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Our Future Democracy: Reconsidering Regulation of Social Media in the Era of Trumpian Politics

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The political climate in the U.S.A., and in much of the world, has taken on an oppressive quality. Both in terms of real-world oppression, *vis a vis* separation of families and exclusion of specific classes of people, but also in terms of public discourse, our climate is both confrontational and vitriolic. The prominent tip of this iceberg is President Trump's particular brand of politics. Encompassing threats to political opponents, disrespect for the rule of law, disregard for truth and falsehood, disdain for the press as an "enemy of the people," and a general practice of authoritarianism, Trumpian politics views the world as a zero-sum game, a world where winning must always come at a cost to another. The success of this brand of politics in the United States and around the world has benefitted from a communications environment typified by the always-on world of social media.

Trumpian politics and its cousins in the UK, Germany, Italy, and Hungary have found a useful mechanism for politicking in social media. The Internet and its attendant World Wide Web and social media applications were once thought to be a tremendous force for democratization, for example in the Arab Spring and Occupy protests. While Internet technologies may indeed serve as democratic forums, the legal frameworks for its regulation, such as Section 230 of the Telecommunications Act that grants immunity for third-party content, frame the Internet as a neutral space of democratic communication. It is subject to few if any problems of the commons and is available at such low cost that any regulation would constitute a violation of Internet users' and companies' rights. Nevertheless, the same tools that can elevate Barack Obama also enabled Donald Trump. As social media continues to grow and become more central to the political process, we must reconsider the regulatory framework that has governed the American Internet experience since the end of the 20th century.

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This article explores the grounds for the regulation of social media companies in light of the success Trumpian politics has found via that communication medium. We address the role of the Internet and social media in facilitating democratic debate by reviewing the legal frameworks, technological characteristics, and cultural effects related to social media. Any analysis of this sort should begin with *Reno v. ACLU,* where the Court characterized the Internet as "hardly a scarce commodity" and held that, "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox" (*Reno*, 1997, p. 870). This language seems quaint, however, in an age when four companies control such vast swaths of online activities and is especially problematic in an era characterized by radical deregulation, as Trump's Federal Communications Commission (henceforth, FCC) has already shown by repealing Net Neutrality rules (Galloway, 2017). Because of *Reno*, social media is often thought to be beyond the scope of federal regulation.

Our analysis instead suggests that in the American legal tradition, private property can be subject to regulation when it is "affected with the public interest" (*Munn*, 1876, p. 94). In *Munn v. Illinois* (1876), the Court held that privately owned grain elevators were subject to regulation, limiting price gouging just as railroads could be regulated. Grain elevators and railroad tracks made sense as public goods in an America that was sustained by agrarian economics. Similarly, in an America that is sustained by the information economy, social media companies represent near-monopolies that people must use for any number of industries. In terms of free speech, social media represents one of the chief ways of communicating in the public sphere. This is not a boutique reading of communication law. Rather it draws on a rich history reaching back to the Constitutional provision for the Post Office and roads, through the regulation of critical economic and communication infrastructure seen in *Munn*, to the deference given to the "public good" in radio regulation throughout the 20th century and codified in *NBC v. U.S.* (1943).

To contextualize our argument, we first review the Court's decision in *Reno v. ACLU* (1997), the last major ruling on Internet regulation, and find its rationale for limited governmental intervention to be outdated. In the process, we invoke the Postal Power, *Munn v. Illinois* (1876), and *NBC v. U.S.* (1943) to indicate possibilities for potential regulation, finding that even private property is subject to regulation when its value to the public rises to

a particular threshold (*Munn*, 1876). Having established the legal potential for regulation, we make the case that the FCC should reexamine the regulatory status of social media companies. We use Wu's concept of "attention merchants" (2016) and use current data and examples to establish which parts and activities of social media need to be regulated. Marwick and Lewis issued a dire warning in 2017 that elections around the world would continue to be shaped by the spread of disinformation over social media, and that warning has been borne out in recent elections worldwide. Rethinking the fundamental regulatory framework of the Internet is now necessary, as our democratic institutions depend upon safeguarding our communication networks to ensure free speech and freedom of the press.

