

# FROM PLATFORMS TO SPRINGBOARDS

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## INTRODUCTION

The metaphor of the marketplace of ideas is under siege with its detractors pointing to Facebook, Twitter, and other social media sites as proof positive that the model is no longer operative.<sup>1</sup> The surprising outcome of the 2016 U.S. presidential election<sup>2</sup> and the concomitant focus on the scourge of “fake news”<sup>3</sup> have placed Internet platforms<sup>4</sup> at the center of controversy. Commentators evince an increasing skepticism of whether a free market for ideas and for facts is in the best interest of the American polity.<sup>5</sup> Critics cite concerns about the effects of increasingly

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<sup>1</sup> To paraphrase Douglas Adams: “In the beginning [platforms were] created. This has made a lot of people very angry and been widely regarded as a bad move.” DOUGLAS ADAMS, *THE RESTAURANT AT THE END OF THE UNIVERSE 1* (1980).

<sup>2</sup> See, e.g., Josh Katz, *Who Will Be President?*, N.Y. TIMES (Nov. 8, 2016, 10:20 PM), <https://www.nytimes.com/interactive/2016/upshot/presidential-polls-forecast.html> [<https://perma.cc/VGF8-VWXH>] (providing 85% likelihood Hillary Clinton would win election).

<sup>3</sup> See Mark Verstraete et al., *Identifying and Countering Fake News*, ARIZ. J. EMERGING TECH. (forthcoming 2018).

<sup>4</sup> The definition of “platform” is somewhat nebulous. This Article uses the term to denote an Internet application that primarily hosts, and allows users to interact with, content provided by third parties (rather than the application’s owner). Other definitions exist as well. See, e.g., David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. REG. 325, 328 (2003) (defining platform as that which “connects or coordinates the activities of multiple groups of customers”); *Platform*, PC MAG. ENCYCLOPEDIA, <https://www.pcmag.com/encyclopedia/term/49362/platform> [<https://perma.cc/DC8R-VKNM>] (defining platform as a “hardware and/or software architecture that serves as a foundation or base”).

<sup>5</sup> See, e.g., Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html> [<https://perma.cc/4ACM-SSYY>]; Tim

low-cost information, fearing that it reinforces biases, undermines democratic institutions, violates privacy, enables discrimination, and potentially threatens national security. Platforms, which exist principally to disseminate user-generated content (as opposed to material authored at their direction), have been caught in the crossfire.<sup>6</sup> They face an array of demands—sometimes strident, sometimes contradictory—to alter the information ecology that their applications host.

In response, platforms have already altered their curation techniques based upon social and market pressures. Facebook formed a partnership with a set of external fact-checking entities to police the content of posted links.<sup>7</sup> Google has refined the user interface for its news and search services to include a “Fact Check” section.<sup>8</sup> Backpage dropped its adult services section.<sup>9</sup> Twitter purged accounts that it suspected were bots, drawing the ire of political conservatives.<sup>10</sup> Despite these self-

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Wu, *How Twitter Killed the First Amendment*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/opinion/twitter-first-amendment.html>

[<https://perma.cc/Z2UT-RPCR>]; Jeremy W. Peters, *In Name of Free Speech, States Crack Down on Campus Protests*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/us/politics/campus-speech-protests.html> [<https://perma.cc/YZQ6-5XP9>].

<sup>6</sup> A recent Knight-Gallup poll found that 54% of respondents felt that social media had a negative effect on news reporting. See *Gallup-Knight Foundation Report: Americans See Media As Key to Democracy But Increasingly Don't Trust It*, KNIGHT FOUND. (Jan. 15, 2018), <https://knightfoundation.org/press/releases/gallup-knight-foundation-report-americans-see-media-as-key-to-democracy-but-increasingly-don-t-trust-it> [<https://perma.cc/MTG6-KULH>].

<sup>7</sup> See Jason Schwartz, *Is Facebook Preparing to Open Up on Fake News?*, POLITICO (Jan. 7, 2018, 5:05 PM), <https://www.politico.com/story/2018/01/07/facebook-fake-news-326996> [<https://perma.cc/9QVH-YYQ9>]; Daniel Funke, *It's Been a Year since Facebook Partnered with Fact-Checkers. How's It Going?*, POYNTER (Dec. 15, 2017), <https://www.poynter.org/news/its-been-year-facebook-partnered-fact-checkers-hows-it-going> [<https://perma.cc/P7W2-XRVZ>].

<sup>8</sup> See Daniel Funke, *Google Suspends Fact-Checking Feature over Quality Concerns*, POYNTER (Jan. 19, 2018), <https://www.poynter.org/news/google-suspends-fact-checking-feature-over-quality-concerns> [<https://perma.cc/S2KE-LDEJ>].

<sup>9</sup> See Derek Hawkins, *Backpage.com Shuts Down Adult Services Ads after Relentless Pressure from Authorities*, WASH. POST (Jan. 10, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/01/10/backpage-com-shuts-down-adult-services-ads-after-relentless-pressure-from-authorities/> [<https://perma.cc/FUD9-WYEP>].

