

# *RED LION BROADCASTING CO. V. FCC* AND THE RISE OF SPEECH-ENHANCING REGULATIONS OF SOCIAL MEDIA PLATFORMS

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## I. INTRODUCTION

Americans increasingly get their news through the Internet, and specifically, through social media platforms.<sup>1</sup> In fact, Americans get more of

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<sup>1</sup> 47 U.S.C. § 230(a)(5) (2018) (“Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.”); Katerina Eva Matsa & Elisa Shearer, *News Use Across Social Media Platforms 2018*, PEW RES. CTR. (Sep. 10, 2018), <https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/> [https://perma.cc/34JC-SUKM]; Amy Mitchell et al., *The Modern News Consumer*,

their news from social media than from print newspapers.<sup>2</sup> As the rate of this news consumption increases, two attributes of social media platforms become more readily apparent. First, these platforms play a filtering role, stemming from their status as *de facto* gatekeepers of an endless flow of information that includes news. Second, social media companies' incentive structure as technology platforms, rather than as media companies, does not align with the values of the traditional press.<sup>3</sup> These two attributes combine to threaten the marketplace of ideas by facilitating the spread of disinformation<sup>4</sup> or other harmful yet engagement-driving content, or by suppressing certain viewpoints. This ultimately leads to an increase in apathy and suspicion at best, or polarization and radicalization at worst.

Social media platforms<sup>5</sup> provide users with a "modern public square" subject to First Amendment speech and press protections.<sup>6</sup> Thus, any regulation of such platforms must satisfy constitutional restraints. Over the years, the Supreme Court has taken varying approaches to its review of regulations of speech, depending on the speech's medium. The Court views regulation of newspapers as speech-abridging,<sup>7</sup> but comparable regulation of radio and television stations as speech-enhancing.<sup>8</sup> The distinction between speech-enhancing regulations and speech-abridging ones is constitutionally significant due to the First Amendment's prohibition against any law "abridging the freedom of speech."<sup>9</sup> Lawmakers can avoid constitutional obstacles even where their laws restrict some form of speech, as long as they

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PEW RES. CTR. (Jul. 7, 2016), <https://www.journalism.org/2016/07/07/pathways-to-news/> [<https://perma.cc/L3S9-QD44>].

<sup>2</sup> Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RES. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/> [<https://perma.cc/E9RN-SE8L>].

<sup>3</sup> See generally Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129 (2019).

<sup>4</sup> See Nabihah Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J.F. 337, 339–341 (2017).

<sup>5</sup> Rapidly evolving technology and the overlap of functionalities among social media and older services like email make it difficult to articulate a perfect definition of social media. Using the Merriam-Webster definition of social media as a guide, this note uses "social media" in reference to services like Facebook, Twitter, Instagram, and other websites where users interact and share expressive content with each other. See *Social Media*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/social%20media> (defining social media as "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)") [<https://perma.cc/KNX8-JBLB>].

<sup>6</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

<sup>7</sup> See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974).

<sup>8</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375–76 (1969).

<sup>9</sup> U.S. CONST. amend. I.

can convince courts that the restrictions ultimately have speech-enhancing effects.<sup>10</sup> Noise ordinances are a common example of speech-enhancing regulations. Although they undoubtedly limit forms of expression, they nevertheless enhance speech by fostering an environment where other ideas will not be drowned out. Thus, litigators may choose to defend the constitutionality of speech regulations by painting them as speech-enhancing.

The Court has found that speech is particularly vulnerable to suppression by non-governmental forces in the medium of broadcasting, so it treats regulations of that medium leniently,<sup>11</sup> while it strictly scrutinizes regulations of speech in other media like printed news.<sup>12</sup> In the early years of the Internet, the Supreme Court adopted the strict scrutiny approach for regulations that affect the Internet as a whole,<sup>13</sup> but the Court has not answered the question of how it will review regulations of social media platforms, where there is a unique threat to the marketplace of ideas.

This Note explores the question of whether, as a matter of constitutional law, regulations of social media platforms should be viewed as speech-enhancing or speech-abridging under *Red Lion Broadcasting Co. v. FCC*. The public's growing concern over social media, amplified by recent events like Russia's interference in the 2016 U.S. presidential election, have prompted legislators to propose or enact laws—specifically, electioneering and anti-bias laws—aimed at enhancing speech.<sup>14</sup> These efforts indicate a general awareness that the marketplace of ideas is uniquely threatened on social media and that regulations affecting speech on this medium will tend to enhance it. In this note, Part II summarizes the competing approaches to First Amendment review of media regulations embodied by *Red Lion* and *Miami Herald Publishing Co. v. Tornillo* and then traces their progeny to the Internet era. Part II also highlights recently enacted and proposed legislation that targets social media and would likely implicate this body of case law. Part III analyzes the rationales underlying the *Red Lion* decision and argues that they also apply in the social media context. Specifically, the relevant characteristics of the broadcast medium, including its historically regulated status, limited airwave spectrum, long reach, intrusiveness, and unique accessibility to children, are comparable to the characteristics of social media. Part III argues that a comparison between the two media forms reveals that unregulated social media poses a greater threat to the marketplace of ideas than broadcasting did in 1971, the year *Red Lion* was decided. Finally, Part IV discusses the legal viability of specific proposed regulations under this framework, including

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<sup>10</sup> See *Red Lion*, 395 U.S. at 375.

<sup>11</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

<sup>12</sup> See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974).

<sup>13</sup> See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868–69 (1997).

<sup>14</sup> See discussion *infra* Part I.C.

electioneering laws like the Honest Ads Act and anti-bias laws such as the Biased Algorithm Deterrence Act.

## II. BACKGROUND

### A. Broadcasting and Print Media: *Red Lion*, *Tornillo*, and *Pacifica*

The concept of the marketplace remains a useful and compelling analogy for the exchange of ideas online. Courts have long held that the First Amendment's protections of speech and press primarily function to foster a marketplace of ideas,<sup>15</sup> though some commentators reject this theory as an inadequate description of information flow on social media.<sup>16</sup> The Supreme Court upheld a broadcasting regulation as speech-enhancing in *Red Lion Broadcasting Co. v. FCC* because the marketplace of ideas was particularly endangered in that medium.<sup>17</sup> Then, in *Tornillo*, the Court struck down a strikingly similar regulation that applied to newspapers, while firmly endorsing the same marketplace theory.<sup>18</sup> Finally, the Court reaffirmed the *Red Lion* approach by upholding a restriction on broadcast speech in *FCC v. Pacifica Foundation*.<sup>19</sup>

The First Amendment's speech and press protections were included in the Constitution to end oppressive forms of censorship.<sup>20</sup> The Supreme Court later endorsed a theory of the amendment's protection as a means of fostering a marketplace of ideas.<sup>21</sup> Under this theory, government suppression of bad ideas is ineffective; the best way to eliminate falsehood is to allow those bad ideas to compete with good ones, which will ultimately win out.<sup>22</sup>

Media and technology lawyer Nabiha Syed argues that the marketplace theory fails to accurately describe online speech, as it "leaves both users and social media platforms ill-equipped to deal with rapidly evolving problems like fake news."<sup>23</sup> She recommends that a new, more realistic theory take its

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<sup>15</sup> See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 354 (2010); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–272 (1964).