Competing Regulatory Philosophies

The ruling in *Reno v. ACLU* may have been sufficient when it was argued, but both the architecture and the common use of the Internet have changed significantly, necessitating a new legal framework. In *Reno v. ACLU*, the Supreme Court of the United States (henceforth, SCOTUS) indicated that the Internet did not possess any of the "special factors" that allowed lawmakers to regulate television and radio broadcasters. These three factors include "history of extensive government regulation," "the scarcity of available frequencies at its inception," and "its 'invasive' nature" (*Reno*, 1997, p. 846). We shall describe the Court's reasoning for each in turn, indicating how the Internet has changed since the decision was handed down.

The first special factor in *Reno* points to the lack of prior decisions related to the Internet. Since the Court decided *Reno v. ACLU* in 1997, they have not had a history of federal- and state-level regulation relating to the Internet. Today, we have other decisions by the Court and numerous state and federal statutes that regulate the Internet. At the SCOTUS level, *Packingham v. North Carolina* is particularly illustrative. In this decision, Justice Kennedy indicated that social media are akin to the "public square," the "principle sources for knowing current events, checking ads for employment," etc. (*Packingham*, 2017, p. 2). Here, we can see the court's understanding of social media as an invaluable social tool, providing many of the same services we would traditionally associate with both broadcasters and print papers. With an additional 20 years of court decisions and legislation, this first special factor is negated.

In *Reno*, the second special factor the Court cited was the notion that the Internet was not a scarce communications vector like those technologies that rely on the electromagnetic spectrum. According to the Court, "the Internet can hardly be considered a 'scarce' expressive commodity," and "any person with a phone line can become a town crier" (*Reno*, 1997, p. 870). While this is true in terms of the technical capacity of the Internet, Tim Wu (2017, 2018) and others have shown that in the current Internet environment, the scarce commodity is not technical capacity, it is human attention. Because of the massive amount of data on the Internet, companies and state actors compete fiercely for the scarce attention of their customers and citizens. We will return to this point in the next section.

The Court's third special factor in *Reno v. ACLU* was the lack of "captive audience" problematics on the Internet. In *Sable Communications v. FCC*, the Court found that, "Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it" (*Sable*, 1989, p. 492). In this decision, the Court wanted to draw a distinction between media that did not intrude into daily life (i.e., a phone-sex line that needed to be dialed) and media that could invade daily life through its pervasiveness (radio and broadcast TV). The Court characterized this as a "captive audience" problem, wherein obscene or indecent material being transmitted over radio may take a listener by surprise, and the listener may not always be in a position to turn off the radio (while driving, in a doctor's office, etc.). This upheld a district court finding that Internet communications "do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content "by accident," according to the court (*Reno*, 1997, p. 869). This argument hardly holds true today, with Internet-enabled devices in our homes, cars, pockets, offices, and public spaces. Official presidential statements are released via Twitter, for example, striking a serious blow to the reasoning that the Internet does not have a captive audience.

In contrast to the Court's reasoning in *Reno*, we find that a competing approach wends its way through American jurisprudence from the earliest days of the Republic. This reasoning, which we will call the Munn Line of Reasoning or philosophy, for ease, holds that while private interests and property are relevant to communication law, the public interest

can be invoked in the interest of ensuring basic communication infrastructure via the Postal Power, on private property via *Munn*, and in the interest of the public good in *NBC v. U.S.* (1943).

