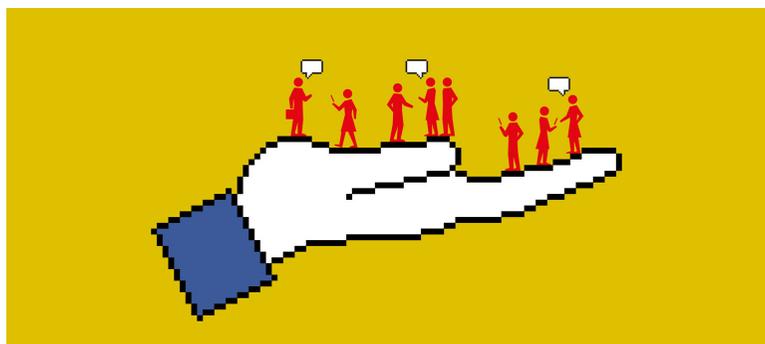


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THE TECH GIANTS, MONOPOLY POWER, AND PUBLIC DISCOURSE



# The Limits of Antimonopoly Law as a Solution to the Problems of the Platform Public Sphere

By **Genevieve Lakier**



**KNIGHT  
FIRST AMENDMENT  
INSTITUTE**

at Columbia University



In November 2019, the Knight First Amendment Institute convened a major symposium at Columbia University, titled “The Tech Giants, Monopoly Power, and Public Discourse,” to address concerns arising from the dominance of a small number of technology companies over a wide range of economic and expressive activity. The essays in this series were originally presented and discussed at this two-day event. Written by scholars and experts in law, computer science, economics, information studies, journalism, political science, and other disciplines, the essays focus on two questions: how and to what extent the technology giants’ power is shaping public discourse, and whether anti-monopoly tools might usefully be deployed to expose or counter this power.

The symposium was conceptualized by Knight Institute staff, including Jameel Jaffer, Executive Director; Katy Glenn Bass, Research Director; Alex Abdo, Litigation Director; and Larry Siems, Chief of Staff. The essay series was edited by Glenn Bass with additional support from Lorraine Kenny, Communications Director; Sarah Guinee, Research Fellow; and Madeline Wood, Communications and Research Coordinator.

*The full series is available at [knightcolumbia.org/research/](https://knightcolumbia.org/research/)*

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## INTRODUCTION

**T**HE IDEA OF BREAKING UP BIG TECH impresses with its audaciousness. The last time the federal government broke up a successful commercial business was in 1982 when the government entered into a consent decree with AT&T that resulted in the creation of the “Baby Bells.”<sup>1</sup> Almost 40 years later, the episode is still remembered as a high—or low—point for government intervention into the economy, depending on one’s perspective.<sup>2</sup> Were the federal government to do what Senator Elizabeth Warren, among other voices on the left, argue that it should—namely, break up the large internet companies, like Amazon, Facebook, and Google, that today provide the platforms for a tremendous range of economic, social, and political activity in the United States—it would exercise a kind of government power that has very rarely been used in this country.<sup>3</sup> Moreover, the result would undoubtedly represent a significant change in the economic relationships that govern important segments of the U.S. economy.<sup>4</sup> That is, indeed, the goal.

One cannot therefore fault those who propose breaking up big tech for a lack of ambition. If anything, the opposite is true: The proposal is so

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ambitious that it may be difficult for many to take seriously. This is not to say that one should *not* take it seriously. As the last few decades have clearly demonstrated, ideas can go from “off the wall” to “on the wall” very quickly, and not only when it comes to constitutional argument. Nevertheless, there is no question that achieving the breakup of big tech will be a difficult task to accomplish, particularly given the significant amounts of money pouring into Washington from the internet companies that are the targets of Warren as well as a host of other thinkers.<sup>5</sup>

It is also the case, however, that *merely* breaking up big tech—however bold, however significant in its economic repercussions—is very unlikely to solve many of the problems that critics associate with the emergence of what we might call the “platform public sphere.” This is because many of those problems—for example, the problem of what Shoshanna Zuboff calls “surveillance capitalism,”<sup>6</sup> the problem of political disinformation,<sup>7</sup> or the problems caused by often-anonymous threatening and harassing speech online<sup>8</sup>—are not ultimately the consequence of economic concentration. And yet it is economic concentration—and for the most part, only economic concentration—that the antitrust tool of divestiture is designed to combat.

This is intentional. It must be remembered that one of the reasons that antitrust has been a favored method of economic regulation in the United States is precisely because it represents a *limited* intervention into the private sphere. As Daniel Crane notes, a primary motivation for enacting the Sherman Antitrust Act was to diffuse political pressure for more radical and interventionist forms of economic regulation.<sup>9</sup> Antitrust was an alternative to nationalization—to the regulatory mechanisms associated, that is, with socialism and communism. Even in the early 20<sup>th</sup> century, when the federal government interpreted its antitrust powers much more aggressively than it has in recent decades, the goal of antitrust regulation was not to fundamentally reshape existing market practices but to ensure that markets functioned competitively.<sup>10</sup> Antitrust law consequently has little to say about business practices that are neither designed to be anticompetitive nor likely to have a substantial anticompetitive effect.<sup>11</sup> There is no reason to think that the situation will be any different today.

The result is that, even if the federal government sued Apple or Facebook or Google for antitrust violations, as many have argued that it should, or went

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so far as to break up Facebook or Google or Amazon along the lines that Warren has suggested, its actions would not directly impact how these or other big tech companies operate their platforms—the rules of access they employ, for example, or the control they exert over speech on their platforms, or their privacy policies.<sup>12</sup> Nor would more aggressive enforcement of the antitrust laws against big tech do anything about what may be the most serious threat to the quality of public discourse in the internet public sphere: namely, the slow-motion destruction of the local news industry that is taking place as advertising dollars that once went to local newspapers and magazines flow instead to Facebook and Google.<sup>13</sup>

Of course, breaking up big tech might indirectly affect at least some of these problems. More competition might, for example, make the big tech companies more sensitive to consumer demands by giving their users greater bargaining power when they demand changes to the existing rules. At present, mass consumer boycotts of Amazon or Google or Facebook are hard to pull off because consumers have so few replacement options.<sup>14</sup> Were these companies broken up along the lines that Warren has suggested, consumers might be better able to push them to adopt more user-protective privacy rules or to alter how they regulate violent and threatening speech.

