

SYMPOSIUM

SOCIAL MEDIA PLATFORMS AND DEMOCRATIC DISCOURSE

by
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This Essay explores how social media platforms have been catalysts for social and political change but have created numerous societal problems. The Essay traces the development of speech technologies and shows how these platforms have influenced the world. These changes are evident in the events of the Arab Spring in the Middle East and even in U.S. political elections (including those of President Obama and President Trump). At the same time, the internet and social media present immense challenges to the democratic process. They have enabled individuals to infect the public debate with so-called “fake news,” and have enabled foreign individuals and foreign governments to interfere in the U.S. election. In addition, as social media companies endeavor to exercise greater control over the public debate, there is a risk that they will censor or unduly restrict social and political discourse.

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INTRODUCTION

Freedom of expression is an essential element of democratic government.¹ In the U.S., where the Declaration of Independence proclaims that the power to govern “deriv[es] . . . from the consent of the governed,”² the governmental system is structured on the assumption that “the people, not the government, possess the absolute sovereignty.”³ In such a system, freedom of speech and of the press are essential. As the United States Supreme Court has recognized, “[s]peech concerning public affairs is more than self-expression; it is the essence of self-government,”⁴ because it is designed to ensure the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”⁵

In the internet era, social media platforms have come to play an increasingly important role in the communications process as well as in society. Such platforms provide an easy and effective way to facilitate social interactions such as keeping in touch with family and friends. Indeed, people use these platforms to post the minutiae of their lives and to communicate their likes and dislikes. Social media platforms

¹ In writing this Essay, Professor Weaver has drawn heavily on his book: RUSSELL L. WEAVER, *FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY* (2d ed. 2019) [hereinafter WEAVER, *FROM GUTENBERG*]. For a discussion of the fundamental importance of free expression, see generally C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 SUP. CT. REV. 245 (1961); see also RUSSELL L. WEAVER, *UNDERSTANDING THE FIRST AMENDMENT* 245–72 (6th ed. 2017).

² U.S. DECLARATION OF INDEPENDENCE (July 4, 1776).

³ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 274 (1964).

⁴ Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Core political speech occupies the highest, most protected position . . .”); Roth v. United States, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

⁵ *Sullivan*, 376 U.S. at 269 (quoting *Roth*, 354 U.S. at 484); see also Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment ‘has its fullest and most urgent application to speech uttered during a campaign for political office.’” (internal citations omitted)). The Court went on to say that “[i]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.” *Id.* at 341.

have also been used for political purposes. For example, individuals use their Facebook accounts to communicate their political views to their friends and others and even to organize and coordinate political movements.

There are benefits and disadvantages to social media platforms. While they can help further democratic discourse, they also come with drawbacks. Social media platforms have been used to disseminate child pornography, perpetrate fraud, and engage in other crimes. People have also used social media platforms to insert “fake news” (essentially, disinformation) into the political process and to try to influence the outcome of elections in the U.S. and elsewhere. Sometimes, individuals use social media to try to manipulate the outcome of elections in other countries.

This Essay examines the role of social media platforms and their relationship to democracy and the political process.

I. THE RISE AND INFLUENCE OF SOCIAL MEDIA PLATFORMS

Social media platforms are a new phenomenon. For most of human history, the ability of people to engage in mass communication was quite limited.⁶ Until the Middle Ages, people had limited communication technologies available to them,⁷ with most European books handwritten by monks in Latin and focused almost entirely on religion.⁸ That changed in the fifteenth century when Johannes Gutenberg came up with the idea for “movable type,” thereby inventing the printing press.⁹ The Gutenberg press made it possible to relatively quickly create multiple copies of documents and books and led to a flowering of information and knowledge.¹⁰ It

⁶ WEAVER, FROM GUTENBERG, *supra* note 1, at 3.

⁷ *Id.* at 4–5.

⁸ *Id.* at 6.

⁹ *Id.* at 9.

¹⁰ Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 4–5 (2002) (“Printing changed every aspect of the human condition—from thinking, learning, and language, to science, religion, and government. The 17th century became known as ‘the century of genius’ in large part due to the explosion of creativity and new ideas fueled by printing. Creativity is often the result of a combination of intellectual activities. For example, reading two books on separate topics and combining their themes in one mind produces a creative interaction. Increased output of printed works led first to the combination of old ideas, and later to the creation of entirely new systems of thought.”); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICHMOND J.L. & TECH. 1, 4–5 (2007) (“There has been only one transformative advance in the original writing technology. Circa 1450 Johannes Gutenberg invented the movable type printing press, which dramatically lowered the cost of producing written records. The printing press allowed mass production of information and thus contributed to the Renaissance, the Scientific Revolution, and the Protestant Reformation.”).

also led to the Protestant Reformation,¹¹ the demise of (or at least significant restrictions on) European monarchies and a corresponding emphasis on democratic systems of government,¹² and an explosion of information regarding science and technology.¹³

Following Gutenberg's invention, innovation in communication technologies stagnated until the nineteenth century when society was able to harness electricity.¹⁴ Electricity involved a major technological advance because it allowed information to move much more quickly than people could move and made it possible to send messages across the country in a matter of seconds.¹⁵ The telegraph led to the swift demise of the Pony Express relay system which had previously required ten days to transport a message from St. Joseph, Missouri, to California.¹⁶ Electricity also led to the creation of radio technology, which allowed sound to be broadcast across the country¹⁷ as demonstrated by President Franklin Delano Roosevelt's Fireside Chats¹⁸ and around the world (e.g., journalists used radio to transmit the sounds of World War II, including the bombing of London, to audiences in the U.S.).¹⁹ Electricity also led to the development of television, which permitted transmission of visual images, in addition to sound, to be broadcasted.

Electricity also eventually led to the development of the internet.²⁰ The communications possibilities of the internet were enhanced by the development of handheld devices (e.g., smartphones). These devices, such as Apple's iPhone, allowed individuals to connect to the internet even though they were away from their desktop computers (and, indeed, almost no matter where they were located), and also allowed individuals to send emails and texts, access Facebook, and conduct a multitude of other internet-based activity. By 2010, market penetration for the various handheld devices had reached 96% of young people in the United States.²¹

¹¹ Paul & Baron, *supra* note 10, at 5.

¹² WEAVER, FROM GUTENBERG, *supra* note 1, at 17–18.

¹³ Paul & Baron, *supra* note 10, at 4.

¹⁴ COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY 118 (David Crowley & Paul Heyer eds., 5th ed. 2007).

¹⁵ Tom Standage, *Telegraphy – The Victorian Internet*, in COMMUNICATION IN HISTORY, *supra* note 14, at 130–31.

¹⁶ *Id.*

¹⁷ David Crowley & Paul Heyer, *Introduction to Part VI Radio Days*, in COMMUNICATION IN HISTORY, *supra* note 14, at 204.

¹⁸ *Fireside Chats*, U.C. SANTA BARBARA, <http://www.presidency.ucsb.edu/fireside.php> (last visited Dec. 5, 2019).

¹⁹ IRVING FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS 163–64 (1997).

²⁰ WEAVER, FROM GUTENBERG, *supra* note 1, at 39–46.

²¹ *Morning Edition: Survey: 96 Percent of Young Adults Own Cellphones*, NAT'L PUB. RADIO (Oct. 18, 2010), <http://www.npr.org/templates/story/story.php?storyId=130639028>.

Internet communication possibilities were complimented by the development of a variety of new communication platforms, including e-mail, listservs, Google, blogs, YouTube, Flickr, Twitter, 3-D panorama, streaming, and other technologies.²² Although Twitter communications originally involved only 140 characters (now 280),²³ there are in 2019, 126 million daily users²⁴ and roughly 500 million tweets per day,²⁵ a huge increase from the one-to-two billion tweets per month in 2010.²⁶ In a modern 24-hour news cycle, in which electronic media can disseminate information quickly, Twitter is much faster, and tweets can be used by reporters to solicit information from possible sources.²⁷ By mid-2010, Facebook had more than 500 million users worldwide.²⁸

These new platforms have had a dramatic impact on societies and on the political process. With some 60 million Russians connected to the internet by 2012 (approximately 40% of the population), the internet has been increasingly used to challenge the Russian establishment.²⁹ Some Russians have used blogs (including LiveJournal, which was once described as Russia's most popular blogging site), Twitter, Facebook, and the social media site Vkontakte.³⁰ Using the internet, one Russian citizen launched a project entitled "A Country Without Stupidity," and another launched a movement entitled "Blue Buckets" (established to challenge the use of blue sirens that allows drivers to ignore traffic laws).³¹ When a local mayor offered cash to veterans in exchange for votes, an individual recorded the offer on

²² Adam Nagourney, *Gathering Highlights Power of the Blog*, N.Y. TIMES (June 10, 2006), <https://www.nytimes.com/2006/06/10/us/10bloggers.html>; *Talk of the Nation: Happy Birthday Internet*, NAT'L PUB. RADIO (Oct. 30, 2009), <http://www.npr.org/templates/story/story.php?storyId=114319703>; Jenna Wortham, *The Inauguration Will Be Televised – and Tweeted and Flicker'd*, N.Y. TIMES (Jan. 19, 2009), <http://bits.blogs.nytimes.com/2009/01/19/the-inauguration-will-be-televised-and-twitter-streamed-flicker/>.

²³ *Weekend Edition: Welcome to the Twitterverse*, NAT'L PUB. RADIO (Feb. 28, 2009), <https://www.npr.org/templates/transcript/transcript.php?storyId=101265831>.

²⁴ Hamza Shaban, *Twitter Reveals Its Daily Active User Numbers for the First Time*, WASH. POST (Feb. 7, 2019), <https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/>.

²⁵ *Be What's Happening*, TWITTER: BUSINESS, <https://business.twitter.com> (last visited Dec. 5, 2019).

²⁶ *On the Media: The Point of Twitter*, WNYC STUDIOS (Apr. 23, 2010), <https://www.wnycstudios.org/story/132752-the-point-of-twitter>.

²⁷ *Id.*

²⁸ *On the Media: The Facebook Effect*, WNYC STUDIOS (Aug. 20, 2010), <https://www.wnyc.org/story/132885-the-facebook-effect/>.

²⁹ See Scott Shane, *In Russia, Echoes of Revolution*, N.Y. TIMES (Jan. 13, 2012), <https://www.nytimes.com/2012/01/15/sunday-review/in-moscow-echoes-of-the-91-communist-overthrow.html>.