<sup>10</sup> See, e.g., Adi Robertson, *Conservative Twitter is Freaking Out over a Reported Bot Purge*, VERGE (Feb. 21, 2018, 10:14 AM), <https://www.theverge.com/2018/2/21/17032798/twitter-russian-bot-purge-conservative-complaint> [<https://perma.cc/8YQZ-EFEK>]; Emily Stewart, *Twitter's Wiping Tens of Millions of Accounts from Its Platform*, VOX (July 11, 2018), <https://www.vox.com/2018/7/11/17561610/trump-fake-twitter-followers-bot-accounts> [<https://perma.cc/V5TM-RZ3A>].

imposed strictures, however, platform critics are still united on one point: the companies must do more.

Commentators disagree, however, on what exactly these platforms ought to do. Depending upon the observer, the applications should: block more political content<sup>11</sup> or encourage its expansion<sup>12</sup>; require users to post under their real names<sup>13</sup> or enable pseudonyms<sup>14</sup>; have more<sup>15</sup> or less<sup>16</sup> human input into curation decisions; give consumers more or less control over the content that appears in their feeds<sup>17</sup>; be more or less cooperative with law enforcement investigations<sup>18</sup>; and deploy more or fewer code-based efforts, such as machine learning, to detect prohibited content.<sup>19</sup>

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<sup>11</sup> See Natalie Andrews, *Senators to Pitch Bill Regulating Political Ads on Social Media*, WALL ST. J. (Oct. 4, 2017, 4:33 PM), <https://www.wsj.com/articles/political-ads-on-social-media-could-face-more-regulation-1507146803> [<https://perma.cc/3DR2-HK LX>].

<sup>12</sup> See Mack DeGeurin, *Majority of Republicans Think Tech Companies Are Censoring Them*, N.Y. MAG. (June 29, 2018, 1:07 PM), <http://nymag.com/selectall/2018/06/republicans-think-tech-companies-censor-political-speech.html> [<https://perma.cc/U9EY-VH3V>].

<sup>13</sup> See Levi Sumagaysay, *Should Twitter, Facebook Get Serious about Real Names?*, SILICONBEAT (Jan. 29, 2018, 11:14 AM), <http://www.siliconbeat.com/2018/01/29/twitter-facebook-get-serious-real-names/> [<https://perma.cc/HF7L-9S36>].

<sup>14</sup> See April Glaser, *Why Some Americans Are Cheering Germany for Taking on Facebook's Policy That You Need to Use Your Real Name*, SLATE (Feb. 17, 2018, 9:03 AM), <https://slate.com/technology/2018/02/why-some-americans-are-cheering-germany-for-taking-on-facebooks-real-name-policy.html> [<https://perma.cc/S5M8-M2ZL>].

<sup>15</sup> See Kathleen Chaykowski, *Facebook Plans to Add 1,000 Moderators Under Pressure to Address Russian Meddling*, FORBES (Oct. 2, 2017, 2:56 PM), <https://www.forbes.com/sites/kathleenchaykowski/2017/10/02/facebook-plans-to-add-1000-moderators-under-pressure-to-address-russian-meddling/> [<https://perma.cc/9PCD-7NZH>].

<sup>16</sup> See Lauren Weber & Deepa Seetharaman, *Staring at Human Depravity to Keep It Off Facebook*, WALL ST. J. (Dec. 27, 2017), <https://www.wsj.com/articles/the-worst-job-in-technology-staring-at-human-depravity-to-keep-it-off-facebook-1514398398> [<https://perma.cc/VW6H-L9UU>].

<sup>17</sup> See Casey Johnston, *The Feed Is Dying*, N.Y. MAG. (Apr. 28, 2016, 4:56 PM), <http://nymag.com/selectall/2016/04/the-feed-is-dying.html> [<https://perma.cc/D9PX-532A>].

<sup>18</sup> See Christopher Raleigh Bousquet, *Why Police Should Monitor Social Media To Prevent Crime*, WIRED (Apr. 20, 2018, 9:00 AM), <https://www.wired.com/story/why-police-should-monitor-social-media-to-prevent-crime/> [<https://perma.cc/4MLJ-6RLH>]; April Glaser & Kurt Wagner, *Twitter Reminds Everyone It Won't Cooperate with Government or Police Surveillance*, RECODE (Nov. 22, 2016, 9:24 AM), <https://www.recode.net/2016/11/22/13719876/twitter-surveillance-policy-dataminr-fbi> [<https://perma.cc/6HEW-J9ZD>].

<sup>19</sup> See Drew Harwell, *AI Will Solve Facebook's Most Vexing Problems, Mark Zuckerberg Says. Just Don't Ask When or How.*, WASH. POST (Apr. 11, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/ai-will-solve->

As one can see, it is impossible for platforms to satisfy all of these demands—some are contradictory, some would expose firms to civil or criminal liability, and some require adopting the critic’s particular, idiosyncratic preferences. Nevertheless, it is possible to discern patterns or similarities among these variegated calls for reform. This Article undertakes a descriptive task: it synthesizes and offers a taxonomy of the strategies that platforms could adopt regarding content regulation. It tries to be agnostic about these strategies, both in terms of their absolute worth and their merit relative to one another. The goal is to create at least a sketch of the options available to Internet platforms during this moment of mounting criticism.

