ON THE MEANINGFUL REFORM OF SOCIAL MEDIA

R. George Wright[*]

INTRODUCTION

It is widely felt that the use of major social media platforms deserves serious critique. Consider a recent assessment by a major English philosopher:

> [C]ombining exaggerated conceptions of freedom of expression with digital connectivity has promoted the proliferation of fake news, spiraling disinformation, filter bubbles and conspiracy theories. All of these may foster cognitive fragmentation and threaten the integrity, and even the future, of a democratic public sphere as well as respect for science and other research.[1]

[*] Lawrence A. Jengen Professor of Law, Indiana University Robert H. McKinny School of Law.

[1] ONORA O'NEILL, A PHILOSOPHER LOOKS AT DIGITAL COMMUNICATION 74 (2022).

Other observers would take issue with one or more of these concerns or add others of their own. Some criticisms may conflict with other criticisms. To some degree, critiques of the major social media platforms may track familiar political divides,[2] but in general, the pathologies of social media seem undeniable.

As it turns out, no readily imaginable set of legal rules is capable of meaningfully addressing the most important pathologies of social media use and platform behavior. The benefits of any legal reform of social media are likely to be disappointingly modest.[3] No social media legal reform can credibly promise the harvesting of much low hanging fruit. Overall, no legal reform is realistically capable of addressing, without incurring comparable costs, the most important underlying social media pathologies.[4] Thus the net benefits of any legal reform of social media will be modest. Ultimately, we must rely, whether vainly or not, on the broad development and more consistent practice by both social media users and platform owners of the relevant epistemic and moral virtues.[5]

---

[2] Contrast, for example, the assumptions, values, and lines of inquiry examined in Parts I.A and I.B.

[3] See *infra* Part II for an elaboration of this discussion.

[4] *See infra* Part II.

[5] *See infra* Part II.

In this article, Part I first considers the most prominent social media platform-friendly,[6] followed by the most prominent social media platform-skeptical,[7] approaches to the scope of free speech by and on such platforms. Part II notes the limited net payoff of these and related legal reform approaches and their inability to meaningfully address the most important social media pathologies.[8] Part II then explores the possible roles of cultivating the relevant epistemic and moral virtues where the law can provide no satisfactory response.[9]

I. THE UNSATISFYING SOCIAL MEDIA PLATFORM CASE LAW

A. The Major Social Media Platforms as Protected Speakers

The relationships between the major social media platforms and a healthy free speech regime are complex. The case law does not handle this complexity well. The leading cases, whatever their outcome, all provoke an entirely reasonable sense of dissatisfaction. This dissatisfaction stems from the case law's repeated failure to properly recognize the costs, including to free speech, of whatever analysis and result a case has adopted. This dissatisfaction thus attaches to cases ruling largely in favor of the major social media platforms, as well as to those ruling largely in favor of government regulation of such platforms.

---

[6] *See infra* Part I.A.
[7] *See infra* Part I.B.
[8] *See infra* Part II.
[9] *See infra* Part II.

Consider, in particular, the major recent cases of *NetChoice, L.L.C. v. Attorney General*[10] ("*NetChoice"*) and *NetChoice, L.L.C. v. Paxton*[11] ("*Paxton"*). These cases reach largely incompatible results in spirit, if not in their technical holdings. Neither is likely to have the last word on major social media platforms and free speech, but they jointly illustrate how unlikely it is that the Supreme Court could ever meaningfully address the basic speech-related pathologies and disfunctions of our social media. The most serious disfunctions of our social media cannot be meaningfully addressed, let alone resolved, by any of the free speech or related legal doctrines on which the Supreme Court might focus.

To begin with, even on their own terms, neither the Eleventh Circuit *NetChoice* case nor the Fifth Circuit *Paxton* case convincingly addresses the most important speech-related considerations. Each case, in its own way, provokes as many troubling questions as it persuasively answers. The need for brevity herein, though, requires a merely illustrative, rather than anything approaching an exhaustive, treatment of the cases in this respect.

The Eleventh Circuit *NetChoice* case was in large measure a victory for the major social media platforms against their Florida state would-be regulators.[12] The court in *NetChoice* began by declaring the key question to be "whether the Facebooks and Twitters of the world—indisputably 'private actors' with First Amendment rights—are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms."[13]

---

[10] 34 F.4th 1196 (11th Cir. 2022). For an insightful discussion of the statute and its effects on media platform speech, see generally, Clay Calvert, *Anti-Censorship Rhetoric v. First Amendment Realities: The Fight Over Florida's Anti-Deplatforming Statute and Some Thoughts About Speaker Autonomy, Compelled Expression and Access Mandates in Online Fora*, 20 FIRST AMEND. L. REV. 385 (2022).

[11] 49 F.4th 439 (5th Cir. 2022).

[12] *See* NetChoice, L.L.C. v. Att'y Gen., 34 F.4th 1196, 1231-32 (11th Cir. 2022).

[13] *Id.* at 1203. For a generally supportive analysis, see Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 99 (2021) ("[S]ocial media platforms should indeed enjoy substantial editorial rights (though probably fewer than prototypical holders of editorial rights such as print newspapers).").

The Florida regulatory statute in question was said to prohibit certain relatively large social media companies from 'deplatforming' particular electoral candidates,[14] and from prioritizing or deprioritizing political candidates' messages.[15] More broadly, content-based removals of posts by what the statute referred to as 'journalistic enterprises' were generally prohibited.[16] Additionally, the statute imposed disclosure requirements, under which the social media platforms in question would have to timely provide a "thorough rationale"[17] for every permissible content-based moderation decision.[18]

In response, the *NetChoice* court granted a preliminary injunction with respect to the specific statutory provisions above, on the assumption of their likely unconstitutionality on free speech grounds.[19] Pursuing the *NetChoice* court's logic on all of the relevant issues would require a lengthy article of its own. Herein, we briefly address only some of the most significant and recurring concerns.

---

[14] *See NetChoice*, 34 F.4th at 1203.

[15] *See id.*

[16] *See id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* Some less speech-burdensome disclosure requirements were not preliminarily enjoined. *Id.*

The court in *NetChoice* began by declaring that even the largest and presumably most market-dominant social media platforms are private enterprises, as distinct from quasi-governmental entities.[20] As well, no one, including candidates for political office, "has a vested right to force a platform to allow [them] to contribute to or consume social-media content."[21] The overwhelming majority of social media content is of course provided by private actors apart from the owners and managers of the platform in question.[22] But, the court concluded, "platforms do engage in some speech of their own."[23]

The court found the social media platform's own speech to take several forms.[24] First, there is likely a term of service or platform-community standards statement that indicates which sorts of speech are subject to prohibition, removal, deprioritization, or some other form of adverse action by the platform.[25] Though perhaps vague or controversial, any such standard statement by the platform's ownership is still thought to amount to 'speech' for First Amendment purposes.[26]

---

[20] *See* NetChoice, L.L.C. v. Att'y Gen., 34 F.4th 1196, 1204 (11th Cir. 2022). Whether a private enterprise could nonetheless amount to a 'common carrier,' or else could be sufficiently linked to a government so as to act under color of state or federal law, are separate questions. *See* Doe v. Google, LLC, 2022 WL 17077497 (9th Cir. Nov. 18, 2022) (mem.) (finding insufficient government entanglement for there to be state action).

[21] *NetChoice*, 34 F.4th at 1204.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1210. For background on the minimum requisites for 'speech' in the First Amendment constitutional sense, see, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004), and R. George Wright, *What Counts as "Speech" in the First Place: Determining the Scope of the Free Speech Clause,* 37 PEPP. L. REV. 1217 (2010).

Second, the social media platforms may choose to add commentary, warnings, disclaimers, or alternative source or viewpoint links to a post, or to otherwise address the content of the post in question.[27] Certainly, a platform's disclaimer of a user's speech may fall within the scope of what constitutes 'speech' for constitutional purposes.[28]

Third, and most interestingly, the *NetChoice* court notes that the content one sees on Twitter and other platforms is not inevitably some raw, unmediated, reverse chronological or otherwise 'natural' succession of posts, or merely random, let alone a strict reflection of the user's own established preferences and priorities.[29] Instead, the user "sees a curated and edited compilation of content from the people and organizations that [they] follow []."[30]

---

[27] *See* NetChoice, L.L.C. v. Att'y Gen., 34 F.4th 1196, 1204 (11th Cir. 2022). Presumably, a platform's disclaimer or other commentary on a post can count as 'speech' at least as much as the underlying post. For general background, see R. George Wright, *Your Mileage May Vary: A General Theory of Legal Disclaimers*, 7 PIERCE L. REV. 85 (2008).

[28] *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

[29] *See NetChoice*, 34 F.4th at 1204.

[30] *Id.* This generic description, however, need not characterize the experience of TikTok users, who may see some algorithmically-derived, and even random, content above and beyond their own consciously articulated preferences. *See generally* Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html#:~:text=A%20recent%20Wall%20Street%20Journal,content%20that%20promotes%20suicide%20or [https://perma.cc/56DD-99UF].

In particular, the platform may or may not remove posts violating its terms of service or community standards.[31] These platform community standards may extend far beyond prohibiting speech that is somehow criminal or tortious, to restrict what the platform regards as discriminatory, misleading, deceptive, abusive, or hate speech.[32] And then, perhaps even more importantly, the platform may arrange content algorithmically for the deprioritization, or the shadow banning, of particular posts or users on a variety of grounds relating to the communication of ideas.[33] Thus, the platform's chosen policies wind up "effectively selecting which users' speech the viewer will see, and in what order, during any given visit to the site."[34] Realistically, the platform selecting the order in which posts are presented means selecting which posts are not likely to be widely seen at all.

As a result of the platform's choices across the various forms of content selection, curation, and moderation, "the platforms develop particular market niches, foster different sorts of online communities, and promote various values and viewpoints."[35] Even if, absurdly, a platform's policies in this respect could somehow be thought of as politically 'neutral,' there can be no guarantee that the political valence of the major social media platforms overall is also somehow neutral.

---

[31] *See NetChoice*, 34 F.4th at 1204.

[32] *Id.* at 1204, 1210-13.

[33] *See id. passim*.

[34] *Id.* at 1204.