³⁰ Julia Ioffe, *Activists Get Connected*, FIN. TIMES (Dec. 16, 2011), <https://www.ft.com/content/a4520742-2607-11e1-856e-00144feabd0>.

³¹ *Id.*

his smartphone and posted it on YouTube.³² The video led to the mayor's conviction for violating Russian election rules.³³ When a Russian police officer discussed police corruption in a YouTube video, it received some two million hits and sparked public anger.³⁴

The internet also played a major role in the uprising in the Middle East referred to as the "Arab Spring." During the Tunisian uprising, social media helped people topple the Tunisian government.³⁵ The initial impetus for the uprising may have been WikiLeaks' internet disclosure of diplomatic cables, which revealed corruption in the Tunisian government.³⁶ The WikiLeaks disclosure was apparently coordinated with a Tunisian leaks group, TuniLeak, which posted the cables online on the same day that WikiLeaks posted the documents.³⁷ Although the WikiLeaks/TuniLeak disclosures may have laid the groundwork for the uprising, the spark came when a 26-year-old college graduate with dismal employment prospects committed suicide by setting himself on fire.³⁸ The man's death "unleashed the pent-up anger of Tunisia's educated and unemployed youth."³⁹

During the uprising, the internet, and in particular social media platforms, provided ordinary individuals with the means to organize, mobilize, and protest.⁴⁰ Traditional media, particularly Al Jazeera, also played a role and complemented internet-based tools.⁴¹ For example, Tunisian protestors recorded the uprising on their cell phones⁴² and posted pictures and videos on the internet through various sites,

³² Michael Schwirtz, *A New Kind of Election Monitor in Russia, the Smartphone*, N.Y. TIMES (Nov. 24, 2011), <https://www.nytimes.com/2011/11/25/world/europe/armed-with-smartphones-russians-expose-political-abuses.html>.

³³ *Id.*

³⁴ Clifford J. Levy, *Videos Rouse Russian Anger Toward Police*, N.Y. TIMES (July 27, 2010), <https://www.nytimes.com/2010/07/28/world/europe/28russia.html>.

³⁵ *Social Media Gets Credit for Tunisian Overthrow*, NAT'L PUB. RADIO (Jan. 16, 2011), <http://www.npr.org/2011/01/16/132975274/Social-Media-Gets-Credit-For-Tunisian-Overthrow> ("Everyone in Tunisia was connected to the Internet, to the site of the bloggers, to the site of Facebook, to Twitter, to organize the revolution.").

³⁶ David D. Kirkpatrick, *Behind Tunisia Unrest, Rage Over Wealth of Ruling Family*, N.Y. TIMES (Jan. 13, 2011), <https://www.nytimes.com/2011/01/14/world/africa/14tunisia.html>.

³⁷ *Id.*

³⁸ David D. Kirkpatrick, *Amid Rioting, Tunisia Closes Universities*, N.Y. TIMES (Jan. 10, 2011), <https://www.nytimes.com/2011/01/11/world/africa/11tunisia.html>.

³⁹ *Id.*

⁴⁰ See Jennifer Preston, *Movement Began with Outrage and a Facebook Page That Gave It an Outlet*, N.Y. TIMES (Feb. 5, 2011), <https://www.nytimes.com/2011/02/06/world/middleeast/06face.html>.

⁴¹ *On the Media: Tunisia's Twitter Revolution*, WNYC STUDIOS (Jan. 21, 2011), <https://www.wnycstudios.org/story/133051-tunisias-twitter-revolution>.

⁴² Jennifer Preston & Brian Stelter, *Cellphones Become the World's Eyes and Ears on Protests*, N.Y. TIMES (Feb. 18, 2011), <https://www.nytimes.com/2011/02/19/world/middleeast/19video>.

including Facebook, Twitter, and Frog⁴³—they also distributed video and pictures through their smartphones and other handheld devices.⁴⁴ For example, a YouTube video depicting police corruption was viewed more than 500,000 times.⁴⁵ As the protests continued, internet postings continued to drive political dissent through various social media platforms such as Facebook,⁴⁶ and some of these postings explicitly called for the ouster of Tunisia's president.⁴⁷

In an effort to suppress the revolt, the Tunisian government sought to restrict internet communications⁴⁸ and even imprisoned bloggers.⁴⁹ However, tech-savvy citizens found ways to evade governmental controls. As one commentator noted: "This is a generation that is educated, is well-informed, that will be more demanding of their rights to participate, to have a civic role in their state, and not to sit through gerrymandered elections and lack of participation in the economy."⁵⁰ Traditional media outside the country, which was given limited access in Tunisia, monitored internet postings as a way of tracking the uprising.⁵¹ Ultimately, Tunisia's president was forced to step down.⁵²

The success of the Tunisian revolution sparked anti-government protests in Egypt.⁵³ Although Egyptians had protested before the Tunisian revolt, the fall of the Tunisian government convinced many Egyptians that change was possible in their country as well.⁵⁴ Tunisian protestors collaborated with Egyptian protestors by

html.

⁴³ *Id.*

⁴⁴ See *Social Media Gets Credit for Tunisian Overthrow*, *supra* note 35.

⁴⁵ Preston, *supra* note 40.

⁴⁶ *Id.*

⁴⁷ David D. Kirkpatrick, *Tunisia Leader Flees and Prime Minister Claims Power*, N.Y. TIMES (Jan. 14, 2011), <https://www.nytimes.com/2011/01/15/world/africa/15tunis.html>.

⁴⁸ See Alexis C. Madrigal, *The Inside Story of How Facebook Responded to Tunisian Hacks*, ATLANTIC (Jan. 24, 2011), <https://www.theatlantic.com/technology/archive/2011/01/the-inside-story-of-how-facebook-responded-to-tunisian-hacks/70044/>.

⁴⁹ *Tunisian Rapper Arrested After Online Protest*, REUTERS (Jan. 7, 2011), <https://af.reuters.com/article/topNews/idAFJ0E7060C320110107>.

⁵⁰ *Social Media Gets Credit for Tunisian Overthrow*, *supra* note 35.

⁵¹ Brian Stelter, *Al Jazeera Hopes Reports from Egypt Open Doors in U.S.*, N.Y. TIMES (Feb. 6, 2011), <https://www.nytimes.com/2011/02/07/business/media/07aljazeera.html>.

⁵² *Tunisia's President Departs Amid National Turmoil*, NAT'L PUB. RADIO (Jan. 14, 2011), <http://www.npr.org/2011/01/15/132925632/angry-demonstrators-march-on-tunisian-capital>.

⁵³ Liz Sly, *Jubilation – and New Determination – Sweep Across Egypt as Thousands Rejoice*, COURIER-J., Feb. 12, 2011, at A1; Anthony Shadid & David D. Kirkpatrick, *Opposition Rallies to ElBaradei as Military Reinforces in Cairo*, N.Y. TIMES (Jan. 30, 2011), <https://www.nytimes.com/2011/01/31/world/middleeast/31-egypt.html?searchResultPosition=10>; *Weekend Edition: Egyptian Streets Fill with Protestors, Tanks*, NAT'L PUB. RADIO (Jan. 31, 2011), <http://www.npr.org/2011/01/29/133327911/Egyptian-Streets-Fill-With-Protesters-Tanks>.

⁵⁴ *Weekend Edition: Tunisians Watch Egypt, Tend Their Own Revolution*, NAT'L PUB. RADIO

using social media sites to discuss tactical issues, including how to evade surveillance, how to deal with rubber bullets, and how to counteract tear gas.⁵⁵ As in Tunisia, social divisions between rich and poor inflamed the desire to protest,⁵⁶ further aggravated by the beating and killing of a dissident (Khaled Said).⁵⁷

Even though a relatively small number of Egyptians had internet access at the time (roughly 20% of the population),⁵⁸ social media platforms played a major role in the Egyptian revolution.⁵⁹ Protestors took smartphone photos of Khaled Said lying in the morgue and posted these photos on Facebook and YouTube.⁶⁰ In addition, protestors used the internet to disseminate a message of nonviolence.⁶¹ Bloggers and Twitter users also participated.⁶²

Since Egypt had some five million Facebook users at the time, it provided a particularly effective medium to inform Egyptians about the uprising and to organize protests.⁶³ Egyptians used Google, YouTube, and smartphones to document the protest with video.⁶⁴ By the time of the revolt, some 473,000 users had accessed the Facebook page of Said, and that page was being used to facilitate communication between the protestors.⁶⁵ The site proposed a day of protests on January 14 (known in Egypt as “Police Day” because it commemorates a police fight against British colonialism), provided that 50,000 people would commit to participating.⁶⁶ In fact, more than 100,000 people indicated an intent to participate.⁶⁷ The Facebook post-

(Jan. 30, 2011), <http://www.npr.org/2011/01/30/133348376/Tunisians-Watch-Egypt-While-Tending-Their-Own-Revolution>.

⁵⁵ David D. Kirkpatrick & David E. Sanger, *A Tunisian-Egyptian Link That Shook Arab History*, N.Y. TIMES (Feb. 13, 2011), <https://www.nytimes.com/2011/02/14/world/middleeast/14egypt-tunisia-protests.html>.

⁵⁶ David D. Kirkpatrick & Mona El-Naggar, *Rich, Poor and a Rift Exposed by Unrest*, N.Y. TIMES (Jan. 30, 2011), <https://www.nytimes.com/2011/01/31/world/africa/31classwar.html?searchResultPosition=1>.

⁵⁷ Preston, *supra* note 40.

⁵⁸ *News Hour: Social Media and Satellite TV: A One-Two Punch Against Mubarak*, PBS NEWS HOUR (Feb. 14, 2011), http://www.pbs.org/newshour/bb/world/jan-june11/egypt2_02-14.html.

⁵⁹ Sly, *supra* note 55, at A3; *see also On the Media; Tweeting from Egypt's Tahrir Square*, WNYC STUDIOS, (Feb. 4, 2011), <https://www.wnycstudios.org/story/133067-tweeting-from-egypts-tahrir-square>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Morning Edition: Blogging and Tweeting, Egyptians Push for Change*, NAT'L PUB. RADIO (Aug. 26, 2010), <http://www.npr.org/templates/story/story.php?storyId=129425721>.

⁶³ Kirkpatrick & Sanger, *supra* note 58; *see also* Sly, *supra* note 53, at A1.

⁶⁴ Preston, *supra* note 40.

⁶⁵ *Id.*

⁶⁶ Kirkpatrick & Sanger, *supra* note 55.

