THE MYTH OF PLATFORM NEUTRALITY

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INTRODUCTION

In 1986, science and technology studies scholar Langdon Winner wrote, "The issues that divide or unite people in society are settled not only in the institutions and practices of politics proper, but also, and less obviously, in tangible arrangements of steel and concrete, wires and transistors, nuts and bolts."[1] To that list, we might add the algorithms, data structures, and policies of Silicon Valley.

Yet, the myth that online platforms are neutral pervades the tech industry. Indeed, "[t]his notion that Facebook is an open, neutral platform is almost like a religious tenet inside the company."[2] That is the conclusion of the editor-in-chief and contributing editor of *Wired* magazine upon interviewing fifty-one current and former employees of the world's biggest social network company. Facebook is hardly alone in insisting on its neutrality.[3] This is a typical ethos of information platforms

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[1] LANGDON WINNER, THE WHALE AND THE REACTOR: A SEARCH FOR LIMITS IN AN AGE OF HIGH TECHNOLOGY 29 (1986).

[2] Nicolas Thompson & Fred Vogelstein, *Inside the Two Years That Shook Facebook— And the World,* WIRED (Feb. 12, 2018, 7:00 AM), http://www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell/ [https://perma.cc/YF9V-ZEZZ].

[3] For example, Microsoft President Brad Smith has gone so far as to suggest that technology companies should be treated as a "Digital Switzerland"—that is, as neutrals between competing claims by different national governments. Brad Smith, President, Microsoft Corp., Transcript of Keynote Address at the RSA Conference 2017: "The Need for a Digital Geneva Convention," at 12, Feb. 14, 2017, https://blogs.microsoft.com/uploads/2017/03/Transcript-of-Brad-Smiths-Keynote-Address-at-the-RSA-Conference-2017.pdf [https://perma.cc/F68E-UL8H]. We do not engage with this particular conception of platform neutrality in this Article, but for a comprehensive consideration of this argument, *see* Kristen Eichensehr, *Digital Switzerlands,* 167 U. PA. L. REV. (forthcoming 2019).

more generally.[4] Platforms emphasize their passivity—they simply pass along the speech of their users to those users' networks, without editorial input.

In this sense, these platforms represent the natural continuation of the role often asserted by engineers, i.e., they are apolitical and neutral with respect to the various controversies raging around them. That their role is to build infrastructure and offer tools to the rest of the public. The tools they offer are not themselves good or bad. What the public does with them is its own fault, or perhaps the fault of rotten governments.

This Article challenges this claim. The argument unfolds in three parts. Building on the insights of Langdon Winner, Part I argues that Internet platforms are not, in fact, neutral with respect to substantive issues. Part II then examines why information platforms nonetheless insist on their neutrality. Part III argues that recognizing non-neutrality does not mean that Internet platforms are characterized by systematic bias against certain political points of view, contrary to the assertions of some political conservatives in the United States.

I.   SILICON VALLEY IS NOT NEUTRAL

Three decades ago, Langdon Winner asked whether artifacts have politics. Winner observed that the usefulness of technologies made them appear morally neutral: "Because technological objects and processes have a promiscuous utility, they are taken to be fundamentally neutral as regards their moral standing."[5] But Winner argues that this misapprehended their political nature: "[T]echnologies are not merely aids to human activity, but also powerful forces acting to reshape that activity and its meaning."[6] Winner famously offered the example of highway overpasses in Long Island, designed by Robert Moses to permit cars, but not buses, to pass, thereby favoring the "upper" and "comfortable middle" classes in the community.[7] Less famously, he offered the example of the mechanical tomato harvester, designed at the University of California, Davis, which benefited very large growers to the detriment of smaller ones.

Winner recognized that technological bias might arise not out of design, but out of neglect. Whereas the Long Island overpasses "were deliberately designed … to achieve a particular social effect," in many

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[4] Cale Guthrie Weissman, *The Myth of the Neutral Silicon Valley Platform Is Crumbling,* FAST CO. (Aug. 16, 2017), http://www.fastcompany.com/40454680/the-myth-of-the-neutral-silicon-valley-platform-is-crumbling [https://perma.cc/T2CN-6ARH].
[5] WINNER, *supra* note 1, at 6.
[6] *Id.*
[7] *Id.* at 23.

cases the politics of technologies arose from inattention.[8] Winner suggested that "to recognize the political dimensions in the shapes of technology does not require that we look for conscious conspiracies or malicious intentions."[9] He offers the example of the countless ways that "buses, buildings, sidewalks, plumbing fixtures, and so forth—made it impossible for many handicapped persons to move about freely," a result arising from "long-standing neglect rather than from anyone's active intention."[10]