[35] *Id.* at 1205. For a similar characterization of the sponsor's selection among possible entrants in a St. Patrick's Day parade, *see generally* Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

As it happens, the Florida statute at issue in *NetChoice* was partly motivated by a desire "to combat the 'biased silencing' of 'our freedom of speech as conservatives . . . by the big tech oligarchs in Silicon Valley.'"[36] More broadly, the Florida statutory drafters thought of the major platforms in terms of the legal category of a public utility,[37] or at least, given the public interest in freedom of speech, as akin to common carriers.[38] The main purpose in recognizing, or treating, the covered platforms as akin to common carriers was thus ultimately to "'level the playing field'" in the practice of free speech.[39]

The court in *NetChoice* responded by considering whether the social media platforms amounted to conduits, or 'pipes,' through which the messages of users flow, or whether the platforms also convey messages of their own, and thus also speak for First Amendment purposes.[40] On this point, the *NetChoice* court referred to the St. Patrick's Day Parade case of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[41] and to Eleventh Circuit precedent:

---

[36] NetChoice, L.L.C. v. Att'y Gen., 34 F.4th 1196, 1205 (11th Cir. 2022).

[37] *See id.*

[38] *See id; see also infra* notes 90-91; It bears mentioning that the covered social media platforms were defined not in terms of monopoly status, oligopoly membership, market share, or non-substitutability, but instead in terms of "size and revenue thresholds." *See NetChoice*, 34 F.4th at 1205.

[39] *See id.* at 1205, 1228; *see also infra* notes 76-80.

[40] *See id.* at 1204.

[41] *Id.; see also supra* note 26.

> In determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message. If we find that the conduct in question is expressive, any law regulating that conduct is subject to the First Amendment.[42]

The *NetChoice* court tacitly recognized that the vast majority of the content posted by users on social media platforms may never be editorially reviewed,[43] but found that the editorial, content selection, and policy-enforcement practices of the platforms amounted to speech within the meaning of the free speech clause.[44] In allegedly enhancing the speech rights of social media users, or in supposedly leveling the speech playing field, the statute impaired the speech of the platforms themselves.[45] Unlike many other corporate entities, "[s]ocial media platforms . . . are in the business of disseminating curated collections of speech."[46]

---

[42] *See* NetChoice, L.L.C. v. Att'y Gen., 34 F.4th 1196, 1212 (11th Cir. 2022) (quoting Coral Ridge Ministries, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1254 (11th Cir. 2021) (emphasis in original)); *see also* Fort Lauderdale Food Not Bombs v. Fort Lauderdale, 901 F.3d 1235, 1244-45 (11th Cir. 2018); Texas v. Johnson, 491 U.S. 397 (1989); and *supra* note 27. But there may be a difference between merely some sort of "message" and a "particularized message," as recognized in the expressive conduct cases of *Texas v. Johnson*, 491 U.S. 397 and Edge v. Everett, 929 F.3d 657 (9th Cir. 2019). Whether deplatforming, demonetizing, downgrading, and similar intentional acts by the platform should count merely as expressive conduct, therefore requiring that the message be particularized, is debatable.

[43] See *NetChoice*, 34 F.4th at 1214.

[44] *See id.*

[45] *See id.* at 1209, 1215 (distinguishing the private shopping mall access case of PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)). Thus, the idea of "leveling the playing field" in free speech cases may be deployed both by and against politically conservative voices.

[46] *Id.* at 1216.

In particular, the *NetChoice* court declared that the platform' content moderation was inherently expressive[47] because "a reasonable observer witnessing a platform remove a user or item of content[48] would infer, at a minimum, a message of disapproval."[49] This standard naturally prompts the question of whether any other parties actually witness an expulsion of a user, the removal of user-posted content, the conscious or algorithmic upgrading or downgrading of a post, the shadow banning of a particular post, or a pattern of shadow banning a user's posts.

We must also ask whether, for example, the platform's manipulation of a post meets the minimum standards for a sufficiently clear, if not self-explanatory, message.[50] Could there typically be plausible reasons for adjusting the visibility of a post other than disapproval, on the merits, of the content of the post?[51] Could a reasonable observer just as well conclude that a no-longer-visible post was voluntarily deleted by the poster, perhaps because of the post's controversiality?[52]

More broadly, we must eventually compare the free speech interests of a social media platform in, for example, undetectedlyundetectably downgrading a post with the affected free speech interests of the poster of the material in question. Is it evident that, say, an unnoticed downgrading of a post promotes the speech of the platform owner more than it impairs the speech of the unknowingly downgraded poster?

---

[47] *See* NetChoice, L.L.C. v. Att'y Gen., 34 F.4th 1196, 1217-18 (11th Cir. 2022).

[48] Author's Note: Or, presumably, consciously demote, hide, downgrade, suppress, or shadow ban user-posted content.

[49] See *NetChoice*, 34 F.4th at 1217.

[50] See *supra* notes 26, 41 and accompanying text. For the complications of shadow banning in particular, see Gabriel Nicholas, *Shadow Banning Is Big Tech's Big Problem*, ATLANTIC (Apr. 28, 2022), https://www.theatlantic.com/technology/archive/2022/04/social-media-shadowbans-tiktok-twitter/629702/ [https://perma.cc/VUV2-34WF].

[51] See *NetChoice*, 34 F.4th at 1217 n.15.

[52] The platform may clearly engage in its own speech by explaining why a post, or a particular user, was banned on the merits. *See, e.g.,* Bobby Allyn & Tamara Keith, *Twitter Permanently Suspends Trump, Citing 'Risk of Further Incitement Of Violence*, NPR (Jan. 8, 2021, 6:29 PM), https://www.npr.org/2021/01/08/954760928/twitter-bans-president-trump-citing-risk-of-further-incitement-of-violence [https://perma.cc/P95V-VRD3].

In some cases, our answer to that question may depend on how close we think the social media platform in question approaches being a 'common carrier.'[53] Should the law, at least in this respect, treat one or more social media platforms as essential facilities that either do or should hold themselves open and available to any would-be user who meets relevant minimal requirements?[54] If so, the door would then be opened to extensive common carrier-type regulation of the platform in question. Or should the law instead recognize that there is no inherent scarcity of cyberspace 'frequencies' and no reason to suppose that social media platforms cannot change, fail, or arise in response to user preferences?[55]

The *NetChoice* court emphasized the decision by the major social media platforms to select from among possible users and their messages, including some and excluding others in accordance with the platform's preferred views and policies.[56] Whether platforms rise and fall or not, they "exercise—and have historically exercised—inherently expressive editorial judgment,"[57] and thus the *NetChoice* court held they do not to amount to common carriers.[58]

---

[53] *See* NetChoice, L.L.C. v. Att'y Gen., 34 F.4th 1196, 1220 (11th Cir. 2022); *see also infra* notes 90-91.

[54] *Id.*

[55] *Id.* at 1220-22.

[56] *Id.* at 1221.

[57] *Id.* at 1222.

[58] *Id.*

On this basis, the *NetChoice* court held that "it is substantially likely that . . . the Act's content-moderation restrictions are subject to either strict or intermediate First Amendment scrutiny, depending on whether they are content-based or content-neutral."[59] The content-moderation restrictions were then held to fail even the intermediate scrutiny that a content-neutral regulation would evoke,[60] thus bypassing any need to distinguish between content-based and content-neutral regulations.[61]

The Florida statute imposed not only content-moderation restrictions but several public disclosure requirements on the affected platforms as well.[62] These mandated disclosures focused on the platform's practices and policies, including its terms of service concerning its users and their posts.[63] The *NetChoice* court oddly chose to characterize the public disclosure requirements as mandating only commercial speech by the platform, rather than a political or cultural speech by the platform, or some combination of commercial, political, and cultural speech.[64]

---

[59] *See* NetChoice, L.L.C. v. Att'y Gen., 34 F.4th 1196, 1226 (11th Cir. 2022). For recent Supreme Court attempts to define and distinguish content-based and content-neutral speech, see City of Austin v. Reagan Nat'l Advert. of Austin, 142 S.Ct. 1464 (2022); Reed v. Town of Gilbert, 576 U.S. 155 (2015) (content-based restrictions on signage). *See also* GEFT Outdoor, LLC v. City of Westfield, 39 F.4th 821 (7th Cir. 2022) (applying City of Austin). For a skeptical assessment of the value of attempting to draw and apply this distinction, see R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081 (2016); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

[60] *See NetChoice*, 34 F.4th at 1226-27.

[61] *Id.*

[62] *See id.* at 1227.

[63] *Id.*

[64] *Id.*

Why the mandated disclosures were held to encompass only commercial speech is far from clear. Consider, the disclosures that the major social media platform TikTok would be required to make. These would include disclosure of TikTok's prohibition of discrimination,[65] hateful behavior,[66] dehumanization of a person or group on any specified grounds,[67] slurs in some contexts but not others,[68] imputations of inferiority on protected categorical grounds,[69] clearly expressed hostility on protected grounds,[70] and the denial of well-established facts in particularly sensitive contexts.[71]

There is perhaps some broad sense in which all of these policies, when publicly expressed, could be said to amount to commercial speech. A for-profit enterprise whose speech unduly impairs its profitability jeopardizes its ability to speak at all. But these policies, whether they are displaced or overridden by other considerations or not,[72] clearly involve political or cultural speech, whether mixed with commercial speech or not.

---

[65] *See* TIKTOK'S COMMUNITY GUIDELINES, www.tiktok.com/community-guidelines?/ang=en [https://perma.cc/ZQU4-4J42] (last visited Nov. 1, 2022) [hereinafter TIKTOK].

[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] *See id.*

[71] *See id.*

[72] Author's Note: Interestingly, the TikTok Community Guidelines also contain a broad exceptions clause. Specifically, "[w]e recognize that some content that would otherwise violate our rules can be in the public interest to view." *Id.* at 3. Given that understanding, the Community Guidelines then announce that "[w]e may allow content to remain on the platform under one of the following public interest exceptions: Documentary[,] Educational[,] Medical and Scientific[,] Counterspeech[,] Satirical[, or] Artistic Content." *Id.* Query whether any objectionable content could not reasonably be characterized as 'counterspeech.'

Compelled disclosure of one's political or cultural principles might well be thought to evoke strict scrutiny judicial review.[73] The NetChoice court, however, in treating the required disclosures as commercial speech, adopted a lesser standard of scrutiny.[74] We can, however, readily imagine cases in which a government's demand for an articulation of a platform's policy is intended to embarrass the platform, either by calling public attention to a platform policy or to the absence of a policy on some contentious matter. Such a possibility should evoke the most rigorous judicial scrutiny.