Divestiture might also limit the political power of the big tech companies and thereby make it easier for the government to regulate them in other ways. After all, the threat that monopolies pose to the efficient operation of the market is not just an economic but a political threat. Businesses that possess concentrated economic power also tend to possess the political pull to prevent regulations that threaten their profits.<sup>15</sup>

The impact of divestiture on the relative political power of the big tech companies and consumers is likely to be modest, however. This is the case for several reasons. First, network effects—the tendency of users to continue to use a network because so many other people are using that network—may mean that, even when they have a more credible choice between platforms, customers are unwilling to leave Facebook or Google or other dominant platforms.<sup>16</sup> Even if network effects do not entrench the power of the big tech platforms, it may be the case that certain harmful practices—for example, the sale of user data to advertisers—are so fundamental to the business model of companies like Facebook and Google that they remain industry

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standards even in a less concentrated market.<sup>17</sup> It also is far from obvious that the breakup of big tech will do a great deal to diminish the political clout of big tech. Companies like Facebook, Amazon, and Google would, after all, remain large and profitable players in the internet economy, even if they were to be broken up along the lines that Warren suggests. This also means that the breakup of big tech is unlikely to do much to help the traditional news media outlets. Facebook, even if divested of WhatsApp, will likely remain a much more attractive destination for advertising dollars than the Cleveland Plain Dealer, say.<sup>18</sup>

What all this means for those concerned about the quality of public discourse in the internet age is that the relevant question is not: Should Google and Amazon and Facebook be broken up? The question is instead: What *other* actions should Congress take to promote the health and vitality of public debate in the platform public sphere? This is not a straightforward question to answer because it requires taking account of not only the costs and benefits of different regulatory tools but also the constraints that the First Amendment imposes on Congress's legislative power.

One of the great benefits of divestiture as a regulatory tool is that it is almost certainly constitutional. In multiple opinions, the Supreme Court has made clear that legislative efforts to promote economic competition are not only constitutionally permissible, they actually protect many of the same values and interests that the Constitution protects.<sup>19</sup> It has consequently tended to take a rather expansive view of the constitutional power that federal and state regulators possess to enforce the antitrust laws, including the power to divest, or break up, anticompetitive monopolies. Although the Court has found some constitutional limits to how broadly the antitrust laws extend—and that, in particular, antitrust laws cannot be interpreted to prohibit collective efforts to petition the government or to engage in political activism—a law mandating the breakup of big tech would not come anywhere close to those limits.<sup>20</sup> Such a law would impose no constraint on the ability of companies like Google and Facebook to petition the government. Nor would it prevent the big tech companies from engaging in political expression or from saying or not saying anything they liked in public. Instead, like other procompetition regulatory interventions in the marketplace, divestiture would *further* constitutional values by preventing companies like

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Google and Facebook from using their economic might to drown out other voices. It seems incredibly unlikely, as a result, that any court would find that Congress lacked the constitutional power to enact divestiture along the lines that Warren and others suggest.

The same is not necessarily true of the other regulatory tools that scholars and policymakers have proposed as a solution to the problems that plague the platform public sphere. This includes Warren’s suggestion that large internet platforms like Amazon and Google not only should be broken up, but services like Google Search also should be required to “meet a standard of fair, reasonable, and nondiscriminatory dealing with users.”<sup>21</sup> Nondiscrimination obligations are a core feature of public utility regulation in the United States.<sup>22</sup> By including a nondiscrimination requirement in her breakup plan, Warren is clearly signaling that she believes the concentrated power of the tech giants needs to be combatted not only by the antimonopoly tool of antitrust but also by the antimonopoly tool of public utility regulation. She is not alone in this belief. In the past few years, a number of scholars and policymakers—many of them participants in this symposium—have suggested that Facebook, Amazon, and Google be treated as public utilities and regulated accordingly.<sup>23</sup>

One can well understand why. After all, public utility laws are designed to protect the public’s right of access to important goods and services—to goods and services that one must have access to if one wishes to participate fully in society.<sup>24</sup> It should be obvious to all by now that the goods and services that platform companies like Google and Facebook provide are goods of this kind.<sup>25</sup> It is perfectly plausible, as a result, to believe that the concerns that justify the imposition of nondiscrimination obligations on railroads and airlines and telephone companies also apply to platform providers like Google and Facebook. Doing so would certainly further many of the same interests that breaking up these companies would further. Like divestiture, it would help ensure the inclusiveness of the platform public sphere by making it harder for the big tech companies to use their economic power to squelch disfavored voices and viewpoints. Imposing on Facebook and Google and other platform providers a duty of fair, reasonable, and nondiscriminatory dealing would also provide regulators a legal hook they could use to regulate the operation of these companies in all sorts of other ways. The public utility

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model is, for that reason, a very attractive one to those who believe that the unregulated power of the tech giants poses a real threat not only to public discourse but to democracy more broadly. It is generative, open-ended, and dynamic.

