FIRST AMENDMENT GOVERNANCE: SOCIAL MEDIA, POWER, AND A WELL-FUNCTIONING SPEECH ENVIRONMENT

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INTRODUCTION

In *Moody v. NetChoice, LLC*,[1] the Supreme Court declared, in a majority opinion by Justice Kagan, that "it is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources. That is the whole project of the First Amendment."[2] In *Moody*, social media platforms claimed that their expressive freedom had been violated by state laws mandating certain content-moderation policies.[3] Although *Moody* was decided on the criteria required to bring a facial challenge, it nonetheless provided some direction with respect to what the government can and cannot do vis-à-vis the First Amendment rights of social media platforms.[4]

This decision also implicitly raises the question of what it means for a democracy to have a well-functioning political speech environment in the digital era. This question seems particularly urgent given the profound dilemma that social media poses for democratic theory and practice. On the one hand, social media democratizes communication and promotes egalitarianism by reducing the cost of speech.[5] It provides new avenues for expression and association, thereby strengthening public discourse. It has also been harnessed to enable citizen participation in political decision-making.[6] On the other hand, social media can undermine democratic functioning, giving rise to various challenges such as disinformation, echo chambers, troll armies, bots, microtargeting, citizen distrust, and foreign election interference.[7] As various attempts at election subversion, including the attack on the Capitol, demonstrate, election disinformation can have

1. Moody v. NetChoice LLC, 603 U.S. 707 (2024).
2. *Id.* at 732–33.
3. *Id.* at 713–17.
4. *Id.* at 717–19.
5. *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995); Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2305 (2021).
6. *See* Hélène Landemore, *Open Democracy and Digital Technologies*, *in* DIGITAL TECHNOLOGY AND DEMOCRATIC THEORY 62, 66 (Lucy Bernholz et al. eds., 2021); Roberta Fischli & James Muldoon, *Empowering Digital Democracy*, 22 PERSPS. ON POL. 819, 819 (2024).
7. *See, e.g.*, CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017); Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017); RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT (2022).

damaging and destabilizing effects on democracy and can diminish the confidence that citizens have in elections. The ongoing stability of political institutions should not be taken for granted in our era of democratic decline.[8]

Although free speech has always posed this particular dilemma—both essential for, yet potentially injurious to, democracy—key features of the new digital era raise questions as to whether conventional regulatory approaches are sufficient to safeguard the public sphere. Social media platforms enjoy unprecedented asymmetries of wealth and power as compared to their users. These platforms play a crucial role in providing and regulating the online speech environment[9] and, hence, in constructing a significant dimension of public discourse. Aside from their dominance, these powerful social media platforms were not created to provide a healthy expressive realm for democracy. Instead, they engage in "surveillance capitalism"—a behavioral advertising business model that sells users' data for immense profits.[10] This profit motive arguably renders the platforms unreliable as self-regulators.[11] The outsized power of social media platforms to shape the expressive sphere, combined with their non-public regarding orientation, raises genuine concerns about the ongoing health of the political marketplace of ideas.

While the overwhelming power of the state has always—and rightly—been viewed as particularly perilous for the freedom of speech, dominant private actors, particularly those who either control or have disproportionate access to the means of communication, can likewise pose a threat to free speech. Is it possible to address such asymmetries of power consistent with the First Amendment? Should social media platforms be regulated to provide for the type of speech environment necessary for democracy? What are the normative attributes of a well-functioning sphere of political expression? More generally, what should be done to protect listeners, a category of democratic actor that tends to receive less scholarly attention than speakers?

This Article offers a preliminary analysis of these issues. It is organized in three parts. Part I begins by providing a brief overview of First Amendment doctrine as it applies to speakers and listeners. In addition, it outlines the three principal values—democracy, autonomy, and truth-seeking—that animate the First Amendment. For the purposes of the ensuing

8. *See, e.g.*, TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018).

9. *See* Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2011 (2018).

10. *See* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 16 (2019).

11. *See* Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1237, 1245 (2018).

analysis, this Article adopts the view that the First Amendment is geared to promoting democratic self-government. Part I then sets out a normative account of a healthy expressive realm. A well-functioning political speech environment for speakers and listeners, I suggest, is one that is free of domination and coercion and in which acute asymmetries in political and economic power do not distort the capacity of individuals to engage in self-government, principally with respect to three central activities: (1) informed voting; (2) discussion and deliberation; and (3) meaningful participation. I claim further that the speech environment ought to protect individuals' liberty, equality, epistemic, and nondomination interests in order to foster a healthy sphere of expression for these self-governing activities.