Finally, the *NetChoice* court rejected even the bare legitimacy of any claimed state interest in somehow "leveling the playing field" of private social media speech and debate.[75] There was thus no legitimate government interest in requiring social media platforms to somehow adjust the political balance, inclusiveness, or representativeness of the posts on the platform in question. The social media platforms thus could not be required to accommodate views that are somehow deemed to be unfairly disadvantaged, unequally treated, or otherwise underpublicized from the standpoint of some official view of the public interest.[76]

---

[73] *See, e.g.,* Wooley v. Maynard, 97 S. Ct. 1428, 1435 (1977); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[74] *See* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1230 (11th Cir. 2022) (adopting the Supreme Court's test for compelled commercial speech as outlined in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)). Ironically, the *Zauderer* test may often be more demanding than the test for government restrictions on non-misleading commercial speech in that Zauderer involves an inquiry into whether the compelled disclosure is "unduly burdensome." *Id.* The standard test for governmental restrictions on non-misleading commercial speech incorporates no such balancing test. *See* Central Hudson Gas & Elec. Co. v. Pub. Ser'v. Com'n, 447 U.S. 557, 564-65 (1980).

[75] *See NetChoice*, 34 F.4th at 1228.

[76] *See id.* at 1228-29. Again, the 'leveling the playing field' argument apparently can be raised from any political perspective.

The risks of permitting any government to determine which viewpoints are underrepresented on the major social media platforms are obvious.[77] We do not trust governments to make disinterested judgments in that realm.[78] But this understanding, even if embodied in free speech law, does not address the well-founded and widespread concern that our major social media platforms have become, in various ways, seriously pathological.

Thus, even when anyone theoretically can go viral, and when messages can be posted without cost to the poster, political discussions on the major social media platforms plainly fall well below any optimal level in their content and tone. Any typical comment thread below a political post on Twitter may leave the reader with a sense of the pathologies of public discourse. Inequalities in resources do indeed skew debates on social media.[79] But we should also recognize the various other ways in which social media can be culturally destructive, whether or not that destructiveness can be meaningfully addressed by government regulation[80].

The *NetChoice* case is thus largely protective of what the major social media platform owners take to be their own speech. We now consider, briefly, some of the lines of argument from an even more recent case largely rejecting the *NetChoice* court's approach in the context of a much broader statutory regulation.

---

[77] *See NetChoice*, 34 F.4th at 1228-29.

[78] *See id.* (quoting the election campaign funding and spending case of Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).

[79] *See, e.g.,* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 467-75 (1996). For what we might call a redistributive approach to the resources required for optimal political discussion and debate, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 414 (1990).

[80] *See infra* Part II.

B. The Major Social Media Platforms: Non-Speakers or as Only Modestly Protected Speakers to Censor Actual Speakers

In *Paxton*, the Fifth Circuit largely rejected major elements of the Eleventh Circuit's *NetChoice* opinion. [81] The Texas statute in question was said to "generally prohibit large social media platforms from censoring speech based on the viewpoint of its speaker."[82] While the Fifth Circuit was indeed concerned with appropriately protecting speech, the speech at issue was taken to be that of the platform's many users,[83] rather than "a corporation's[84] *unenumerated* right to *muzzle* speech."[85] Thus in a remarkable inversion of the Eleventh Circuit's *NetChoice* opinion, the Fifth Circuit *Paxton* case treated the major social media platform owners more as censors than as speakers themselves.[86]

---

[81] NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022). Judge Andrew Oldham authored the majority opinion. *Id.* at 443. Judge Edith Jones concurred in part and Judge Leslie Southwick concurred in part and dissented in part. *Id.* at 494 (Jones, J., concurring in part) (Southwick, J., concurring in part & dissent in part).

[82] *Id.* at 444. The threshold for what qualifies as a "large" social media platform was set at a minimum of fifty million active monthly users, thus encompassing platforms such as Facebook, Twitter, YouTube, and TikTok. *See id* at 445. We set aside herein the large problem of different states imposing mutually incompatible regulations on a platform.

[83] *Id.* at 445. The 'speaker' in this context refers to individual or group users of, or posters on, the covered platform in question. *See id.*

[84] For a controversial defense of commercial corporate political speech rights, see Citizens United v. FEC, 558 U.S. 310 (2010).

[85] *Paxton*, 49 F.4th at 445 (emphasis in original). With sensible exceptions focused on illegal activity in general, criminal incitement, specific threats, and some cases of harassment, the prohibited 'censorship' included, *e.g.,* blocking posts, banning and shadow banning, removals, deplatforming, demonetization, downgrading posts, restricting access or visibility, and other forms of unequal treatment and discrimination. *See id.* at 446.

[86] *See id.* at 445.

The *Paxton* court took the social media platforms' logic to imply that "email providers, mobile phone companies, and banks[87] could cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate, or business."[88] The covered social media entities were thought to be monopolists,[89] amount to the contemporary equivalent of the traditional public town square,[90] and amount as well to common carriers[91] affected with the public interest.[92]

---

[87] And, presumably, credit card companies, mortgage and other lenders, private education and work institutions, along with Amazon and other delivery services. *See* Ellen R. Wald, *Redlining 2021: Banks Are Denying Financial Services Based on Morality*, THE HILL (Jan. 5, 2021, 12:30 PM), https://thehill.com/opinion/finance/532159-redlining-2021 [https://perma.cc/6BT3-NN AX]; s*ee also* Eugene Volokh, *PayPal Still Threatens $2500 Fines for Promoting "Discriminatory" "Intolerance" (Even If Not "Misinformation")*, REASON (Oct. 9, 2022, 5:48 PM), https://reason.com/volokh/2022/10/09/paypal-still-threatens-2500-fines-for-promoting-discriminatory-intolerance-even-if-not-misinformation/ [https://perma.cc/4GBB-MA74].

[88] NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022).

[89] *Id.* at 445, 476. Or perhaps, collectively, oligopolists.

[90] *Id.* at 445, 454. For a loosely analogous claim, consider the language of Justice Thurgood Marshall in the large indoor shopping mall case of *Pruneyard Shopping Center v. Robins*. *See* 447 U.S. 74, 90 (1980) (Marshall, J., concurring) (referring to cases in which "shopping center owners had opened their centers to the public at large, effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and parks"). The shopping center in Pruneyard was thus required to accommodate controversial political speech by the public, with the possibility of the owner or a store's posting a disclaimer. *Id.* at 88. A given shopping center's own policy speech may actually be as extensive as that of a hypothetical social media platform. *See generally* Biden v. Knight First Amend. Inst. Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (mem.) (Thomas, J., concurring) ("applying old doctrines to new digital platforms is rarely straightforward").

[91] *See Paxton*, 49 F.4th at 445; *Biden*, 141 S.Ct. at 1222-23 (Thomas, J., concurring); s*ee also* Eugene Volokh, *My "Treating Social Media Platforms Like Common Carriers?*, REASON.COM BLOG (Aug. 31, 2021), https://www.proquest.com/docview/2769616897/fulltext/AF3AF4827C7147B1PQ/1?accountid=14588 [https://perma.cc/8DM6-EGRQ].

[92] *See Paxton*, 49 F.4th 445; *Biden*, 141 S. Ct. at 1223 (Thomas, J., concurring) (urging permissible regulation of businesses affected with the public interest even if the businesses are not common carriers). From among the increasing literature, see Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133 (2015); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463 (2021).

The *Paxton* court addressed the question of the platform's own speech and exercise of editorial discretion in a multifaceted way.[93] The most distinctive argument adopted by the court was that the timing of the platform's editorial discretion can be constitutionally decisive.[94] Remarkably, the Fifth Circuit in *Paxton* found crucial the fact that most, if not all, of the platforms' decisions as to selection, presentation, blocking, banning, shadow banning, demonetization, deprioritization, downgrading and such were made after, rather than before, the relevant post was published or hosted and displayed on the platform in question.[95]

On this point, the *Paxton* court was able to cite Supreme Court language confirming that many, if not most, editorial decisions in various media take place before publication, often in the form of denying a would-be user the opportunity to have their say in the first place.[96] But as a matter of sheer practicality, most editorial discretion by the social media platforms must occur after a given post has been made. The Supreme Court has previously recognized that practical realities may limit traditional libraries' ability to meaningfully screen books in advance of their purchase, and that the vast majority of shelved library books provoke no explicit speech by the library.[97] A newspaper retraction of a published article, certainly, is not disqualified as speech merely because it occurs post- rather than pre-publication.[98]

---

[93] *See* NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022).

[94] *See id.* at 464-65. There was also the sense that the platform's liability shield under section 230 of the Communications Decency Act was somehow inconsistent with any claim to be engaged in their own speech. *See id.* at 465-66.

[95] *See id.* at 465.

[96] *See id.* at 464-65 (citing the televised electoral candidate debate exclusion case of Ark. Educ. Tele. Commc'n v. Forbes, 523 U.S. 666, 674 (1998) and the newspaper right of reply case of Miami Herald v. Tornillo, 418 U.S. 241, 258 (1974)).

[97] *See* Island Trees Sch. Dist. v. Pico, 457 U.S. 853 (1982) (plurality opinion).

[98] Author's Note: In this context, see the response of Judge Southwick in *Paxton*, 49 F.4th at 495, 502 (Southwick, J., concurring in part and dissenting in part).

Judge Edith Jones also took a skeptical approach in *Paxton* to whether the platforms were speaking, for free speech purposes, precisely in the act of variously curating, moderating, or steering posted content.[99] Judge Jones noted the limited actual audience and the limited content of any unexplained deprioritization, for example, of a given post.[100] Neither the poster, nor anyone else, may recognize the platform's decision, whether algorithmic or not, to downgrade or upgrade a particular post.[101] Even if it were somehow recognized, the substantive meaning of any such downgrading or upgrading may be "incomprehensible."[102]

Judge Jones thus formulated her concerns in this fashion:

> But for their advertising such "censorship"—or the censored parties' voicing their suspicions about such actions —no one would know about the goals of their algorithmic magic. It is hard to construe as "speech" what the speaker never says, or when it acts so vaguely as to be incomprehensible.[103]

The problem with Judge Jones's analysis is that the platforms' speech interests, whether grave or modest, should be judicially cognizable even if the statute impairs the platforms' speech to even one person, or even on only rare occasions. Consider an unpublicized removal of an image that is thought to violate the platform's explicit statement of community standards and policies.[104] Perhaps we could say that in such a case, the pure, non-symbolic act of removing the image implicitly refers to, if it does not incorporate by reference, any relevant published platform policy.

---

[99] *See* NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 494 (5th Cir. 2022) (Jones, J., concurring).

[100] *See id.* at 495 (Jones, J., concurring).

[101] *See id.* at 494-95.