There is, nevertheless, a serious problem with the idea of turning platform companies like Facebook and Google into public utilities and requiring them to provide nondiscriminatory access to consumers: doing so would almost certainly be considered a violation of their First Amendment rights. This is because, unlike the private companies that in the past have been considered public utilities, companies like Google and Facebook engage in pervasive editorial regulation of the speech that flows through their networks.<sup>26</sup> And yet the Supreme Court has, for over 30 years now, held that private property owners who exercise editorial control over speech that takes place on their property cannot ordinarily be required to open that property to speech they dislike.<sup>27</sup>

The Court has only allowed the government to require property owners to open up their property to others' speech when there is good reason to believe that doing so is necessary to prevent the property owner from exercising bottleneck control over an important medium of communication. One could try to argue that Facebook and Google possess bottleneck power of that sort, but it would be hard to make the argument a convincing one, particularly if these companies get broken up.<sup>28</sup> Even if they don't, the argument would be a tough sell. In *Turner Broadcasting System, Inc. v. FCC*—the most recent case in which the Court upheld a forced access law—the Court relied heavily on evidence that in 99 percent of communities in the United States, the local cable company possesses a total monopoly on the provision of cable service to justify a law requiring cable companies to devote a number of their cable channels to transmitting the content of local broadcast television networks.<sup>29</sup> That the local broadcast television industry was, in significant parts of the country, utterly dependent for its survival upon the willingness of cable companies to carry its programming—and more specifically, upon the fact that cable operators exercised “control over most (if not all) of the television programming that is channeled into the subscriber's home [and could] thus silence the voice of competing speakers with a mere flick of the switch”—justified, the Court asserted, the constraint the law imposed on

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their editorial freedom.<sup>30</sup> Facebook and Google may be dominant platforms, but they do not enjoy anywhere close to this level of dominance. There is no switch they can flick that can prevent disfavored speakers from disseminating their message on other, less dominant platforms. Particularly with Justice Kavanaugh on the Court, it is extremely unlikely that any effort to impose a nondiscrimination obligation on platform companies would be upheld against the First Amendment challenge that would be virtually certain to be forthcoming.<sup>31</sup>

The upshot is that neither of the two antimonopoly tools that scholars and policymakers have proposed in recent years as solutions to the economic as well as political and cultural problems created by the rise of big tech will be able to do much to improve the quality of discourse within the platform public sphere. Breaking up big tech may help spur innovation and foster competition, but it won't do much to alter the conditions under which speech occurs. Imposing a rule of nondiscriminatory access on the big tech companies, meanwhile, would alter the conditions of at least some aspects of the platform public sphere, by making it much more difficult for platforms to kick speakers off of their platform or to deny them access in the first place. But it is almost certainly precluded by the First Amendment, at least as the First Amendment is currently understood.

This doesn't mean that there is nothing that lawmakers can do to improve the quality of public discourse on the internet or to ensure equitable access to the platform public sphere. But it does mean that they cannot rely on antimonopoly tools to do so. So what is to be done? In the remainder of this essay, I briefly suggest three regulatory interventions that would do more to directly tackle the problems of public discourse in the internet age than the mechanism of divestiture but that would not create the constitutional problems that a nondiscriminatory access rule would create.

## NEWSPAPER SUBSIDIES

**P**ERHAPS THE EASIEST (although certainly not the cheapest) way that Congress could mitigate the democratic harms created by the economic and cultural dominance of the large platform companies is

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to subsidize other, more traditional platforms for expression—namely, local newspapers. Local newspapers obviously do not provide the same opportunity for public expression as platforms like Facebook and Google do. But they serve another important public function: They uncover and disseminate information about local events, scandals, and problems.<sup>32</sup> The steady flow of advertising money from local newspapers to the platform companies has and surely will continue to contribute to the creation of a public sphere in which there is a great deal of opinion but relatively little fact.

Congress can do something about this by granting a sizable monetary subsidy for local newspapers. National newspapers like *The New York Times* and *The Washington Post* don't need subsidizing because they have managed to transition to a subscription-based business model.<sup>33</sup> But local newspapers do need help.

A subsidy to established local news providers would not solve the root problem plaguing local news: namely, the transformation of the advertising industry on which the news industry has long relied for its economic sustenance. But it would help at least slow down the bleeding until a new economic model can be found. Certainly, the history of the newspaper industry in the United States demonstrates how generative federal newspaper subsidies can be. The significant postal subsidies that Congress granted newspapers beginning in the late 19<sup>th</sup> century produced a country that, by 1820, had both more post offices and more newspapers per capita than any other nation in the world.<sup>34</sup> This in turn fostered a remarkably integrated and dynamic media landscape.<sup>35</sup> The government continued to subsidize mail throughout the early 20<sup>th</sup> century but, since the 1960s, has significantly decreased the size of the postal subsidies.<sup>36</sup> In 2010, the Federal Trade Commission raised the possibility of increasing the size of the federal press subsidies by millions of dollars but has not moved forward on the idea since then.<sup>37</sup> It easily could.

Subsidies pose no constitutional problem. They do not infringe anyone's First Amendment rights, so long as they are applied in a viewpoint-neutral manner.<sup>38</sup> And they represent a much better solution to the problems facing the local news media than the solution that large newspaper businesses like News Corp have advocated, which is to grant newspapers a temporary immunity from antitrust laws.<sup>39</sup> Antitrust immunity tends to favor large industry

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players, for obvious reasons.<sup>40</sup> It would thus do little to help the newspapers that are most at risk in a media landscape dominated by big tech. Targeted subsidies are a much better way to go, even if enacting them might be more politically difficult because of the costs they impose.

As this discussion suggests, federal media policies should take account of the harmful effects that concentrated economic power can have on the public sphere. But this concern need not always make itself felt by means of the classic tools of antimonopoly law.

## PRIVACY REGULATION

**I**N ADDITION TO SUBSIDIZING the traditional news media, Congress could restrict what platform companies do with the information they gather about their users' browsing, shopping, and searching habits. Limiting the platforms' ability to store and disseminate the information that they gather about their users would not only promote individual privacy interests; it would also help ensure broad participation in the platform public sphere by preventing those who wish to visit politically unpopular sites or engage in dissident speech or association from being chilled by the fear of surveillance.