When Winner imagined technology in the 1980s, he was thinking explicitly of "hardware."[11] A decade later, James Boyle turned attention from physical technologies to more ethereal ones. He argued that technologies often obscure politics, contending that technological solutions often "elide the question of power—both private *and* public."[12] He continued, "The technology appears to be 'just the way things are'; its origins are concealed, whether those origins lie in state-sponsored scheme or market-structured order, and its effects are obscured because it is hard to imagine the alternative."[13]

At the dawn of the Internet age, Lawrence Lessig drew the attention of lawyers to what he called the "West Coast Code" of Silicon Valley—which had as much regulatory power in its own domain as the "East Coast Code" of Washington, D.C.[14] Lessig argued that the power of East Coast Code would increase over West Coast Code as East Coast Code was written by corporations rather than hackers and other "individuals located outside any institution of effective control."[15] Lessig did not frame this argument in terms of contesting technological neutrality—but the idea of governance by code implicitly repudiates technologists' claim to merely technical, apolitical activity. Indeed, Lessig argued that we should not "commit ourselves to neutrality" in the construction of the Internet: "We can no more stand neutral on the question of whether the Net should enable centralized control of speech than Americans should stand neutral on the question of slavery."[16] Lessig recognized that the way the Internet's technology protocols were written

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[8] *Id.*

[9] *Id.* at 25.

[10] *Id.*

[11] *Id.* at 123 ("For my purposes here, the term 'technology' is understood to mean all of modern practical artifice, but to avoid confusion I prefer to speak of 'technologies' plural, smaller or larger pieces or systems of hardware of a specific kind.").

[12] James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 205 (1997).

[13] *Id.*

[14] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 53 (1999).

[15] *Id.*

[16] *Id.* at 205.

were inherently political—for example, enabling or disabling anonymity, aggrandizing or diminishing central control, and respecting or ignoring privacy.

With these insights as background, we now turn to consider specifically the claim of neutrality proffered by contemporary information platforms. We offer eight reasons why modern informational platforms are not quite as neutral as their founders make them out them to be.

First and foremost, by fundamentally changing the economics of producing, distributing, and consuming all kinds of content, modern information platforms have transformed political communication. Technologists will protest: But doesn't this just prove our point that Internet platforms are indeed neutral? After all, they don't pick and choose who speaks on their platforms, but simply empower anyone to pick up the microphone. It is this very fact that demonstrates that these technologies are not neutral: they shift the landscape of speech—from the careful curation of access by traditional editors to a few space-constrained speech channels, to the torrent of information flowing through the Internet.

By changing the very nature of the playing field on which ideas compete, information platforms that strive to be neutral and apolitical have changed the nature of what is available in the marketplace of political ideas. The changes wrought by new technology do not benefit everyone equally. Through their empowerment of one-to-many communications, information platforms give individuals the power to speak to the world, without the need to place an op-ed or to purchase an advertisement (though they have made it cheaper and easier than ever to buy ads, including false or misleading political ads).[17] As one of us has noted, "A fundamental design principle of the Internet—'end-to-end design'—facilitates minority participation."[18] "The World Wide Web deepens this design principle: an important democratizing feature of the Web is that it enables anyone to become a content provider on the Internet, even with little capital equipment or technical knowledge."[19] This has both potentially attractive and problematic results. Viewed optimistically, "The Web … brings us closer to the ideal of a 'semiotic democracy,' in which all individuals have the power to participate in the process of meaning-

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[17] *See* Sheera Frenkel, *Facebook Tried to Rein In Fake Ads. It Fell Short in a California Race.* N.Y. TIMES (June 3, 2018), https://www.nytimes.com/2018/06/03/technology/california-congressional-race-facebook-election-interference.html [https://perma.cc/95YQ-GDES].

[18] Anupam Chander, *Whose Republic?,* 69 U. CHI. L. REV. 1479, 1490 (2002).

[19] *Id.* at 1491.

making."[20] At the same time, ideas that were fringe in the broadcast era are now able to reach national and global audiences thanks to the platforms, whereas ideas that once had all of the advantages of being mainstream increasingly struggle to compete in a changed media ecosystem. These changes have had profound political consequences both here and abroad, including by weakening the middle and strengthening the extreme ends of the political spectrum.

Second, this innate tendency of information platforms to give voice to the fringes, and potentially make it harder for the mushy middle to be heard, is compounded by design choices the information platforms have made. Take, for example, the algorithms used by social media platforms like Facebook and Twitter to determine what you see as you peruse your news feed. These algorithms do not simply present you with a chronological set of information provided by everyone in your network. Rather, they have been designed and optimized to maximize the companies' revenue by maximizing the time you spend on their platform and the number of advertising links you click. Not one political consideration likely went into the development of these algorithms, and yet the creation of "echo chambers"[21] and the spread of "fake news"[22] are not neutral in their impact on politics.