[102] *Id.*

[103] *Id.* at 494-95. Of course, the platform's speech to the poster alone would still count as speech.

[104] *See, e.g.,* TIKTOK, *supra* notes 65-72 and accompanying text.

Doubtless the reason for some removals will be unclear, if undertaken without any associated explanation. But is it true that even an entirely vague expression of disapproval cannot count as speech? Suppose someone points at a particular social media post and says, merely, either 'Hooray!' or 'Boo.'[105] Has that person not engaged in speech within the meaning of the First Amendment? Or has that person indeed spoken, however vaguely, for First Amendment purposes by virtue of clearly conveying approval or disapproval?[106]

---

[105] *See, e.g.,* A. J. AYER, LANGUAGE, TRUTH, AND LOGIC (2d ed. Dover Press) (1936).

[106] For background, see *supra* note 26, as well as the expansive view advocated in MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT (2017).

The speech-related legal grievances of posters, and of would-be posters, often face legal barriers in the form of insufficient state action, or of insufficient action under color of state or federal law, understood as a generally insufficient government connection to the platform's treatment of the plaintiff speaker.[107] At the federal statutory level, section 230 of the Communications Decency Act has been held to extend its immunization to non-criminal good faith platform decisions to remove user-posted content, whether in breach of the platform's terms of service or not.[108] It is presumably in part the motivation behind state regulation of the platforms to redress a supposed imbalance of speech rights. But social media platforms may be treated by federal law effectively as non-speakers only for certain purposes, or more precisely, as speakers who are statutorily protected from certain forms of speech liability, without thereby logically forfeiting their free speech rights for other purposes and in other contexts.

---

[107] *See, e.g.,* Doe v. Google LLC, 2022 WL 17077497, *3 (9th Cir. Oct. 17, 2022) (insufficient state 'entanglement' for state action to be present); Prager Univ. v. Google LLC, 951 F.3d 991, 997-98 (9th Cir. 2020); Rogalinski v. Meta Platforms, Inc., 2022 WL 3219368 (N.D. Cal. Aug. 9, 2022); O'Handley v. Padilla, 579 F. Supp. 3d 1163 (N.D. Cal. 2022); Daniels v. Alphabet Inc., 2021 WL 1222166, *6 (N.D. Cal. Mar. 31, 2021) (seeking to apply a federal-level *Bivens* cause of action); Child.'s Health Def. v. Facebook Inc., 546 F. Supp. 3d 909, 922 (N.D. Cal. 2021) (seeking to apply a federal-level *Bivens* cause of action); Lewis v. Google LLC, 461 F. Supp. 3d 938, 955-56 (N.D. Cal. 2020).

[108] *See, e.g.,* Word of God Fellowship, Inc. v. Vimeo, Inc., 205 A.D.3d 23, 166 N.Y.S.3d 3, *leave to appeal denied*, 38 N.Y.3d 912, 192 N.E.3d 356 (2022), and *cert. denied*, 143 S. Ct. 746 (2023). The court concluded that "Section 230 prevents lawsuits against Internet service providers for their good faith decisions to remove content that they consider objectionable." *Id.* 205 A.D.3d at 24, 166 N.Y.S.3d at 5. *See also* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016); Universal Commc'n. Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007); Enrique Armijo, *Reasonableness as Censorship: Section 230 Reform, Content Moderation, and the First Amendment*, 73 FLA. L. REV. 1199 (2021) (noting various problems with revising section 230); Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303 (2021) (encouraging additional competition among platforms).

II. THE LIMITS OF ANY LEGAL SOLUTIONS AND THE ROLE OF VIRTUES AND VICES IN CONTEMPORARY SOCIAL MEDIA

Doubtless the Supreme Court will, in one or more future opinions, bring order to the application of free speech principles to major social media platforms and their users. The problem, though, is that whatever the Court eventually decides, the weightiness and value of contrary, disapproved approaches will remain apparent. No Supreme Court solution in this context can avoid substantial free speech and other costs. In this context, there is again little low hanging fruit to be had. Whatever the Court chooses will inevitably have disturbing doctrinal implications and undesirable consequences. The Court will have to reject entirely plausible and weighty arguments. Whoever the dissenters are, they will have cogent arguments. No Court resolution will seem genuinely satisfying.

This inevitability should be disturbing enough. But far more disturbing is a largely separate further inevitability: whichever course the Supreme Court chooses will simply not make much real difference to the actual social media experience and to the overall cultural and political effects of contemporary social media. The law, in this sense, will matter little.

Consider first, though, the initial problem of the disappointing tradeoffs, or the inevitable difficulty in arriving at any satisfying resolution of any number of questions raised by the case law. In particular, even if the major platforms do not qualify as classic monopolies or oligopolies, is there no reason to treat them any differently than the entrants in a plainly competitive market for, say, dish towels. Even if the platforms are not sufficiently linked to any government for their editorial choices to be made under color of law, should their relatively broad insulation from liability under federal statutory law count for nothing in the context of a poster's free speech rights? And even if the major platforms do not qualify as common carriers, should it make any difference that they clearly seem to be substantially and directly affected with the vitally important public interest? If would-be users can be 'cancelled' on a wide variety of grounds by the major social media platforms, can they equally be cancelled by the major banks, insurers, schools, and credit sources?

As well, if we assume that the major platforms are not literally classic public forums, is there a sense in which they alone perform, at least roughly, a unique successor role to that once performed by the publicly owned town square? If so, how can the legal system distinguish between 'bias,' or political unfairness, and 'neutrality,' or political fairness, in platform policies and practices? Is it ever desirable for the law to attempt to do so? Relatedly, should the legal system ever be in the business of seeking to 'level the playing field' as among competing political actors and views? Can governments recognize which groups have fewer economic resources, or less cultural status, than others, or are otherwise disadvantaged? When is the field insufficiently level?

And then, what should the legal system do about unpublicized, undisclosed curating or ranking of 'speech' by platforms, apart from their well-publicized platform rules? Is a platform's unelaborated downgrading of a post, on no specified grounds, speech for constitutional purposes? By what test should such presumed speech be constitutionally protected? Are the speech rights of the platforms burdened if they feel somehow bound to post their own public disclaimer of user messages that they dislike but are legally required to post? Does a platform's refusal to post a user's message in the first place ever constitutionally differ from posting, but then removing or somehow downgrading, that user's message?

For each of these inescapable questions, there is simply no unequivocal best answer, in the sense of an answer that promotes constitutional and other values that are clearly greater than the constitutional and other values that are lost by legally adopting that answer. Even more important, though, is that whatever choices the Court eventually makes will make little practical difference to our social media environment. This is the second, and more important, broad concern. The above questions and even their best answers will not significantly change the most important cultural and political effects of the major social media. Here, the impact of even dramatic changes in the law itself is, realistically, minimal.

To begin to see this, consider how little any answers to the above questions would affect the most important attributes, favorable and unfavorable, of our major social media. The benefits and the harms of social media are largely insensitive even to ambitious regulatory reforms. If we seek a meaningfully upgraded and more valuable social media experience, we must look beyond any of the legal regulatory reforms contemplated by the current case law.

Certainly, the affirmative contributions of social media, and of the internet more broadly, are of remarkable value. Consider this brief and entirely reasonable summary by Erwin Chemerinsky and Alex Chemerinsky:

> [T]he internet has democratized the ability to reach a mass audience. It used to be that to reach a large audience, a person had to be rich enough to own a newspaper or to get a broadcast license. Now, though, anyone with a smart phone—or even just access to a library where there is a modem—can reach a huge audience instantaneously. No longer are people dependent on a relatively small number of sources for news.[109]

[109] Erwin Chemerinsky & Alex Chemerinsky, *The Golden Era of Free Speech, in* SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY 87, 89 (2022).

Despite the swings in popularity among particular social media platforms, social media use remains widespread across the major demographic categories.[110] And the potential of social media to provide a broad, inexpensive, easily accessible, well-tailored education of various sorts is clear.[111] As well, social media platforms offer unique opportunities to locate and communicate with persons who share one's interests and identities.[112] Social media platforms such as YouTube provide free access to audio and video of many of the greatest musical and other cultural performances and achievements of the last century[113] and beyond.[114] Obscure questions can be answered instantaneously. These cultural benefits are remarkable.

---

[110] *See, e.g.,* Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021 [https://perma.cc/MU8A-KCMF]. At a more granular level, though, political messaging on social media varies not only by platform, but by demographic. On pre-Elon Musk Twitter, "[g]roups such as college graduates, Democrats and Democratic leaners, those ages 50 and older, and women each produce 80% or more of all tweets from U.S. adults mentioning politics or political issues." Sam Bestvater, et al., *Politics on Twitter: One-Third of Tweets from U.S. Adults Are Political*, PEW RSCH. CTR. (June 16, 2022), https://www.pewresearch.org/politics/2022/06/16/politics-on-twitter-one-third-of-tweets-from-u-s-adults-are-political/ [https://perma.cc/L6RM-K88U].

[111] *See, e.g.,* Cynthia J. Brame, *Effective Educationl Vidoes: Principles and Guidelines for Maximizing Student Learning from Video Content*, 15 CELL BIOLOGY EDUC. – LIFE SCI. EDUC. 1, 2 (Oct. 13, 2017), https://doi.org/10.1187/cbe.16-03-0125 [https://perma.cc/V8F7-BXBG] ("discussing using YouTube Annotate or HapYak to provide students with a question and promiting them to move forward after completion").

[112] *See, e.g.,* Social media benefits and risks: pre-teens and teenagers, RASINGCHILDREN.NET.AU (Oct. 14, 2022), https://raisingchildren.net.au/teens/entertainment-technology/digital-life/social-media [https://perma.cc/67FZ-SYTA]. *But cf.* JEAN M. TWENGE, IGEN: WHY TODAY'S SUPER-CONNECTED KIDS ARE GROWING UP LESS REBELLIOUS, MORE TOLERANT, LESS HAPPY—AND COMPLETELY UNPREPARED FOR ADULTHOOD (2017) (documenting its title thesis).

[113] *See, e.g.,* Rick88888888, *Stunning footage of the construction of New York's Empire State Building in color (opened 1931)*, YOUTUBE (Dec. 2, 2021), www.youtube.com/watch?v=EdDECW5FLAM [https://perma.cc/D85A-UCEP] (showing the colorized video of the construction of the Empire State Building opened in 1931).

[114] Thewisemonkey9, *Jessye Norman: Strauss – Four Last Songs, 'Im Abendrot'*, YOUTUBE (June 19, 2012) https://www.youtube.com/watch?v=q_y19ssI6_M [https://perma.cc/5YJZ-UYS9].