⁶⁷ *Id.*

ings were supplemented by traditional print posters that also advertised the protests.⁶⁸ Tens of thousands of protestors ultimately turned out to protest, and many shouted slogans suggested on the Facebook page.⁶⁹

Other social media sites also facilitated the protests, including Twitter. At one point, there were some 11,000 Twitter postings regarding Hosni Mubarak in a single hour (although, to put the quantity into perspective, a Twitter feed entitled “icantdateyou” generated 274,000 postings in the same hour).⁷⁰ Protesters responded by protesting in the streets.⁷¹ On one site, Bambuser, which provides a method for streaming video images, postings increased dramatically from 800 to 10,000 postings per day during the protests.⁷²

The April 6 Youth Movement facilitated the Egyptian protests by coordinating street protests on Facebook.⁷³ The group’s organizational efforts prompted more than 90,000 protestors to sign up on its Facebook page, and tens of thousands of protestors turned out to rally in Egypt’s streets.⁷⁴ After developing a plan for the protests (which involved gathering after Friday prayers to march on Liberation Square), the organizers distributed the plan through email, Twitter, and text messages.⁷⁵ In addition, one protestor used Facebook to disseminate information regarding Egyptian police brutality.⁷⁶ The protestors were able to coordinate the participation of Mohamed ElBaradei, a diplomat and Nobel Laureate who supported the protests by recommending the mosque that he should attend on the day of the protests.⁷⁷ As the protests grew in strength, the uprising began to be covered by the mainstream media and became a major news story in its own right.⁷⁸ Protestors streamed into Cairo and camped out in Tahrir Square and used traditional technologies (e.g., bullhorns) at the rallies themselves.⁷⁹

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Natasha Singer, *Why Some Twitter Posts Catch On, and Some Don’t*, N.Y. TIMES (Feb. 5, 2011), <https://www.nytimes.com/2011/02/06/business/06stream.html>.

⁷¹ Kareem Fahim & Mona El-Naggar, *Violent Clashes Mark Protests Against Mubarak’s Rule*, N.Y. TIMES (Jan. 25, 2011), <https://www.nytimes.com/2011/01/26/world/middleeast/26egypt.html>.

⁷² See Preston & Stelter, *supra* note 42.

⁷³ See David Kirkpatrick & Mona El-Naggar, *Protest’s Old Guard Falls in Behind the Young*, N.Y. TIMES (Jan. 30, 2011), <https://www.nytimes.com/2011/01/31/world/middleeast/31opposition.html>.

⁷⁴ *Id.*

⁷⁵ *Id.*; see also Wael Ghonim and *Egypt’s New Age Revolution*, CBS NEWS (Feb. 13, 2011), <https://www.cbsnews.com/news/wael-ghonim-and-egypts-new-age-revolution/>.

⁷⁶ Wael Ghonim and *Egypt’s New Age Revolution*, *supra* note 75.

⁷⁷ Kirkpatrick & El-Naggar, *supra* note 73.

⁷⁸ *Id.*

⁷⁹ Lolita C. Baldor, *U.S. Urges Democracy for Egypt*, COURIER-J., Jan. 31, 2011, at A1; Kareem Fahim & Anthony Shadid, *Quiet Acts of Protest on a Noisy Day*, N.Y. TIMES (Feb. 1,

Once the Egyptian government realized that the internet was being used to coordinate the revolt, it moved to shut down Egyptian internet providers,⁸⁰ cell phone service providers,⁸¹ and Twitter.⁸² Vodafone, for example, was ordered to shut down its service to selected areas in Egypt.⁸³ Because of these governmental actions, Facebook saw a dramatic drop in activity.⁸⁴ The government even jailed a Google official for assisting with online organizing.⁸⁵

Throughout the Middle East, social media played a prominent role in the Arab Spring uprisings. Protestors in Bahrain, who were calling for the establishment of a constitutional monarchy,⁸⁶ used their smartphones to take pictures of governmental repression and posted their pictures on the internet.⁸⁷ Even though Facebook was officially banned in Jordan, calls for protests spread in that country through both Facebook and Twitter.⁸⁸ Syrians used Facebook to call for “a day of rage,”⁸⁹ as well as to arrange protests, and relied on YouTube to depict their protests to the rest of the world⁹⁰ and to attract other Syrians to the protests.⁹¹ As tensions mounted, hostilities in the country increased.⁹² In Yemen, some of the protests were arranged

2011), <https://www.nytimes.com/2011/02/02/world/middleeast/02scene.html>.

⁸⁰ *Weekend Edition: Simon Says: Egypt's Stone Age Response to 21st Century Media*, NAT'L PUB. RADIO (Jan. 29, 2011), <http://www.npr.org/2011/01/29/133325987/egypts-stone-age-response-to-21st-century-media>.

⁸¹ *Morning Edition: Lawlessness Could Hijack Egypt's Popular Uprising*, NAT'L PUB. RADIO (Jan. 31, 2011), <http://www.npr.org/2011/01/31/133363676/lawlessness-could-hijack-egypts-popular-uprising>.

⁸² Fahim & El-Naggar, *supra* note 71 (noting various restrictions, including the fact that Twitter had confirmed that its site had been blocked in Egypt).

⁸³ James Glanz & John Markoff, *Egypt Leaders Found "Off" Switch for Internet*, N.Y. TIMES (Feb. 15, 2011), <https://www.nytimes.com/2011/02/16/technology/16internet.html>; Matt Richtel, *Egypt Cuts Off Most Internet and Cell Service*, N.Y. TIMES (Jan. 28, 2011), <https://www.nytimes.com/2011/01/29/technology/internet/29cutoff.html>.

⁸⁴ Glanz & Markoff, *supra* note 84.

⁸⁵ *Wael Ghonim and Egypt's New Age Revolution*, *supra* note 75.

⁸⁶ See Michael Slackman, *Amid Standoff, Opposition Seeks Dissolution of Bahraini Government*, N.Y. TIMES (Feb. 20, 2011), <https://www.nytimes.com/2011/02/21/world/middleeast/21bahrain.html>.

⁸⁷ Preston & Stelter, *supra* note 42.

⁸⁸ Ranya Kadri & Ethan Bronner, *King of Jordan Dismisses His Cabinet*, N.Y. TIMES (Feb. 1, 2011), <https://www.nytimes.com/2011/02/02/world/middleeast/02jordan.html>.

⁸⁹ *Id.*

⁹⁰ Roula Khalaf, *Violent Protests Spread in Syria*, FIN. TIMES (Mar. 26, 2011), <https://www.ft.com/content/e892dcda-56e4-11e0-9c5c-00144feab49a>.

⁹¹ *Syria "Great Friday" Protest Reportedly Turns Bloody*, NAT'L PUB. RADIO (Apr. 22, 2011), <http://www.npr.org/2011/04/22/135628118/syrian-forces-protesters-face-off-on-great-friday>.

⁹² Anthony Shadid, *Fear of Civil War Mounts in Syria as Crisis Deepens*, N.Y. TIMES (Jan. 14, 2012), <https://www.nytimes.com/2012/01/15/world/middleeast/syria-in-deep-crisis-may-be-slipping-out-of-control.html>.

through text messaging, which was preferable to social networking sites like Facebook because of a lower level of internet access in that country.⁹³ In Sudan, protests were organized through Facebook, Twitter, and other sites.⁹⁴ In Saudi Arabia, online petitions were offered to the government, and some individuals called for a day of protest⁹⁵ as well as for the establishment of a constitutional monarchy.⁹⁶ In Morocco, the “February 20 Movement for Change” generated 10,000 protestors.⁹⁷ In Iran, internet websites were used to report on events⁹⁸ and protesters established a Facebook page for videos and eyewitness accounts—they also used Twitter.⁹⁹

Even in China, a country in which the government has engaged in aggressive internet censorship, the internet has begun to significantly reshape society. In 2009, China had some 298 million users as well as some 70 million bloggers, and those bloggers repeatedly found ways to avoid government-imposed internet restrictions.¹⁰⁰ For example, some bloggers posted their writings under pseudonyms.¹⁰¹ In an effort to avoid the impact of internet filters, bloggers employed different names for the issues and things that they discussed; for example, instead of saying that military “tanks” were involved in an incident, a blogger might refer to the involvement of “tractors”.¹⁰² Using social media platforms, some called for protests and for a “Jasmine Revolution.”¹⁰³ Within China, attempts to protest were met with what one newspaper referred to as “a mass show of force.”¹⁰⁴ When a prominent dissident repeated threats that had been made against him by Chinese officials,

⁹³ Laura Kasinof & J. David Goodman, *Yemeni Youth Square Off with Forces*, N.Y. TIMES (Feb. 13, 2001), <https://www.nytimes.com/2011/02/14/world/middleeast/14yemen.html>.

⁹⁴ Sharon Otterman, *Sudan Sees Migration of Unrest to Its Streets*, N.Y. TIMES (Jan. 30, 2011), <https://www.nytimes.com/2011/01/31/world/africa/31unrest.html>.

⁹⁵ *Morning Edition: Online Calls Increase for Protests in Saudi Arabia*, NAT'L PUB. RADIO (Mar. 3, 2011) <http://www.npr.org/2011/03/03/134221978/Saudi-Reforms>.

⁹⁶ *Leading Saudis Call for Constitutional Monarchy*, SYDNEY MORNING HERALD (Mar. 1, 2011), <https://www.smh.com.au/world/leading-saudis-call-for-constitutional-monarchy-20110228-1bbtk.html>.

⁹⁷ Steven Erlanger, *Fears of Chaos Temper Calls for Change in Morocco*, N.Y. TIMES (Feb. 21, 2011), <https://www.nytimes.com/2011/02/21/world/middleeast/21morocco.html>.

⁹⁸ Liz Robbins, *Iran Squelches Protest Attempt in Capital*, N.Y. TIMES (Feb. 20, 2011), <https://www.nytimes.com/2011/02/21/world/middleeast/21iran.html>.

⁹⁹ Neil MacFarquhar & Alan Cowell, *Iran Uses Force Against Protests as Region Erupts*, N.Y. TIMES (Feb. 14, 2011), <https://www.nytimes.com/2011/02/15/world/middleeast/15iran.html>.

¹⁰⁰ *China Appears to Tighten Internet Access Around Tiananmen Anniversary*, PBS NEWS HOUR (June 1, 2009), https://www.pbs.org/newshour/science/asia-jan-june09-china_06-01.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Andrew Jacobs, *Chinese Government Responds to Call for Protests*, N.Y. TIMES (Feb. 20, 2011), <https://www.nytimes.com/2011/02/21/world/asia/21china.html>.