Article 1, Clause 7 of the Constitution empowers Congress to "establish Post Offices and post roads." Post Offices do not concern us here, but post roads and the mail carried on them speak to the necessity of maintaining communication infrastructure for any cohesive nation-state. In *Searight v. Stokes* (1845), the Court ruled that Congress could compel the states to ensure the upkeep of roads used for the transport of the mails. Furthermore, in *Lewis Publishing Co. v. Morgan* (1913), the Court found that postal subsidies for newspapers could be monitored to prevent subsidization of publications related mostly to advertising. Finally, in *Lamont v. Postmaster General* (1965), the Court found that Congress could not force citizens to affirmatively state they wanted to receive "communist political propaganda." In short, Congress is empowered to create and maintain the roads that secure communication but are forbidden to attempt altering the content of mail on said roads in a manner ultimately similar to the content/conduit distinction undergirding FCC regulations of broadcast and the Internet.

Likewise, the *Munn v. Illinois* (1876) ruling on grain elevators and railroad tracks treats private property that is affected with the public interest as subject to legitimate regulation via state power (Wilson, 2000). Following from this reading of private property and the public interest, we can see that social media is analogous to a grain elevator that lifts products to be distributed along a common carrier network. Though the technology of social media is substantively different from either railroad tracks or grain elevators, it is affected with public interest in the same way as these older technologies were in their respective economic eras.

Finally, *NBC v. U.S.* (1943) indicates that "radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation" (p. 226). However, at a deeper level, the scarcity of radio, or of social media platforms, is the means to securing the end of the public interest. The public interest is difficult to define, but the Court wrote in 1943 that the "avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States" (*NBC v. US*, p. 217). Social media is available to many, but the ability to

communicate one's views on social media is much more tightly controlled by a world of advertisers and influencers. Entire boutique industries have cropped up to generate bot followers or deploy clever search-engine optimization (henceforth, SEO) tactics to ensure their clients' views are heard disproportionately loudly. In conjunction with the repeal of net neutrality protections, discussed in detail later, the Internet is less a marketplace of ideas than a system rigged in the interests of those with the means to shout the most.

The Postal Power, *Munn v. Illinois* (1876), and *NBC v. US* (1943) illustrate that the government regulation of private property as it relates to public interest is possible, indeed even necessary, depending on the circumstances. This is, in fact, the justification for the establishment of the FCC, which was intended to ensure that broadcasters used their private property in accordance with the public good. In the same way that grain elevators, railroad tracks, and network broadcasters must be regulated for the public good, social media companies are the new common space in American discourse, whether it be commercial speech, political speech, or private speech. Nevertheless, we must address both the substantial hurdle of *Reno* and its contention that the Internet is not scarce, pervasive, nor historically regulated. To do so, we provide a new analysis of the Internet and social media's unique characteristics as the Court did in 1943 and 1997.

The Court's ruling in 1997 was made in good faith based on the limited use of the Internet at the time. While the opportunities were exciting, the actual user base of the Internet was small. It was not pervasive and an individual's engagement with Internet-based content was mostly, if not entirely, voluntary given their resources. That is patently no longer the case and the chief justifications for not regulating Internet speech (history of regulation, scarcity, pervasiveness) need to be reconsidered in light of the social reality of the Internet, particularly as it relates to social media companies. Furthermore, there are new problematics relating to free speech that have developed since *Reno v. ACLU* was decided. In particular, we will review changes in Internet architecture relating to algorithms and application programming interfaces (henceforth, APIs), the massive uptake in adoption since 1997, and the public's economic and political interest in the Internet, showing how all three have changed in the intervening years.

One unique characteristic of the Internet and social media is the increasing ubiquity of its adoption, both here and around the world. Internet access has steadily increased globally, but just as important is the way in which individuals relate to the Internet. Unlike when the Court argued that the Internet's lack of scarcity meant that "any person with a phone line can become a town crier" (*Reno*, 1997, p. 870), many, if not most, people engage with the Internet through social media applications such as Facebook. The Internet now has a population penetration of over 51%, with over 3.5 billion users as of December 2017 (Miniwatts Marketing Group, 2017). Furthermore, the Internet is now used increasingly as the primary content distribution platform for news and government communications. Nearly half of adults in the U.S. use Facebook as a primary news source, according to PEW research data from 2017 (Shearer & Gottfried). President Trump's Twitter account serves as a primary means of communication to his voter base. The massive adoption of social media by private, corporate, and government actors means that the modern citizen is virtually required to engage in these communications systems to some degree.