<sup>16</sup> See Syed, *supra* note 4.

<sup>17</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.").

<sup>18</sup> See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 252 (1974).

<sup>19</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

<sup>20</sup> See generally David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

<sup>21</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919).

<sup>22</sup> See *Red Lion*, 395 U.S. at 390; *Abrams*, 250 U.S. at 630.

<sup>23</sup> Syed, *supra* note 4.

place.<sup>24</sup> Syed is right to note that the systemic features of social media prevent the marketplace of ideas from functioning as it should,<sup>25</sup> but we need not be so quick to abandon what has been a central feature of First Amendment law for the past century.<sup>26</sup> Instead, these failings warrant a more lenient judicial attitude toward laws seeking to correct them.

Fifty years ago, the Supreme Court reviewed a Federal Communications Commission (FCC) regulation of the broadcasting medium. In that case, *Red Lion Broadcasting Co. v. FCC*, the Court upheld the “fairness doctrine,” a longstanding regulation requiring that a radio station allot equal time to all qualified candidates for a given public office and that targets of personal or group attacks must be offered a reasonable opportunity to respond through the radio station’s facilities.<sup>27</sup> After a Pennsylvania radio station carried a broadcast criticizing journalist and writer Fred J. Cook, Cook demanded free reply time, which the station refused. The FCC and the D.C. Circuit Court of Appeals held that the station was obligated to provide Cook reply time for free.<sup>28</sup>

The Supreme Court unanimously affirmed these decisions,<sup>29</sup> holding that the fairness doctrine was not unconstitutional, but instead “enhance[d], rather than abridge[d], the freedoms of speech and press protected by the First Amendment.”<sup>30</sup> The Court reasoned that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”<sup>31</sup> The Court held that the government may permissibly regulate broadcasting equipment because of its potential to “snuff out the speech of others,” stemming from three characteristics of the “new media” of broadcasting.<sup>32</sup> First, radio licenses are resources which “the Government has denied others the right to use.”<sup>33</sup> Second, there is a “scarcity of radio frequencies.”<sup>34</sup> Third, “the reach of radio signals is incomparably greater than

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<sup>24</sup> See Syed, *supra* note 4.

<sup>25</sup> See Syed, *supra* note 4 (arguing that the necessity of online content filtering has a natural tendency to “feed insular ‘echo chambers,’” and that platforms’ profit incentives encourage the rapid dissemination of fake news because it is sensational and cheaply distributed).

<sup>26</sup> See *Abrams*, 250 U.S. at 630 (Holmes, J. Dissenting) (“the best test of truth is the power of the thought to get itself accepted in the competition of the market.”). *Abrams*, announced one hundred years ago in November 1919, was the first time the Supreme Court—albeit in Justice Holmes dissent—recognized the marketplace of ideas theory of free speech.

<sup>27</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–75 (1969).

<sup>28</sup> *Id.* at 371–73.

<sup>29</sup> See *id.* at 401 (indicating that eight justices voted in favor of the FCC, while Justice Douglas did not participate in the opinion).

<sup>30</sup> *Id.* at 375.

<sup>31</sup> *Id.* at 386.

<sup>32</sup> *Id.* at 386–87.

<sup>33</sup> *Id.* at 391.

<sup>34</sup> *Id.* at 390.

the range of the human voice, and the problem of interference is a massive reality.”<sup>35</sup> Together, these characteristics justified government regulations intended to “preserve the marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.”<sup>36</sup> The Court added that such regulations were consistent with First Amendment values because they prevented a small number of station owners from having “unfettered power” to limit use of their stations.<sup>37</sup> As the Court stated, “[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium open to all.”<sup>38</sup>

Five years later, the Court rejected a similar regulation that applied to newspapers in *Miami Herald Publishing Company v. Tornillo*.<sup>39</sup> In that case, a Florida statute granted political candidates a right to equal space to reply to newspaper criticism.<sup>40</sup> The *Miami Herald* newspaper published editorials critical of a candidate running for a position in the Florida state legislature.<sup>41</sup> The candidate, citing the Florida statute, demanded the newspaper print his replies, but the *Herald* refused.<sup>42</sup> The Florida Supreme Court held that “free speech was enhanced and not abridged by the Florida right-of-reply statute.”<sup>43</sup> The U.S. Supreme Court reversed, rejecting the appellee’s arguments that the regulations protected the marketplace of ideas in a world where newspapers had become “noncompetitive and enormously powerful and influential in [their] capacity to manipulate popular opinion.”<sup>44</sup> Although both parties cited heavily to *Red Lion* in their briefs, the Supreme Court did not reference it at all when it unanimously held that the right-of-reply statute violated the First Amendment.<sup>45</sup> The Court opined, “[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution, and, like many other virtues, it cannot be legislated.”<sup>46</sup>

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<sup>35</sup> *Id.* at 387–88.

<sup>36</sup> *Id.* at 390.

<sup>37</sup> *Id.* at 392.

<sup>38</sup> *Id.*

<sup>39</sup> 418 U.S. 241 (1974).

<sup>40</sup> *Id.* at 243.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 244.

<sup>43</sup> *Id.* at 245 (relying on *Red Lion*); *Tornillo v. Miami Herald Pub. Co.*, 287 So. 2d 78, 83–85 (Fla. 1973), rev’d, 418 U.S. 241 (1974).

<sup>44</sup> *Tornillo*, 418 U.S. at 249.

<sup>45</sup> See 418 U.S. 241; *Miami Herald Pub. Co. v. Tornillo*, 1974 WL 185859 (U.S.), 20–23 (U.S., 2004) (appellant’s brief); *Miami Herald Pub. Co. v. Tornillo*, 1974 WL 185860 (U.S.) (U.S., 2004) (appellee’s brief).

<sup>46</sup> *Tornillo*, 418 U.S. at 256.

Ironically, the *Tornillo* opinion partly relied on a kind of scarcity—though not the same scarcity that contributed to the result in *Red Lion*.<sup>47</sup> In the same paragraph that the Court came closest to referencing *Red Lion*—when it conceded that a newspaper is not “subject to the finite technological limitations of time that confront a *broadcaster*”<sup>48</sup> and is in that sense not as burdened by fairness requirements—the Court held that scarcity of print space made the right-of-reply statute too great of a burden on newspaper editors.<sup>49</sup> Ultimately, the Court found that such regulation of newspapers harmed speech by raising newspapers costs, discouraging the publishing of controversial articles, and “intru[ding] into the function of editors.”<sup>50</sup>

*Tornillo* did not mark a shift in the Court’s philosophy of the First Amendment but rather solidified one approach reflecting suspicion of regulations in the context of print media. The Court’s alternative, *Red Lion* approach for broadcasting media remained intact. In 1978, the Supreme Court decided *FCC v. Pacifica Foundation*, holding that it was permissible under the First Amendment for the FCC to prohibit “indecent” language in broadcasting.<sup>51</sup> A radio station broadcast a satiric monologue by George Carlin titled “Filthy Words,” which listed a number of “words you couldn’t say on the public . . . airwaves.”<sup>52</sup> The FCC suit was prompted by a father’s complaint after he heard the broadcast while driving with his young child.<sup>53</sup> The Court reviewed the FCC’s determination that the monologue was indecent and therefore prohibited by statute, and it upheld the Commission’s decision, writing, “it is broadcasting that has received the most limited First Amendment protection.”<sup>54</sup> Among the “complex” reasons for distinguishing print media from broadcasting, the Court stated that the relevant ones here were the latter medium’s “uniquely pervasive presence in the lives of all Americans” and its “unique[] accessib[ility] to children.”<sup>55</sup>

This history illustrates the context-specific nature of First Amendment protection. To preserve a vibrant marketplace of ideas, the Court adjusts its inquiry to address the unique dangers that might befall that marketplace in a

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<sup>47</sup> *Id.* at 257 (“[I]t is not correct to say that, as an economic reality, newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.”).