¹⁰⁴ *See id.*

the threats were quickly repeated on the Chinese microblogging website Sina Weibo.¹⁰⁵

Social media has also played a major role in the United States. One of the most interesting developments has involved the use of local social media sites to address local issues.¹⁰⁶ These sites have developed even in areas that might be regarded as resistant to online communication (e.g., Amish communities).¹⁰⁷ In New Jersey, student protests erupted when voters rejected school budgets, thereby forcing potential budget cuts that negatively affected class sizes and offerings.¹⁰⁸ The protests were attributed to a Facebook posting that led to a gathering of some 18,000 student protestors.¹⁰⁹

In Louisville, Kentucky, a local organization, “8664.org,”¹¹⁰ sought to alter traffic routes in order to create a more livable city by rerouting an interstate highway around downtown Louisville so that downtown riverfront land could be used for scenic and recreational purposes.¹¹¹ The group’s plan was to reroute I-64 through Indiana, reducing traffic congestion and saving money.¹¹² The organization sought to accomplish its objectives through an aggressive web campaign¹¹³ as well as through traditional media.¹¹⁴ However, the group also maintained a strong presence on Facebook¹¹⁵ and YouTube,¹¹⁶ and it arranged public fora to promote its ideas.¹¹⁷ Although the effort failed, it garnered considerable local support (the organization

¹⁰⁵ Josh Chin, *After Beijing Lets Dissident Leave, He Spurs an Internet Catchphrase*, WALL STREET J. (Jan. 20, 2012), <https://www.wsj.com/articles/SB10001424052970204301404577170743814443180>.

¹⁰⁶ See Grace Schneider, *S. Ind. Deaths Turn Spotlight on Topix.com*, COURIER-J., Feb. 13, 2011, at A1.

¹⁰⁷ See Noam Cohen, *Exploring News by the Amish Online*, N.Y. TIMES (Sept. 20, 2009), <https://www.nytimes.com/2009/09/21/technology/internet/21link.html>.

¹⁰⁸ Winnie Hu, *In New Jersey, a Civics Lesson in the Internet Age*, N.Y. TIMES (Apr. 27, 2010), <https://www.nytimes.com/2010/04/28nyregion/28jersey.html>.

¹⁰⁹ *Id.*

¹¹⁰ The term “86” means to “throw away” or “get rid of,” and in this case, the “64” refers to Interstate 64. *About the 8664 Alternative*, 8664.ORG, <http://www.8664.org/about.html> (last visited Oct. 27, 2019).

¹¹¹ 8664.ORG, www.8664.org (last visited Oct. 27, 2019).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Marcus Green, *\$341 Million for Bridges OK'd*, COURIER-J., Mar. 25, 2008, at B1.

¹¹⁵ 8664, FACEBOOK, <https://www.facebook.com/8664.org> (last visited Oct. 3, 2019).

¹¹⁶ James Walter Moore, *8664*, YOUTUBE (May 14, 2006), <http://www.youtube.com/watch?v=eMFkK419XIk>.

¹¹⁷ Marcus Green, *8664 Organizers Push Proposal with the Public*, COURIER-J. (Nov. 29, 2007), <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20071129/NEWS01/711290452>.

claimed 10,000 members)¹¹⁸ and showed how an organization could effectively use the internet to convey its ideas to the public and create a movement.

Social media has also been used by individuals to affect the resolution of other public issues. During the debate about whether Judge Brett Kavanaugh should have been confirmed to the U.S. Supreme Court, many turned to the internet to discuss issues related to sexual abuse, especially the #MeToo movement.¹¹⁹ During the hearings, when questions were raised regarding Dr. Christine Blasey Ford's failure to accuse Kavanaugh earlier, a new hashtag emerged: #WhyIDidntReport.¹²⁰ As one commentator noted, "it may take a survivor a while to process that trauma, and even to identify what has happened," and many women explained that they were also dissuaded from reporting by "fear, anger and shame."¹²¹ Another hashtag, #Believe-Women, also emerged.¹²² These hashtag movements encouraged other women to step forward and identify themselves as also being victims of sexual assault and harassment.¹²³

The internet has also been used to influence political campaigns.¹²⁴ Take, for example, MoveOn.org, a group of liberal activists that has actively sought to influence political debate through the internet¹²⁵ and that has tried to involve increasing numbers of liberal voters in the political process.¹²⁶ In 2003, the group claimed 1.4 million members and even held a mock presidential primary to pick a challenger to President Bush.¹²⁷ The movement has also utilized internet-based techniques to raise substantial funds within a matter of hours to support candidates who opposed the Iraq War.¹²⁸ Following the nomination of then-Governor Sarah Palin for Vice

¹¹⁸ *Id.*

¹¹⁹ See Jacey Fortin, *#WhyIDidntReport: Survivors of Sexual Assault Share Their Stories After Tweet*, N.Y. TIMES (Sept. 23, 2018), <https://www.nytimes.com/2018/09/23/us/why-i-didnt-report-assault-stories.html>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Maya Salam & Niraj Chokshi, *Protesters Rally Against Kavanaugh, and Back His Accusers: "The Wave of Women Is Here,"* N.Y. TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/us/stop-kavanaugh-walkout-sexual-assault.html>.

¹²³ Fortin, *supra* note 119.

¹²⁴ Linton Weeks, *Politics in the Social Media Age: How Tweet It Is*, NAT'L PUB. RADIO (Oct. 29, 2010), <http://www.npr.org/templates/story/story.php?storyId=130873983>.

¹²⁵ Linton Weeks, *Ten Years Later, MoveOn Is 4.2 Million Strong*, NAT'L PUB. RADIO (Sept. 22, 2008), <http://www.npr.org/templates/story/story.php?storyId=94882173>.

¹²⁶ Terence Smith, *Plugged-In Politics*, PBS NEWS HOUR (Aug. 5, 2003), <https://www.pbs.org/newshour/show/plugged-in-politics>.

¹²⁷ *Id.*

¹²⁸ Michael Luo, *Obama Hauls in Record \$750 Million for Campaign*, N.Y. TIMES (Dec. 4, 2008), <https://www.nytimes.com/2008/12/05/us/politics/05donate.html>; Weeks, *supra* note 125.

President of the United States, MoveOn.org raised \$1.2 million in a 24-hour period for a pro-Obama, pro-Biden advertising campaign.¹²⁹

Like MoveOn.org, a number of “liberal bloggers” have teamed up with democratic interest groups (e.g., labor unions and MoveOn.org) in an attempt to push the Democratic Party further to the left. One such group is Accountability Now.¹³⁰ In addition to soliciting donations, this group of bloggers recruits leftist candidates to challenge centrist incumbent democrats.¹³¹ As one of the members stated: “We’re going to be about targeting incumbents to make space for Obama to be more progressive.”¹³²

Web-based political and social movements have also had a significant impact on political campaigns. For example, blog activity is widely credited with causing Senator Joseph Lieberman (a former democratic vice-presidential candidate) to lose his bid for re-nomination to the United States Senate in 2006.¹³³ Lieberman, who, in the view of his critics, had failed to adequately oppose the war in Iraq, was challenged from the left in the primary.¹³⁴ Although Lieberman lost the primary, he ultimately decided to run as an Independent.¹³⁵ With support from Republicans, who realized that they could not defeat the Democratic candidate and who evidently felt that Lieberman was a preferable alternative to a more liberal Democrat, Lieberman prevailed in the general election.¹³⁶ The net effect was that the internet-based challenge did not oust Lieberman, but did shift his political affiliation from Democrat to Independent. Lieberman, who was therefore less beholden to Democratic party interests, endorsed John McCain over Barack Obama in the 2008 presidential election.¹³⁷ Lieberman thereafter decided not to run for reelection, acknowledging that he would face substantial opposition.¹³⁸

¹²⁹ Weeks, *supra* note 125.

¹³⁰ Jim Rutenberg, *Bloggers and Unions Join Forces to Push Democrats to Left*, N.Y. TIMES (Feb. 26, 2009), <https://www.nytimes.com/2009/02/27/us/politics/27web-liberals.html>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Michael Russo, *Are Bloggers Representatives of the News Media Under the Freedom of Information Act?*, 40 COLUM. J.L. & SOC. PROBS. 225, 225 (2006); Rutenberg, *supra* note 130.

¹³⁴ Rutenberg, *supra* note 130.

¹³⁵ William Yardley, *Lieberman Plans Independent Bid if Primary Fails*, N.Y. TIMES (July 4, 2006), <https://www.nytimes.com/2006/07/04/nyregion/04lieberman.html>.

¹³⁶ Kate Zernike, *Allied with Democrats, Lieberman Easily Aligns with Republicans*, N.Y. TIMES (Feb. 8, 2007), <https://www.nytimes.com/2007/02/08/us/politics/08lieberman.html>.

¹³⁷ Liz Holloran, *Sen. Lieberman: Why Should We Toe the Party Line?*, NAT’L PUB. RADIO (Jan. 21, 2011), <http://www.npr.org/2011/01/21/133095715/sen-lieberman-why-should-we-toe-the-party-line>.

¹³⁸ Craig Lemoult, *Connecticut Sen. Lieberman Won’t Seek Re-Election*, NAT’L PUB. RADIO (Jan. 19, 2011), <http://www.npr.org/2011/01/19/133058807/Sen-Lieberman-Wont-Seek-Re-Election>.

The role of the internet in political campaigns expanded during the 2018 mid-term election cycle. During that election, most political candidates began sending text messages to potential supporters asking for their votes.¹³⁹ One advantage of social media advertising is that it allows candidates to collect the email addresses of potential supporters and interact with them through email. While candidates may still be sending campaign mailings and placing ads on television, they were increasingly sending personalized campaign text messages to the phones of potential voters for the 2018 election.¹⁴⁰ Both Democrats and Republicans used these mass messaging apps.¹⁴¹ Of course, the use of text messages in political campaigns is not entirely new. Barrack Obama announced his vice-presidential candidate by text message, and both Hillary Clinton and Donald Trump used text messages “to raise money, promote local events and get voters to the polls.”¹⁴² What is new is that political candidates were aggressively using text messaging to avoid crowded social media platforms and crowded email inboxes.¹⁴³

II. THE PROBLEMS CREATED BY SOCIAL MEDIA

Even though social media has enabled greater participation in the democratic process, it has also caused numerous societal problems. For one thing, social media platforms are incubators for so-called “fake news,” i.e. false or disinformation. They have also enabled foreign governments and foreign individuals to more easily attempt to influence U.S. elections.