A similar argument can be made regarding Google's PageRank algorithm which, in its original, platonic form, ranks the quality of individual pages as search results for a given query by combining the number of "backlinks" to that page with a mathematically-derived assessment of the quality of those "backlinks."[23] The PageRank algorithm may be neutral in the sense that it is neither Republican or Democratic, yet it embodies a value judgment about how to rate the quality of information. This has had undeniable political consequences, given Google's enormous share of the market for search.[24] Rather than relying on experts to produce

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[20] *Id.* (quoting William W. Fisher, *Property and Contract on the Internet,* 73 CHI. KENT L. REV. 1203, 1217–18 (1998)).

[21] CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017); for criticism of an earlier version of Sunstein's argument, see generally Chander, *supra* note 18.

[22] One influential group of scholars from different disciplines has defined "fake news" as "fabricated information that mimics news media content in form but not in organizational process or intent." *See* David M.J. Lazer et al., *The Science of Fake News,* 359 SCIENCE 1094, 1094 (2018).

[23] Lawrence Page et al., *The PageRank Citation Ranking: Bringing Order to the Web,* STAN. U. INFOLAB 2 (1999).

[24] Google currently possesses 90.8% of the global market for internet searches. Jeff Desjardins, *How Google Retains More Than 90% of Market Share,* BUS. INSIDER (Apr.

what they consider *accurate* information, Google relies on the wisdom of crowds (as expressed in part by their linking activity) to return what it deems to be *relevant* information. This choice may be why four out of the top ten results returned recently by Google to a search conducted by the authors asking, "are vaccines safe" pointed to so-called "anti-vaxxer" sites, even though the safety and efficacy of vaccines is beyond scientific dispute. The same search conducted three months later, however, only produced one anti-vaccination site among the top-ten results.

Third, there is growing recognition that automated algorithms, such as those relied on by information platforms, can further perpetuate pernicious bias. Safiya Noble argues that search engines reinforce racism through their recommendations and auto-complete suggestions, which reflect, and thereby perpetuate, the biases of society.[25] Noble's book is part of an emerging body of work demonstrating algorithmic discrimination—that algorithms, on their own, produce results that reflect pernicious discrimination—for example, against women or minorities.[26]

Fourth, the platforms are explicitly non-neutral with respect to certain issues specified in their community guidelines. These guidelines do not simply recapitulate the law, but rather set out a series of normative commitments. They take sides, for example, by banning hateful speech that, at least in the United States, is lawful. The guidelines are not typically written by the community, but rather by those who control the platform. The guidelines help constitute the community—restricting who is or is not welcome. Facebook states that "we welcome a multitude of viewpoints"—but within limits set out in its Community Guidelines.[27] These Community Guidelines state that users should not target victims of discrimination, though it does not clearly ban it.[28] Twitter ostensibly goes further to prohibit "abusive behavior," recognizing that such behavior might silence others on its platform: "We prohibit behavior that crosses the line into abuse, including behavior that harasses, intimidates, or uses

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23, 2018, 7:35 PM), http://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4 [https://perma.cc/HXH4-RT9Q].

[25] SAFIYA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018).

[26] *Id.*

[27] Adam Mosseri, *Building a Better News Feed for You,* FACEBOOK NEWSROOM (Jun. 29, 2016), http://newsroom.fb.com/news/2016/06/building-a-better-news-feed-for-you/ [https://perma.cc/B3YN-B8HP].

[28]   *Community   Standards*,   FACEBOOK, https://www.facebook.com/communitystandards#bullying-and-harassment [https://perma.cc/SQ7Y-V52D] (Facebook "ask[s] that people show sensitivity towards victims of violence and discrimination.").

fear to silence another user's voice.[29] Twitter further bans "hateful conduct," stating: "You may not promote violence against, threaten, or harass other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease."[30] YouTube tells users not to post harmful or dangerous content: "Don't post videos that encourage others to do things that might cause them to get badly hurt, especially kids."[31] One dating site, noting its "strong stance against hate," banned a person accused of being a white nationalist from its platform (though the individual denied that the dating profile was his).[32] The platforms adjust their policies in recognition of societal developments. Facebook and Google, for example, recently banned advertisements for cryptocurrencies, though they are legal.[33] Google also recently banned advertisements for bail bonds, citing social science research on how this industry preys on the poor and people of color, as well as the work of a coalition of advocates who are attempting to reform the money bail system.[34]

Even the interpretation of the community guidelines brings to bear normative judgments. Bans on hate speech require a platform to decide what precisely constitutes hate speech.[35] Platforms may even override their own community guidelines when some other policy goal so requires. When some argued that President Donald Trump had violated Twitter's community guidelines, Twitter responded by announcing that his account would not be suspended because "[b]locking a world leader … would hide important information people should be able to see and debate."[36] When

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[29] *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/YB37-DNBV].