Finding commonalities across the range of criticisms has at least three benefits. First, classifying reform proposals should press commentators to clarify and acknowledge the tradeoffs inherent in the changes for which they advocate. For example, a platform with an aggressive content removal policy for revenge porn may improve privacy for users and for the wider public. But, this policy may also hurt the public interest. For example, making it difficult to share the lewd “selfie” photographs that led to Congressional representative Anthony Weiner’s political downfall.<sup>20</sup> By contrast, a policy that embodies a strong preference for uncensored expression is likely to have more than its share of white supremacist content and “alt-right” users.<sup>21</sup> There can be multiple, legitimate, conflicting demands on platforms regarding their content. This makes it impossible to resort to moral weight—at least in a principled, rigorous fashion—to resolve curation questions.

Second, it can (hopefully) help the discussion on platform governance move beyond regulation by anecdote. Showing the similarity among seemingly disparate proposals will help reveal the larger informational strategy that critics seek to have Internet firms deploy. Calls for systemic redesign should necessitate at least some proof, and details, about the extent to which the underlying problems are systemic and not offset by the benefits of a platform’s approach. Perfection in content moderation is unattainable, especially since commentators have different views of what constitutes the good.

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facebook-most-vexing-problems-mark-zuckerberg-says-just-dont-ask-when-or-how/ [https://perma.cc/L9QR-9K4Y].

<sup>20</sup> See Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2015, 2068–69 (2014).

<sup>21</sup> See generally Olga Khazan, *The Dark Minds of the “Alt-Right”*, ATLANTIC (Aug. 17, 2017), <https://www.theatlantic.com/science/archive/2017/08/the-dark-minds-of-the-alt-right/537144/> [https://perma.cc/G8VG-MWLU]; Christopher Caldwell, *What the Alt-Right Really Means*, N.Y. TIMES (Dec. 2, 2016), <https://www.nytimes.com/2016/12/02/opinion/sunday/what-the-alt-right-really-means.html> [https://perma.cc/U572-85MB].

Finally, each policy proposal must grapple with the underlying technological challenge created by millions of users and billions of posts. It is impossible for human moderators to police content if platforms are to function effectively. Code-based solutions—a perennial source of both hope and despair—remain crude: both false positives and false negatives are inevitable, particularly when there is disagreement about underlying values.<sup>22</sup> Critics are going to be disappointed even if platforms attempt to fully implement proposed reforms. The taxonomy helps remind us of this unpleasant truth in the midst of a heated debate.

The Article next describes the five basic moves platforms can make: focusing on process, emphasizing theories of the middle range, adopting one of the partisan views on free speech, enabling filter bubbles, or building counter-bubbles. It concludes by suggesting that each of these tactics ultimately begs the larger questions: what is it we want platforms to be, as engines of human expression? and why?

### I. PRIORITIZE PROCESS

The first strategy that platforms can employ is to elucidate the procedures and mechanisms they use in deciding what content they remove, restore, deprecate, and promote. This is an approach familiar to legal scholars—it describes the structure within which normative preferences about content are processed.<sup>23</sup> It emphasizes how decision-making occurs, and when, regardless of the content question at issue. A process-based approach is not technocratic, and platforms should not pretend (nor be allowed to pretend) that it is normatively neutral. Procedural effects can be determinative for substantive questions, and legal scholars have produced a rich literature on questions of fairness, justice, and design for processes that platforms could consider.<sup>24</sup>

Platforms are already documenting and discussing the various procedures they use to regulate content. For example, the Internet services company Cloudflare came under pressure after the 2017 neo-Nazi demonstrations in Charlottesville, Virginia, when it became more widely known that the firm provided services to Daily Stormer, a white

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<sup>22</sup> One person's trash is another's treasure; one person's terrorist is another's freedom fighter.

<sup>23</sup> See, e.g., Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377 (2009).

<sup>24</sup> See, e.g., Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565 (2018); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); Robert G. Bone, *Rethinking the "Day in Court Ideal" and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

supremacist hate site. Previously, Cloudflare had evinced a simple content policy; it would not remove information or evict customers based on substance, since the firm “[didn’t] have the expertise to pass judgment” on expression.<sup>25</sup> But the growing controversy over the violence in Charlottesville—combined with the Daily Stormer’s attacks on Cloudflare management<sup>26</sup> and the firm’s concerns about effects on its initial public stock offering<sup>27</sup>—led Cloudflare’s chief executive to unilaterally change that policy. He explained, “My rationale for making this decision was simple: the people behind the Daily Stormer are assholes and I’d had enough,” admitting “this was an arbitrary decision.”<sup>28</sup>