Social media companies like Twitter are in a double bind because, on the one hand, they claim the inability to regulate their own platforms, but on the other hand, Twitter serves as a platform for official presidential statements. Harassment on social media platforms has become an unfortunate norm over the last several years, causing many high-profile users to abandon the platforms (Parker, 2018; Strause, 2016). The ability to block offending users on social media has been one recourse for private individuals, but the ruling in *Knight First Amendment Institute v. Trump* (2018) indicates that public officials may not have that ability. Indeed, many of President Trump's thoughts on policy positions are found on Twitter before they are available anywhere else. Thus, many stakeholders in American democracy require access to Twitter in order to keep abreast of a rapidly shifting political landscape. Under these conditions, it is untenable to suggest that the Internet is not a pervasive medium.

Ubiquity of the Internet and social media on their own may not plausibly make them pervasive in the sense that the Court has defined it as in *FCC v. Pacifica* (1978). This standard entails that users must be confronted with content not of their own choosing, thus justifying limited time, place, and manner regulation. However, the ubiquity, and sometimes necessity, of social media forces users to engage with algorithmically determined content only partially

selected by the user. Thanks to algorithmic intervention, users are often unaware of the decisions being made to funnel content into their interfaces, and these algorithmic interventions have already come under fire for their opacity and poorly explained implementation (O'Neil, 2016). YouTube's algorithm for removing the ability to earn money from selling something on its site, for example, has come under fire from the LGBT community for demonetizing videos that address LGBT community issues (Kain, 2017). Furthermore, the user is unable to change or, in most cases, even view the algorithms that are sorting content. These algorithms are protected as trade secrets under U.S. copyright law, providing the maximum level of opacity to tech companies.

These algorithmic sorting procedures are editorial decisions in all but name, but the responsibility that would rest with trained journalists in traditional media outlets is instead safeguarded by strings of code. The designers of these algorithms are not trained journalists, so the outcomes of the algorithmic intervention have come under fire repeatedly for not living up to the standards employed by news organizations like the Associated Press or Reuters. Facebook's problems with this have led to extensive internal investigations and firings after accusations of anti-conservative bias (Thompson & Vogelstein, 2018). Algorithms place particular profitable perspectives front and center in their users' newsfeeds and ultimately lead to conditions of information siloing analogous to early warnings of echo chambers formed in AM radio in the absence of the Fairness Doctrine (Jamieson, 2008). Unlike the Internet of town criers and infinite information, social media mediates a user's access to information based on opaque motives defined by profit. As such, social media is both pervasive and scarce, allowing the FCC to regulate in the public interest.

The current FCC, operating as a Trumpian deregulation agency, is changing the underlying operations of the Internet. Net Neutrality, the primary regulatory framework instituted under the Obama administration, became a target as soon as Trump took office. This is part of a larger Trumpian strategy of rolling back regulations put in place during the Bush and Obama administrations. Ajit Pai, the embattled head of the FCC under Trump, has also demonstrated an affinity for Trumpian politics, including lying to the public about a cyberattack on the FCC to prevent discussion of the Net Neutrality rollback (Murdock, 2018). The use of confusion and chaos to further a political goal is one of the hallmarks of the

Trump administration, and Net Neutrality is one of the many casualties of the war on facts. This is further troubling because it prevents potential competitors to Facebook and Twitter from gaining traction.