[30] *Id.*

[31] *Policies and Safety,* YOUTUBE, https://www.youtube.com/intl/en-GB/yt/about/policies/ [https://perma.cc/KZ6W-GX8A].

[32] *See* Katie Notopoulos, *Bumble Just Kicked Off A Pro-Trump Media Personality As Part of Its "Stance Against Hate"*, BUZZFEED (Jan. 24, 2018, 4:02 PM), https://www.buzzfeed.com/katienotopoulos/jack-posobiec-bumble [https://perma.cc/5S75-5YCP].

[33] Lara O'Reilly, *Google To Ban Ads for Virtual Currencies*, WALL ST. J. (Mar. 14, 2018), https://www.wsj.com/articles/google-to-ban-ads-for-cryptocurrencies-1521000060 [https://perma.cc/V7QK-U45X].

[34] David Graff, *Google Bans Ads for Bail Bonds Services*, GOOGLE INSIDE ADWORDS (May 7, 2018), https://adwords.googleblog.com/2018/05/google-bans-ads-for-bail-bonds-services.html [https://perma.cc/8CG7-VMHE].

[35] Susan Benesch & Rebecca MacKinnon, *The Innocence of YouTube,* FOREIGN POL'Y (Oct. 5, 2012, 4:47 PM), https://foreignpolicy.com/2012/10/05/the-innocence-of-youtube/ [https://perma.cc/99LE-E5W6].

[36] Casey Newton, *Twitter Explains Why it Hasn't Banned President Trump,* VERGE (Jan. 5, 2018, 4:16 PM), http://www.theverge.com/2018/1/5/16855900/twitter-donald-trump-ban-explanation [https://perma.cc/453A-XSCZ]; Twitter Inc., *World Leaders on Twitter,*

Facebook deleted the iconic photo of a naked girl fleeing napalm bombing in Vietnam for a violation of its nudity policy, Facebook's administrators restored the photo following a public outcry.[37]

Fifth, the platforms have created a new job category—content moderator—that recognizes their role in regulating content on their sites. Facing criticism from advertisers for placing some advertisements adjacent to objectionable content, Google announced in December 2017 that it would hire 10,000 additional people to police the content on YouTube and its other services.[38] Such moderators would be unnecessary if YouTube were to simply carry all content, regardless of the harm posed.

Sixth, the platforms themselves are taking steps that recognize the politics of their services. Google's decision to withdraw certain services from China serves as a prominent example of a technology service recognizing that its usual operations can easily lead to unjust results, including complicity in censorship or in the persecution of dissidents.[39] In moving its search operations to Hong Kong from mainland China, Google sought to evade requirements to censor its search results.[40] After closing its mainland Chinese servers, Google initially automatically redirected search inquiries from Google.cn to Google.com.hk, its uncensored Chinese language service based in Hong Kong.[41] When the Chinese authorities objected to this approach, Google offered users from the mainland a choice as to whether their searches should be redirected to the

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TWITTER   BLOG   (Jan.   5,   2018), http://blog.twitter.com/official/en_us/topics/company/2018/world-leaders-and-twitter.html [https://perma.cc/BJ5C-JT2U].

[37] Mark Scott & Mike Isaac, *Facebook Restores Iconic Vietnam War Photo It Censored for Nudity*, N.Y. TIMES (Sept. 9, 2016), http://www.nytimes.com/2016/09/10/technology/facebook-vietnam-war-photo-nudity.html [https://perma.cc/979R-FBNM].

[38] Susan Wojcicki, *Expanding Our Work Against Abuse of Our Platform,* YOUTUBE OFFICIAL BLOG (Dec. 4, 2017), http://youtube.googleblog.com/2017/12/expanding-our-work-against-abuse-of-our.html [https://perma.cc/4BHN-Y8AF].

[39] This is precisely what happened to Yahoo when its Chinese subsidiary provided information to the local authorities that led to the arrest and imprisonment of a journalist for allegedly publishing secret material online. *See, e.g.,* Joseph Kahn, *Yahoo Helped Chinese to Prosecute Journalist,* N.Y. TIMES (Sept. 8, 2005), https://www.nytimes.com/2005/09/08/business/worldbusiness/yahoo-helped-chinese-to-prosecute-journalist.html [https://perma.cc/88JM-YDNV].

[40] David Drummond, *A New Approach to China: An Update,* GOOGLE OFFICIAL BLOG (Mar. 22, 2010), http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html [https://perma.cc/V89Z-M8ZD].