By contrast, YouTube sets out a more detailed “three strikes” policy for violations of its Community Guidelines.<sup>29</sup> Incurring one strike will limit a user’s access to YouTube features. Earning a second blocks the user from uploading new material for two weeks. And receiving three strikes within three months results in termination of the user’s account. Users can appeal a strike if they believe the penalty is unfounded, and in some cases, YouTube will remove content without imposing a strike. The

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<sup>25</sup> Elizabeth Dwoskin & Tracy Jan, *Why GoDaddy’s Decision to Delist a Neo-Nazi Site Is Such a Big Deal*, WASH. POST (Aug. 14, 2017), [https://www.washingtonpost.com/business/economy/web-registration-site-godaddy-delists-neo-nazi-site-in-wake-of-charlottesville-violence/2017/08/14/3edcdd14-811a-11e7-902a-2a9f2d808496\\_story.html](https://www.washingtonpost.com/business/economy/web-registration-site-godaddy-delists-neo-nazi-site-in-wake-of-charlottesville-violence/2017/08/14/3edcdd14-811a-11e7-902a-2a9f2d808496_story.html) [<https://perma.cc/QC9W-CPZL>] (quoting Cloudflare’s general counsel).

<sup>26</sup> See Anthony Cuthbertson, *Who Should Police the Internet? Neo-Nazi Ban Was “Really, Really Dangerous,” Says Cloudflare CEO*, NEWSWEEK (Feb. 5, 2018, 12:59 PM), <http://www.newsweek.com/who-should-police-internet-neo-nazi-ban-797173> [<https://perma.cc/442E-Z468>] (noting that “it was comments in the [Daily Stormer] site’s forums that suggested Cloudflare’s leadership were secret Nazis” which led to the ultimate decision); Matthew Prince, *Why We Terminated Daily Stormer*, CLOUDFLARE (Aug. 16, 2017), <https://blog.cloudflare.com/why-we-terminated-daily-stormer/> [<https://perma.cc/NH7P-LARC>].

<sup>27</sup> See John Shinal, *The CEO Who Pulled the Plug on Neo-Nazi Site Says He Did It to Protect His Company*, CNBC (Sept. 24, 2017, 9:04 AM), <https://www.cnbc.com/2017/09/24/cloudflare-ceo-matthew-prince-explains-why-he-booted-the-daily-stormer.html> [<https://perma.cc/L4KM-XJT7>].

<sup>28</sup> Timothy B. Lee, *Cloudflare CEO Says His Daily Stormer Takedown Was “Arbitrary” and “Dangerous,”* ARS TECHNICA (Aug. 16, 2017, 10:47 PM), <https://arstechnica.com/tech-policy/2017/08/cloudflare-ceo-the-people-behind-the-daily-stormer-are-assholes/> [<https://perma.cc/8NL9-FA95>] (quoting e-mail written by chief executive Matthew Prince).

<sup>29</sup> *Community Guidelines Strike Basics*, YOUTUBE, <https://support.google.com/youtube/answer/2802032?hl=en> [<https://perma.cc/2MGZ-GCRS>].

company enables its users to flag information that they believe violates the Guidelines, but the ultimate decision is reserved to YouTube staffers.<sup>30</sup>

The goal of a process-based approach is to describe accurately the structures within which and by which normative decisions about preferences regarding content are made.

## II. POLICIES OF THE MIDDLE RANGE

The second strategy that platforms can adopt is to promulgate policies of the middle range.<sup>31</sup> These policies serve as the connective tissue between high-level principles (such as Google's "You can make money without doing evil"<sup>32</sup>) and the detailed, fact-specific determinations that platforms make when judging individual pieces of content.<sup>33</sup> Policies of the middle range, unlike the process-centered strategy above, are expressly concerned with content restrictions. They set out the categories of information that are permitted or prohibited, and attempt to elucidate, in as fine-grained a fashion as possible, the methodologies by which platforms classify information as falling inside or outside each category.

Category-level delineation of information will not suffice to make this strategy work. Consider, for example, a platform that decides to ban nudity. In theory, "nudity" should be reasonably amenable to definition—federal regulations do so.<sup>34</sup> A strict prohibition, though, risks censoring material that is neither salacious nor prurient, such as depictions of Michelangelo's sculpture of David,<sup>35</sup> breastfeeding advice,<sup>36</sup> Nick Ut's

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<sup>30</sup> *Policies and Safety*, YOUTUBE, <https://www.youtube.com/yt/about/policies/#reporting-and-enforcement> [<https://perma.cc/X3S2-FV5G>] ("Our staff carefully reviews flagged content . . .").

<sup>31</sup> See Robert K. Merton, *On Sociological Theories of the Middle Range*, SOCIAL THEORY AND SOCIAL STRUCTURE 39 (1968 ed.).

<sup>32</sup> *Ten Things We Know to Be True*, GOOGLE, <https://www.google.com/about/philosophy.html> [<https://perma.cc/BG8F-97S8>].

<sup>33</sup> See Merton, *supra* note 31, at 39 (describing such theories as "between the minor but necessary working hypotheses that evolve in abundance during day-to-day research and the all-inclusive systematic efforts to develop a unified theory").