<sup>48</sup> *Id.* at 256–57 (emphasis added).

<sup>49</sup> *See id.*

<sup>50</sup> Justice White addressed this speech-chilling argument in *Red Lion* as well, but he found that such an effect had not occurred and was not likely to occur in broadcasting. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 393–94 (1969).

<sup>51</sup> *See*, 438 U.S. 726, 738 (1978).

<sup>52</sup> *Id.* at 729.

<sup>53</sup> *Id.* at 730.

<sup>54</sup> *Id.* at 748.

<sup>55</sup> *Id.* at 748–49.

given medium. Accordingly, the Court had to engage with these competing approaches when the Internet started to take off. The two cases discussed in the next section illustrate how the Court grappled with the rapidly evolving medium.

### B. The Internet: *Reno* and *Packingham*

The FCC repealed the fairness doctrine in 1987.<sup>56</sup> Though *Red Lion* remains good law, courts have limited its scope to the broadcasting context. In the 1997 case *Reno v. American Civil Liberties Union*, the Court declined to extend the regulation-friendly approach of *Red Lion* to the Internet as a whole.<sup>57</sup> Although the broadcasting context made regulation of “indecent speech” permissible in *Pacifica* nineteen years earlier, the Court in *Reno* took a different approach to a statutory prohibition of “indecent communications” on the Internet.<sup>58</sup> It held that the factors justifying regulation of the broadcast media—the “history of extensive government regulation, the scarcity of available frequencies at its inception, and its ‘invasive’ nature,” are not present on the Internet.<sup>59</sup> In dismissing the application of *Red Lion*’s scarcity rationale, the Court wrote:

[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds . . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.<sup>60</sup>

In 2017, the Court again considered regulation of Internet speech—specifically, speech by users on social media platforms.<sup>61</sup> In that case, *Packingham v. North Carolina*, the Court struck down a North Carolina law making it a felony for a registered sex offender to post on social media websites like Facebook and Twitter.<sup>62</sup> Writing for the majority, Justice Kennedy referred to social media as “the modern public square,” and wrote that today, it is clear that “cyberspace . . . and social media in particular” is the

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<sup>56</sup> In re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, N.Y., 2 FCC Rcd. 5043 (1987) (repealing the fairness doctrine).

<sup>57</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997).

<sup>58</sup> *Id.* at 868–79.

<sup>59</sup> *Id.* at 868 (citations omitted).

<sup>60</sup> *Id.* at 870.

<sup>61</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

<sup>62</sup> *Id.* at 1733, 1738.

“most important place[] . . . for the exchange of views.”<sup>63</sup> Kennedy urged the Court to “[e]xercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.”<sup>64</sup>

Justice Alito concurred in the judgment but rejected Kennedy’s “undisciplined dicta” that “equate[s] the entirety of the Internet with public streets and parks.”<sup>65</sup> Alito added, “there are important differences between cyberspace and the physical world.”<sup>66</sup> He proceeded to list “a few that are relevant to Internet use by sex offenders,” including greater difficulty of parental monitoring in observing sex offenders as they approach children and ease of assuming a false identity due to the “unprecedented degree of anonymity” on the Internet.<sup>67</sup>

Justice Alito also took issue with Justice Kennedy’s cautious approach to the review of Internet regulations.<sup>68</sup> Because the Internet poses a heightened danger to children, in Alito’s view, “caution” would warrant a more regulatory-friendly approach.<sup>69</sup>

### C. *Red Lion* Today and the Rise of Speech-Enhancing Regulations

After *Reno*, *Red Lion* has seldom been invoked in Internet cases. The few times litigators have raised the issue, they have not been successful.<sup>70</sup> In *Washington Post v. McManus*, for example, the U.S. District Court for the District of Maryland held that a state electioneering statute that required both social media websites and news websites to publish information about political advertisements and to submit related records for state inspection violated the First Amendment.<sup>71</sup> Although the court recognized that “the [Supreme] Court has carved out special rules for broadcast media,” it relied on *Reno* to hold that the *Red Lion* rationale did not apply to the Internet.<sup>72</sup>

Despite the Court’s refusal to extend *Red Lion* or adopt a similarly relaxed approach to Internet cases in general, the door remains open in the social media context. First, the Supreme Court has not decided how it will review speech-enhancing regulations of social media platforms, such as election disclosure laws or anti-bias laws. *Reno* did not foreclose the

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<sup>63</sup> *Id.* at 1732, 1735.

<sup>64</sup> *Id.* at 1736.

<sup>65</sup> *Id.* at 1738 (Alito, J., concurring).

<sup>66</sup> *Id.* at 1743.

<sup>67</sup> *Id.* at 1743–44.

<sup>68</sup> *Id.* at 1744 (Alito, J., concurring).

<sup>69</sup> *See id.*

<sup>70</sup> *See, e.g., Washington Post v. McManus*, 355 F. Supp. 3d 272, 288 (D. Md. 2019).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

possibility of a relaxed form of scrutiny in this context, as *Reno* considered a regulation affecting the Internet as a whole and not the narrower context of social media.<sup>73</sup> Moreover, both *Reno* and *Packingham* considered laws that abridged user speech, but they did not limit the speech of Internet “gatekeepers”—those who own and operate social media platforms. *Red Lion* was a case about the gatekeepers in broadcasting, and it was their status as gatekeepers that threatened the marketplace of ideas. The Supreme Court has not had the opportunity to address regulations that would enhance Internet user speech by placing limits on the content-moderating powers of Facebook, Twitter, and Google. It is therefore an open question whether *Red Lion* or a similar regulation-friendly approach applies to laws affecting the speech of gatekeepers of social media platforms.

And it is a question that will increasingly be asked. For most of the short history of the Internet, speech-affecting laws were designed to protect persons from harm, and they did not purport to enhance speech.<sup>74</sup> But recent events have raised the public’s consciousness as to dangers posed by social media platforms’ “unfettered power”<sup>75</sup> over what users see online, and those events have triggered a new dawn for speech-enhancing regulations. As Stanford Law School Professor Nathaniel Persily writes in reference to Twitter, Facebook, and Google, “[t]ry as they might not to be media companies, they nevertheless have power far in excess of that which legacy media institutions had in their heyday, let alone today.”<sup>76</sup> Legislatures have started to take an interest in these concerns: to combat perceived dangers to the online marketplace of ideas, the federal government and several states have proposed or passed laws that potentially limit platform speech in order to enhance speech overall, including election ad disclosure requirements and anti-bias statutes.<sup>77</sup> The constitutionality of these measures remains in question.