[41] NIR KSHETRI, THE QUEST TO CYBER SUPERIORITY: CYBERSECURITY REGULATIONS, FRAMEWORKS, AND STRATEGIES OF MAJOR ECONOMIES 133 (2016).

Hong Kong site.[42] Google's struggles must be understood as part of an effort to make good on its original commitment, "Don't be evil,"[43] but within the context and limits of its own business needs.

One reporter collected the response of various platforms to white supremacist speech after the Charlottesville, Virginia killing:

- GoDaddy denied the white supremacist website Daily Stormer domain registration, after insisting for months that it would not censor content.
- Google did the same.
- So did WordPress.
- Facebook too is cracking down on linked white supremacist content, and has even began to delete white nationalist accounts over hate speech.
- Airbnb canceled reservations for white nationalists trying to travel to Charlottesville.
- PayPal said it wouldn't do business with hate groups.
- Uber banned two white supremacists from using the ride-hailing app after a driver overheard a racist conversation.
- The chat app Discord has banned white supremacist channels.
- Even Cloudflare, the content distribution service that protects websites from hacking and DDoS attacks, changed its long-held tune on protecting white supremacist sites: It stopped providing service to Daily Stormer.[44]

These responses bring to mind John F. Kennedy's favorite quotation, in which the late president interprets and summarizes a key passage of Dante's *Inferno* thusly: "The hottest places in hell are reserved for those who in a time of moral crisis preserve their neutrality."[45] Against the backdrop of the moral crisis of Charlottesville, perhaps we shouldn't be surprised that self-described neutral platforms were moved to act.

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[42] U.S.-China Economic and Security Review Commission, Report to Congress 230 (2010).

[43] Google's parent company, Alphabet, dropped this famous motto from its Code of Conduct in 2015. See Tanya Basu, *New Google Parent Company Drops 'Don't Be Evil' Motto,* TIME (Oct. 4, 2015), http://time.com/4060575/alphabet-google-dont-be-evil/ [https://perma.cc/TVS4-RSZF].

[44] Weissman, *supra* note 4.

[45] *John F. Kennedy's Favorite Quotations: Dante's Inferno*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/JFK-Fast-Facts/Dante.aspx [https://perma.cc/T2AJ-UN4S].

Seventh, technologists are redesigning the technologies themselves in recognition of the technologies' implicit politics. Consider two examples. In 1996, the World Wide Web consortium offered a metadata system for websites that would allow a common labeling scheme to allow automated filtering of websites. While the platform was itself explicitly "value-neutral,"[46] the inclusion of this capability in the web protocols would improve automated censorship as long as websites accurately labeled themselves. Two decades later, technologists showed that even highly technical error codes can embed politics. In 2015, the Internet Engineering Steering Group of the Internet Engineering Task Force approved the introduction of a web status code 451, named after Ray Bradbury's famous book about book burning. This error code allows an Internet provider to explain that a particular web resource sought by a user is "unavailable for legal reasons." This tells users that they are being denied access to a particular web resource, not because of some technical connection error, but rather government policies.

Eighth, platforms are actively promoting substantive visions. Consider, for example, even something as ostensibly frivolous as the Google Doodle. The Google Doodles celebrating individual historical figures for the United States often showcase women and minorities, as figure 1 shows. It would appear that Google is seeking to bring recognition to neglected historical figures, thereby countering the standard historical texts that privilege white men whose contributions are worthy of remembering.

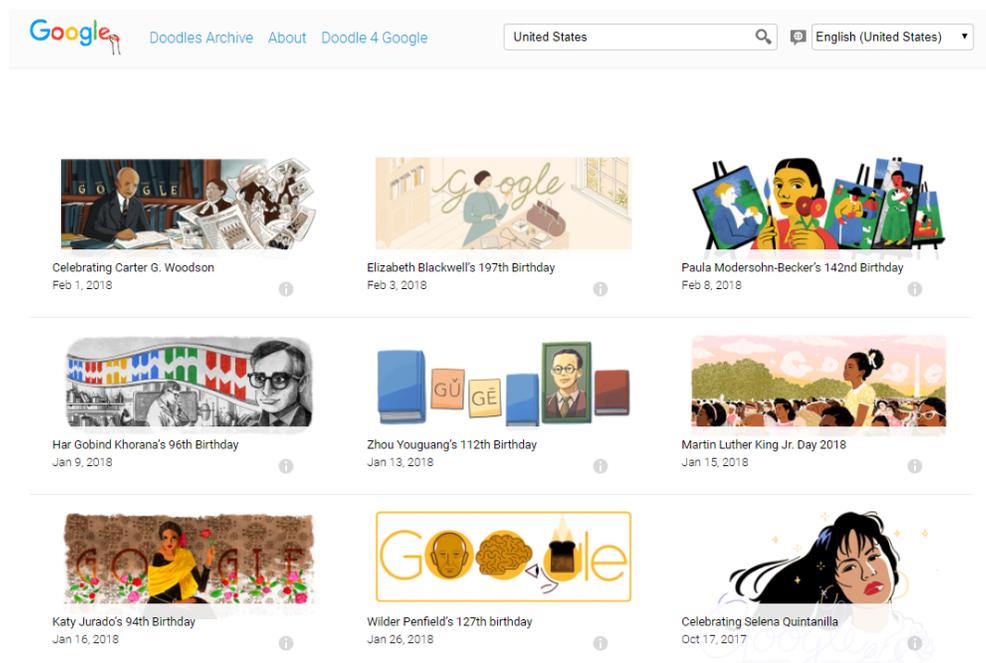[46] PLATFORM FOR INTERNET CONTENT SELECTION (PICS), http://www.w3.org/PICS/ [https://perma.cc/49UN-R2U3].