<sup>34</sup> See 28 C.F.R. § 540.72(b)(2) (defining, for Bureau of Prisons purposes, nudity as "a pictorial depiction where genitalia or female breasts are exposed").

<sup>35</sup> Cf. Alexander Abad-Santos, *China Turned Michaelangelo's David Into Porn*, ATLANTIC (July 10, 2012), <https://www.theatlantic.com/international/archive/2012/07/china-turned-michelangelos-david-porn/326117/> [<https://perma.cc/8AKX-GZD2>].

<sup>36</sup> See Mikaela Conley, *Breastfeeding Advocates Protest Facebook With Nurse-In*, ABC NEWS (Feb. 8, 2012), <http://abcnews.go.com/Health/breastfeeding-advocates-hold-facebook-protest/story?id=15530012> [<https://perma.cc/2Q96-ZDG7>].

photograph of a child fleeing a napalm attack,<sup>37</sup> or documentation of human rights abuses by authoritarian governments.<sup>38</sup> Platforms that want to be family-friendly, but not overly restrictive of material unrelated to sex, will have to craft a more nuanced methodology for deciding when to block depictions of naked bodies. Instagram, for example, bans nudity, but with significant qualifiers: the prohibition “includes photos, videos, and some digitally-created content that show sexual intercourse, genitals, and close-ups of fully-nude buttocks. It also includes some photos of female nipples, but photos of post-mastectomy scarring and women actively breastfeeding are allowed. Nudity in photos of paintings and sculptures is OK, too.”<sup>39</sup>

Policies of the middle range help to put users on notice as to what content is allowed. This might reduce the number of removal decisions that a platform has to make, if users follow the rules, although deliberate protests against a policy could cut the other way. This codification should also increase the public’s perception (and hopefully the reality) of transparency by Internet firms. These policies do create risks, however. One is that platforms will be hoist with their own petard.<sup>40</sup> Observers can measure firms against their avowed criteria and attack non-compliance as hypocrisy (whether that failing is real or imagined). Another is that classification inherently involves discretion. By putting forth policies of the middle range, platforms may obfuscate the degree to which they retain maneuvering room to banish posts or to promote them.

Nonetheless, this approach has considerable virtues. It commits Internet firms to a set of substantive benchmarks, increasing both trust and predictability. That, in turn, generates greater accountability, even if only through social sanctions and market effects. Network effects aside, users can vote with their feet, or more accurately, their fingers.

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<sup>37</sup> See *The Story Behind the “Napalm Girl” Photo Censored by Facebook*, TIME (Sept. 9, 2016, 2:25 PM), <http://time.com/4485344/napalm-girl-war-photo-facebook/> [<https://perma.cc/T2HY-7QN4>] (describing Facebook’s removal of the photo).

<sup>38</sup> See *Internet Filtering in Saudi Arabia in 2004: Overblocking*, OPENNET INITIATIVE, <https://opennet.net/studies/saudi#toc1d> [<https://perma.cc/WA4Y-MT6B>] (noting erroneous classifications by Smartfilter software, including “labeling a women’s human rights site as nudity because of one image of a naked woman showing the marks of torture”).

<sup>39</sup> *Community Guidelines*, INSTAGRAM, <https://help.instagram.com/477434105621119> [<https://perma.cc/YUK9-5HET>].

<sup>40</sup> See WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 3, sc. 4.

### III. GRASP THE NETTLE ON FREE SPEECH PARTISANSHIP

A third strategy is that platforms could choose to align themselves explicitly with one of the two contending camps in the current free speech and First Amendment debate: information libertarianism<sup>41</sup> or the anti-subordination approach.<sup>42</sup> While choosing a side ensures criticism from the opposing one, failing to do so guarantees criticism from both.<sup>43</sup> The point of platforms becoming partisans is not to be reductionist about the complexities of content moderation. Rather, it is to reinforce that intermediaries must, at base, make a choice about how relevant an author's or speaker's identity is to their decisions about content moderation.

Platforms that espouse information libertarianism are, essentially, advocates of free trade in the marketplace of ideas. They prefer more information to less and are reluctant to base content decisions on identity. By contrast, anti-subordination sites prefer to prioritize content from underrepresented, marginalized, or disfavored speakers. Both approaches have structural biases. The anti-subordination perspective requires adopting an underlying normative approach for which targeted groups deserve a preference. Authors who advocate animal abuse are undoubtedly marginalized but rarely judged worthy of rescue from disapprobation.<sup>44</sup> Information libertarianism, though, risks replicating existing patterns of power and popular prejudices.

For platforms, aligning with one side of the current First Amendment debates has drawbacks: it guarantees criticism from the other side's partisans, if not others. And no platform will be able to adopt completely the libertarian or anti-subordination position. Choosing one as

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<sup>41</sup> See Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335 (2017).

<sup>42</sup> See, e.g., Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). But see Mark Verstraete & Derek E. Bambauer, *Ecosystem of Distrust*, 16 FIRST AMEND. L. REV. 129 (2018) (criticizing the anti-subordination approach).