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<sup>73</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 869 (1997).

<sup>74</sup> For example, the Communications Decency Act attempted to restrict indecent and obscene Internet content, and the recently enacted FOSTA-SESTA package targeted sex trafficking. See 47 U.S.C.A. § 223; Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

<sup>75</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969).

<sup>76</sup> Nathaniel Persily, *The 2016 U.S. Election: Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 74 (2017).

<sup>77</sup> Honest Ads Act, S. 1989, 115th Cong. (2017); see also Democracy Protection Act, 2018 N.Y. Laws 358–360 (codified at N.Y. ELEC. § 14-100, -106, -107, -126); 2018 Wash. Sess. Laws 2453–80; MD. CODE ANN., ELEC. LAW § 13-405 (West 2019).

### III. RED LION FOR SOCIAL MEDIA PLATFORMS

Justice Kennedy cautioned the Court in *Packingham* not to declare any hard rules about how the Constitution applies to the Internet because the Internet is rapidly and constantly evolving.<sup>78</sup> Although the historical scar left by colonial-era Britain's prior restraints on *print* media—the regime that prompted the First Amendment's adoption—made the hands-off outcome in *Tornillo* almost inevitable,<sup>79</sup> online social media is new and different enough to justify consideration of a different approach. *Red Lion* demands that courts seriously consider how the factual contexts surrounding new media affect the marketplace of ideas and whether regulations addressing pressing concerns in those contexts will likely be speech-enhancing or speech-abridging.

For an attempt to extend *Red Lion* beyond the broadcasting context to succeed, litigators will have to show that *Red Lion*'s rationales—and the concerns underlying them—apply to the factual context of social media. Specifically, litigators will have to compare platforms with the three factors that distinguished broadcasting in *Red Lion*: (1) broadcasting's historically regulated status,<sup>80</sup> (2) spectrum scarcity,<sup>81</sup> and (3) broadcasting's reach and potential for interference.<sup>82</sup> Further, those litigators should consider the two other factors that the Court added in *Pacifica* to distinguish broadcasting: (1) its "invasiveness" and (2) its effect on vulnerable users like children.<sup>83</sup>

#### A. *Red Lion* Factors

On a superficial level, social media platforms do not possess all of these characteristics on a one-to-one scale, but each of the *Red Lion* and *Pacifica* factors addressed underlying concerns that are implicated by social media platforms. Broadcasting's history as a regulated medium justified a relaxed First Amendment standard—not because licensure requirements had been in place long enough to get grandfathered into an exemption from First Amendment scrutiny, but because those requirements were necessary to cure a defective marketplace of ideas: Without an ordering of airwave usage, no

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<sup>78</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

<sup>79</sup> *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring).

<sup>80</sup> *See Red Lion*, 395 U.S. at 388; *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997).

<sup>81</sup> *See Red Lion*, 395 U.S. at 387–88.

<sup>82</sup> *See id.* at 388–89.

<sup>83</sup> *See FCC v. Pacifica Found.*, 438 U.S. 726, 763–64 (1978) (Brennan, J., concurring) (noting that "[b]oth the [majority] opinion . . . and the [concurrence] rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, and (2) the presence of children in the listening audience").

one could intelligibly communicate by radio.<sup>84</sup> The second *Red Lion* factor, spectrum scarcity, necessitated a consolidation of power in the hands of relatively few actors and entrenched that power even when the spectrum became less scarce. Thus, regulations on broadcasting only served to enhance speech by transferring some of the broadcasters' power to those whose voices would otherwise not be heard. The third and final *Red Lion* factor, the far reach of airwaves and the potential to interfere with other speech over the radio, bears similarities to speech on social media. Posts online are potentially viewed and listened to by millions, and the gatekeepers' incentives cause them to moderate content in such a way that displaces certain speech.<sup>85</sup> The *Pacifica* factors are also implicated on social media: harmful online content can appear unexpectedly on one's feed, and social media is easily accessible to children.<sup>86</sup> That latter concern is compounded by the heightened vulnerability of children on the Internet, in contrast to physical locations where they are more easily supervised, as Justice Alito noted in his *Packingham* concurrence.<sup>87</sup> These "differences in the characteristics of new media" justify a different First Amendment standard.<sup>88</sup>

### 1. *Historically Regulated Status*

The first rationale for permitting the fairness doctrine in *Red Lion* had to do with the historically regulated status of the broadcasting industry.<sup>89</sup> This was not a recognition of a historical exception, where longstanding acceptance of certain regulations opened the door to new ones of a similar nature. Instead, the historical regulatory regime in broadcasting created a status quo where the medium was controlled by a small number of powerful licensees.<sup>90</sup> Although social media platforms have by no means been regulated to the same extent as broadcasting, platforms' inherent characteristics give rise to an even more severe concentration of power.

The licensing regime in *Red Lion* was significant because it was necessary to increase speech by facilitating it in an orderly way through governmental grants. Without a licensing program, the Court stated, the airwaves would be chaotic because everyone would use them, and no one

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<sup>84</sup> See *Red Lion*, 395 U.S. at 388.

<sup>85</sup> See discussion *infra* Part II.A.3.

<sup>86</sup> See discussion *infra* Part II.B.

<sup>87</sup> See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1743 (2017) (Alito, J. concurring).

<sup>88</sup> *Red Lion*, 395 U.S. at 386.

<sup>89</sup> See *id.* at 399–400.

<sup>90</sup> See *id.*

would be heard.<sup>91</sup> Without governmentally imposed order, there could be no marketplace of ideas on the air at all. Congress solved this problem by controlling who received licenses and who did not. Congress did not confer any speech rights, it merely conferred temporary<sup>92</sup> exclusivity rights that made speech possible. It was therefore not a violation of anyone's freedom of speech for Congress or the FCC to transfer those exclusive rights to others. The FCC simply set up a trigger for when such a transfer would occur: whenever a broadcaster aired personal attacks.<sup>93</sup> Thus, when broadcasters exercised speech over the radio, the use of that amplification was a regulatory privilege not subject to the ordinary First Amendment safeguards.

It was not the fact of historical regulation that justified a relaxed standard in broadcasting, but the new status quo that regulation created.<sup>94</sup> After all, speech critical of the government was also historically regulated for a long period of time, yet the Sedition Act would never be tolerated today. The broadcasting licensure regime mattered in *Red Lion* because it created a distorted marketplace of ideas. Everyone can speak and be heard at the ordinary volume of the human voice, but the regulatory regime in broadcasting created a significant imbalance in who was allowed to speak. With the power of radio speech consolidated in the hands of so few, speech-enhancing mechanisms were necessary to reestablish the preconditions of a properly functioning marketplace of ideas.