On the other hand, the American public understandably does not react to social media with unmixed gratitude. One study, for example, found more than half of both Democrats and Republicans believe that "social media have a largely negative effect on the way things are going in the country today."[115] Among the many concerns of those persons surveyed are social media misinformation, harassment of various sorts, stalking, hatred, partisanship, polarization, and self-validating echo chambers.[116]

[115] *See* Brooke Auxier, *64% of Americans say social media have a mostly negative effect on the way things are going in the U.S. today*, PEW RSCH. CTR. (Oct. 15, 2020) https://www.pewresearch.org/short-reads/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today/ [https://perma.cc/XW4Y-5TLH].

[116] *See id. See also* JARON LANIER, TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW (2018); Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1031 (2016) ("it is easier than ever for shaming to spin out of control"). On stalking and harassment, see R. George Wright, *Cyber Harassment and the Scope of Freedom of Speech*, 53 UC DAVIS. L. REV. 187 (2020).

To the extent that these phenomena really do manifest on social media, whether on political sites or not, they are plainly cause for serious concern. Perhaps, though, there is a silver lining to such pathologies. Perhaps when users can, without inhibition, express their real views on any subject there is, positively, in some respects less coerced compliance with dictated norms;[117] less dissembling;[118] less preference falsification;[119] and less disguising of one's real meaning.[120] And as well, it would be misleading to critique only the major social media platforms in particular, even for severe harms, where the harms in question are baked into the internet more generally, and not just social media.[121]

---

[117] *See* VACLAV HAVEL, THE POWER OF THE POWERLESS 24 (Paul Wilson trans., 1978) (Vintage ed. 2018) (discussing mere ritualistic political language unconnected to reality).

[118] *See* CZESLAW MILOSZ, THE CAPTIVE MIND 54 (Jane Zielonko trans., 1981) (Vintage ed. 1990) (1951) (pervasive "acting" in the sense of the social performance of approved scripts and of impression management). This is not the correct page number.

[119] *See* TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 3 (First Harvard Univ. Press paperback ed. 1997) (preference falsification as "the act of misrepresenting one's genuine wants under perceived social pressures").

[120] *See* ARTHUR M. MELZER, PHILOSOPHY BETWEEN THE LINES: THE LOST HISTORY OF ESOTERIC WRITING (paperback ed. 2017).

[121] *See, e.g.,* NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS 138, 141 (2010) (the internet in general as impairing the ability to sustainedly read and concentrate, as distinct from scanning and skimming); MARIO VARGAS LLOSA, NOTES ON THE DEATH OF CULTURE: Essays on Spectacle and Society 204 (John King ed. 2015, John King trans.) (2012) ("My impression is that literature, philosophy, history, art criticism, to say nothing of poetry, all the manifestations of culture written for the Net, will doubtless be ever more entertaining, that is, more superficial and transient."); Joseph Firth, et al., *The "Online Brain": How the Internet May Be Changing Our Cognition*, 18 WORLD PSYCHIATRY 119, 126 (2019) ("[Hi]gher frequency of Internet use over 3 years in children is linked with decreased verbal intelligence at follow up, along with impeded maturation of both grey and white matter regions [of the brain].") (citation omitted); Gianluca Quaglio & Sophie Millar, *Potentially Negative Effects of Internet Use*, EUR. PARLIAMENTARY RSCH. SERV. REP. 5 (May 13, 2020), https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/641540/EPRS_IDA(2020)641540_EN.pdf [https://perma.cc/P46K-BFDB] ("There is evidence to suggest that children's cognitive development can be damaged by prolonged internet use, including the development of memory skills, attention span, abilities for critical reasoning, language acquisition, reading and learning.").

Still, the serious personal, cultural, and political harms of social media are accumulating and by now undeniable. Any such social media harm can be inflicted on a large scale, almost instantaneously, without any central direction, akin to a murmuration of starlings, but with the effect of disinhibited mobbing.[122]

We have thus briefly considered some of the legal issues posed by state, or potentially federal, regulation of the major social media platforms. The initial problem was that the constitutional and other costs of any significant form of regulation, as well as of any significant decision not to regulate, seem inevitably high, and the overall net benefits of any legal policy seem modest.

[122] *See generally* Barbara J. King, *Video: Swooping Starlings In Murmuration*, NPR (JAN. 4, 2017, 2:29PM), https://www.npr.org/sections/13.7/2017/01/04/506400719/video-swooping-starlings-in-murmuration [https://perma.cc/6E96-V967] (murmurations of starlings). There can also be 'defensive' social media murmurations, as when one side of a political divide seeks in unison to change the subject of a potentially embarrassing discussion.

As we then move to look directly to the above pathologies of the major social media platforms,[123] we discover that the law, in whatever form, and whether pro- or anti-regulatory, has little potential to cure those pathologies. It is, for example, easy in our polarized culture for a partisan to judge disfavored social media messages to be false,[124] fake, misleading, discriminatory, uncontextualized, uncivil, divisive, intolerant, hyper partisan, willfully disturbing, hostile, or hateful. The speaker of such messages, however, will often defend them as perhaps uncomfortable, but largely cogent, civil, and not motivated by hate or prejudice. It is instead supposedly one's antagonists who are being divisive and intolerant. Inevitably, any such judgment by any party typically reflects the biases and contestable preferences of that party. What counts as, say, 'disinformation,' divisiveness, or intolerance may thus largely reflect one's political dispositions.[125] And the idea of having supposedly more or less unbiased 'fact checkers' resolve such disputes in our polarized,

---

[123] *See supra* notes 114-115 and accompanying text.

[124] Social media posts are of course subject to the established, if itself often controversial, law of defamation, including issues of public versus private figure libel plaintiff status and the role of speech on public as distinct from private concern. For background, see R. George Wright, *How to Do Surgery on the Constitutional Law of Libel*, 74 SMU L. REV. F. 145 (2021). For a sense of a broader inclination among some government officials to discourage what they regard as false, deceptive, misleading or out-of-context political claims, see Ken Klippenstein & Lee Fang, *Truth Cops: Leaded Documents Outline DHS's Plans to Police Disinformation*, THE INTERCEPT (Oct. 31, 2022, 5:00 AM), https://theintercept.com/2022/10/31/social-media-disinformation [https://perma.cc/3DR8-FSMF].

[125] For a sense of the distrust and contentiousness over official determinations as to what counts as 'disinformation,' see Kanishka Singh, *U.S. advisers say no need for Disinformation Governance Board*, REUTERS (July 18, 2022, 7:42 PM), https://www.reuters.com/world/us/us-advisers-say-no-need-disinformation-governance-board-2022-07-19/ [https://perma.cc/UUH8-WCGB]; *see also* Caleb Ecarma, *Embattled DHS "Disinformation" Board Officially Folds Under a Torrent of Threats and Online Abuse*, VANITY FAIR (Aug. 25, 2022) https://www.vanityfair.com/news/2022/08/dhs-disinformation-board-folds [https://perma.cc/QM7V-2RAR]; s*ee generally* Emily Bazelon, *The Disinformation Dilemma*, *in* SOCIAL MEDIA FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY 41 (2022). What counts as 'misinformation' is neither neutrally arbitrable, nor determinable by law without a revolution in free speech jurisprudence.

low-trust culture presumes that such 'neutral' fact checkers[126] will enjoy a broad authority, and a broad trust,[127] that is unlikely to be actually extended.[128]

---

[126] For a sense of the contestedness of fact-checker neutrality, see Stephen J. Ceci & Wendy M. Williams, *The Psychology of Fact-Checking: Fact Checkers Aim to Get Closer to the Truth, But Their Biases Can Shroud the Very Truth They Seek*, SCI. AM. (Oct. 25, 2020) https://www.scientificamerican.com/article/the-psychology-of-fact-checking1/ [https://perma.cc/LT4Q-9ZQZ]; Moran Marietta et al., *Fact Checking, Polarized Politics: Does the Fact-Check Industry Provide Consistent Guidance on Disputed Realities?*, 13 F. 577 (DEC. 1, 2015), https://doi.org/10.1515/for-2015-0040 [https://perma.cc/N4KY-ZU5H]; Shan Jiang et al., *Bias Misperceived: The Role of Partisanship and Misinformation in YouTube Comment Moderation*, ASS'N. FOR THE ADVANCEMENT OF A.I. (2019), at 278, https://ojs.aaai.org/index.php/ICWSM/article/view/3229/3097 [https://perma.cc/D9XE-9RSN] (discussing the effect of partisanship and misinfrmation on comment moderation); Sungkyu Park, et al., *The Presence of Unexpected Biases in Online Fact-Checking*, 2 HARV. KENNEDY SCH. MISINFORMATION REV. 1 (2021). Part of the problem is that even assuming that a decision maker is relatively free of political or cognitive biases, the crucial dispute may be over inherently vague, ambiguous, or essentially contested and partly normative ideas, such as speech that is motivated, to one degree or another, by conscious or subconscious hatred. For discussion, see JEREMY WALDRON, THE HARM IN HATE SPEECH (paperback ed. 2014). In the meantime, what parties perceive as misinformation poisons the social media well. *See* David Klepper, *Poll: Most in US say misinformation spurs extremism, hate*, AP News (OCT. 12, 2022 11:11 PM), https://apnews.com/article/religion-crime-social-media-race-and-ethnicity-05889f1f4076 709c47fc9a18dbee818a [https://perma.cc/UV8X-J7L5].

[127] For background, see KEVIN VALLIER, TRUST IN A POLARIZED AGE (2021) (discussing societal trust and trust in government); KEVIN VALLIER, MUST POLITICS BE WAR? RESTORING OUR TRUST IN THE OPEN SOCIETY (2019) (discussing a liberal political theory on social and political trust). More broadly, see FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1st Free Press Paperback ed.1996).

[128] Referring disputed allegations of subjective and perhaps subconscious hatred or group-bias to a third-party adjudicator is more likely to sustain, if not enhance, the underlying dispute than to resolve it in some mutually credible fashion. Any third-party fact checker is likely to develop their own, likely contested, reputation for conscious or subconscious bias. Consider the difference in the Twitter review process, above and beyond any changes to published Twitter community standards, pre- and post-Elon Musk's takeover of Twitter. John Cassidy, *Beware Elon Musks's Takeover of Twitter*, The NEW YORKER (Oct. 28, 2022), https://www.newyorker.com/news/our-columnists/beware-elon-musks-takeover-of-twitter [https://perma.cc/FX2D-7NUJ]. A further complication is the common tendency to declare that apparent misbehavior is excusable when we, but not our opponents, engage in it, along with a general reluctance to publicly criticize those we consider allies.