Figure 1. Recent Google Doodles in the United States

Such doodles are among the many myriad decisions that platforms make with normative effects. When you instruct Amazon's Alexa or Google's Assistant, "Tell me the news," the voice assistants decide which news services they will read to you. Yahoo's home page has been selecting which news services to promote for literally two decades, while some have estimated that Google News drives as much as 40% of the total traffic to news websites.[47]

II. WHY SILICON VALLEY CLAIMS NEUTRALITY

It is virtually impossible for platforms to be neutral in their effects, but their embrace of the rhetoric of neutrality is motivated both by economic and legal factors. Arguing that social media platforms are political, Julie Cohen suggests that economics may determine the politics of networked information technologies:

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[47] Ricardo Bilton, *Google News: Still a Major Traffic Driver,* DIGIDAY (Nov. 10, 2014), http://digiday.com/media/google-news-still-major-traffic-driver/ [https://perma.cc/N5FV-DAN6].

> Networked information technologies are protean, and thus might seem an odd candidate for designation as inherently political. And yet all information flows reduce to bits, and all networked digital technologies possess at least the capacity for modulation. One might conclude that the inherently political character of networked information technologies is thus very much an open question. Yet it is closer to the truth, I think, to understand modulation from a perspective that emphasizes economic (as opposed to technological) determinism: a variant of materialism that underscores the dictates of the regime of political economy within which networked information technologies have emerged.[48]

A studied neutrality may emerge, then, from economic interests.

Law can also promote neutrality by conditioning immunities on passivity, which is a species of neutrality. For example, if only passive intermediaries that simply pass along all user-generated content without question qualify for legal immunities, then companies will face a strong incentive to remain steadfastly neutral to the content they receive. But such an approach leads inevitably to the further proliferation of the most disturbing (if legal) content because acting to remove such information would subject the platforms to legal liability.[49] Both the Digital Millennium Copyright Act (DMCA) and the Communications Decency Act are designed to avoid this problem. These statutes allow information platforms to actively moderate the content on their services while remaining under a broad umbrella of immunity.[50] The DMCA does condition immunity for transitory network communications and system caching on the service provider not actively selecting the material transmitted or cached, but it includes no such neutrality requirement for its safe harbor for Internet hosts or search engines.[51] The European Union's E-Commerce Directive is similar.[52]

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[48] Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1933 (2013).

[49] *See, e.g.,* Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *17–18 (Sup. Ct. 1995) (holding online platform liable as the publisher of a libelous statement posted by a user based on its content moderation activities).

[50] 47 U.S.C. § 230 (2012).

[51] Compare DMCA section 512(a)(2) ("the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider"), and section 512(b)(2)(a) ("the material

The embrace of neutrality is a theoretical construct with direct, practical effects. When Facebook sought to combat the use of its platform to circulate misinformation, Facebook settled on simply flagging as "disputed" any story that had been contested by its fact-checking partners.[53] A commitment to neutrality was taken to require eschewing stronger measures: "If Facebook were to take more significant action, like hiring human editors, creating a reputational system or paying journalists, the company would instantly become something it has long resisted: a media company rather than a neutral tech platform."[54] The desire to protect its reputation as a neutral platform led Facebook to take a fateful decision in the run-up to the November 2016 presidential election. Early that year, conservatives claimed that Facebook's "Trending Topics" news service was tilted against them, citing a Gizmodo news story.[55] Facebook responded by reassigning the human team that curated the Trending Topics feed in favor of a supposedly-neutral automated algorithm. That algorithm proved easy to manipulate for those who wished to promote misleading news.[56]

Neutrality, when applied to the Internet, also requires consideration of demands for "net neutrality." Indeed, some have argued that we should move beyond neutrality at the network layer to search and other forms of neutrality at the application layer.[57] Should information platforms be required to remain neutral, just as we might require Internet service providers to remain neutral? The French Digital Council seems to imply this logic: "Digital society does not only consist of the actual networks but also of access and communication services in which platforms play a central role."[58] The Council explains further: "Platform neutrality can be viewed from two angles: the traditional defensive angle designed to

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described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content") with DMCA section 512(c) and 512(d).