There is growing evidence that fears of online surveillance impact the willingness of users to participate in online discourse—particularly on controversial political topics.<sup>41</sup> At least some users of platform services believe that there is enough of a risk of negative consequences from expressing a potentially controversial view to stay quiet. These fears are not irrational. As Zuboff and others have documented, the big tech companies have a close and complicated relationship with the institutions that make up the national security state and frequently share user data with them (not always involuntarily).<sup>42</sup> Recent incidents in which journalists critical of the Trump administration's immigration policies were stopped and questioned at the border demonstrate vividly how this data can be, and perhaps has been, used not only to investigate national security threats but to target those who criticize the government or express politically unpopular views.<sup>43</sup> This is precisely the kind of state action the First Amendment was enacted to prevent, but

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current First Amendment doctrine makes it virtually impossible for those chilled by the threat of surveillance to bring a constitutional claim.<sup>44</sup>

There is consequently a good free speech argument, as well as a good privacy argument, for strengthening the (currently very weak) laws that govern how the government acquires and uses this kind of data and when and how the companies can disseminate it. Reforms of this sort could do a lot more than divestiture to ensure that the platform public sphere is robust, diverse, and inclusive.

Nor would strengthened privacy laws cause the kind of First Amendment problems that imposing a nondiscrimination access requirement on the big tech companies would. This is because, as the Court has made clear in numerous opinions, laws that restrict the collection and dissemination of information do not violate the First Amendment when they reasonably further a substantial government interest, when they are employed in a viewpoint-neutral manner, and when the information they restrict relates to private matters—“domestic gossip,” say, or “trade secrets”—rather than to matters of public concern.<sup>45</sup>

This is true notwithstanding the Court’s 2011 decision in *Sorrell v. IMS Health, Inc.* to strike down a Vermont law that prohibited pharmacies from selling to pharmaceutical marketers information about doctors’ prescribing habits without the doctors’ consent.<sup>46</sup> Some have interpreted the decision in *Sorrell* to mean that all restrictions on the dissemination and sale of private information will be considered presumptively invalid or close to it.<sup>47</sup> But in fact, *Sorrell* articulates a much narrower rule, namely that laws that restrict the dissemination of private information *in order to target* particular kinds of speakers must be closely scrutinized.<sup>48</sup>

What this means for user data is that Congress should be able to justify relatively easily laws that restrict the uses that the big tech companies can make of it and with whom it can be shared. Such laws, after all, would clearly further the government’s substantial interests in individual privacy and in freedom of speech. The information they would regulate, meanwhile—information about what websites users search for, what kinds of shoes they like to buy, or who is in their friend network—may possess great commercial significance to advertisers, but in its discrete particularity is unlikely to be of broad “public concern.” Consequently, so long as Congress enacted a

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general enough privacy law—one that did not, like the law struck down in *Sorrell*, limit the ability of the big tech companies to disseminate the information they possessed to only certain users—the First Amendment should not constrain its powers.

There is no need, in other words, to rely on corporate self-regulation—or, alternatively, to rely on the law of fiduciary obligations—to protect user privacy and, along with it, the vitality of the platform public sphere.<sup>49</sup> Fears of the First Amendment when it comes to privacy regulation have been greatly overblown, as the cases handed down since *Sorrell* make quite clear.<sup>50</sup> The First Amendment does make it exceedingly difficult for the government to force businesses to open up their property to speech they dislike, but it does not prevent the government from requiring businesses to protect the privacy of those to whom they voluntarily agree to provide services. Presumably this is because the Court thinks of the former kind of state action as posing a much more serious threat to the operation of the marketplace of ideas than the latter. We may agree or disagree, but what it means, practically, is that Congress has a good deal of power to affect the conditions of discourse on the platform public sphere by enacting viewpoint-neutral privacy laws—laws that give individuals some degree of knowledge and control over the data that the big tech companies possess about them and the uses to which it is put.

## TARGETED SPEECH REGULATIONS

**F**INALLY, CONGRESS OR STATE LEGISLATURES could make the platform public sphere a less threatening or dangerous place by enacting targeted speech regulations that make it either unlawful or expensive for the big tech companies to host threatening or harassing speech on their platforms. Legislatures have, in fact, already done so—as of this writing, the dissemination of nonconsensual pornography is a criminal offense in 46 states and the District of Columbia, and similar legislation has recently been introduced in Congress.<sup>51</sup> Congress also recently limited the broad immunity that internet companies possess under Section 230 of the Communications Decency Act from liability for speech that appears on their platforms to exclude speech that promotes prostitution or sex trafficking.<sup>52</sup>

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This revision to the scope of Section 230 may only be the first of many; in a moment when many believe that the big tech companies possess too much power, Section 230 is a popular target for legislative reform.<sup>53</sup>

This kind of targeted speech regulation is of course precisely the kind of thing one might hope to avoid by engaging in more structural or “infrastructural” reform of the internet ecosystem—reforms, like the antimonopoly tools discussed earlier, that reshape the conditions under which speech occurs, rather than target that speech itself.<sup>54</sup> But, as the earlier discussion makes clear, it simply may not be possible for structural reforms to solve all of the problems that plague the platform public sphere. The problems of racial hatred or sexual violence may simply be too pervasive to be solved by the mechanism of competition. Lawmakers who want to prevent (for example) the serious economic or reputational harms that the public circulation of sexually graphic images can cause may therefore have no choice but to target the speech directly.<sup>55</sup> The same is true for those concerned about the problems caused by threats of violence on the internet.