The Internet has not come close to being regulated to the same extent as radio broadcasting, as the Court recognized in *Reno*. But present complaints about platforms' behavior echoes the complaints made by the FCC in *Red Lion*. Social media companies have come under fire for banning certain content and users.<sup>95</sup> Much of these companies' use of this control is laudable; for instance, Facebook recently announced that its algorithms will begin banning white supremacist messages.<sup>96</sup> Other platforms prohibit "hate speech" generally.<sup>97</sup> Still, these companies' power to control the content seen and heard

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<sup>91</sup> See *id.* at 388 ("It was . . . the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934.").

<sup>92</sup> Broadcasting licenses expired in three years unless they were renewed. *Id.* at 394.

<sup>93</sup> *Id.* at 391.

<sup>94</sup> *Id.* at 388–89.

<sup>95</sup> Marissa Lang, *Blocked and Banned by Social Media: When is it Censorship?* S.F. CHRON. (Aug. 30, 2016), <https://www.sfchronicle.com/business/article/Blocked-and-banned-by-social-media-When-is-it-9193998.php?psid=4yAxS> [<https://perma.cc/9D2Y-LVSE>].

<sup>96</sup> Liam Stack, *Facebook Announces New Policy to Ban White Nationalist Content*, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/business/facebook-white-nationalist-supremacist.html/> [<https://perma.cc/YC5W-GYFX>].

<sup>97</sup> See, e.g., *Community Guidelines*, TUMBLR, <https://www.tumblr.com/abuse/hatespeech> (accessed Nov. 27, 2019) [<https://perma.cc/6FLD-YL2S>]; *Hateful Conduct Policy*, TWITTER,

by users, an increasing number of which use these websites as their primary source of news, is concerning. In *Red Lion*, an extensive regulatory regime was necessary to facilitate speech that otherwise would not exist, but it also created a problem of exclusive access by a small number of gatekeepers.<sup>98</sup> On social media, an extensive regulatory regime was not necessary to confer the exclusive power over content enjoyed by the medium's gatekeepers, which is even greater than it was in the broadcasting industry fifty years ago. Both the broadcasters then and the social media platforms now have the ability to purge certain perspectives from online communities and to amplify harmful and false information. And because their incentives and values diverge from those of the traditional news industry,<sup>99</sup> this danger has become a reality online. Professor Langvardt writes that the incentive for social media platforms to promote "engagement" has produced algorithms that "harm[] the quality of public discourse and deliberation."<sup>100</sup> In extreme cases, this has led to user radicalization.<sup>101</sup> For example, one report found that YouTube "provides a breeding ground for far-right radicalization, where people interested in conservative and libertarian ideas are quickly exposed to white nationalist ones."<sup>102</sup> Platform algorithms also tend to exclude perspectives that users disagree with, creating polarization.<sup>103</sup> Ultimately, this produces echo chambers where extremist groups can gain influence while having their ideas go unchallenged.<sup>104</sup> Therefore, the nature of online platforms likely poses an even greater danger to the marketplace of ideas than did the broadcasting industry's regulated status in *Red Lion*.

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<https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (accessed Nov. 27, 2019) [<https://perma.cc/LX4P-YHZA>].

<sup>98</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>99</sup> See Erin C. Carroll, *Platforms and the Fall of the Fourth Estate: Looking Beyond the First Amendment to Protect Watchdog Journalism*, MD. L. REV. (forthcoming 2020) (arguing that platform values and norms disincentivize watchdog reporting and compromise the press's ability to perform a core structural role).

<sup>100</sup> Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129 (2019).

<sup>101</sup> *Id.* at 149 ("Many recommendation algorithms . . . have been shown to repeatedly send users along a 'radicalizing path.'").

<sup>102</sup> Olivia Solon, *YouTube's "Alternative Influence Network" Breeds Right Wing Radicalization, Report Finds*, GUARDIAN (Sep. 18, 2018), <https://www.theguardian.com/media/2018/sep/18/report-youtubes-alternative-influence-network-breeds-rightwing-radicalisation> [<https://perma.cc/89YR-VZPV>].

<sup>103</sup> See, e.g., Michela Del Vicario et al., *Echo Chambers: Emotional Contagion and Group Polarization on Facebook*, SCI. REPS. (Dec. 1, 2016).

<sup>104</sup> See *id.*

## 2. *Scarcity Rationale*

The second rationale justifying the separation of broadcasting from other contexts in *Red Lion* is the “scarcity of radio frequencies.”<sup>105</sup> Because the physical realities of the electromagnetic spectrum prevent everyone from using the airwaves at once, if there is to be any orderly and productive use of the airwaves at all, it would necessarily be at the exclusion of the vast majority of would-be speakers.<sup>106</sup> When only so few actors have access to the means of expression, there exists a danger of some ideas being imposed on listeners while other ideas lack representation on the airwaves. As the Court emphasized in *Red Lion*, the First Amendment “right of the viewers and listeners . . . is paramount.”<sup>107</sup>

It was not spectrum scarcity itself, but the result it produced—an endangered marketplace of ideas—that supported this leg of the Court’s reasoning. This is apparent from the Court’s answer to the argument that since the beginning of the broadcasting regulatory regime in 1929,<sup>108</sup> the airwave frequency spectrum has broadened significantly. The radio station in *Red Lion* argued that with the discovery of microwaves and other innovations, the frequency spectrum had increased and no longer justified the fairness doctrine.<sup>109</sup> The Court acknowledged that there were, in fact, unutilized “gaps” in the spectrum, but the Court also observed that the effects of spectrum scarcity remained because the broadcasting industry was dominated by a small number of organizations.<sup>110</sup> Even though it was “technologically possible” for new entrants to begin broadcasting, that possibility could not by itself render the fairness doctrine unconstitutional.<sup>111</sup> Established broadcasters enjoyed a “substantial advantage” due to “[l]ong experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages.”<sup>112</sup> Existing outlets had unprecedented power over what was said and heard on the radio, and that justified the continuance of a pro-regulation First Amendment approach. The problem originally created by spectrum scarcity was thus perpetuated by the entrenchment of the gatekeepers, even though the spectrum had become less scarce.

The Internet is certainly not scarce, as *Reno* noted, but a small number of gatekeepers enjoy a dominance over social media platforms resembling the

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<sup>105</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>106</sup> *See id.* at 388.

<sup>107</sup> *Id.*

<sup>108</sup> Radio Act of 1927, Pub. L. N. 69-632, 47 U.S.C. §§ 81-83 (repealed 1934).

<sup>109</sup> *Red Lion*, 395 U.S. at 396–97.

<sup>110</sup> *See id.* at 400.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

dominance of broadcasting companies. It is, in fact, more severe and consolidated than the broadcasting industry ever was.<sup>113</sup> Facebook, Google, and Twitter have the power to control what is viewed on their platforms, as well as what is posted. These companies are increasingly policing content on their websites, which Justice Kennedy identified as “the most important places . . . for the exchange of views.”<sup>114</sup> Although the Internet does not possess a comparable physical scarcity comparable to the broadcasting industry in the 1930s, it shares the de facto gatekeeper scarcity that existed in broadcasting when *Red Lion* was decided.