[52] Council Directive 2000/31, 2000 O.J. (L 178) 3, arts. 14-15.

[53] Farhad Manjoo, *Can Facebook Fix Its Own Worst Bug?* N.Y. TIMES (Apr. 25, 2017), http://www.nytimes.com/2017/04/25/magazine/can-facebook-fix-its-own-worst-bug.html [https://perma.cc/9R7M-WWBM].

[54] *Id.*

[55] Thompson & Vogelstein, *supra* note 2; Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016, 9:10 AM), https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006 [https://perma.cc/S9NT-EGEM].

[56] Thompson & Vogelstein, *supra* note 2.

[57] Nate Anderson, *Search Neutrality? How Google Became a "Neutrality" Target,* ARS TECHNICA (Apr. 29, 2010, 10:32 PM), http://arstechnica.com/tech-policy/2010/04/search-neutrality-google-becomes-neutrality [https://perma.cc/R9EK-DCJC].

[58] Opinion no. 2014-2 of the French Digital Council on Platform Neutrality, 6 (May 2014).

protect liberties, including freedom of expression, free trade, free access to data and content and free competition; or the offensive angle aimed at developing user power in the long term, promoting economic and social progress, creating the right conditions for a multitude of user types and encouraging innovation."[59] The Council does not, in fact, demand that platforms remain neutral with respect to the speech of all users. Perhaps the Council has in mind the argument that James Grimmelmann offers against search neutrality: "A search engine cannot possibly treat all websites equally, not without turning into the phone book."[60] While there are important antitrust concerns with dominant platforms using their power to promote additional services owned by them, to demand that platforms eschew an active editorial role would be to subject users to increased moderation by algorithms that, as discussed above, are not neutral either. Indeed, over-reliance on automated algorithms will generate both "overbroad censorship and biased enforcement."[61]

III.   ARE SILICON VALLEY PLATFORMS LEFTIST?

In the United States, conservative critics have charged that information platforms are fundamentally biased against them. "Big Tech is easily associated with West Coast liberalism and Democratic politics, making it a fertile target for the right," the *New York Times* observes.[62] The platforms are run by "left-wing guys," conservatives allege, citing as one example Facebook's removal of anti-Islam activist Pamela Geller's page "Stop Islamization of America."[63] In that case, Facebook reversed the hate speech-based removal within a few hours.[64] Whenever West Coast platforms act in ways unfavorable to conservative speakers,

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[59] *Id.*

[60] James Grimmelmann, *Some Skepticism About Search Neutrality*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 443 (2010).

[61] Natasha Duarte, Emma Llanso, & Anna Loup, *Proceedings of the 1st Conference on Fairness, Accountability and Transparency*, 81 PROC. MACHINE LANGUAGE RES. 106 (2018).

[62] Michael M. Grynbaum & John Herrmanmarch, *New Foils for the Right: Google and Facebook*, N.Y. TIMES (Mar. 6, 2018), http://www.nytimes.com/2018/03/06/business/media/paul-schweizer-google-facebook.html [https://perma.cc/Z7HB-TE9N].

[63] Valerie Richardson, *Google, Facebook, Reddit Are Run by a Bunch of 'Left-wing Guys'*, WASH. TIMES (Jun. 13, 2016), http://www.washingtontimes.com/news/2016/jun/13/facebook-reddit-censorship-reignites-conservative-/ [https://perma.cc/BJG9-AZP4].

[64] *Facebook Restores Pamela Geller's Anti-Islam Page After Brief Removal,* HAARETZ (Jun. 14, 2016, 10:19 AM), http://www.haaretz.com/world-news/americas/facebook-restores-pamela-geller-s-anti-islam-page-1.5395351 [https://perma.cc/8AKH-GVWJ].

accusations of bias often follow. Does the non-neutrality of technologies thus affirm the complaint of Silicon Valley's conservative critics? No. We believe that there is little evidence that Silicon Valley platforms are systematically biased against conservatives.