<sup>43</sup> As former Texas politician Jim Hightower titled his book, "There's Nothing in the Middle of the Road but Yellow Stripes and Dead Armadillos." Jim Hightower, *THERE'S NOTHING IN THE MIDDLE OF THE ROAD BUT YELLOW STRIPES AND DEAD ARMADILLOS* (1997).

<sup>44</sup> Cf. *Animal Abuse Registry Rates Low on List of Nevadans' Needs*, LAS VEGAS REV. J. (Dec. 31, 2013, 10:02 AM), <https://www.reviewjournal.com/opinion/editorial-animal-abuse-registry-rates-low-on-list-of-nevadans-needs/> [https://perma.cc/ULS7-H429].

a lodestar, however, does help a platform to decide its default settings and to mount a principled defense of its choices about content.

#### IV. ENABLE FILTER BUBBLES

Since the early days of the commercial Internet, commentators have feared that users will seek to construct echo chambers for themselves, setting up screens that prioritize points of view with which they agree and blocking dissent.<sup>45</sup> The sheer volume of information transmitted over the Internet necessitates some sort of selection process, and people dislike data that contradicts their existing positions and beliefs. Fears of the filter bubble have steadily increased.<sup>46</sup> And yet, increasing users' ability to customize their social media feeds is at the heart of many reform proposals.

As a fourth strategy, platforms could therefore give users more control over what information they see and how it is prioritized. It could be possible for users to see stories about Bernie Sanders but not Hillary Clinton or that promote theories that the earth is flat while rejecting round earth pieces. Sites and applications could let people favor sources: links to Fox News bubble to the top, while ones to MSNBC languish. Each individual could choose which topics, viewpoints, speakers, and so forth are promoted or retained for their consumption.

Customization inevitably presents the problem of default settings, which can wield considerable influence over users, particularly those who are not technologically sophisticated or who visit the platform less frequently.<sup>47</sup> However, the difficulty with defaults can be mitigated by using a forced choice architecture:<sup>48</sup> before the platform will function for a

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<sup>45</sup> See, e.g., CASS SUNSTEIN, *REPUBLIC.COM* (2001). *But see* Dan Hunter, *Philippic.com*, 90 CAL. L. REV. 611 (2002).

<sup>46</sup> See, e.g., ELI PARISER, *THE FILTER BUBBLE* (2011); Mostafa M. El-Bermawy, *Your Filter Bubble Is Destroying Democracy*, WIRED (Nov. 18, 2016, 5:45 AM), <https://www.wired.com/2016/11/filter-bubble-destroying-democracy/> [<https://perma.cc/H9ZC-SW3X>]; CASS R. SUNSTEIN, #REPUBLIC (2017); Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014); Kevin J. Delaney, *Filter Bubbles Are a Serious Problem with News, Says Bill Gates*, QUARTZ (Feb. 21, 2017), <https://qz.com/913114/bill-gates-says-filter-bubbles-are-a-serious-problem-with-news/> [<https://perma.cc/HNK3-SMCY>].

<sup>47</sup> See, e.g., Steve Lohr, *The Default Choice, So Hard to Resist*, N.Y. TIMES (Oct. 15, 2011), <http://www.nytimes.com/2011/10/16/technology/default-choices-are-hard-to-resist-online-or-not.html> [<https://perma.cc/SVE2-CWVB>]; RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008).

<sup>48</sup> See, e.g., Punam Anand Keller et al., *Enhanced Active Choice: A New Method to Motivate Behavior Change*, 21 J. CONSUMER PSYCHOL. 376 (2011); Eric J. Johnson et al., *Beyond Nudges: Tools of a Choice Architecture*, 23 MKTG. LETTERS 487 (2012).

new user, the user must make some initial selections regarding the content they want to see.<sup>49</sup> For example, a user could pick from an ideologically balanced news feed or one that favors a particular partisan perspective; or it could choose certain topics to view or hide, or whether to receive information only from trusted sources (a whitelist) or from all sources unless placed on a block list.

This proposal is an extension of the capabilities that most, if not all, platforms already provide users. We already choose who to include in our networks, which lets us confine whose updates we see—and who sees our own. Furthermore, most platforms base suggestions of new connections on existing ties, such as people listed in our e-mail address books or friends of people with whom we are already linked. If we pick poorly, we can de-associate from a person in our network entirely or reduce our interactions with them (for example, by seeing fewer of their updates, or preventing them from viewing ours). LinkedIn lets users select which topics or participants show up in their feeds. Facebook enables consumers to hide ads from a given source or to temporarily cease seeing information from a particular account.<sup>50</sup>

Ultimately, committing to the filter bubble concept would mean that platforms will appear quite different to different users. Information that one de-prioritizes, or even blocks, may be highlighted for someone else.

## V. COUNTER FILTER BUBBLES

If enabling their users to create filter bubbles is unattractive to platforms, they could adopt the opposite strategy: deliberately confront people with information contrary to their views and preferences. This approach is conceptually similar to the now-defunct “fairness doctrine” promulgated by the Federal Communications Commission for broadcast radio and television in 1949<sup>51</sup> and upheld by the Supreme Court twenty years later.<sup>52</sup> The doctrine mandated that, for controversies of public importance, broadcasters air material representing the range of views on

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<sup>49</sup> In addition, users would not be prompted with pre-sets. For example, if a platform asked its users, “Do you want to see content about politics?” with “Yes” or “No” as possible responses, neither would be selected by default.