Under Net Neutrality rules, Internet service providers (ISPs) were unable to prioritize traffic to particular websites like Facebook. Without Net Neutrality guidelines in place, it behooves ISPs to prioritize traffic from the largest content providers, such as Facebook and Twitter. It is further useful for ISPs to reach agreements with such content providers, giving their customers discounted bandwidth rates when accessing services from these companies. This exaggerates the issues of scarcity and pervasiveness we mentioned earlier, because now Facebook's role as a news distributor is reinforced by the ISPs themselves. Thus, both the underlying infrastructure of the Internet and the social infrastructure of ubiquitous social media use contribute to Facebook's continued dominance in this space. Without proper editorial control at Facebook, the repeal of Net Neutrality will only continue to solidify its position as the premier news source.

Munn indicates that private property can be regulated when it is "affected with the public interest" (1876, p. 94). Social media, and Facebook in particular, is most certainly affected with the public interest, economically and politically, in ways that mutually reinforce the other. Facebook, like other social media firms, needs people, or more accurately our attention. Tim Wu argues that the ability to focus and ultimately harvest attention for monetary gain has developed into a major part of American capitalism and yielded some positive results, functionally free broadcast news for example (2016). Facebook is different. Wu writes "Having been originally drawn to Facebook with the lure of finding friends, no one seemed to notice this new attention merchant had inverted the industry's usual terms of agreement" (Wu, 2016, p. 300-301). Now the costs to users are simply advertisements, sometimes placed by hostile foreign actors, and the whole structure of information exchange suffers as a result.

Mark Zuckerberg's own rhetoric illustrates that he believes his platform will "develop the social infrastructure to give people the power to build a global community that works for all of us" (Zuckerberg, 2017). He argued that the decline in social infrastructure, such as churches and voluntary civic organizations, necessitates Facebook's involvement in the very

stuff of society. Zuckerberg has followed through on this promise. Facebook's early rise in the mid-2000s is best characterized by rapid, unreflective growth. In the process, as with many growing companies, Facebook attacked potential rivals. Twitter had been the place for news distribution on the web (Thompson & Vogelstein, 2018). Seeking to dethrone Twitter, "Facebook's emissaries fanned out to talk with journalists and explain how to best reach readers through the platform," (Thompson & Vogelstein, 2018). By 2015, Facebook had become the leading referrer of users to publication websites. In a very real way, Facebook is the ether through which global information flows move, much as the broadcast spectrum carries radio waves. But unlike the electromagnetic spectrum, a product of natural forces, Facebook is the product of human ingenuity and will. In 2018, the company announced that it would reprioritize family and friends' posts over news content. In the process, the spectrum that Facebook represents for news content became hostile to the most powerful means of reaching news consumers. In the broadcast world, it would be as though the laws of physics took a break. Zuckerberg and other tech moguls like to argue that they are simply neutral platforms with the same responsibilities as a phone company that merely needs to connect your call. In the process, American journalism has been left scrambling to find alternative means of distribution, but also of advertising (Oremus, 2018).

In 1997, there was great uncertainty in how, precisely, advertising would function in cyberspace. Today, just two companies, Facebook and Google, control more than 60% of online ad revenues in the U.S. and 50% worldwide (Reuters, 2017). This duopoly is due, in part, to the industrial psychology employed by social media. Internet entrepreneur Sean Parker, the first president of Facebook, revealed some of the industrial psychology design decisions made during Facebook's early days. Parker says, "we need to sort of give you a little dopamine hit every once in a while, because someone liked or commented on a photo or a post or whatever. And that's going to get you to contribute more content, and that's going to get you more likes and comments. It's a social-validation feedback loop" (Allen, 2017). Here, the audience is held captive by its own psychological processes. Useful for advertisers, but not so much for news media whose adjustments to the online space cheapened public discourse (Foer, 2017).