A. *Fake News*

While fake news has existed since the beginning of time, social media platforms have enabled the widespread dissemination of fake news. Facebook has nearly two billion users worldwide, “reaches approximately 67% of U.S. adults,” and 44% of U.S. adults have indicated that they receive their news from Facebook.¹⁴⁴ Regarding the 2016 election, Twitter found some 50,000 Russia-linked accounts that were

¹³⁹ Kevin Roose, *Campaigns Enter Texting Era with a Plea: Will U Vote 4 Me?*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/technology/campaign-text-messages.html>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 672–73 (2017).

spreading disinformation.¹⁴⁵ That disinformation was spread not only by Republican supporters, but also by Democratic partisans.¹⁴⁶ As one commentator noted, “digging up large-scale misinformation on Facebook was as easy as finding baby photos or birthday greetings.”¹⁴⁷ In 2018, there “were doctored photos . . . of Latin American migrants headed towards the United States border. There were easily disprovable lies about the women who accused Justice Brett M. Kavanaugh of sexual assault, cooked up by partisans with bad faith agendas.”¹⁴⁸ Indeed, “every time major political events dominated the news cycle, Facebook was overrun by hoaxers and conspiracy theorists, who used the platform to sow discord, spin falsehoods and stir up tribal anger.”¹⁴⁹

Fake news is particularly disturbing in nations that are premised upon democratic principles because it can subvert and undermine the democratic process with disinformation. Indeed, some have argued that the very objective of fake news is to destabilize institutions.¹⁵⁰

B. Interference in Electoral Campaigns

The internet has also created special problems for democratic processes, particularly for democratic elections. Because of the worldwide nature of the internet, individuals located in one country can easily try to influence the outcome of elections in other countries. These attempts to influence can be undertaken by foreign governments, or by individuals, but the goal is to sway the electorate in favor of a preferred result.

Efforts to subvert elections can come in many different forms. Some attempts involve an effort to introduce “fake news” into democratic discussions, thereby misleading the electorate. Other attempts can involve using the internet to sow discord

¹⁴⁵ Jon Swaine, *Twitter Admits Far More Russian Bots Posted on Election than It Had Disclosed*, *GUARDIAN* (Jan. 19, 2018), <https://www.theguardian.com/technology/2018/jan/19/twitter-admits-far-more-russian-bots-posted-on-election-than-it-had-disclosed>.

¹⁴⁶ Craig Timberg & Shane Harris, *Russian Operatives Blasted 18,000 Tweets Ahead of a Huge News Day During the 2016 Presidential Campaign. Did They Know What Was Coming?*, *WASH. POST* (July 20, 2018), <https://www.washingtonpost.com/technology/2018/07/20/russian-operatives-blasted-tweets-ahead-huge-news-day-during-presidential-campaign-did-they-know-what-was-coming/>.

¹⁴⁷ Kevin Roose, *Facebook Thwarted Chaos on Election Day. It's Hardly Clear that Will Last.*, *N.Y. TIMES* (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/business/facebook-midterms-misinformation.html>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *E.g.*, Mark Scott & Melissa Eddy, *Europe Combats New Enemy of Political Stability: Fake News*, *N.Y. TIMES* (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/world/europe/europe-combats-a-new-foe-of-political-stability-fake-news.html>.

or division within the electorate and thereby to motivate (or perhaps discourage) portions of the electorate.

Claims of election interference were common after the U.S. 2016 presidential election, including allegations that the Russian government tried to help ensure Donald Trump's election.¹⁵¹ There were also claims that Russian intervention was designed simply to destabilize the U.S. political system and "remove faith" in America.¹⁵² Indeed, special counsel Robert Mueller indicted 12 Russians for masterminding computer attacks designed to undermine the Democratic Party.¹⁵³

There were also allegations that the Russians specifically sought to undermine Democratic candidate Hillary Clinton.¹⁵⁴ They did so using hash tags such as "#Trump2016," "#TrumpTrain," and "#Hillary4Prison."¹⁵⁵ One blog post referred to Hillary as "pure evil," and one Russian operative claimed that he was reprimanded for not producing enough posts that were critical of Hillary.¹⁵⁶ Russians also allegedly paid for online advertisements that encouraged voters to favor then-presidential candidate Donald Trump or perhaps to vote for then-presidential candidate Jill Stein.¹⁵⁷ The assumption is that Stein voters would otherwise have voted for Hillary Clinton, thus harming Clinton's electoral possibilities.

The vehicle for Russian interference with the U.S. election was the Internet Research Agency (IRA), which purportedly created hundreds of fake accounts and social media pages¹⁵⁸ and spent large amounts of money to advertise on social media.¹⁵⁹ The IRA allegedly used several social media platforms including Twitter,

¹⁵¹ Dustin Volz, *Pence Points at Russia for 2016 Election Interference, Vows to Tighten Cybersecurity*, WALL STREET J. (July 31, 2018), <https://www.wsj.com/articles/dhs-forms-new-cyber-hub-to-protect-critical-u-s-infrastructure-1533029400>.

¹⁵² David V. Hawpe, *Hacking America*, COURIER-J., Apr. 1, 2018, at I1.

¹⁵³ Tom Schoenberg & Greg Farrell, *U.S. Indicts 12 Russians Before Trump's Meeting with Putin*, U.S. L. WK. (July 13, 2018), <https://news.bloomberglaw.com/us-law-week/us-indicts-12-russians-before-trumps-meeting-with-putin>.

¹⁵⁴ Neil MacFarquhar, *Inside the Russian Troll Factory: Zombies and a Breakneck Pace*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/world/europe/russia-troll-factory.html>.

¹⁵⁵ Scott Shane, *How Unwitting Americans Encountered Russian Operatives Online*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/us/politics/russian-operatives-facebook-twitter.html>.

¹⁵⁶ *Id.*

¹⁵⁷ Jonathan Martin & Maggie Haberman, *Indictment Leaves No Doubt: Russia Backed Trump. But Was It the Difference?*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/us/politics/trump-election-russia.html>.

¹⁵⁸ Robert McMillan & Deepa Seetharaman, *Facebook Pulls Fake Accounts that Mimic Russian Tactics Ahead of Election*, WALL STREET J. (July 31, 2018), <https://www.wsj.com/articles/facebook-removes-fake-accounts-that-displayed-activity-consistent-with-russian-efforts-during-2016-election-1533055712>.

¹⁵⁹ Kenneth Osgood, *The C.I.A.'s Fake News Campaign*, N.Y. TIMES (Oct. 13, 2017),

PayPal, and YouTube, but some election observers believe that Facebook and Facebook advertisements constituted the IRA's favored platform and that it used Facebook to organize protest rallies beginning in 2015.¹⁶⁰

The IRA employed so-called "trolls"—people who posed as Americans and weighed in on controversial issues.¹⁶¹ These trolls, purportedly numbering in the thousands, worked 12-hour shifts and were prepped regarding what to say on U.S. social media sites.¹⁶² Each troll was expected to produce at least 80 comments per day and to have posts shared at least 20 times per day.¹⁶³ Once a troll created a post, he would forward it to one of a "countless" number of fake accounts in an effort to create a large number of page views.¹⁶⁴ Although some Clinton supporters believe that the Russian efforts tipped the election, it is not clear how much impact these posts had on the U.S. electorate.¹⁶⁵ There were many problems with the Clinton campaign, including Clinton's general unpopularity.¹⁶⁶ As one commentator observed, regarding the posts, "the audience seemed to grow more jaded and paid less attention to what they wrote."¹⁶⁷

One of the tactics allegedly used by the Russians during the 2016 presidential election was to sow discord "among U.S. voters through social media—impersonating Americans, coordinating with unwitting U.S. activists and even planning rallies."¹⁶⁸ Russians also allegedly tried to intervene in debates regarding the Affordable Care Act (ACA).¹⁶⁹ In a four-year period, the IRA sent out some 600 posts related

<https://www.nytimes.com/2017/10/13/opinion/cia-fake-news-russia.html>.

¹⁶⁰ Sheera Frenkel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/technology/indictment-russian-tech-facebook.html>.

¹⁶¹ Mike Isaac, *The Week in Tech: Social Media Faces Another Election Test*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/technology/social-media-midterm-elections.html?searchResultPosition=1>; see also Anton Troianovski, *A Former Russian Troll Speaks: "It Was like Being in Orwell's World,"* WASH. POST (Feb. 17, 2018), <https://www.washingtonpost.com/news/worldviews/wp/2018/02/17/a-former-russian-troll-speaks-it-was-like-being-in-orwells-world/>.

¹⁶² MacFarquhar, *supra* note 154.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See *id.*; Martin & Haberman, *supra* note 157.

¹⁶⁶ *Id.*

¹⁶⁷ MacFarquhar, *supra* note 154.

¹⁶⁸ Schoenberg & Farrell, *supra* note 153.

¹⁶⁹ Stephanie Armour & Paul Overberg, *Nearly 600 Russian-Linked Accounts Tweeted About the Health Law*, WALL STREET J. (Sept. 12, 2018), <https://www.wsj.com/articles/nearly-600-russia-linked-accounts-tweeted-about-the-health-law-1536744638>.

to the ACA, and some of these accounts had more than 100,000 followers.¹⁷⁰ Although there were tweets on both sides of the ACA issue, approximately 80% of the ACA-related tweets offered a conservative perspective on the issue.¹⁷¹

Russians were also allegedly involved in using the internet to hack into the Democratic National Committee's (DNC) email accounts, including Clinton's campaign chairman John Podesta's email account,¹⁷² and they were alleged to have stolen the usernames and passwords of volunteers in Clinton's campaign for president.¹⁷³ Of course, such hacking was possible only because of the nature of the internet. In an earlier day, such as during the Watergate era, thieves were forced to physically break into campaign offices in order to steal information. In an internet era, thieves could invade Podesta's computer and steal campaign information remotely, even from outside the U.S. The stolen emails were slowly revealed to the electorate in the month leading up to the election and they showed that the DNC (although required to be neutral in regards to the Democratic candidates) was actually favoring Clinton over her rival presidential candidate Bernie Sanders.¹⁷⁴

Russian interference in the U.S. political system allegedly continued into the 2018 mid-term elections.¹⁷⁵ Purportedly, Russia again used trolls, who were active on Twitter and who distributed "politically divisive messages" on "hot button issues" (e.g., race and politics) in an effort to "rile up the American electorate"¹⁷⁶ and sow "division" and "discord."¹⁷⁷ For example, following the mass shootings at Marjory Stoneman Douglas High School in Parkland, Florida, bot-operated Twitter ac-

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Martin & Haberman, *supra* note 157.