<sup>50</sup> See, e.g., Rachel Kraus, *How to Customize Your Facebook News Feed so It's Less Annoying*, MASHABLE (Feb. 8, 2018), <https://mashable.com/2018/02/08/facebook-news-feed-26-friends-rumor-see-first-how-to/> [<https://perma.cc/8FT6-LUA8>].

<sup>51</sup> *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

<sup>52</sup> *Red Lion Broad. v. Fed. Comm'n. Comm'n.*, 395 U.S. 367 (1969).

the topic.<sup>53</sup> Any fairness mandate faces a number of challenges, such as how to assess which issues are sufficiently important to merit a canvassing of views and how to determine which viewpoints merit inclusion in the debate. Moreover, adopting the goal of presenting users with countervailing information rests on the same Hegelian premise<sup>54</sup> as the marketplace of ideas:<sup>55</sup> people will have to evaluate information critically as part of a quest for truth. However, some evidence from psychology and behavioral economics suggests that this method may, counterintuitively, cause people to hold to their preconceptions even more strongly. But since social media platforms are not a didactic environment, surfacing diverse views may be the best that platforms can do.

The anti-bubble strategy may not be popular with platforms—it runs the risk of irritating users, something sites normally strive to avoid if only for pecuniary reasons.<sup>56</sup> There is a business case to be made for countering filter bubbles, though. Platforms generally want to maximize the degree to which their users are engaged with the site or application and its content, whether measured by quantity of time, quality of time, number of contributions, or some other metric. Controversy promotes engagement—many users have a surprising stamina for online arguments.<sup>57</sup>

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<sup>53</sup> See Dylan Matthews, *Everything You Need to Know about the Fairness Doctrine in One Post*, WASH. POST (Aug. 23, 2011), [https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ\\_blog.html](https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ_blog.html) [<https://perma.cc/BHR3-QGAR>]; Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1126–30 (1993); Mark R. Arbuckle, *How the FCC Killed the Fairness Doctrine: A Critical Evaluation of the 1985 Fairness Report Thirty Years After Syracuse Peace Council*, 15 FIRST AMEND. L. REV. 331 (2017); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1413 (2017).

<sup>54</sup> See generally Julie E. Maybee, *Hegel's Dialectics*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta, ed., 2016), <https://plato.stanford.edu/entries/hegel-dialectics/> [<https://perma.cc/83RA-BQZK>].

<sup>55</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Jane R. Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 92–96 (2014).

<sup>56</sup> See generally Catherine Tucker & Alexander Marthews, *Social Networks, Advertising, and Antitrust*, 19 GEO. MASON L. REV. 1211, 1219–25 (2012) (discussing network effects and switching costs on social media platforms).

<sup>57</sup> See, e.g., Jayson DeMers, *6 Ways To Increase User Engagement On Your Content*, FORBES (May 7, 2016, 8:00 AM), <https://www.forbes.com/sites/jaysondemers/2016/05/07/6-ways-to-increase-user-engagement-on-your-content/#12f00ed8181f> [<https://perma.cc/BYU5-YJP8>]; Gabriele Boland, *How Politics Gave Nordstrom a 11,000% Increase in Social Engagements*, NEWSWHIP (Feb. 14, 2017), <http://www.newswhip.com/2017/02/nordstrom-social-media-trump/#GjOktW0mDMqRGZRA.99> [<https://perma.cc/VBL2-5VU6>]. Social media controversies can have offline effects as well. See, e.g., Piet van Niekerk, *Magazine Covers: Does Controversy Sell in the Social Media Age?*, FIPP (Feb. 16, 2017),

This contrarian strategy is replete with challenging judgment calls. Some popular topics, such as sports, likely are not worth any counterprogramming efforts.<sup>58</sup> Others may not be susceptible to disproof: if religion demonstrates the triumph of faith over proof, then empiricism is irrelevant, and the best platforms can do is to provide alternative forms of faith. And, platforms must assess which issues are legitimately in question. It is hardly sensible to confront someone who posts about taking an around-the-world cruise with sources on flat earth series, or to direct someone who has just visited Yad Vashem with claims that the Holocaust was a hoax. Platforms should be provocateurs but not trolls.

However, this approach is also not uncharted terrain for platforms, and there is some existing data for how to approach the problem.<sup>59</sup> Google, for example, has occasionally intervened to provide counterprogramming, such as when it inserted a disclaimer about search results for the term “Jew.”<sup>60</sup> (The top result was for Jew Watch, a hate group.<sup>61</sup>) YouTube has also begun an effort to include links to Wikipedia articles alongside videos that tout conspiracy theories.<sup>62</sup> Both Google and Facebook include fact-checking links for certain content, demonstrating that they have the ability to identify which material qualifies for skepticism.