In the end, the dilemmas posed by social media platform cases are not correctable by the law or by bureaucracies. If meaningful progress in addressing the most important pathologies of social media is to be made, we must look elsewhere. Ultimately, the health and value of our social media are more a matter of multi-institutional socialization, education, and the development of worthy group and individual habit, than of legislation and constitutional adjudication.[129]

If there are to be any genuine solutions, they must transcend mere reform of the law. Consider again the assessment of the philosopher Onora O'Neill:

> [C]ombining exaggerated conceptions of freedom of expression with digital connectivity has promoted the proliferation of fake news, spiraling disinformation, filter bubbles and conspiracy theories. All of these may foster cognitive fragmentation and threaten the integrity, and even the future, of a democratic public sphere as well as respect for science and other research.[130]

---

[129] *See* THE REPUBLIC OF PLATO 116 (bk. IV, at 425) (Francis MacDonald Cornford trans., Oxford Univ. Press 1941) (c. 380 B.C.E.). See also Judge Learned Hand on the inescapable limits of the law and of legal reform in Learned Hand, The Spirit of Liberty, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 190 (Irving Dillard 3d ed., 1960. Alfred A. Knopf) (1944) (Judge Learned Hand's 1944 speech in celebration of "I Am an American" Day) ("[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it"). The law in this context is to be distinguished from other institutions, including "families, schools, peers, youth development programs, the media, religious institutions, and the larger culture." CHRISTOPHER PETERSON & MARTIN E. P. SELIGMAN, CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION 5 (2004). For one historic vision of the role of universities in particular, see JOHN HENRY NEWMAN, THE IDEA OF A UNIVERSITY 120-21 (Loyola U. Press reprint ed., 1987) (1852) ("a cultivated intellect, a delicate taste, a candid, equitable, dispassionate mind, a noble and courteous bearing in the conduct of life;— these are the . . . objects of a university").

[130] O'NEILL, *supra* note 1, at 74.

Elsewhere, it has been much more widely argued that "'fake news,' 'alternative facts,' 'echo chambers,' 'information silos,' and 'filter bubbles' seriously restrict our ability to discern truth from falsehood, or even allow us access to criteria that might enable us to do so."[131] These cultural phenomena, along with the most fundamental difficulties remaining in the wake of the statutory regulation cases,[132] are best addressed not by legislatures and courts, but by the admittedly slower, more incremental, decentralized process of cultural change. Cultural practices regarding the proper roles and limits of basic civic virtues are inescapably crucial. But we must then recognize that a cultural approach may be unsuccessful as well. There can be no guarantee that at this stage in our cultural trajectory even an optimal focus on virtues and vices, and on their cultivation, will pay off.

There are already a number of broad taxonomies of the virtues that are most clearly related to a healthier social media ecosystem. Most comprehensively, Professor Shannon Vallor lists honesty, self-control, humility, justice, courage, empathy, care, civility, flexibility, perspective, magnanimity, and what she refers to as "technomoral wisdom."[133] On another account, the virtues most relevant to social media use encompass "curiosity, intellectual autonomy, intellectual humility, attentiveness, intellectual carefulness, intellectual thoroughness, open-mindedness, intellectual courage and intellectual tenacity."[134]

---

[131] Nancy E. Snow, *Democratic Truth-Seeking, Tribal Epistemologies, and Trust*, *in* VIRTUES, DEMOCRACY, AND ONLINE MEDIA: ETHICAL AND EPISTEMIC ISSUES 11, 11 (Nancy E. Snow & Maria Silva Vaccarezza eds., 2021) (quoting LEE MCINTYRE, POST TRUTH 173 (2018)).

[132] *See generally supra* Part II.

[133] SHANNON VALLOR, TECHNOLOGY AND THE VIRTUES: A PHILOSOPHICAL GUIDE TO A FUTURE WORTH WANTING 120 (2016).

[134] Richard Heersmink, *A Virtue Epistemology of the Internet: Search Engines, Intellectual Virtues, and Education*, 32 SOC. EPISTEMOLOGY 1, 1 (2018).

At present, the major social media platforms and posts do not, to put it mildly, invariably encourage or display these virtues. One United Kingdom survey reports that "[o]nly 15% of parents agree that social media supports/enhances a young person's character."[135] This is an entirely unsurprising result. More specifically, parents noted the negative traits or vices[136] of "[a]nger, arrogance, ignorance, bad judgment and hatred . . ."[137]

---

[135] Press Release, *Social media Sites obstruct chilren's moral development, say parents*, JUBILEE CTR. (July 14, 2016), https://www.birmingham.ac.uk/news-archive/2016/social-media-sites-obstruct-childrens-moral-development-say-parents [https://perma.cc/XK9F-46S3] (last visited Nov. 1, 2022).

[136] *See id.*

[137] *Id.*

These virtues, and certainly these vices, are not best addressed through internet-related state or federal legislation or adjudication. Consider, for example, the vice of voluntarily and socially chosen ignorance, the fruits of which are commonly manifested across social media.[138] A majority of Americans surveyed are now unable to name the three branches of the federal government.[139] Persons who obtain most of their news from social media tend to be less well informed than others about current affairs and policy debates.[140] And among contemporary teenagers in particular, one in six report that they are on TikTok "almost constantly,"[141] and one in five say they are on YouTube almost constantly.[142]

---

[138] *See generally* Ilya Somin, *Time to start taking political ignorance seriously*, WASH. POST (Nov. 8, 2016, 10:05 AM), www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/08/time-to-take-political-ignorance-seriously [https://perma.cc/9B9S-C4VB] (of course, not all ignorance represents a vice); *see* RICHARD ARUM & JOSIPA ROKSA, ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES (2011); Philip Babcock & Mindy Marks, *Leisure College USA*, AM. ENTER. INTS. FOR PUB. POL'Y RSCH. (2010), https://www.aei.org/wp-content/uploads/2011/10/07-EduO-Aug-2010-g-new.pdf?x91208 [https://perma.cc/U8LT-MGFJ] (documenting a broad, multi-generational, substantial, multi-level, across-the-board decrease in student study effort); Bryan Caplan, *Straight Talk about Economic Illiteracy*, https://www.mercatus.org/sites/default/files/d7/uploadedFiles/Mercatus/Publications/Straight%20Talk%20About%20Economic%20Literacy.pdf [https://perma.cc/4M6B-Z7KS] (last visited Nov. 1, 2022); Robert Lynch, *How statistical illiteracy warps our view of reality and perverts public policy*, THE HILL (Apr. 18, 2022, 1:00 PM), https://thehill.com/opinion/technology/3271748-how-statistical-illiteracy-warps-our-view-of-reality-and-perverts-public-policy/ [https://perma.cc/45VR-MKJ3]; Jean M. Twenge, W. Keith Campbell & Ryne A. Sherman, *Declines in Vocabulary Among American Adults Within Levels of Educational Attainment*, 1974-2016, 76 INTEL. 1 (July 4, 2019), https://doi.org/10.101 6/j.intell.2019.101377 [https://perma.cc/HX6F-MQXY].

[139] See *generally Americans' Civics Knowledge Drops in First Amendment and Branches of Government*, ANNENBERG PUBLIC POL'Y CTR. UNIV. PA. (Sept. 13, 2022) https://www.annenbergpublicpolicycenter.org/americans-civics-knowledge-drops-on-first-amendment-and-branches-of-government/ [https://perma.cc/XM37-5QTN] (last visited Nov. 1, 2022).

[140] See *generally* Amy Michell, et al., *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RSCH. CTR. (July 30, 2020), www.pewresearch.org/journalism/2020/07/30/americans-who-mainly-get-their-news [https://perma.cc/N3NX-M97P].

[141] Alyson Klein, *Big Numbers of Teens Are on TikTok 'Almost Constantly.' What Should Teachers Do?*, EDUC. WKLY. (Aug. 10, 2022) https://www.edweek.org/technology/big-numbers-of-teens-are-on-tiktok-almost-constantly-what-should-teachers-do/2022/08 [https://perma.cc/W8PA-ALZK].

[142] *Id.*

All of these causes and manifestations of the vice of political and broader ignorance are largely unresponsive to any reasonably imagined legislative or judicial reform. To the extent that social media distraction is a matter of something like an addiction, the law is even less relevant. There are more than sufficient school attendance and curriculum rules on the books.[143] At this point, no imaginable law will prevent social media addiction, or even mere reliance on social media as a main source of news. No plausible law can effectively incentivize an abandonment of the various social media in favor of more serious, if less entertaining, sources of news.

[143] *See generally, e.g.*, CAL. ASS'N STUDENT PERFORMANCE & PROGRESS LANGUAGE MATHEMATICS SKILLS, https://caaspp-elpac.ets.org/caaspp/UnderstandingSBResults [https://perma.cc/C4T3-TGPS] (last visited (Oct. 24, 2022); *School Attendance Review Board: A Road Map for Improved School Attendance and Behavior*, SAN DIEGO CNTY OFF. EDUC. (May 14, 2018), https://resources.finalsite.net/images/v16360 49504/sdcoenet/yn4bpqrzs47dqoeeldxb/StateSARBHandbook5-14-2018corrected.pdf [https://perma.cc/36GJ-QQXZ]; *Experts weigh in on the dangers of social media on students*, ILL. FED'N TCHRS. (Oct. 17, 2023), https://www.ift-aft.org/post/experts-weigh-in-on-the-dangers-of-social-media-on-students [https://perma.cc/8CQ7-MBW7].

Consider, then, some of the other civic, group, and personal virtues necessary for a healthy social media ecosystem, and whether the law can realistically expect to develop, replace, or bypass the need for such virtues in social media users. There is clearly a public interest in less perversely uncivil social media debates.[144] The mutually exercised virtue of civility, within some appropriate limits, is widely recognized as socially valuable. Even John Rawls's largely virtue-neutral approach to justice as fairness requires "the virtues of civility and tolerance."[145] But by the very nature of civility itself,[146] this virtue is not neutrally policeable by law or by governmental officials, either in reality or certainly as perceived by the government's critics.