Entrenchment of the existing platforms seems permanent given the barriers to enter into the social media platform market. What makes a social media platform desirable for users is, first and foremost, that it has already captured other users.<sup>115</sup> Users are attracted to Facebook because their friends are on Facebook; they read Twitter posts because influential celebrities and public figures post on Twitter. A new platform would have to displace these online giants to succeed.<sup>116</sup> For this reason, many, including Senator Elizabeth Warren and Facebook co-founder Chris Hughes, have called for Facebook to be broken up.<sup>117</sup> The concentration of power in the social media context, as with broadcasting, threatens the natural competition of ideas. As Justice White wrote, “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to

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<sup>113</sup> J. Clement, *Leading Social Media Websites in the United States in August 2019, Based on Share of Visits*, STATISTA, (Sept. 9, 2019), <https://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/> [<https://perma.cc/YV68-KU37>].

<sup>114</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

<sup>115</sup> See Dipayan Ghosh, *Don't Break up Facebook—Treat it Like a Utility*, HARV. BUS. REV. (May 30, 2019), <https://hbr.org/2019/05/dont-break-up-facebook-treat-it-like-a-utility> [<https://perma.cc/7JA2-Q5HE>].

<sup>116</sup> For example, in 2014, Ello tried to become a Facebook alternative, promising not to sell ads or to “sell data about you to third parties.” Ed Cumming, *Ello—and Goodbye to the New Facebook?*, GUARDIAN (Oct. 5, 2014), <https://www.theguardian.com/media/2014/oct/05/ello-and-goodbye-facebook-competitor-social-networking/> [<https://perma.cc/NH5A-PCB9>]. The company failed because it could not reach a “critical mass of users”; even if Facebook users were frustrated by its data tracking and advertising, they would not leave Facebook because “that’s where everyone is, and that’s the point of a social network.” Nick Srnicek, *We Need to Nationalise Google, Facebook and Amazon. Here’s Why*, GUARDIAN (Aug. 30, 2017), <https://www.theguardian.com/commentisfree/2017/aug/30/nationalise-google-facebook-amazon-data-monopoly-platform-public-interest/> [<https://perma.cc/S2CD-EQGD>].

<sup>117</sup> Steven Overly, *Facebook Co-Founder Calls on the Government to Break Up the Company*, POLITICO (May 9, 2019), <https://www.politico.com/story/2019/05/09/facebook-cofounder-criticism-1313365/> [<https://perma.cc/KAH5-XFVK>]; Jason Abbruzzese, *Elizabeth Warren Calls to Break Up Facebook, Google, and Amazon*, NBC NEWS (Mar. 8, 2019), <https://www.nbcnews.com/tech/tech-news/elizabeth-warren-calls-break-facebook-google-amazon-n980911/> [<https://perma.cc/P6VX-DCAG>].

countenance monopolization of that market, whether it be by the Government itself or a private licensee.”<sup>118</sup>

The Court discussed the scarcity factor in *Reno*, dismissing *Red Lion* as inapplicable to the Internet because there was no spectrum scarcity; rather, there was an abundance.<sup>119</sup> The Court opined,

[T]he Internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue.<sup>120</sup>

But the Internet’s information overload—its spectrum abundance, so to speak—contributes to the same ills that endangered speech in broadcasting in *Red Lion*. There, spectrum scarcity necessitated ordering to ensure that broadcasters used their airwaves responsibly.<sup>121</sup> In the social media context, the abundance of information online forces content hosts to perform a filtering function, thus thrusting upon them a similar responsibility. One free speech advocate, who testified at a House Judiciary Committee hearing examining the filtering practices of social media, stated in his written testimony that “[c]ontent moderation is an inevitable part of the Internet. Website operators will always have to make judgments about what content to take down and what to leave up, monitor and moderate objectionable content, promote effective counter-speech, educate their users, and generally create healthy, positive and dynamic online communities.”<sup>122</sup> Just as those in control of the scarce airwaves in *Red Lion* had a fiduciary-type responsibility in presenting content to their wide audiences, those in control of the over-abundance of content online have a responsibility to filter that content fairly.<sup>123</sup>

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<sup>118</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>119</sup> *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

<sup>120</sup> *Id.*

<sup>121</sup> *See Red Lion*, 395 U.S. at 389–92.

<sup>122</sup> *An Internet ‘Fairness Doctrine’ Would Stifle Free Speech, Protect Tech Giants*, TECHFREEDOM (Apr. 25, 2018), <http://techfreedom.org/Internet-fairness-doctrine-stifle-free-speech-protect-tech-giants/> [<https://perma.cc/7ERL-DAAT>].

<sup>123</sup> *See Red Lion*, 395 U.S. at 389; Jonathan Zittrain, *How to Exercise the Power You Didn’t Ask For*, HARV. BUS. REV. (Sept. 19, 2018), <https://hbr.org/2018/09/how-to-exercise-the-power-you-didnt-ask-for> (discussing online platforms as “information fiduciaries”) [<https://perma.cc/ZH8U-7DTP>].

### 3. *Reach and Interference*

The third leg of *Red Lion*'s reasoning was that "the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality."<sup>124</sup> Half the world could be speaking at the same time while the other half listened, the Court said, and even with so many voices employed at once, speech could flourish because the human voice is simply not loud enough to drown out other voices.<sup>125</sup> Radio broadcasting, on the other hand, reaches far enough that users of the same frequency drown each other out, even when they are far away.<sup>126</sup> This problem of reach and interference justified not only the licensing regime that divvied out exclusive privileges to use the airwaves, but also the fairness regulations that aimed to improve the marketplace of ideas by increasing representation of differing ideas. This factor builds on the first two because it exacerbates the threat posed by a consolidated industry.

Content on social media has a similarly wide reach as radio broadcasts. For instance, a single Tweet from President Trump on March 28, 2019 was retweeted 15,153 times and liked 54,032 times in seven hours.<sup>127</sup> A single YouTube video can have millions, or even billions, of views.<sup>128</sup> Although the reach of online media rivals that of broadcasting, the phenomenon of direct interference recognized in *Red Lion* is admittedly absent. One YouTube video will not drown out another, preventing it from being seen by audiences. Nevertheless, new media with a powerful reach has the potential to undermine the marketplace of ideas by displacing speech with other online expression. This is because the same organizations that dispense information provide a filtering service that prefers some information over others and that insulates radical posts from sources that disagree.<sup>129</sup>

While a variety of ideas exist on the Internet, like ideas are packaged with like, and sensationalist news is overemphasized.<sup>130</sup> This is akin to the interference in *Red Lion*, but with a key difference: In *Red Lion*, if multiple

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<sup>124</sup> *Red Lion*, 395 U.S. at 387–88. See also *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans.”).

<sup>125</sup> See *Red Lion*, 395 U.S. at 387–88.

<sup>126</sup> See *id.*

<sup>127</sup> Donald Trump (@realDonaldTrump), TWITTER (Mar. 28, 2019, 2:41 PM), <https://twitter.com/realdonaldtrump/status/1111352552615043078> [<https://perma.cc/7Z8M-V7L9>].

<sup>128</sup> J. Clement, *Most Popular YouTube Videos Based on Total Global Views as of August 2019 (in Billions)*, STATISTA, (Aug. 19, 2019), <https://www.statista.com/statistics/249396/top-youtube-videos-views/> [<https://perma.cc/6KKB-3E8U>].

<sup>129</sup> See Vicario et al., *supra* note 103.

