2021); 21st Century Foundation for the Right to Express and Engage in Speech Act, S. 1384, 117th Cong. (2021).

215. Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. (2021).

216. 47 U.S.C. § 230(a)(3).

217. *See id.*

218. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct 13, 16 (2020), *denying cert. to Enigma Software Grp. USA, LLC*, 946 F.3d 1040 (9th Cir. 2019).

recommend a limited forum model. This recommendation can be embedded within the statute as a mere description of the “good faith” requirement, providing direction to social media companies without making strict compliance mandatory. This means social media companies will definitely achieve section 230 immunity should they follow the recommendations and, if they do not, *may* achieve section 230 immunity if they are able to show they acted in good faith by other means.

The cusp of section 230’s “good faith” definition is that social media companies remain objective regarding their classifications of information, ensuring that viewpoints are not removed simply because the private companies take a different position. This objectivity, however, is to be guided by the transparency provided in the companies’ user agreements and community guidelines, as proposed by the PACT Act. In other words, social media companies will not obtain section 230 protection if they do not follow the provisions set out in their user agreements or if their user agreements are so unclear that a reasonable person would be unable to understand that certain content is in violation of the companies’ policies.

Certain information that social media companies decide is too controversial or subversive for widespread dissemination, but not necessarily violative of their community guidelines, may be limited to specific online forums for discussion within the platform. This is especially true of conflicting information, which often fits the congressional purpose of section 230 by promoting “true diversity of political discourse” and “myriad avenues for intellectual activity.”²¹⁹ The significance here is that a legislative recommendation allows private companies to decide what information to stop distributing, bypassing any First Amendment concerns that the government is promoting “speakers whose message [it] supports” or “suppress[ing] a disfavored message.”²²⁰

To reiterate, these proposed modifications to section 230 do not provide legal methods of enforcement: to provide such regulation is likely to run afoul of current First Amendment jurisprudence. However, these proposed modifications do provide recommendations that give clear guidance to social media companies on what the standard of good faith should be under section 230. This standard is based on three primary foundations: the congressional purpose of section 230, the policies detailed in companies’ user agreements and community guidelines, and the freedom of companies to set boundaries on their platforms while still allowing users to share ideas and information. This recommendation would also guide judicial

219. § 230(a)(3).

220. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572–573 (2011).

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determinations of good faith under section 230. As litigation arises, the judiciary can flesh out the standard even further by following the underlying spirit of the good faith recommendation pursuant to its legislative goal.

CONCLUSION

Misinformation, disinformation, and fake news have created severe social divisions by alienating individuals with opposing political views and beliefs. A primary goal of this Comment is to redefine these terms as “conflicting information” to objectively discuss this social problem without invoking any underlying political ideologies. A comprehensive review of social science research is presented to lay the foundation for balancing the desire to stop the harmful effects of conflicting information with the desire to protect American free speech principles. As discussed throughout this Comment, regulating the harmful effects will be difficult because of underlying political loyalties and the current jurisprudence on commercial speech, but the online limited forum model presented here is built on neutral political ground that evades free speech concerns. Although the online limited forum is an idealistic solution, the spirit of the ideal can hopefully spark the beginning of much-needed political compromise.

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