¹⁷³ See Schoenberg & Farrell, *supra* note 153.

¹⁷⁴ *Id.*

¹⁷⁵ Julian E. Barnes & Matthew Rosenberg, *Kremlin Sources Go Quiet, Leaving C.I.A. in the Dark About Putin's Plans for Midterms*, N.Y. TIMES (Aug. 24, 2018), <https://www.nytimes.com/2018/08/24/us/politics/cia-russia-midterm-elections.html>; Nicholas Fandos & Catie Edmondson, *Facing New Russian Hacking, Senators Signal They Are Ready to Act*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/russia-sanctions-microsoft-hacking.html>; Adam Goldman, *Justice Dept. Accuses Russians of Interfering in Midterm Elections*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/russia-interference-midterm-elections.html>.

¹⁷⁶ Goldman, *supra* note 175; Georgia Wells et al., *Russian Trolls Weigh in on Roseanne Barr and Donald Trump Jr.*, WALL STREET J. (June 19, 2018), <https://www.wsj.com/articles/russian-trolls-weigh-in-on-roseanne-barr-and-donald-trump-jr-1529425771>.

¹⁷⁷ Goldman, *supra* note 175.

counts were initiated under the hashtags “#gunreformnow” and “#Parklandshooting.”¹⁷⁸ As another example, some Twitter accounts focused on the National Anthem controversy in the National Football League.¹⁷⁹

The total of troll-farm operated accounts was alleged to be as high as 3,800, resulting in as many as eight million tweets and retweets, with tens of thousands of followers.¹⁸⁰ In addition, Facebook and Instagram advertisements were used.¹⁸¹ The alleged goal was “to create instability and doubt in governments, because [Russians] believe they benefit from the chaos and the loss of confidence in U.S. institutions.”¹⁸² In response, Twitter has stepped up efforts to identify and suspend these troll accounts.¹⁸³

III. SOCIAL MEDIA AS THE “GATEKEEPER” OF INTERNET COMMUNICATION

While social media platforms have helped enable ordinary people to engage in mass communication and indeed have given them the potential to engage in worldwide communication, these platforms are subject to private control and have the ability to censor private speech.

Essentially, social media platforms have become the new “gatekeepers” of communication. Throughout history, speech technologies have been controlled by “gatekeepers”—individuals who are able to control the use of those technologies by other people.¹⁸⁴ As noted, the Gutenberg printing press was a revolutionary communications advancement. However, it came with gatekeepers—those who owned or controlled the use of that technology such as newspaper editors.¹⁸⁵ The gatekeepers had much greater freedom to use their printing presses to convey their own ideas. Most people could access print technology only if the gatekeepers of those technologies consented.¹⁸⁶ If not, ordinary individuals might be limited to oral or handwritten techniques for conveying their ideas.¹⁸⁷

As extraordinary as radio, television, satellite, and cable communications were, all of those technologies came with gatekeepers and limitations as well. Because of

¹⁷⁸ Sheera Frenkel & Daisuke Wakabayashi, *After Florida School Shooting, Russian “Bot” Army Pounced*, N.Y. TIMES, (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/technology/russian-bots-school-shooting.html>.

¹⁷⁹ *Id.*

¹⁸⁰ Wells et al., *supra* note 176.

¹⁸¹ See Goldman, *supra* note 175.

¹⁸² Wells et al., *supra* note 176.

¹⁸³ *Id.*

¹⁸⁴ WEAVER, FROM GUTENBERG, *supra* note 1, at 21–38.

¹⁸⁵ *Id.* at 36.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

the nature of radio and television (involving a limited number of bandwidths and the probability of signal confusion if more than one person tried to use the same bandwidth at any one time), the U.S. government adopted a licensing system which required individuals to hold government-issued licenses in order to operate radio and television stations.¹⁸⁸ Not uncommonly, those licenses were controlled by wealthy individuals or corporations who could afford the equipment and the licenses to operate these technologies.¹⁸⁹ As with the printing press, those who operated and controlled radio and television licenses exercised significant control over who could access those systems.¹⁹⁰ Ordinary individuals could not demand or require that the owners and operators air their views.¹⁹¹ Satellite and cable technologies were enormously expensive to establish and operate and therefore were commonly controlled by corporations.¹⁹²

The internet was a major advancement over prior technologies because it was a decidedly democratic technology. Personal computers (PCs) allowed individuals to quickly and easily create quality content at home using their own equipment.¹⁹³ When coupled with a printer, the prices of which had dropped dramatically, the PC enabled ordinary people to print high-quality content and to make multiple copies, thereby allowing them to effectively engage in “desktop publishing.”¹⁹⁴ The internet complimented the personal computer by providing ordinary individuals with the means for distributing documents that they had created on their PCs,¹⁹⁵ and thereby allowed ordinary people to engage in mass communication.¹⁹⁶ Individuals could gain access to the internet with nothing more than a desktop computer and internet access. Over time, smartphones were developed, making internet communication even easier. Those who could not afford a desktop or smartphone could gain free or inexpensive computer and internet access at places like internet and cyber cafes. Those who had a smartphone but could not afford internet access could use the internet for free at many businesses (e.g., McDonalds and Starbucks).

The internet solved the problem of how to mass distribute information and documents created with PCs. Historically, if someone created a printed work, they

¹⁸⁸ See *Red Lion Broad. Co. v. Fed. Comm'ns Comm'n*, 395 U.S. 367, 376–77 (1969).

¹⁸⁹ Elaine B. Gin, *International Copyright Law: Beyond the WIPO and TRIPS Debate*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 763, 777–78 (2004).

¹⁹⁰ *Id.* at 778.

¹⁹¹ See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 132 (1973).

¹⁹² FANG, *supra* note 19, at 203–04.

¹⁹³ Paul & Baron, *supra* note 10, at 5–6.

¹⁹⁴ FANG, *supra* note 19, at 196.

¹⁹⁵ David Crowley & Paul Heyer, *Introduction to Part VIII New Media and Old in the Information Age*, in *COMMUNICATION IN HISTORY*, *supra* note 14, at 298.

¹⁹⁶ Janet Abbate, *Popularizing the Internet*, in *COMMUNICATION IN HISTORY*, *supra* note 14, at 327.

would either have to distribute it themselves in hard copy, pay someone else to distribute it (e.g., the postal service), post it in a public square, or try to disseminate it through existing newspapers, radio, or television networks. Unless the individual could get free distribution through an existing media outlet, distribution costs—either in terms of personal effort or monetary spending—could be daunting. With the internet, ordinary people could bypass traditional methods of communication for the first time in history and distribute content themselves directly to their readers. Indeed, individuals could instantaneously disseminate their ideas all over the world through the click of a computer mouse. Not only could individuals send e-mails and create websites, they could also communicate through chat rooms, Listservs, and blogs. They could also send text messages and communicate in many other (new) ways. In other words, PCs and the internet created completely new communication possibilities for ordinary individuals, enabling those individuals to mass communicate without having to go through the traditional gatekeepers of mass communication.¹⁹⁷ As a result, the internet could be used by all age groups, and by people of all political persuasions, in almost every country, and it thereby transformed mass communication.¹⁹⁸

Social media platforms have begun to perform more of a gatekeeper role in internet communications. The overwhelming majority of social media platforms are privately owned, and the owners of those platforms have the right to control and limit speech on their platforms.¹⁹⁹ Since the First Amendment to the U.S. Constitution prohibits governmentally-imposed restrictions on free speech and not privately-imposed restrictions,²⁰⁰ it frequently has no application to the actions of these private entities.

Of course, the fear is that social media platforms will limit speech on their platforms in an effort to control the dissemination of ideas and censor ideas that they do not like. Social media platforms exercise control over speech through their “acceptable use” or “terms of service” policies, which give them broad authority to exclude particular types of content and even to terminate or limit service to users.²⁰¹ Facebook uses its terms of service policy to exclude various types of content²⁰² and

¹⁹⁷ David Crowley & Paul Heyer, *Introduction to Part VIII New Media and Old in the Information Age*, *supra* note 14, at 298.

¹⁹⁸ See Teddy Wayne, *Digital Habits Shift Across Age Groups*, N.Y. TIMES (Dec. 13, 2009), <https://www.nytimes.com/2009/12/14/technology/internet/14drill.html>.

¹⁹⁹ Margot E. Kaminski & Kate Klonick, *Facebook, Free Expression and the Power of a Leak*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/opinion/facebook-first-amendment-leaks-free-speech.html?searchResult>.

²⁰⁰ *Hudgens v. Nat'l Labor Relations Bd.*, 424 U.S. 507, 513 (1976).

²⁰¹ *E.g.*, *Terms of Service*, FACEBOOK, <https://facebook.com/terms.php> (last visited Dec. 8, 2019).

²⁰² *Community Standards: Objectionable Content*, FACEBOOK, https://facebook.com/communitystandards/objectionable_content (last visited Sept. 29, 2019).

it employs a team that is authorized to take down content that it concludes is illegal or violates its policy.²⁰³ Twitter has a terms of use policy and blocks Tweets from entering countries when the content would violate local law or when the government of that country requests the blocking.²⁰⁴ Under its policy, Twitter may block tweets that insult the Thai monarchy and preclude Nazi-related tweets from entering Germany.²⁰⁵ In addition to retaining a right to exclude content, social media platforms need not guarantee due process to its users related to a take down or give them any right of redress or appeal.²⁰⁶

Recently, Google removed some 41 social media accounts that were allegedly connected to the IRA.²⁰⁷ These accounts contained content designed to discourage minorities from voting in the election.²⁰⁸ One of the Russian accounts was “Woke Blacks,” which urged African Americans to stay home from the polls rather than support “the lesser of two devils.”²⁰⁹

In addition, China, North Korea, and Iran also allegedly attempted to influence the outcome of the U.S. elections, or to at least sow division and discord within the United States.²¹⁰ Other posts suggested that U.S. military veterans were being disfavored vis-à-vis illegal immigrants and that African Americans were being unfairly harassed and beaten up by police officers, or they sought to create rifts between Christians and non-believers.²¹¹

The ability of social media platforms to control content presents significant free speech concerns. There is always the risk that decisions to prohibit content will be swayed by public opinion. Thus, unlike the First Amendment, under which free speech rights are not determined by majority vote, public opinion may influence take-down decisions that social media platforms make. There is also a risk that governments will pressure social media companies to censor speech. For example, in 2018, Twitter shut down the account of Abu Mehdi al-Mohandis, a prominent

²⁰³ *Enforcing Our Community Standards*, FACEBOOK (Aug. 6, 2018), <https://newsroom.fb.com/news/2018/08/enforcing-our-community-standards/>.