---

[144] *See* Michael Heseltine & Spencer Dorsey, *Online Incivility in the 2020 Congressional Elections*, 75 POL. RSCH. Q. 512, 513 (2022) (noting the "feedback effect" of incivility leading to responsive, if not escalating, incivility); Melissa Bo-Ya Feng, *Orwell, Trump, and Twitter: Reeaxamining the Relationship Between Politics and Language*, N.Y.U. EXPOSITORY WRITING PROGRAM, https://wp.nyu.edu/mercerstreet/2021-2022/orwell-trump-and-twitter-reexamining-the-relationship-between-politics-and-language/ [https://perma.cc/8QFP-XS5F] (last visited Nov. 1, 2022) ("While Twitter encourages concision through its character limit, it does not encourage clarity, rationality, or civility . . . .").

[145] JOHN RAWLS, POLITICAL LIBERALISM 194 (expanded ed. 2005). For a thoughtful general account, see Cheshire Calhoun, *The Virtue of Civility*, 29 PHIL. & PUB. AFF. 251 (2000) (discussing the proper scope and limits of civility). For the underlying logic of civility, see EDWARD SHILS, THE VIRTUE OF CIVILITY: SELECTED ESSAYS ON LIBERALISM, TRADITION AND CIVIL SOCIETY 251 (Liberty Fund, 1997) ("[c]ivility is basically respect for the dignity and the desire for dignity of other persons . . .. Civility treats others as, at least, equal in dignity, never as inferior in dignity"). See Kant's condemnation of contemptuous mockery in IMMANUEL KANT, THE METAPHYSICS OF MORALS 213 (Lara Denis, ed., Mary Gregor trans., 2017) (1797). Note that on none of these accounts is the virtue of civility to be exercised largely by one's opponents, and only to a lesser extent, if at all, by one's political allies.

[146] RAWLS, *supra* note 145.

Similarly, a healthy social media environment requires a sufficient presence of virtues such as an active and well-calibrated sense of one's own fallibility,[147] genuine open-mindedness,[148] self-criticality,[149] and a realistic, but not self-abasing, humility.[150] Each of these virtues is indispensable in any battle against undue social media disinhibition[151] and accelerating

---

[147] *See* JOHN STUART MILL, ON LIBERTY 77 (Gertrude Himmelfarb ed., 1974) (1859) ("while everyone well knows himself to be fallible, few think it necessary to take any precautions against their own fallibility"). Consider in particular the phenomenon in which an advocate has no answer to an apparently overwhelming objection, only to later tweet out essentially the same message again at the first opportunity, as though incapable of genuine learning. More broadly, note Montaigne's reference to persons "who are addicted and devoted to certain set and fixed opinions." THE COMPLETE ESSAYS OF MONTAIGNE 420 (Donald M Frame trans., 1943) (1958 ed.).

[148] *See generally* Jason Baehr, *The Structures of Open-Mindedness*, 41 CAN. J. PHIL. 191 (2011); William Hare, *What Open-Mindedness Requires*, 33 SKEPTICAL INQUIRER 36 (2009), https://skepticalinquirer.org/wp-content/uploads/sites/29/2009/03/p36.pdf [https://perma.cc/2XFZ-CP7B].

[149] *See* PHILIP E. TETLOCK & DAN GARDNER, SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION 20 (2015) ("superforecasting demands thinking that is open-minded, careful, curious, and–above all–self-critical," with the strongest predictor of an unusual ability to forecast future events being a "commitment to self-improvement").

[150] *See, e.g.,* CHRISTOPHER PETERSON & MARTIN E.P. SELIGMAN, CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION 462 (2004) (the virtue of humility as including "the ability to acknowledge one's mistakes, imperfections, gaps in knowledge, and limitations"). Plainly, humility in this sense overlaps with other epistemic and moral virtues.

[151] *See generally* Jason Kawall, *Patience, Love of Truth, and Navigating Online Media in an Age of Distraction*, *in* VIRTUES, DEMOCRACY, AND ONLINE MEDIA (2021); *see* O'NEILL, *supra* note 130, at 124-25; Christy M.K. Cheung et al., *Online Disinhibition: Conceptualization, Measurement, and Implications for Online Deviant Behavior*, 121 INDUS. MGMT. & DATA SYS. 48 (Feb. 4, 2021) (conceptualizing online disinhibition and devloping a measurement instrument for online distribution); Jaimee Stuart & Riley Scott, *The Measurement of Online Disinhibition (MOD): Assessing Perceptions of Reductions in Restraint in the Online Environment*, 114 COMPUTS. HUM. BEHAV. 106534 (2021), https://doi.org/10.1016/j.chb.2020.106534 [https://perma.cc/AT5G-EK7Z]; John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321 (July 28, 2004), https://psycnet.apa.org/doi/10.1089/1094931041291295 [https://perma.cc/TK5C-U99P] (discussing six factors that interact with each other in creating online dishibitation); Sheng Wu et al., *Examining the Antecedents of Online Disinhibition*, 30 INFO. TECH. & PEOPLE 189 (Mar. 6, 2017), https://doi.org/10.1108/ITP-07-2015-0167 [https://perma.cc/TEC2-4H6F] (The social media disinhibition problem is not merely a matter of the additive effects, but of the compounding effects, of disinhibition. Consider how the disinhibited barking of one dog in a public park can sometimes set off a cacophony of responsive barking.).

hyperpolarization.[152] Yet none is legally monitorable in any credible way, let alone somehow neutrally enforceable by law.

As one comprehensive study has concluded, "partisan bias is a bipartisan problem and . . . we may simply recognize bias in others better than we see it in ourselves . . . ."[153] And as another observer has concluded, there has been a "rise of an emotivism and intuition in the public sphere that tends to bury dispassionate reflection and reasoned debate under a mountain of gut feelings and intense reactions, all quickly expressed, replicated and made viral through Facebook and Twitter."[154]

---

[152] In the extreme case, "[p]assionate hatred can give meaning and purpose to an empty life." ERIC HOFFER, THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS 75 (reissue ed. 2010) (1951); *see generally* Evette Alexander, *Polarization in the Twittersphere: What 86 million tweets reveal about the political makeup of American Twitter users and how they engage with news*, KNIGHT FOUND. (Dec. 17, 2019), https://knightfoundation.org/articles/polarization-in-the-twittersphere-what-86-million-tweets-reveal-about-the-political-makeup-of-american-twitter-users-and-how-they-engage-with-news/ [https://perma.cc/PU22-AP4G]; Dan Hopkins, *Political Twitter Is No Place For Moderates*, FIVETHIRTYEIGHT, (Nov. 1, 2017, 10:13 AM), https://fivethirtyeight.com/features/political-twitter-is-no-place-for-moderates [https://perma.cc/98SQ-PZN2]; Christopher Mims, *Why Social Media Is So Good at Polarizing Us*, WALL ST. J. (Oct. 19, 2020, 7:00 AM), https://www.wsj.com/articles/why-social-media-is-so-good-at-polarizing-us-11603105204 [https://perma.cc/DFR8-ZYXV]; Jay J. Van Bav el, et al., *How Social Media Shapes Polarization*, 25 SCI. & SOC'Y 913 (2021), https://doi.org/10.1016/j.tics.2021.07.013 [https://perma.cc/G74S-LB3T] (discussing the evidence between social media and political polarization).

[153] Peter H. Ditto, et al., *At Least Bias Is Bipartisan: A Meta-Analytic Comparison of Partisan Bias in Liberals and Conservatives*, 14 PERSP. ON PSYCH. SCI. 273, 286 (2019), https://doi.org/10.1177/1745691617746796 [https://perma.cc/ZCS5-E9G6].

[154] Juan Pablo Bermudez, *Social Media and Self-Control: The Vices and Virtues of Attention*, *in* SOCIAL MEDIA AND YOUR BRAIN 57, 72 (C.G. Prado ed., 2017).

As well, hatred of one's opponent, and hathotic delight in one's hatred of that opponent, are also not generally amenable to legal prohibition, or to judicial injunction. But such hatred is linked to a greater likelihood of sharing what one knows to be fake news on social media,[155] thus further polluting the media. And more subtly, there is the further virtue of temperance, in the sense of entirely reasonable self-restraint, in reacting to an encounter with opposing views on social media. With the virtue of temperance, we neither dismiss such opposing views with contempt,[156] nor perversely intensify our disagreement because we have encountered such views.[157] But of course, the virtue of temperance cannot generally be effectively instilled by targeted legislation.[158]

---

[155] *See* Mathias Osmundsen et al., *Partisan Polarization Is the Primary Psychological Motivation Behind Political Fake News Sharing on Twitter*, 115 AM. POL. SCI. REV. 999, 1012-13 (2021), https://doi.org/10.1017/S0003055421000290 [https://perma.cc/73GQ-X7UL] ("it may be difficult to fix the problem of fake news without fixing the larger problem of political polarization"). Yet more perversely, see Christian Cecconi et al., *Schadenfreude: Malicious Joy in Social Media Interactions*, 11 FRONTIERS IN PSYCH. 1 (2020), https://doi.org/10.3389/fpsyg.2020.558282 [https://perma.cc/9ZZR-JBUF].

[156] *See* Jason Baehr, *Democracy, Information Technology, and Virtue Epistemology*, *in* VIRTUES, DEMOCRACY, AND ONLINE MEDIA 30, 36 (2021).

[157] There is ongoing uncertainty as to a "backfire" effect, pursuant to which exposure to opposing views leads not to any epistemically better result, but instead to "doubling down" on one's prior beliefs. *See, e.g.*, Christopher A. Bail, et al., *Exposure to Opposing Views on Social Media Can Increase Political Polarization*, 115 PROC. NAT'L ACAD. SCIS. 9216 (2018), https://doi.org/10.1073/pnas.1804840115 [https://perma.cc/H4YS-6V24]; Ezra Klein, *When Twitter users hear out the other side, they become more polarized*, VOX (Oct. 18, 2018, 8:30 AM), https://www.vox.com/policy-and-politics/2018/10/18/17989856/twitter-polarization-echo-chambers-social-media [https://perma.cc/UTB5-CFK4]. But see a larger and more comprehensive study, Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes' Steadfast Factual Adherence*, 41 POL. BEHAV. 135, 160 (2018), https://doi.org/10.1007/s11109-018-9443-y [https://perma.cc/JL8M-DMGB] (finding no evidence of factual backfire from confrontations on various polarized issues).

[158] *See, e.g.*, U.S. CONST. amend. XXI (repealing the 18th Amendment's prohibition on alcohol); Maggie Secara, *Controlling the Uncontrollable,* ELIZABETHAN SUMPTUARY STATUTES (July 14, 2001), www.elizabethan.org/sumptuary [https://perma.cc/9L5L-A7DZ].