The choice between bubbles and counter-bubbles—if a platform decides to make one—is more significant than mere affirmation or trendiness. It raises the question of whether users can select the information architecture that best meets their preferences and needs or whether higher-level intervention is helpful. This issue of autonomy is ancient and persistent; responses range from unfettered free choice to

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<https://www.fipp.com/news/opinion/magazine-covers-does-controversy-sell>  
[<https://perma.cc/A49Q-QKPS>].

<sup>58</sup> Even sports, though, can be a vehicle for discussion of important issues, such as labor and employment policy, or race. *See, e.g.*, Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 820 F.3d 527 (2d Cir. 2016); DAVID KAREN & ROBERT E. WASHINGTON, *SOCIOLOGICAL PERSPECTIVES ON SPORT: THE GAMES OUTSIDE THE GAMES* 32–34 (2015).

<sup>59</sup> *See generally* Evgeny Morozov, *Warning: This Site Contains Conspiracy Theories*, SLATE (Jan. 23, 2012, 7:43 AM), [http://www.slate.com/articles/technology/future\\_tense/2012/01/anti\\_vaccine\\_activists\\_9\\_11\\_deniers\\_and\\_google\\_s\\_social\\_search\\_.html](http://www.slate.com/articles/technology/future_tense/2012/01/anti_vaccine_activists_9_11_deniers_and_google_s_social_search_.html) [<https://perma.cc/BN2S-2A3Q>].

<sup>60</sup> *See* Danny Sullivan, *Google In Controversy Over Top-Ranking for Anti-Jewish Site*, SEARCH ENGINE WATCH (Apr. 24, 2004), <https://searchenginewatch.com/sew/news/2065217/google-in-controversy-over-top-ranking-for-anti-jewish-site> [<https://perma.cc/2382-33DE>].

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

<sup>62</sup> *See* Louise Matsakis, *YouTube Will Link Directly to Wikipedia to Fight Conspiracy Theories*, WIRED (Mar. 13, 2018, 6:36 PM), <https://www.wired.com/story/youtube-will-link-directly-to-wikipedia-to-fight-conspiracies/> [<https://perma.cc/X7HH-9B3T>].

paternalism to “nudges” in a particular direction. Thus, the decision to enable bubbles or push counter-bubbles of necessity forces a platform to select how actively it tries to shape its users’ preferences.

### CONCLUSION

This Article is agnostic about which, if any, of these approaches ought to be adopted by platforms. It does not have a normative agenda; instead, its goals are descriptive. These categorizations help to show the symmetries among seemingly dissimilar proposals. For example, pressing platforms to enable users to block content that they deem to be harassing or hateful are, at base, a call for filter bubbles.

In addition, delineating these types of methods helps us understand the tradeoffs they entail and pushes advocates and critics to grapple with them. As platforms have learned, it is easy to be glibly in favor of free speech but far harder to confront the ugliness that unrestrained dialogue inevitably entails.<sup>63</sup> Environments with strong commitments to free speech will almost certainly have more than their share of white supremacists, neo-Nazis, and other bigots. A site that aggressively removes revenge porn is likely to take down the infamous photos of former Congressional representative Anthony Weiner, which had significant political salience while he was in office and, later, when he ran for mayor of New York City. However, the costs of reform are not an excuse for inaction; a sufficiently compelling rationale can hold its own in a careful cost-benefit analysis. But it is intellectually dishonest to pretend that the choices that platforms face are costless or self-evident. Systematizing the options for curating content should also help move beyond regulation by anecdote. Platforms, like all human creations, are going to be imperfect.<sup>64</sup>

The problem with platforms ultimately lies not with our code but with ourselves. We have not yet come to a consensus on what societal role these Internet applications ought to play or why. The debates over fake news, manipulation of political preferences, and online echo chambers are the Internet version of long-standing questions about human capacities and goals for information. Absent a strong deontological commitment to truth, we would not worry about fake news if voters were impervious to it. Our fears are consequentialist: both that people will be led astray from their

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<sup>63</sup> See Andrew Marantz, *Reddit and the Struggle to Detoxify the Internet*, NEW YORKER (Mar. 19, 2018), <https://www.newyorker.com/magazine/2018/03/19/reddit-and-the-struggle-to-detoxify-the-internet> [<https://perma.cc/JP4E-3634>].

<sup>64</sup> See *id.* (“Never again would I be able to read a lofty phrase about a social-media company’s shift in policy—‘open and connected,’ or ‘encouraging meaningful interactions’—without imagining a group of people sitting around a conference room, eating free snacks and making fallible decisions.”).

true wants and beliefs and that society will suffer lasting damage as a result. Efforts to reshape platforms are, at base, attempts to change the information environment in which people operate and, thus, to alter the substance of their decisions. This makes the fight over Facebook and its ilk simultaneously more and less weighty. The stakes—human flourishing—are higher, but we have long experience grappling with the underlying problem. Ultimately, we want platforms to be springboards, launching users towards our particular vision of the good. This Article tries both to describe the tactics that can be used to this end, and to encourage the debate to focus on the larger project at issue rather than questions of mechanics.