²⁰⁴ Somini Sengupta, *Censoring of Tweets Sets Off #Outrage*, N.Y. TIMES (Jan. 27, 2012), <https://www.nytimes.com/2012/01/28/technology/when-twitter-blocks-tweets-its-outrage.html>.

²⁰⁵ *Id.*

²⁰⁶ Kaminski & Klonick, *supra* note 199.

²⁰⁷ Wells et al., *supra* note 176.

²⁰⁸ Martin & Haberman, *supra* note 157.

²⁰⁹ *Id.*

²¹⁰ David E. Sanger & Sheera Frenkel, *New Russian Hacking Targeted Republican Groups, Microsoft Says*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/russia-cyber-hack.html>.

²¹¹ Scott Shane, *Some of the Popular Images and Themes the Russians Posted on Social Media*, N.Y. TIMES (Dec. 17, 2018), <https://www.nytimes.com/2018/12/17/us/russian-social-media-posts.html>.

Iraqi militia leader, for inciting violence.²¹² Al-Mohandis had blamed the U.S. for involving itself in Basra, and shortly thereafter there was violence against U.S. diplomats.²¹³ When he was criticized for inciting violence, Al-Mohandis's account was shut down and his supporters complained about undue U.S. governmental influence.²¹⁴ Twitter refused to comment on the ban for privacy and security reasons.²¹⁵ There is also a risk that social media platforms will favor certain political perspectives over competing perspectives.

Whether social media platforms actually do discriminate against certain types of political content is unclear. Twitter, for one, claims that it does not discriminate against conservatives, and Facebook declares that free speech is “core to both who we are and why we exist,” and asserts that it only removes hate speech and violent threats.²¹⁶ Facebook specifically denies that it discriminates against conservative views.²¹⁷ Others challenge Facebook's assertions. On Facebook's internal messaging system, a senior Facebook engineer posted a statement titled, “We Have a Problem With Political Diversity,” noting that “We are a political monoculture that's intolerant of different views.”²¹⁸ The engineer went on to say that Facebook “claim[s] to welcome all perspectives, but [is] quick to attack – often in mobs – anyone who presents a view that appears to be in opposition to left-leaning ideology.”²¹⁹ Regarding certain issues (e.g., diversity and immigration), the post noted that employees “can either keep quiet or sacrifice [their] reputation and career.”²²⁰ Following the Facebook post, more than 100 Facebook employees decided to form an online group titled “FB'ers for Political Diversity.”²²¹ The Facebook controversy erupted after Facebook decided to ban Alex Jones and allegedly limited the speech of Senator Ted Cruz and President Trump.²²² Of course, the perception of a liberal bias is reinforced by the fact that Facebook's Chief Executive Officer, Mark Zuckerberg,

²¹² See Michael R. Gordon, *Twitter Shuts Down Iraqi Militia Leader's Account Over Rocket Attack on U.S. Consulate*, WALL STREET J. (Sept. 12, 2018), <https://www.wsj.com/articles/twitter-shuts-down-iraqi-militia-leaders-account-over-rocket-attack-on-u-s-consulate-1536787707>.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Kevin Roose, *Facebook Banned Infowars. Now What?*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/facebook-banned-infowars-now-what.html>.

²¹⁷ *Id.*

²¹⁸ Kate Conger & Sheera Frenkel, *Dozens at Facebook Unite to Challenge Its “Intolerant” Liberal Culture*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/technology/inside-facebook-employees-political-bias.html>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

and its Chief Operating Officer, Sheryl Sandberg, donate money to Democratic politicians and liberal causes.²²³

Allegations of bias have also been leveled against other social media platforms. For example, congressional Republicans have alleged that Twitter is biased against conservative views—a claim that Twitter’s Chief Executive, Jack Dorsey, vigorously denies.²²⁴

Until relatively recently, social media platforms maintained secrecy regarding their moderation guidelines.²²⁵ Despite these efforts at secrecy, Facebook’s guidelines became public in early 2017.²²⁶ The guidelines suggest that Facebook will take action against posts involving such things as hate speech, terrorist propaganda, graphic violence, adult nudity, sexual activity, child sexual exploitation, revenge porn, credible violence, suicidal posts, bullying, harassment, breaches of privacy, and copyright infringement.²²⁷

However, Facebook’s guidelines suffer from both vagueness and ambiguity. For example, some regard Facebook’s policies on sexual content as “complex and confusing.”²²⁸ Additionally, the guidelines suggest that a statement like “Someone shoot Trump” should be deleted because a head of state is in a protected category, but a statement like “To snap a bitch’s neck, make sure to apply your pressure to the middle of her throat” can remain.²²⁹ Facebook justifies leaving the latter post online by arguing that “people commonly express disdain or disagreement by threatening or calling for violence in generally facetious and unserious ways.”²³⁰ Likewise, the statement “fuck off and die” need not be removed because it would not be regarded as a credible threat.²³¹ Photos of children being subjected to bullying or non-sexual physical abuse need not be deleted unless there is a sadistic or celebratory element.²³² Videos of violent deaths are sometimes deleted, but attempts at self-

²²³ *Id.*

²²⁴ Cecilia 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>.

²²⁵ Kaminski & Klonick, *supra* note 199.

²²⁶ Nick Hopkins, *Revealed: Facebook’s Internal Rulebook on Sex, Terrorism and Violence*, GUARDIAN (May 21, 2017), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence>.

²²⁷ *Id.*; see also Alex Hern & Olivia Solon, *Facebook Closed 583m Fake Accounts in First Three Months of 2018*, GUARDIAN (May 15, 2018), <https://www.theguardian.com/technology/2018/may/15/facebook-closed-583m-fake-accounts-in-first-three-months-of-2018>.

²²⁸ See Hopkins, *supra* note 226.

²²⁹ *Id.*

²³⁰ *Id.* (“[Such statements] are not regarded as credible threats.”).

²³¹ *Id.*

²³² *Id.*

harm need not be deleted.²³³ Although photos of animal abuse or mutilation are permissible, they should be marked as “disturbing.”²³⁴ Such photos can be removed if they reveal “sadism,” which the guidelines define as “enjoyment of suffering.”²³⁵ Child nudity is sometimes permissible but not in the context of the Holocaust.²³⁶

The decisions regarding particular content can be difficult. For example, Facebook was criticized when it failed to remove videos of a father killing his child in Thailand and of Robert Godwin being killed, but it won acclaim for “disseminating videos of police killings and other government abuses.”²³⁷ While the guidelines prohibit posts involving child exploitation, Facebook has not fully decided how to handle images involving cartoon images of exploitation.²³⁸

The vagueness of the guidelines is aggravated by the fact that Facebook’s moderators are “overwhelmed” by the total volume of work.²³⁹ Purportedly, Facebook receives more than 6.5 million reports a week involving allegations of fake or improper accounts, and Facebook’s moderators are sometimes forced to make decisions regarding the permissibility of content in as little as 10 seconds.²⁴⁰

Some worry that social media companies like Facebook exercise too much control over speech on their platforms and have suggested that these companies should adopt transparent governing procedures.²⁴¹ For example, the Santa Clara Principles, a guidebook, suggests that social networks “should publish the number of posts they remove, provide detailed information for users whose content is deleted explaining why, and offer the chance to appeal against the decision.”²⁴²

One thing is clear: a large amount of content has been excluded from social media platforms. In the first three months of 2018, Facebook closed 583 million accounts that it characterized as “fake,” and it took “moderation action” against some 1.5 billion accounts.²⁴³ Of these moderation actions, Facebook removed some 2.5 million instances of hate speech, 1.9 million instances of terrorist propaganda, 3.4 million instances of graphic violence, and 21 million instances of adult nudity

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*; Kaminski & Klonick, *supra* note 199.

²³⁶ Hopkins, *supra* note 226.

²³⁷ *Id.*

²³⁸ Hern & Solon, *supra* note 227.

²³⁹ *See* Hopkins, *supra* note 226.

²⁴⁰ *Id.*

²⁴¹ *See* Hern & Solon, *supra* note 227.

²⁴² *Id.*

²⁴³ *Id.*

and sexual activity.²⁴⁴ YouTube deleted 8.3 million videos in a three-month period “for breaching its community guidelines.”²⁴⁵

These moderation actions affect a large quantity of speech. For example, in response to WikiLeaks’s decision to release diplomatic communications that had been stolen from the U.S. government, some online companies decided (perhaps after prompting by governmental officials) to cut their ties to WikiLeaks and its supporters and to discontinue carrying WikiLeaks’s website.²⁴⁶ Amazon was one of the companies that excluded WikiLeaks,²⁴⁷ stating that it violated its terms of service to post documents online without taking steps to prevent injury to others.²⁴⁸ WikiLeaks managed to stay online only by switching servers.²⁴⁹ WikiLeaks also suffered setbacks regarding its ability to obtain funding. For example, MasterCard, Visa, and PayPal decided to stop processing payments to WikiLeaks.²⁵⁰ A MasterCard representative justified the decision on the basis that: “Given the serious nature of allegations and broad concerns raised by many regarding the activities of this organization, we believe it was prudent to suspend acceptance, and that’s what we’ve done.”²⁵¹ PayPal justified its action on the basis that “WikiLeaks might be encouraging illegal behavior, and that violates PayPal’s acceptable-use policy.”²⁵²

In excluding WikiLeaks content, Amazon relied on a terms of service agreement which stated that “you represent and warrant that you own or otherwise control all of the rights to the content.”²⁵³ Since WikiLeaks was trying to publish documents that had been stolen from the U.S. government, Amazon concluded that this restriction had been violated.²⁵⁴ In addition, the Amazon terms of service contract gives it the right to ban content that “could cause injury,” and Amazon expressed concern that “WikiLeaks was not exercising sufficient caution in redacting names from the documents before disclosing them.”²⁵⁵

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Charlie Savage, *Amazon Cites Terms of Use in Expulsion of WikiLeaks*, N.Y. TIMES (Dec. 2, 2010), <https://www.nytimes.com/2010/12/03/world/03amazon.html>.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *All Things Considered: Hackers Overwhelm WikiLeaks Servers*, NAT’L PUB. RADIO (Dec. 3, 2010), <http://www.npr.org/2010/12/03/131790969/Hackers-Overwhelm-WikiLeaks-Servers>.