Efforts to regulate speech directly will obviously raise all sorts of First Amendment questions. Laws that restrict speech because of its harmful content are typically considered presumptively invalid under the First Amendment. That presumption is rebuttable, however, if the government can demonstrate a sufficiently compelling reason for the law—and it doesn’t apply at all to unprotected speech like true threats. This explains why courts have long upheld the federal threats statute as applied to threats made on the internet. It also explains why just a few months ago, the Vermont Supreme Court upheld the state’s nonconsensual pornography law against a First Amendment challenge.<sup>56</sup> There is therefore opportunity for legislators to regulate these and other kinds of harmful speech on the internet more intensively than harmful content has been regulated in the past.

This does not mean, of course, that doing so is normatively desirable. That is a far more complicated and context-specific question than can be answered in general—and certainly not in this essay. I will simply note that, when assessing it, policymakers and scholars should keep in mind not merely the benefits and harms of the speech in question but also the particular conditions under which speech on the internet occurs. One of the profound changes that the emergence of the platform public sphere has

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brought about is a significant democratization of the opportunity to engage in public expression. The result is to increase tremendously the range of speakers—and speech acts—that circulate publicly. This is obviously both a good and a bad thing; it energizes and empowers but it also makes possible all kinds of hateful, harassing, and demeaning speech. It also raises the costs of enforcing any criminal or, for that matter, civil regulation of speech. And it heightens the possibility—present whenever the government regulates speech—that laws intended to remove violent or harassing or derogatory speech from the internet will in fact be used to punish politically unpopular speakers, rather than the worst kinds of speech.

This suggests that whatever targeted speech regulation is enacted should be narrow in its scope, to help ensure that the government’s coercive power is wielded against the worst of the worst rather than against the politically vulnerable. What this means, in turn, is that even targeted regulation of speech will only be able to do so much to improve the conditions of discourse on the internet. It may, however, be the best that regulators can do, absent the kind of cultural and political change that creates and alters speech norms and the conditions of production on the internet.

## CONCLUSION

**T**HERE IS NO QUESTION that the First Amendment—particularly as it is currently understood—makes regulating the platform public sphere more challenging, *even when* what those regulations seek to do is the same thing the First Amendment is supposed to do: namely, create a public sphere that is “uninhibited, robust, and wide-open.”<sup>57</sup> We may not like this aspect of contemporary First Amendment law but it is something that is unlikely to change any time in the near future.

What that means is that some regulatory tools—the tool of public utility regulation, for example—may be poorly suited to the challenges of our contemporary moment (challenges that are legal, as well as economic, social, and political). That may not mean we want to give up on them. Perhaps it is First Amendment law that ultimately has to change, and not our regulatory ambitions. Nevertheless, this essay has pointed to some important

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alternatives that may be available even notwithstanding the current, highly deregulatory approach of First Amendment law. It is important to keep them in mind if we want to have both freedom of speech and freedom to regulate.

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## NOTES

- 1 See *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 223 (D.D.C. 1982) (approving the consent decree).
- 2 Compare TIM WU, *THE CURSE OF BIGNESS* 92–98 (2018) (interpreting the divestiture of AT&T as “the last major breakup” and a development that unleashed the “innovation the Bell system monopoly had been holding back”); Richard A. Epstein, *Monopolization Follies: The Dangers of Structural Remedies Under Section 2 of the Sherman Act*, 76 ANTITRUST L.J. 205, 231 (2009) (blaming the AT&T divestiture for “set[ting] the path towards FCC Regulation under the Telecommunications Act of 1996 which ... [ultimately] led to a major meltdown in the telecommunications industry”).
- 3 See William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act As a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1105–09 (1989) (noting how rare successful divestitures have been).
- 4 As Senator Warren notes, “[n]early half of all e-commerce goes through Amazon. More than 70% of all Internet referral traffic goes through sites owned or operated by Google or Facebook.” Elizabeth Warren, *Here’s How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9eoda324c> [<https://perma.cc/MQ37-HE2N>].
- 5 See Cecilia Kang & Kenneth P. Vogel, *Tech Giants Amass a Lobbying Army for an Epic Washington Battle*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/us/politics/amazon-apple-facebook-google-lobbying.html> [<https://perma.cc/3C6K-6FHQ>] (noting that Amazon, Apple, Facebook, and Google spent a combined total of \$55 million on lobbying in 2018, and that some of the companies increased their spending in 2019).
- 6 SHOSHANNA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 8 (2019) (defining surveillance capitalism as an economic system in which accumulation occurs through the extraction and sale of “behavioral surplus”—i.e., information about what individuals do that can be used to predict their behavior in the future). Although Zuboff makes clear that the companies engaged in this kind of economic production are not only platform companies, she identifies Google as a pioneer of surveillance capitalism and Facebook, Amazon, and Microsoft as increasingly reliant on it. *Id.* at 9. See *infra* notes 42–45 and accompanying text for why we might regard this kind of economic practice to be not merely a characteristic of, but a threat to, the platform public sphere.
- 7 See, e.g., Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating Fake News and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1225 (2018) (“During the 2016 Presidential campaign, the average adult saw at least one ‘fake news’ item on social media. ... Cheap distribution and easy user targeting on social media enable the rapid spread of disinformation. Disinformative content, like other online political advertising, is ‘micro-targeted’ at narrow segments of the electorate, based on their narrow political views or biases. ... [A]n untraceable flood of disinformation prior to an election stands to undermine voters’ ability to choose the candidate that best aligns with their preferences”).
- 8 Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64 (2009) (“On social networking sites, blogs, and other ... platforms, destructive groups publish lies and doctored photographs of vulnerable individuals. They threaten rape and other forms of physical violence. They post sensitive personal information for identity thieves to use. They send damaging statements about victims to employers and manipulate search engines to highlight those statements for business associates and clients to see. They flood websites with violent sexual pictures and shut down blogs with denial-of-service attacks. These assaults terrorize victims, destroy reputations, corrode privacy, and impair victims’ ability to participate in online and offline society as equals.”).
- 9 Daniel A. Crane, *Antitrust’s Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 133–34 (2018).
- 10 The Court articulated this forcefully in *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 4 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unre-

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strained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”). See also Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984) (“The goal of antitrust is to perfect the operation of competitive markets.”).