<sup>130</sup> See *id.*

radio speakers used the same airwaves, none of them would be heard and the marketplace of ideas would cease to exist. By contrast, when interference through filtering and displacement occurs on Internet platforms, the marketplace of ideas is instead distorted. Truth does not win over falsehood because false ideas are disseminated along with congruent ideas that match the same theme, so that their falsity frequently remains unexposed. This displacement, coupled with the far-ranging reach of online posts, threatens informed communication.

### B. *Pacifica* factors

In addition to historic regulation, spectrum scarcity, and reach and interference, the *Pacifica* Court recognized two other factors that influenced how broadcasting should be treated under the First Amendment. As described in a later case, “[t]he *Pacifica* opinion . . . relied on the ‘unique’ attributes of broadcasting, noting that broadcasting . . . can intrude on the privacy of the home without prior warning as to program content, and is ‘uniquely accessible to children, even those too young to read.’”<sup>131</sup> Broadcasting has the potential to be invasive because listeners might “turn[] on a radio and be[] taken by surprise by an indecent message.”<sup>132</sup> This invasiveness was held not to apply to the Internet in *Reno* because “[c]ommunications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden. Users seldom encounter content ‘by accident.’”<sup>133</sup>

But *Reno* was decided in 1997 when social media did not exist.<sup>134</sup> Since then, social media has become a massive part of our lives, and video makes up a significant portion of its content. Facebook generates an average of eight billion video views per day, with five hundred million people viewing videos on Facebook daily.<sup>135</sup> Video content has at least as great a potential for invasiveness as radio content did in *Pacifica*; instead of merely hearing an offensive scene, video can surprise viewers with offensive imagery as well. And the sheer volume of content creators working under the cloak of anonymity exacerbates such invasiveness in a disturbing way. Earlier this

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<sup>131</sup> *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 127 (1989) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978)).

<sup>132</sup> *Id.* at 128.

<sup>133</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 869 (1997).

<sup>134</sup> The first recognizable social media website, Six Degrees, was created later that year in 1997. Drew Hendricks, *Complete History of Social Media: Then and Now*, SMALL BUS. TRENDS (May 8, 2013), <https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html/> [<https://perma.cc/4FWY-X452>].

<sup>135</sup> Derek Doeing, *55+ Powerful Video Marketing Statistics for 2019*, G2CROWD.COM, (Aug. 9, 2018), <https://learn.g2crowd.com/video-marketing-statistics/> [<https://perma.cc/8XBJ-5NE3>].

year, a mother discovered a YouTube video on a children's website that contained instructions for how to self-harm, spliced in between clips of a popular Nintendo game.<sup>136</sup> Even though such videos violate the content policies of YouTube and other online platforms, they can receive tens of millions of views before they are taken down.<sup>137</sup> The ability to share these videos on social media thus creates the possibility that unexpected and unwanted content could invade a user's experience.

The other factor relied on in *Pacifica* was the accessibility of broadcasting to children.<sup>138</sup> Concern for children on the Internet was also addressed in Justice Alito's concurrence in *Packingham*.<sup>139</sup> Echoing the language of the *Red Lion* opinion, Justice Alito observed that "there are important differences between cyberspace and the physical world."<sup>140</sup> Among these was the heightened vulnerability of minors in cyberspace as compared to physical locations.<sup>141</sup> Justice Alito warned that, "if the entirety of the internet or even just 'social media sites' are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders."<sup>142</sup> In accordance with Justice Alito's concern, many commentators have spoken out about the dangers that could befall children on social media and on the Internet as a whole.<sup>143</sup> Unsurprisingly, this has been a central focus of federal legislation<sup>144</sup> and constitutional review.<sup>145</sup> Because these *Pacifica* factors, in addition to the *Red Lion* factors, are implicated by social media, a different standard of constitutional review for First Amendment issues is justified.

#### IV. REGULATORY SOLUTIONS

*Red Lion* represents the Court's willingness to uphold laws affecting speech in new contexts, where the marketplace of ideas does not function

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<sup>136</sup> Sophie Lewis, *Horrified Mom Discovers Suicide Instructions in Video on YouTube and YouTube Kids*, CBS NEWS (Feb. 23, 2019), <https://www.cbsnews.com/news/youtube-kids-inappropriate-horrified-mom-discovers-suicide-instructions-in-video-on-youtube-and-youtube-kids/> [<https://perma.cc/3NPQ-D2WL>].

<sup>137</sup> *The Great Momo Panic*, GIMLET, (Mar. 14, 2019), <https://gimletmedia.com/shows/reply-all/j4h6jd/138-the-great-momo-panic> [<https://perma.cc/688S-U28N>].

<sup>138</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

<sup>139</sup> See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1739 (2017) (Alito, J., concurring).

<sup>140</sup> See *id.* at 1743 Alito, J., concurring).

<sup>141</sup> See *id.*

<sup>142</sup> *Id.*

<sup>143</sup> See Jodi Whitaker & Brad J. Bushman, *Online Dangers: Keeping Children and Adolescents Safe*, 66 WASH. & LEE L. REV. 1053 (2009).

<sup>144</sup> See 47 U.S.C. § 223 (2018); Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253.

<sup>145</sup> See *Packingham*, 137 S. Ct. 1730; *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

properly on its own.<sup>146</sup> If social media is such a context, then the Court is more likely to uphold legislative solutions aimed at enhancing speech, whereas the Court would likely strike down comparable laws on First Amendment grounds in more traditional contexts, like print media. This Part outlines some of the possible legislative and administrative solutions that have been discussed, proposed, or enacted. Specifically, recent election transparency and anti-bias legislation represent two kinds of attempts to enhance speech on social media platforms by placing limitations on platform gatekeepers. These laws would become significantly more viable as a constitutional matter if a *Red Lion* approach is applied to the social media context. Because these efforts represent attempts to repair a broken or distorted marketplace of ideas brought to light either by Russian election interference or gatekeeper abuse of control, they are likely to revitalize the *Red Lion* debate in the courts.

### A. Election transparency laws

In response to massive Russian interference with the 2016 U.S. presidential election,<sup>147</sup> both federal and state legislatures have proposed or passed election transparency laws. Advertisements on the radio and television—media contexts that receive more limited First Amendment protection—are currently subject to disclosure requirements.<sup>148</sup> Recent bills aim to extend those requirements to the Internet. If social media platforms are treated similarly to radio and television under a *Red Lion* theory, then these extensions will pass constitutional muster. But if a *Tornillo*-type standard applies, then these laws could potentially be struck down.

Several bills addressing online electioneering transparency have been passed at the state level.<sup>149</sup> In Maryland, for instance, the Online Electioneering Transparency and Accountability Act banned the use of foreign money to pay for political ads.<sup>150</sup> While some in the tech community had approved the Act,<sup>151</sup> *The Washington Post* and other newspapers sued the state, arguing that, among other things, the Act compelled speech in violation

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<sup>146</sup> See discussion *supra* Part I.A.

<sup>147</sup> S. SELECT COMM. INTELLIGENCE, 116TH CONG., REP. ON RUSSIAN ACTIVE MEASURES, CAMPAIGNS, AND INTERFERENCE IN THE 2016 U.S. ELECTION (2019).