It is certainly true that Internet platforms have removed some speech emanating from the American right (just as they have removed speech emanating from the left), but they have done so largely on the ground that that speech violated community guidelines against hate speech. Overall, a platform may well remove more right-wing speech than left-wing speech, perhaps because the speech on the extreme right-wing is more likely to include hate speech targeted on the basis of race, gender, or other invidious criteria. To be sure, elements on the left certainly engage in hate speech, and we fully expect that Internet platforms would apply their community guidelines to such speech. Consider, for instance, the recent uptick in anti-Semitic speech and sentiments on the left of the European political spectrum.[65] There would be a problem with bias if the platforms meted out differential treatment to similarly hateful content coming from opposite ends of the political spectrum. However, there is no evidence to suggest that this is the case. If anything, anecdotal evidence suggests that platforms treat hateful speech from the left more harshly than such speech from the right.[66]

Furthermore, to the extent that more right-wing news is demoted as "fake," it may be because such news is less objectively true. An empirical study of media coverage during the 2016 election by the Berkman Klein Center concludes: "The architectural features of the election media ecosystem facilitated the use of network propaganda and disinformation disproportionately by the right."[67] Following the tragic school shooting in Parkland, Florida, some right-wing commentators circulated videos falsely alleging that students at that school seeking gun control laws were "crisis

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[65] *See* Roger Cohen, *An Anti-Semitism of the Left*, N.Y. TIMES (Mar. 7, 2016), https://www.nytimes.com/2016/03/08/opinion/an-anti-semitism-of-the-left.html [https://perma.cc/XUW3-625H].

[66] *See, e.g.,* Julia Angwin and Hannes Grassegger, *Facebook's Secret Censorship Rules Protect White Men from Hate Speech But Not Black Children,* PROPUBLICA (June 28, 2017), https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms [https://perma.cc/7MS7-ZJLL] (noting how Facebook took no action against a post by a conservative Republican's post calling for all radical Muslims to be killed, while suspending the account of a Black Lives Matters activist who wrote a post stating that "[a]ll white people are racist.").

[67] Robert Faris et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election, in* BERKMAN KLEIN CENTER RESEARCH PUBLICATION 19 (Aug. 21 2017).

actors."[68] Both Facebook and Google acted to remove such videos, which had been initially promoted by their own algorithms.[69] Removing either white supremacist speech or false accusations against children should not be seen as partisan bias against conservatives, even though it reflects non-neutrality about the content of speech. In the words of Stephen Colbert's quip, "reality has a well-known liberal bias."[70]

The fact that platforms carry biases does not mean that they have put their thumbs on the scale on every issue. That information platforms are increasingly making decisions with normative effects is not to accuse them of bias in the partisan political sense. Indeed, everything we know about how the major information platforms operate suggests that they attempt to remain non-partisan both here in the United States and abroad with respect to ordinary politics.

Even if the information platforms embrace a limited version of the Federal Communication Commission's now lapsed "equal time" rule, giving almost all political ideas access to their platforms on identical terms, the platforms are *not* neutral because they impact the political status quo in uneven ways. There may be no intent on the part of information platforms to benefit one political belligerent or another, but their effect in doing so cannot be denied.

CONCLUSION

There is much truth for information platforms in the old German proverb that "self-awareness is the first step to improvement."[71] For too long, the giants of Silicon Valley have attempted to portray themselves as neutral platforms, but the very fact of their existence has utterly transformed how people learn and think about matters ranging from politics to sex. Thus, while the platforms may perceive themselves as neutral, their effects are inherently not. Their founders may continue to talk of scrupulous neutrality, but the actions of the platforms speak louder than words when it comes to their active moderation of content, their unabashed (and laudable) proclamation of corporate values, and their

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[68] Jack Nicaas & Sheera Frenkel, *Facebook and Google Struggle to Squelch 'Crisis Actor' Posts,* N.Y. TIMES (Feb. 23, 2018), http://www.nytimes.com/2018/02/23/technology/trolls-step-ahead-facebook-youtube-florida-shooting.html [https://perma.cc/PZ34-XJ4R].

[69] Jefferson Graham, *'Crisis Actors' YouTube Video Removed after It Tops 'Trending' Videos,* USA TODAY (Feb. 21, 2018), http://www.usatoday.com/story/tech/talkingtech/2018/02/21/crisis-actors-youtube-david-hogg-video-removed-after-tops-trending-video/360107002/ [https://perma.cc/Z32B-UJS6].

[70] Stephen Colbert, White House Correspondents' Dinner speech (Apr. 29, 2006).

[71] The original phrase is "Selbsterkenntnis ist der erste Schritt zur Besserung."

willingness (also laudable from our perspective) to speak out about the great issues of the day.

Platforms should drop the pretense of neutrality and acknowledge their active role in managing content. By accepting the fact that they are not now neutral and were never neutral to begin with, platforms can finally accept and properly fulfill the responsibilities that are incident to their influence and control over our most important means of communication. This entails platforms being unafraid to use their platforms for the social good.