11 See, e.g., *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283–84 (2018).

12 Senator Warren has acknowledged as much about her proposal. Warren, *supra* note 4.

13 See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 203 (2017) (“In 2001, approximately 411,800 people were employed in the journalism industry. By 2016, the number fell below 174,000. Between 2000 and 2015, newspaper print advertising revenue declined from \$60 billion to \$20 billion per year. ... The decline in newspaper revenue is accelerating, as advertising shifts dramatically to social media.”).

14 Jack Nicas, *They Tried to Boycott Facebook, Apple, and Google: They Failed*, N.Y. TIMES (Apr. 1, 2018), <https://www.nytimes.com/2018/04/01/business/boycott-facebook-apple-google-failed.html> [<https://perma.cc/3GW3-89BA>] (“People looking to punish major tech companies by abstaining from their products have been bedeviled time and again by the difficulty in escaping them.”); Nick Statt, *Boycotting Digital Monopolies Like Facebook Is Harder Than It Seems*, THE VERGE (Mar. 22, 2018), <https://www.theverge.com/2018/3/22/17152922/delete-facebook-boycott-cambridge-analytica-tech-monopoly-data-privacy> [<https://perma.cc/2DMJ-PT32>] (“The #DeleteFacebook movement is ill-equipped to grapple with Facebook’s pervasive and unprecedented control of digital life.”).

15 K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1629 (2018) (“The problem of private power, then, is best understood as not just economic, but a political problem of domination—the accumulation of arbitrary authority unchecked by the ordinary mechanisms of political accountability. This dom-

ination-based critique of private power was a common thread in Progressive Era legal and political thought.”); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 590 (1969) (“Opposition to monopoly is frequently premised on political grounds. Private economic power, epitomized by the monopolist, is thought to endanger democratic processes.”).

16 Stan Liebowitz & Stephen E. Margolis, *Network Effects and Externalities*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 671 (1998) (network effects occur when “the benefit, or surplus, that [a person] derives from a good” changes with “the number of other [persons] consuming the same kind of good.”). Of course, while network effects may entrench one site’s dominance, they also mean that when a sufficient number of users leave a particular network, others will be more likely to leave as well. In other words, they can destabilize as well as perpetuate the competitive advantage of a particular network. See David S. Evans & Richard Schmalensee, *Debunking the Network Effects Bogyman*, 40 REGULATION 36, 38 (2017) (making this point).

17 Critics of the companies have certainly suggested as much. See ZUBOFF, *supra* note 6, at 138 (quoting a complaint filed against Google asserting that the company is “under enormous pressure from the financial community to increase the ‘effectiveness’ of its tracking, so that it can increase revenues and profits” and therefore “[g]iving a user the ability to control his own privacy information ... [would pose an] existential threat to Google”); Ari Ezra Waldman, *Privacy, Sharing, and Trust: The Facebook Study*, 67 CASE W. RES. L. REV. 193 (2016) (“In 2012, Facebook revealed that it sweeps in 2.5 billion pieces of content and more than 500 terabytes of data each day. ... The company, along with third-party and partner websites, tracks users’ web-browsing history, purchases, and other web content. ... All of this information is essential to the success of Facebook’s business model, relying as it does on behavioral advertising, targeting content, and tailoring users’ online experiences.”).

18 This is not just because of its size but also because of the many benefits Facebook can provide advertisers because it knows so much about the consumption habits of its users. See ZUBOFF, *supra*

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note 6, at 77–93 (chronicling how advertising dollars flowed to Google for this reason).

**19** See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.”); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.”).

**20** For cases establishing the Petition Clause limit to the reach of antitrust liability, see *California Motor Transport Co. v. Trucking Unlimited.*, 404 U.S. 508 (1972); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). For cases establishing the limits of antitrust law’s ability to penalize publicly important speech, see *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

**21** Warren, *supra* note 4.

**22** Posner, *supra* note 15, at 607 (“The essence of a public utility’s or common carrier’s duty, as traditionally conceived, is to serve all comers at fair rates.”); Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1330–31 (1998) (“For almost a century, public utility companies and com-

mon carriers had one common characteristic: All were required to offer their customers service under rates and practices that were just, reasonable, and non-discriminatory.”).

**23** Rahman, *supra* note 15; GANESH SITARAMAN, GREAT DEMOCRACY INITIATIVE, REGULATING TECH PLATFORMS: A BLUEPRINT FOR REFORM (2018), <https://greatdemocracyinitiative.org/wp-content/uploads/2018/03/Regulating-Tech-Platforms-final.pdf> [<https://perma.cc/SM2J-V9H4>] (discussing how to adapt traditional public utilities regulations to internet platforms); Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 797–99 (2017).

**24** See William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1635 (2014) (noting that in the early 20<sup>th</sup> century, “public utility [law] was seen as a common, collective enterprise aimed at managing a series of vital network industries that were too important to be left exclusively to market forces”); Rahman, *supra* note 15, at 1639 (“The common thread in the public utility discourse of the early 20<sup>th</sup> century [was] the need to ensure collective, social control over vital industries that provided foundational goods and services on which the rest of society depended. ... Public utility regulations were seen as vital for regulating those private actors operating in goods and services whose provision seemed to require some degree of market concentration and consolidation—and whose set of users and constituencies were too vast to be empowered and protected through more conventional methods of market competition, corporate governance, or ordinary economic regulation.”).

**25** See Rahman, *supra* note 15, at 1670 (“Google and Facebook are increasingly part of our informational infrastructure, shaping the distribution of and access to news, ideas, and information upon which our economy, culture, and increasingly politics depend ... . As the most influential and widely-used platforms shaping individual consumption of news, information, and media, these platforms in turn enable a wide range of downstream uses.”).