<sup>148</sup> See, e.g., 11 C.F.R. § 110.11 (2019).

<sup>149</sup> See Democracy Protection Act, 2018 N.Y. Sess. Laws ch. 59, pt. JJJ (McKinney) (codified at N.Y. Elec. § 14-100, -106, -107, -126); 2018 Wash. Legis. Serv. ch. 304 (West); MD. CODE ANN., ELEC. LAW § 13-405 (West 2018).

<sup>150</sup> See MD. CODE ANN., ELEC. LAW § 13-405 (West 2018); Edward Ericson, Jr., *Newspapers Sue Over Electioneering Disclosure Law*, COURTHOUSE NEWS SERV. (Aug. 17, 2018), <https://www.courthousenews.com/newspapers-sue-over-electioneering-disclosure-law/> [https://perma.cc/A4JD-TYXU].

<sup>151</sup> Ericson, *supra* note 150 (“Facebook told the newspaper that it was on board with the law.”).

of *Tornillo*.<sup>152</sup> A district court reviewing the Act agreed with the plaintiffs and granted a preliminary injunction preventing enforcement of certain provisions.<sup>153</sup> However, the court declined to follow *Red Lion*, citing *Reno*.<sup>154</sup>

At the federal level, a proposed electioneering bill called the Honest Ads Act would require online platforms like Facebook and Google to disclose information about the groups of people targeted by political ads, what those ads cost, and who ran them.<sup>155</sup> These companies would also have to make “reasonable efforts” to ensure that foreign nationals did not fund political ads.<sup>156</sup> The disclosure requirements would cover ads made about “national legislative issue[s] of public importance,” even though this scope raises constitutional concerns.<sup>157</sup> The government’s constitutional license to impose disclosure requirements on broadcasters is, of course, rooted in *Red Lion*’s relaxed standards for broadcasting.<sup>158</sup> Although the Honest Ads Act has not yet been passed, the Federal Election Commission has already initiated a proposed rulemaking process to require more disclaimers for Internet political ads.<sup>159</sup>

The election disclosure bills and proposed regulations are likely to raise the *Red Lion* question in the courts. While these requirements are permissible in the broadcasting context, Russian interference in the 2016 election made it clear that social media poses a special threat to the democratic process. Advocates for these measures should seek an expansion of *Red Lion* to the Internet or argue that social media platforms present a new kind of space deserving a regulation-friendly approach for similar reasons to those given in *Red Lion*.

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<sup>152</sup> *Washington Post v. McManus*, 355 F. Supp. 3d 272 (D. Md. 2019).

<sup>153</sup> *See id.*

<sup>154</sup> *Id.* at 288 (“This rationale, the Court has made clear, is particular to broadcast communications and does not apply to cable transmissions or material posted on the Internet.”).

<sup>155</sup> Honest Ads Act, S. 198, 115th Cong. § 8 (2017).

<sup>156</sup> *Id.* at § 9.

<sup>157</sup> In *Buckley v. Valeo*, the D.C. Circuit rejected a part of a statute to the extent that it could be read to impose mandatory disclosure of ads on “issues of public importance.” 519 F.2d 821, 870 (D.C. Cir. 1975), *aff’d in part, rev’d in part*, 424 U.S. 1 (1976), and *modified*, 532 F.2d 187 (D.C. Cir. 1976). Although the case went to the Supreme Court, this issue was not discussed on appeal. *See* 424 U.S. 1 (1976).

<sup>158</sup> *See Well-Intentioned ‘Honest Ads’ Bill Raises Serious Free Speech Concerns*, TECHFREEDOM (Oct. 19, 2017), <http://techfreedom.org/well-intentioned-honest-ads-bill-raises-serious-free-speech-concerns/> (arguing the Honest Ads Act would be unconstitutional because the Internet is a different context from broadcasting) [<https://perma.cc/GH2B-872W>].

<sup>159</sup> *See FEC Public Hearing on Internet Disclaimers* FEC RECORD: REGULATIONS (July 18, 2018), <https://www.fec.gov/updates/public-hearing-internet-disclaimers-2018/> (discussing public hearings resulting after the notice proposed rulemaking) [<https://perma.cc/TT2U-QKP5>].

## B. Anti-bias bills

Another form of speech-enhancing legislation of social media platforms includes proposals that target perceived bias on those platforms. Many lawmakers and commentators—primarily those on the right—have spoken out against bias in social media, both in filtering algorithms and in content-policing decision-making.<sup>160</sup> House bill H.R. 492, the “Biased Algorithm Deterrence Act,” proposes that social media platforms showing political bias be deprived of statutory protections from liability.<sup>161</sup> Even though they have been withdrawn, similar bills have been presented at the state level.<sup>162</sup>

These proposals, which somewhat resemble the fairness doctrine—ironically, a policy reviled by many conservatives—will undoubtedly raise speech concerns. Indeed, when Ted Cruz accused Facebook of suppressing conservative speech and raised the idea of limiting CDA protections to “neutral platforms,” speech advocate Berin Szóka’s response referred to these proposals as a “Fairness Doctrine for the Internet.”<sup>163</sup> In order for these laws to survive judicial scrutiny, an expansion of the *Red Lion* approach to the context of social media would seem necessary.

## V. CONCLUSION

Justice Kennedy warned the judiciary in *Packingham* to be cautious in its approach to the rapidly and unpredictably evolving Internet.<sup>164</sup> But we do not know what this caution should look like; is it more cautious to take a regulation-friendly approach to Internet cases or a regulation-hostile approach? That all depends on which approach best preserves a well-functioning online marketplace of ideas. Given the recent use of media manipulation as a means of destabilizing our democracy and the structural realities giving tech giants vast reach and control, the more cautious approach would seem to be the regulation-friendly one. Although the rationales of *Red*

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<sup>160</sup> See, e.g., Margaret Harding McGill, et al., *Trump Pushes Government Action Against “Terrible Bias” at Social Media Summit*, POLITICO (Jul. 11, 2019), <https://www.politico.com/story/2019/07/11/anti-tech-bill-sponsor-white-house-social-media-summit-1586902> [<https://perma.cc/DUK5-MMHN>]; Cecelia Kang & Sheera Frenkel, *Republicans Accuse Twitter of Bias Against Conservatives*, N. Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/technology/lawmakers-facebook-twitter-foreign-influence-hearing.html> [<https://perma.cc/TYP8-UZLU>].

<sup>161</sup> Biased Algorithm Deterrence Act, 116th Cong. (2019).

<sup>162</sup> Stop Social Media Censorship Act, H.B. 1028, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019); Stop Social Media Censorship Act, S.B. 1722, 2019 Leg., Reg. Sess. (Fla. 2019).

<sup>163</sup> See TECHFREEDOM, *supra* note 122.

<sup>164</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

*Lion* do not directly map onto the attributes of social media platforms, the concerns underlying those rationales are implicated even more than they were by the broadcasting media fifty years ago. Given the Court's recognition that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them,"<sup>165</sup> supporters of regulatory solutions to social media-related issues should look to *Red Lion* as the constitutional ground for their efforts.

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<sup>165</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969).