There are thus a number of epistemic and moral virtues, and their corresponding vices, that bear indispensably on the value of the social media experience. Typically, each of these virtues is linked to, and promotive of, the pursuit of meaningful truth. Merely for example, "[t]hose who are epistemically self-indulgent desire, consume, and enjoy truths, treats, and falsehoods indiscriminately . . . ."[159] As well, the virtue of "[o]pen-mindedness requires sincere commitment to the pursuit of truth, without which a concern for evidence and argument and a readiness to revise one's opinion serves no meaningful purpose."[160] The culturally indispensable pursuit of truth, on social media and elsewhere, requires a number of supportive virtues.

The virtues that support the pursuit of truth on social media are especially necessary in overcoming obstacles that are built into one's individual personality, the social media, and the broader culture. In particular, confirmation bias[161] can be aggravated merely by associating with one's selected online friends.[162] What one sees on social media is often then curated by the platform to reinforce and enhance one's pre-existing biases, as well as to increase one's time spent on social media.[163] The relevant epistemic and moral virtues are necessary to reduce such biases, and in resisting the broader cultural tendency to somehow minimalize the very idea of truth itself.[164]

---

[159] Heather Battaly, *Epistemic Self-Indulgence,* 41 METAPHILOSOPHY 214, 233 (2010), https://doi.org/10.1111/j.1467-9973.2009.01619.x [https://perma.cc/K6MF-7TKY].

[160] Hare, *supra* note 148, at 38.

[161] *See* LORD BACON, NOVUM ORGANUM 23, (Joseph Devey, ed. 1902) (1620) ("The human understanding, when any proposition has been once laid down . . . forces everything else to add fresh support and confirmation; and although most cogent and abundant instances may exist to the contrary, yet either does not observe or despises them. . . rather than sacrifice the authority of its first conclusions.").

[162] *See* Jane R. Bambauer et al., *Cheap Friendship*, 54 U.C. DAVIS L. REV. 2341, 2345 (2021) ("even if individuals are engaged in good faith attempts to understand the truth, and even if they are rational, and want to avoid confirmatory filter bubbles, they will *still* become more polarized in their beliefs if their friends are a source of political information").

[163] *See* VALLOR, *supra* note 133, at 179-80 (platform algorithms as potentially tending to exacerbate one's cognitive biases).

[164] *See, e.g.*, SIMON BLACKBURN, TRUTH: A GUIDE 38 (2005); Richard Rorty, *Main Statement*, *in* WHAT'S THE USE OF TRUTH? 31 (2007).

We have often historically associated the pursuit of the truth with widely attractive public virtues such as courage.[165] In our culture, the virtues, including courage, must be summoned to resist the tendency to subordinate the value of pursuing truth itself to the promotion of whatever strikes us as more appealing.[166] Even more or less arbitrary, if fervently held, political preferences sometimes tend to trump the pursuit of truth.[167]

Prioritizing one's political—or any other—values over the pursuit of the truth may well be currently popular. But the following implication then arises:

> If the search for truth is only of secondary or tertiary demand in the marketplace of ideas, then efforts that seek to curb or call out disinformation will likely not have the desired effects. The marketplace of ideas metaphor presumes that people are in the market for truth. But if people are seeking affirmation and/or entertainment over truth, then reforms designed to correct the market for truth will have missed the point. Truth is not what the marketplace consumers most want.[168]

---

[165] *See, e.g.*, Whitney v. California., 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (overruled on other grounds); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); MILL, *supra* note 147*; see also* HAVEL, *supra* note 117; Liu Xiaobo, NO ENEMIES, NO HATRED: SELECTED ESSAYS AND POEMS 294-95 (Perry Link, Tienchi Martin-Liao & Liu Xia eds., 2012).

[166] *See* LEE MCINTYRE, POST-TRUTH 11 (2018) ("one gets the sense that post-truth is not so much a claim that truth *does not exist* as that *facts are subordinate to our political point of view*").

[167] See *id.*

[168] William P. Marshall, *Cheap Speech, Freedom of Speech, and the War Against Disinformation*, 20 FIRST AM. L. REV. 418, 423 (2022).

Subordinating the pursuit of truth[169] to other values does indeed pose this problem for social media reform. But this is a deep problem that is not realistically amenable to targeted legal reform. Prioritizing any value, including one's political preferences, over the truth leads inescapably into an abyss of pragmatic self-contradiction and sheer arbitrariness. For example, anyone who fundamentally seeks their gratification must choose among alternative visions of what that gratification, or well-being, consists.[170] But the popular views of a gratifying or fulfilling life, politically or otherwise, are largely mutually incompatible. Any choice among those incompatible options that is not, in some way, guided by some conception of truth, and of its pursuit, must then inevitably be arbitrary. No such truth-indifferent choice among options could be meaningfully—truly—better than any other choice. Arguing for one's popular or unpopular choice, in any public setting, would then merely expose one's ultimate arbitrariness. The logical priority of pursuing the truth is a crucial element of any cultural resistance to the unintentional epistemic sabotage that is now widely characteristic of the major social media platforms.

Here, as elsewhere, the law has nothing directly constructive to offer, beyond, of course, providing for the social infrastructure within which all discussions, meaningful or not, take place. Whatever the length of the reform process that is necessary, a flourishing social media culture requires, most crucially, the broader cultivation of the relevant epistemic and moral virtues. But again, there can be no guarantee that any such cultivation of the epistemic and moral virtues is, under our own cultural circumstances, likely or even possible.

---

[169] For merely one approach to how this pursuit does, or ought to, take place, see KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 291-324 (2002 ed.) (1963).

[170] Consider the incompatible visions noted in RICHARD MCKEON, *Ethica Nicomachea (Nicomachean Ethics) (complete)*, *in* THE BASIC WORKS OF ARISTOTLE (Random House, Inc. 1941) (2001 ed.) (referring to diverse visions of individual happiness as either pleasure, wealth, or honor, or some combination thereof).

CONCLUSION

At this point, the free speech law of the state or federal regulation of social media is, in many respects, deeply conflicting. This is clear from the largely contrasting approaches taken in the Eleventh Circuit *NetChoice* decision[171] and in the Fifth Circuit *Paxton* decision.[172] Of course, the Supreme Court may well resolve some, if not all, of the current legal doctrinal conflicts.[173] The crucial problems are, however, not matters of doctrinal uncertainty, judicial acuity, or lack of judicial uniformity.

Rather, the problem is the discouragingly high price in relevant free speech and other cultural values that any given legal solution to any relevant problem exacts. There is very little low-hanging fruit to be harvested by any statutory or judicial means. The costs, in free speech related and other values, of any imaginable Supreme Court rules governing social media regulation will, inevitably, be disappointingly high. This will be true regardless of the path the Supreme Court eventually adopts.

The second, and even more important, part of the problem, though, is that no set of state or federal regulations, or judicial determinations, is likely to meaningfully address the most widely recognized and most important social media pathologies. At best, a legal rule might conceivably reduce one such pathology, at the cost of worsening, or even creating, another. The only meaningful responses to the most serious social media platform pathologies instead depend, crucially, on the cultivation and collective exercise of the relevant epistemic and moral virtues. No law can replace a reasonably good awareness of our own relevant limitations, and for our joint willingness to adjust our social media participation in accordance with those limitations.[174]

---

[171] For discussion, see *supra* Part I.A.

[172] For discussion, see *supra* Part I.B.

[173] *See supra* Part II.

[174] *See* DAVID DUNNING, SELF-INSIGHT: ROADBLOCKS AND DETOURS ON THE PATH TO KNOWING THYSELF (2005).

Many of us are, understandably, reluctant to give up on legal rules and courts as the source of a genuinely healthier social media landscape. But it is becoming apparent that some of the most disturbing social media platforms and other problems involve prisoner's dilemmas, tragedy of the commons circumstances, or uncontrolled negative externalities. And when we think of the prisoner's dilemma and structurally similar problems, we naturally think of distinctly legal solutions.[175]

Actually, prisoner's dilemma cases and structurally similar problems do not always require legally-based solutions.[176] But far more importantly, even setting aside its other limitations, the law certainly cannot solve our major social media platform problems if the law-making process itself involves deeper, embedded prisoner's dilemmas and similar pathologies. If a law, or a change in the law, is widely perceived by its opponents as amounting largely to a partisan move in a political game, such laws will then be thought of not as particularly authoritative or legitimate, but as ground to be captured at the earliest opportunity, followed, inevitably, by partisan counter-moves, in a likely negative-sum prisoner's dilemma. And there is no one outside this system to effectively impose any broadly desirable overall solution on us.

---

[175] *See* JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION (1986); *see generally* MARTIN PETERSON, THE PRISONER'S DILEMMA (Cambridge Univ. Press 2015); RUSSELL HARDIN, COLLECTIVE ACTION (1982); *see also* Garrett Hardin, *The Tragedy of the Commons: The Population Problem Has No Technical Solution; It Requires a Fundamental Extension in Morality*, 162 SCI. 1243 (1968). Actually, our political circumstances often involve not merely being trapped in a prisoner's dilemma, but being trapped in a prisoner's dilemma in which our various possible payoffs involve winding up in one payoff cell rather than another in a further, embedded prisoner's dilemma.

[176] *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (2015).

Instead, the potentially viable solutions to our major social media platform pathologies must flow, if at all, from the broader exercise of the relevant epistemic and moral virtues.[177] This process need not involve anything like self-sacrifice or unilateral disarmament in the likely vain hope of reciprocity. Instead, what is required is our conscientious reassessment of the real values that we should attribute to each possible outcome of any relevant prisoner's dilemma.[178] Our own current valuations of the available political and legal outcomes are not fixed, and they certainly do not flow unalterably from pure logic.[179] Unhappily, though, the major social media platforms experience today does not encourage any such thoughtful reassessment of our valuations and priorities.

---

[177] *See supra* note 128 and accompanying text. No doubt there are limits to how far one should extend a virtue such as civility or tolerance. In our cultural moment, though, we tend to err substantially on the side of underinclusiveness. In general, we underextend the proper scope of epistemic peerhood, and of the epistemic equality of persons. *See* R. George Wright, *Epistemic Peerhood in the Law*, 91 ST. JOHN'S L. REV. 663 (2017).

[178] *See* Martin Peterson, *Introduction, supra* note 175, at 3.

[179] Consider the underlying belief that education ought to involve "making virtue agreeable, and in making it a second nature." LEIBNIZ, *Memoir for Enlightened Persons of Good Intention*, *in* POLITICAL WRITINGS 103, 106 (Patrick Riley trans.) (2d ed. 1988) (1695).