**26** See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (documenting the extensive ways in which private platforms like Facebook regulate or “govern” the speech that takes

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place on their platforms).

**27** The Court first held as much in *Miami Herald Publishing Co. v. Tornillo*, which struck down a state right-of-reply law because the Court found that “[e]ven if a newspaper would face no additional costs to comply with [the] law,” the law violated the First Amendment “because of its intrusion into the function of editors.” *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The Court later made clear that the same rule applied to property other than newspapers. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1, 19–21 (1986) (public utility cannot be required to grant space in its billing envelopes to another party’s speech); *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (car owner cannot be required to display state motto on his license plate). In 2018, the Court applied the *Tornillo* principle to strike down a California law that required crisis pregnancy clinics to put up signs disseminating a government-approved message on their property. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

**28** Rahman has argued that public utility regulation is a complement, rather than a substitute, for antitrust regulation. Rahman, *supra* note 15, at 1680–82. In some respects, this is certainly true. Both bodies of law are, at their heart, efforts to address the threat to public welfare posed by concentrated economic power. However, as this essay suggests, the use of antitrust tools like the tool of divestiture can make it harder to justify the extension of the public utility model to market actors like the platform companies, given current First Amendment doctrine. In some contexts then—for example, this one—the two regulatory tools may not be compatible.

**29** *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 197 (1997).

**30** *Id.* (internal quotations omitted).

**31** During his time as a judge on the D.C. Circuit Court of Appeals, Justice Kavanaugh argued that the net neutrality rules issued by the FCC in 2015 violated the First Amendment because they prevented internet service providers (ISPs) from discriminating among speakers and were not justified by evidence showing that the ISPs exercised “market-distorting monopoly power” in their geographic markets. *See*

*U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 432 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). The majority of the D.C. Circuit rejected this argument and refused to reconsider the panel decision, which upheld the rules because it found that the ISPs did not exercise much, if any, editorial discretion over the speech they transmitted. *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 741 (D.C. Cir. 2016) (finding no evidence to challenge the FCC’s findings that ISPs “exercise little control over the content which users access on the Internet”). The Court consequently agreed with the FCC, that the ISPs provided a conduit for speech but were not speakers in their own right for First Amendment purposes. *Id.* This is undoubtedly correct. As Jonathan Zittrain among others has noted, ISPs generally do not access or exert any control over the content of the speech they transmit; they are, to use his language, “passive conduits for others’ material.” Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 271 (2006). Nevertheless, that Justice Kavanaugh believed that the First Amendment prevents the government from imposing nondiscrimination obligations on ISPs—because, in his view, they might one day in the future choose to exercise editorial control over the speech they transmit—makes it indisputably clear that he would consider the imposition of nondiscrimination obligations on platform companies unconstitutional, at least absent a showing of “market power.” *U.S. Telecom Ass’n*, 855 F.3d at 435 (Kavanaugh, J., dissenting). Kavanaugh could likely persuade four or more members of the Court to agree, given its pronounced unwillingness in recent years to interfere in any way with the expressive autonomy of property owners. *See* Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, U. CHI. L. REV. (forthcoming 2020).

**32** *See* Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 LOY. L. REV. 499, 505–06 (2018).

**33** In many respects, the emergence of the large platform sites has helped their business, by making their content more easily accessible to a national audience. *See* Derek Thompson, *The Print Apocalypse and How to Survive It*, THE ATLANTIC (Nov. 3, 2016), <https://www.theatlantic.com/business/archive/2016/11/the-print-apocalypse-and-how-to-survive-it/506429/> [<https://perma.cc/637A-FQLC>].

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- 34 RICHARD B. KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, THE POST OFFICE, AND PUBLIC INFORMATION, 1700–1860s* at 57 (1989).
- 35 Peter J. Wosh, *Going Postal*, 61 *AMER. ARCHIVIST* 220, 223 (1998) (“Newspapers, freely exchanging information by mail, tended to reprint the same national and foreign stories. This provided the news with a certain coherence, and created a relatively homogenized informational universe, although local variations existed and multiple political perspectives certainly were reflected. ... The federal government largely underwrote the cost of this venture by indirectly subsidizing newspapers with cheap postage, subcontracting with transit companies ... to deliver the mail, and using the postal service as a rationale for building a national overland transportation network. A cozy public/private partnership developed, as the postal system stimulated a wide range of business enterprises and internal improvements.”).
- 36 FTC, *Potential Policy Recommendations to Support the Reinvention of Journalism 15–16* (2010), [https://www.ftc.gov/sites/default/files/documents/public\\_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf) [<https://perma.cc/EYX3-F9GV>].
- 37 *Id.* at 17–20.
- 38 *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) (holding that when subsidizing speech “the Government may not aim at the suppression of dangerous ideas” but that it may “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way” (internal quotations omitted)).
- 39 See e.g., *The Free and Diverse Press: Hearings on Online Platforms and Market Power, Part 1, Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2019), <https://docs.house.gov/meetings/JU/JU05/20190611/109616/HHRG-116-JU05-Wstate-PitofskyD-20190611.pdf> [<https://perma.cc/ZWK5-Y5NH>] (statement of Dave Pitofsky, General Counsel, News Corp).
- 40 See Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea*, 105 *Nw. U. L. REV.* 1399, 1407, 1416 (2015).
- 41 See Elizabeth Stoycheff et al., *Privacy and the Panopticon: Online Mass Surveillance’s Deterrence and Chilling Effects*, 21 *NEW MEDIA AND SOC’Y* 602 (2019); Elizabeth Stoycheff, *Under Surveillance: Examining Facebook Spiral of Silence Effects in the Wake of NSA Internet Monitoring*, 93 *JOURNALISM & MASS COMM.* Q. 296 (2016); Jonathan W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 *BERKLEY TECH. L.J.* 117 (2016).
- 42 ZUBOFF, *supra* note 6, at 112–21; David Lyon, *Surveillance, Snowden, and Big Data: Capacities, Consequences, Critique*, *BIG DATA & SOC’Y*, July–Dec. 2014, at 1, 5 (noting that one of the most important “surveillance trends” of the past few decades has been the “increased integration of government and commercial surveillance”); Connor Simpson, *How Google and Facebook May Help with the NSA and PRISM*, *THE ATLANTIC* (June 8, 2013), <https://www.theatlantic.com/technology/archive/2013/06/how-google-and-facebook-cooperated-nsa-and-prism/314459/> [<https://perma.cc/84F3-BLNP>].
- 43 Tom Jones, Mari Payton & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, *NBC SAN DIEGO* (Mar. 6, 2019), <https://www.nbcsandiego.com/investigations/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html> [<https://perma.cc/HS7C-UUKF>]; COMMITTEE TO PROTECT JOURNALISTS, *NOTHING TO DECLARE: WHY U.S. BORDER AGENCY’S VAST STOP AND SEARCH POWERS UNDERMINE PRESS FREEDOM* (2018).
- 44 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 411–14 (2013) (holding that, absent actual knowledge that they are being surveilled, speakers lack standing to challenge government surveillance practices on First Amendment grounds).
- 45 See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (assuming that a law prohibiting the recording of private telephone communications would be constitutional as applied to speech of private, as opposed to public concern); *The Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (noting that the government may “forbid [the] nonconsensual acquisition [of