²⁵⁰ *Morning Edition: Corporations Are Drawn into WikiLeaks Controversy*, NAT’L PUB. RADIO (Dec. 13, 2010), <https://www.npr.org/2010/12/13/131979010/corporations-are-drawn-into-wikileaks-controversy>.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Savage, *supra* note 246.

²⁵⁴ *See id.*

²⁵⁵ *Id.*

The allegedly neo-Nazi website, The Daily Stormer, was first banned by GoDaddy after it mocked a young woman who was killed during protests that occurred in Charlottesville, Virginia in 2017.²⁵⁶ The site was then moved to Google, which banned it for violating its terms of service.²⁵⁷

Likewise, three internet giants—Google, Apple, and Facebook—have moved aggressively to remove content produced by Alex Jones and his site Infowars as “hate speech.”²⁵⁸ The New York Times referred to Jones as someone “who became famous for his spittle-flecked rants and far-fetched conspiracies, including the idea that the Sandy Hook massacre was an elaborate hoax promoted by gun-control supporters.”²⁵⁹ He has also referred to the 9/11 attacks as an “inside job” and helped spread the “Pizzagate” controversy.²⁶⁰ In regard to the 9/11 attacks, he stated: “Now 9/11 was an inside job, but when I say inside job it means criminal elements in our government working with Saudi Arabia and others, wanting to frame Iraq for it.”²⁶¹ Other sites—including YouTube, Pinterest, and MailChimp—also took action to ban Infowars.²⁶²

For a while at least, Twitter chose to leave Mr. Jones’s posts alone.²⁶³ However, Twitter eventually changed course and banned both Jones and Infowars from its platforms for allegedly violating its terms of use policy.²⁶⁴ In particular, Twitter expressed concerns that Jones was harassing a CNN reporter.²⁶⁵ Jones responded that the reporter was a “public figure” and one who had been attempting to “bully” tech companies into banning Jones.²⁶⁶ Interestingly, 13 of Jones’s most popular tweets involved reposts of tweets by President Trump.²⁶⁷

²⁵⁶ Bill Chappell, *Neo-Nazi Site Daily Stormer Is Banned by Google After Attempted Move from GoDaddy*, NAT’L PUB. RADIO (Aug. 14, 2017), <https://www.npr.org/sections/thetwo-way/2017/08/14/543360434/white-supremacist-site-is-banned-by-go-daddy-after-virginia-rally>.

²⁵⁷ *Id.*

²⁵⁸ Li Yuan, *The Week in Tech: Infowars and China’s Great Firewall*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/tech-infowars-china-great-firewall.html>.

²⁵⁹ Roose, *supra* note 216.

²⁶⁰ Christine Hauser, *Megyn Kelly Calls Alex Jones’s Sandy Hook Denial “Reviling,” but Still Plans to Air Interview*, N.Y. TIMES (June 12, 2017), <https://www.nytimes.com/2017/06/12/business/media/megyn-kelly-alex-jones-newtown.html>.

²⁶¹ *Id.*

²⁶² Roose, *supra* note 216.

²⁶³ Yuan, *supra* note 258.

²⁶⁴ Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/technology/twitter-alex-jones-infowars.html>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

Leading social media companies have also banned other right-wing individuals, and fundraising sites, including PayPal, Patreon, and GoFundMe, have banned individuals on the right.²⁶⁸ Included in these bans are Hunter Wallace, described as a white nationalist blogger, and Kyle Chapman, also known as “Based Stickman,” described as an alt-right personality.²⁶⁹ In response, some right-wing groups have started their own funding websites.²⁷⁰ Airbnb cancelled bookings for far right individuals related to a rally in Charlottesville, Virginia (one that ultimately resulted in violence).²⁷¹ YouTube, which is owned by Google, has placed special restrictions on “controversial religions or supremacist content.”²⁷² Facebook banned “Britain First,” which has been described as a far right group in the UK.²⁷³ Twitter has also banned Milo Yiannopoulos, allegedly for an online harassment campaign against an actress, as well as Chuck Johnson, a Breitbart writer, for alleged threats toward a civil rights activist.²⁷⁴ Twitter has also banned organizations such as the American Nazi Party and Golden Dawn.²⁷⁵

IV. THE INTERNET’S RESILIENCE

Because of the resilience of the internet, it is not clear that these social media bans have had a huge impact on the speech of banned individuals or organizations. There is a potential impact because they were banned from the most influential social media platforms (e.g., Facebook and Twitter) and therefore have been forced to resort to lesser platforms. Nevertheless, despite the fact that it was banned from certain websites, The Daily Stormer remains readily available on the internet.²⁷⁶ Indeed, The Daily Stormer has used the GoDaddy and Google bans to tout itself as the “most censored” publication.²⁷⁷

The bans do not seem to have hurt Alex Jones or Infowars either. Like The Daily Stormer, Infowars played up its role as a “martyr” by slapping “censored”

²⁶⁸ Kevin Roose, *The Alt-Right Finds a New Enemy in Silicon Valley*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/2017/08/09/business/alt-right-silicon-valley-google-memo.html>.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Niraj Chokshi, *Facebook Blocks Britain First, a Far-Right Anti-Muslim Group Promoted by Trump*, N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/world/facebook-ban-britain-first.html>.

²⁷⁴ See Conger & Nicas, *supra* note 264.

²⁷⁵ *Id.*

²⁷⁶ DAILY STORMER, <https://dailystormer.name/> (last visited Dec. 8, 2019).

²⁷⁷ Jonathan Berr, *Neo-Nazi Website Daily Stormer Ordered to Pay \$4.1 Million to Dean Obeidallah*, FORBES (June 17, 2019), <https://www.forbes.com/sites/jonathanberr/2019/06/17/neo-nazi-website-daily-stormer-ordered-to-pay-41-million-to-dean-obeidallah/#2f5d6b105494>.

labels on a number of its videos and initiating a “forbidden information” marketing campaign.²⁷⁸ Moreover, like The Daily Stormer, Infowars remains readily available on the internet.²⁷⁹ Indeed, following some of the social media bans (but before the Twitter ban), Jones saw an eight percent bump in his Twitter followers (which translated to about 70,000 followers).²⁸⁰

In addition, organizations like Infowars have sometimes found ways to circumvent social media bans. For example, when Facebook decided to ban Infowars, private Infowars groups and messaging apps continued to proliferate on Facebook.²⁸¹ Through both “closed” and “secret” channels, groups like Infowars could function without much oversight or review.²⁸² Thus, although Infowars videos and podcasts have been removed from various platforms, it has become one of the most popular apps, sometimes on those very platforms.²⁸³

While individuals can still access the Infowars site directly, some believe that Jones and Infowars will have trouble attracting new followers because they cannot access the most popular sites such as Facebook.²⁸⁴ Of course, Jones responded (interestingly enough, through another Twitter account) by turning the ban into a public relations coup, claiming that “[t]hey’re scared of us. They’re scared of the populist movement.”²⁸⁵ Twitter responded that it would take action to prevent Jones and Infowars from circumventing its ban.²⁸⁶

CONCLUSION

Freedom of speech has been influenced over the centuries by technological advances. The first such advance was the Gutenberg printing press, which made it possible to relatively quickly create multiple copies of books and documents, led to dramatic changes in society, including the Protestant Reformation, the Enlightenment, major changes in governmental philosophy, and industrial and technological innovation. In the British colonies in what would later become the United States, the press allowed American leaders to read the writings of the Enlightenment, and those writings ultimately influenced both the writing of the U.S. Declaration of

²⁷⁸ See Roose, *supra* note 216.

²⁷⁹ INFOWARS, <https://www.infowars.com/> (last visited Dec. 8, 2019).

²⁸⁰ See Conger & Nicas, *supra* note 264.

²⁸¹ Kevin Roose, *Facebook’s Private Groups Offer Refuge to Fringe Figures*, N.Y. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/technology/facebook-private-groups-alex-jones.html>.

²⁸² *Id.*

²⁸³ See Yuan, *supra* note 258.

²⁸⁴ See Conger & Nicas, *supra* note 264.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

Independence and the drafting of the U.S. Constitution—indeed, the entire structure of the U.S. governmental system.

As transformative as the printing press may have been, its benefits were not available to all. Those who owned or controlled printing presses, and later newspapers, had the power to publish what they chose to publish. Those who did not were subject to “gatekeepers” (the owners of printing presses and newspapers) who had the power to decide what could (and, more importantly, what could not) be published. If a writer could impress the owner of a printing press with the brilliance of his work, he might persuade the owner of the press to publish it. Likewise, if a writer had enough money, he might pay the owner of a printing press to publish it for a fee. Those who could not persuade or pay were left with only more primitive means of communication.

The invention of electricity led to a series of communications innovations that allowed information to be disseminated broadly at speeds far faster than people could move. The telegraph allowed individuals to harness electrical impulses to send messages at incredible speeds over long distances. Radio permitted the transmission of sound without the need for wires, and television enabled the communication of both sound and visual content. Satellites allowed communication signals to be beamed around the world, and cable permitted companies to disseminate large quantities of programming. However, as with the printing press, all of these technologies came with gatekeepers and barriers that made it difficult for ordinary people to readily access these new technologies.

The internet is the first truly democratic means of mass communication because it is readily accessible by most people through devices (personal computers and smartphones) that can be purchased relatively inexpensively. Those who cannot afford even this modest investment can gain free access through public libraries or internet cafes. Moreover, compared to earlier technologies, the internet’s capabilities are staggering, offering people the capacity to reach others all around the world. Internet platforms (e.g., Facebook and Twitter) abound, as do internet communication systems (e.g., email, blogs). For the first time, ordinary people really do have the means to communicate on a mass scale.

Some gatekeepers have emerged on the internet in the sense that social media platforms use “terms of use” agreements to control access to (and use of) their platforms. This content moderation is potentially disturbing from a free speech perspective in that social media platforms can prefer certain political perspectives over others or can preclude or ban certain ideas. Indeed, certain platforms may choose to limit speech because they are pressured to do so by the public or by governmental officials.

Nevertheless, the internet has proven to be remarkably resilient. Even those who have been banished at one point or another (e.g., The Daily Stormer, WikiLeaks, Alex Jones, and Infowars) by various social media platforms remain accessible on the internet and retain the ability to contact the public through email, blogs,

and other internet devices. At most, the social media bans limit the authority of these groups to access certain platforms—unfortunately, some of the most influential platforms—thereby limiting their ability to reach a new and broader audience.