Facebook's own development strategies and current status as the dominant social media platform and secondary online advertising platform create a de facto situation which puts its Sec. 230 protection from liability for their users' content in question. Wu suggests that existing or new laws aimed at reducing trolling, creating advertising funding transparency, or anti-cyber stalking laws could "redirect attention to a question originally raised by the Federal Communications Commission's fairness doctrine and the *Red Lion Broadcasting Co. v. FCC* decision: how far the government may go solely to promote a better speech environment" (2017, p. 24). Facebook has already had an enormous effect on a variety of speech environments.

It is not unheard of for Facebook to comply with State directives related to national security claims. Facebook has long obeyed Israeli government demands to shut down Palestinian media outlets. In September of 2016, the company met with Israeli officials and not long after, it was revealed that they had acquiesced to 95% of the 158 Israeli requests (Greenwald, 2017). According to McKernan, Palestinian-based news accounts followed by roughly 2 million people were blocked by the company with no other reason given than "violation of community standards," (2016). When we consider that up to 96% of Palestinians claim that Facebook is their primary means of receiving news, it is clear that the company can, in certain circumstances act as an arm of government, shutting down information flows like dictatorships.

While this example implicates a region already known for media censorship, Facebook recently blocked the account of Ramzan Kadyrov, the strongman leader of Chechnya, when he was placed on the U.S. Treasury sanctions list (Specia, 2017). Others on the list, including the leaders of Venezuela (Greenwald, 2017) have active accounts, as do Buddhist preachers in Myanmar who have been banned by their own country from public preaching they say incites violence against the Rohingya minority (Specia & Mozur, 2017). In Whatcom County, Washington, the sheriff's office demanded location data for members of Bellingham No DAPL, an anti-pipeline construction group, and only relented when the ACLU filed suit. In these cases, Facebook has purposefully injected itself into the center of information distribution, acting as an arm of the state for all intents and purposes.

Mark Zuckerberg has said "We are not in the business of picking which issues the world should read about, but we are in the business of connecting people with the stories they find most meaningful," (Zuckerberg, 2017). Facebook's acquiescence to government, its prominence as a tool of news distribution, and its intervention in information flows via algorithmic intervention show that social media has moved beyond a neutral position as a tech company. Facebook specifically is more akin to a hybrid between a publisher or broadcaster, and the company can potentially be productively thought of as the spectrum or post office itself. The qualities and context discussed above ultimately suggest that the wires of the Internet are not coterminous with the ways in which those wires are employed.

Conclusions

As we have shown, due to its pervasiveness and use as a news distribution network, social media is deeply implicated in the flows of free information that enable the functioning of democracy and adherence to the principles of the First Amendment. Based on our readings of *Reno v. ACLU*, *Munn v. Illinois*, and *Packingham v. North Carolina*, we believe that social media companies may be subject to some of the same regulations that we place upon broadcasters. It is important to remember at this juncture that social media is not the same thing as the Internet.

These problems are not insurmountable, and some policy solutions, like Net Neutrality rules and the Fairness Doctrine, have already been implemented in the past. Net Neutrality rules promote strong competition by disincentivizing ISPs and content producers from reaching special arrangements. The Fairness Doctrine, as it was applied to television and radio, could help ameliorate the glut of hyperpartisan and outright false stories that proliferate on the Internet. These were, at one time, uncontroversial policy implementations that drew support from both sides of the aisle. Reimplementation in the age of Trump may prove to be more difficult, but social media, as the new public square, must be attended to as radio and television were in the past.

Failure to do so will only compound these troubles, as the disinformation campaigns in the United States, Great Britain, France, Myanmar and more represent only primitive uses of these disinformation tactics. As algorithmic intervention and targeted advertising

become more advanced, we will face information warfare of greater frequency and complexity, which will be inherently asymmetric unless these companies are regulated. If we are unwilling to address these issues, we will continue to witness the decline of democratic discourse as we are drowned out by bots, shills, and intelligence operatives. Ultimately, this is a problem that affects the future of democracies worldwide, since a functioning democracy requires trusted sources of information to facilitate public debate. In the end, we must fight for the democracy we want for our children.

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