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private truthful information] ... may classify certain information, [and may] establish and enforce procedures ensuring its redacted release” even if it may not sanction the publication of truthful matters on public concern); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36–37 (1984) (affirming the constitutionality of a protective order prohibiting the disclosure or publication of private information obtained during discovery).

46 564 U.S. 552 (2011).

47 See, e.g., Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C.D. L. REV. 1183, 1193–94 (2016) (interpreting *Sorrell* to mean that “the First Amendment puts rather strict limits on how government might regulate companies, like Uber and Facebook, that collect large amounts of information about end-users and then analyze, use, distribute, and sell that information to make profits, or to gain business or political advantages”); Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 871 (2012) (interpreting *Sorrell* to mean that “the odds certainly seem stacked against data-disclosure restrictions under current law”).

48 *Sorrell*, 564 U.S. at 564 (applying “heightened scrutiny” to the Vermont law because it “imposes an aimed, content-based burden on [pharmaceutical] detailers” and thus “has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner”). See also *id.* at 573 (strongly suggesting that a law that “allow[s] the ... sale or disclosure in only a few narrow and well-justified circumstances,” like the Health Insurance Portability and Accountability Act, would pose less of a constitutional problem because it would pose less risk of viewpoint discrimination). Accord NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 82–84 (2015).

49 See, e.g., Balkin, *supra* note 47, at 1186 (arguing that the best way to reconcile privacy and free speech interests in the digital age is by designating the “online service providers and cloud companies who collect, analyze, use, sell, and distribute personal information” as “information fiduciaries towards their customers and end-users”). For criticism of the idea of the information fiduciary, see Lina M.

Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019).

50 See, e.g., *Project Veritas Action Fund v. Conley*, 244 F. Supp. 3d 256, 263–65 (D. Mass. 2017) (sustaining against a First Amendment challenge to a content-neutral state statute that made it a crime to secretly hear or record wire or oral communications after concluding that [t]he government has a significant interest in protecting the “conversational privacy” of its citizens); *Boelter v. Hearst Commc’ns, Inc.*, 192 F. Supp. 3d 427, 445–49 (S.D.N.Y. 2016) (upholding a state law that prohibited sellers of books or recordings from disclosing the identity of their customers because it furthered substantial privacy interests and was not viewpoint discriminatory); *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 949, 954 (7th Cir. 2015) (concluding that a federal law that prohibits individuals from either obtaining or disclosing individually identifying information from government motor vehicle records could be constitutionally applied to sanction a newspaper that disclosed such information in an article because the law furthered substantial privacy interests and was content neutral).

51 *Revenge Porn Laws*, Cyber Civil Rights Initiative, <https://www.cybercivilrights.org/revenge-porn-laws/> [<https://perma.cc/RNQ4-Z4YY>]; Steven Nelson, *Federal ‘Revenge Porn’ Bill Will Seek to Shriveled Booming Internet Fad*, U.S. NEWS & WORLD REPORT (Mar. 26, 2014), <https://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-see-to-shriveled-booming-internet-fad> [<https://perma.cc/WLN4-RL4Q>].

52 18 U.S.C. § 2421A (2018).

53 See e.g., Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 292–93 (2019) (making this point); Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019); EARN IT Act of 2020, S. 3398, 116th Cong. (2020).

54 See Khan & Pozen, *supra* note 49, at 536–37 (distinguishing between infrastructural reforms of the digital environment from those, like the information fiduciary model, that conceive the problem in narrower relational terms).

55 For description of those harms see Danielle

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Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

56 State v. VanBuren, 2018 VT 95, ¶¶ 48–69 (Vt. June 7, 2019) (concluding that Vermont’s law satisfies strict scrutiny because it furthers compelling government interests by narrowly tailored means).

57 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

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## About the Authors

**GENEVIEVE LAKIER** is Assistant Professor of Law and Herbert and Marjorie Fried Teaching Scholar at the University of Chicago Law School. Lakier’s scholarship explores the connections between culture and law; her current research includes an exploration of the cultural history of the First Amendment as well as the state’s changing role in the regulation of sex. Between 2006 and 2008, she was an Academy Scholar at the Weatherhead Center for International and Area Studies at Harvard University. She is the author of “Imagining an Antisubordinating First Amendment” in the *Columbia Law Review* and has written for the *Harvard Law Review*, *University of Pennsylvania Journal of Constitutional Law*, and *Supreme Court Review*.

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