While this Article sets out an admittedly idealized account of what a well-functioning political speech environment would entail, and while such an account may never be attained in full (or even in part), a normative theory provides, I suggest, a useful benchmark by which to assess current challenges and their possible regulatory solutions.[12] To this end, Part I also identifies certain challenges posed by the digital public sphere, and, in addition, advances a claim of "digital exceptionalism"—the idea that the online world of expression has distinctive features that not only distinguish it from the non-digital world but that also pose unique and profound difficulties for the attainment of a well-functioning expressive realm.

Part II turns to First Amendment jurisprudence to see whether it enables the government to address the challenges posed by the digital world so as to provide for a well-functioning political speech environment. It begins by describing the positive conception of the First Amendment, under which the state is viewed as having an affirmative role in protecting the democratic public sphere from the distortive influence of powerful private entities. Part II then offers a snapshot view of the current law of public discourse, focusing in particular on campaign finance regulation and the *Moody* decision, to show that the Court has largely abandoned the positive conception in favor of an approach that prohibits the government from ensuring a greater diversity of expression.

While the Court's approach protects listeners from the power of the state, it gives rise to the troubling conundrum that the political speech environment is left unprotected not only from the dominant power of private tech giants but also from the deficits of the digital public sphere. Neither the

12. To be sure, the idealized account offered here does not on its own furnish a roadmap for reform efforts; its ambition is instead cabined to identifying normative objectives and the problematic features of the world to which such objectives apply, following what Jacob Levy has described as "a back and forth process between cases and principles, evils and ideals." Jacob T. Levy, *There Is No Such Thing as Ideal Theory*, 33 SOC. PHIL. & POL'Y 312, 328 (2016).

state nor the platforms protect listeners from the effects of acute asymmetries of private power. Indeed, many regulatory responses to the challenges of digital exceptionalism would likely fall afoul of the First Amendment. For this reason, the sizeable gap between the normative ideal of a well-functioning political speech environment and the often disheartening reality of the digital public sphere cannot be closed by contemporary First Amendment doctrine.

In response to this conundrum, Part III makes an argument for "countervailance," which is, in essence, the idea that certain mechanisms could counter, or at least lessen, these asymmetries in power and their resulting deficits such that listeners' interests are better protected, even if that protection does not rise to the level of establishing the kind of equality needed for self-governance. I briefly consider a suite of countervailing mechanisms—including disclosure and transparency rules, a narrow prohibition of false election speech, strategies to manage deepfakes, state-led incentives structures and norms, public jawboning, and civil society efforts—that can be deployed by public entities, social media platforms, and civil society institutions. Given First Amendment constraints, however, these measures are necessarily modest in their scope and cannot serve as full-blown solutions to the challenges of digital exceptionalism.

I. A WELL-FUNCTIONING SPEECH ENVIRONMENT AND ITS CHALLENGES

This Part sets out a normative account of a well-functioning political speech environment. It also argues for "digital exceptionalism"—the idea that the challenges faced by the digital public sphere are unique and may therefore require a tailored regulatory response. To ground the discussion, I begin with a brief overview of First Amendment values and doctrine as they apply to speakers and listeners.

A. SPEAKERS, LISTENERS, AND THE FIRST AMENDMENT

In his philosophical examination of the freedom of expression, T.M. Scanlon identifies three groups of interests: those of participants, audiences, and bystanders.[13] Burt Neuborne's Madisonian reading of the First Amendment likewise identifies a range of participants in a "neighborhood" of expressive freedom, including, most prominently, speakers and listeners.[14] For Neuborne, listeners ought to be treated as equal partners,

13. *See* T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 520 (1979).

14. *See* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 100 (2015).

who, like speakers, require expressive freedom to develop their own identities and preferences.[15] Speakers and listeners thus go hand in hand: the "free flow of ideas and information generated by autonomous speakers" is "essential to the ability of hearers to make the informed decisions on which the efficient functioning of choice-dependent institutions like democracy, markets, and scientific inquiry depend."[16]

In First Amendment doctrine, however, listener interests play a limited role; indeed, such interests are typically protected to the extent that they correspond to speaker interests.[17] To be sure, the underlying logic of the categorical approach to First Amendment jurisprudence—under which the Supreme Court has created tiers of speech based on the value of particular kinds of speech to public discourse—is implicitly oriented to the perspective of listeners.[18] For instance, political speech is afforded maximum protection because it provides indispensable information for citizens to fulfill their democratic roles, while libel is accorded no value because defamatory statements do not enhance, and indeed detract from, reasoned discourse.

The Supreme Court has also recognized that under the First Amendment, listeners may enjoy a "right to know" or an "independent right to receive information."[19] Indeed, the right of listeners to receive a free flow of information has served as the basis of the First Amendment's protection of commercial and corporate speech.[20] However, in the face of the Court's increasingly deregulatory posture toward commercial speech, critics have argued that rather than protecting listener interests, the Court has subordinated them to corporate speech rights.[21] Although speaker interests usually trump listener interests in the event of a conflict, there are some circumstances outside of public discourse in which listener interests can prevail. As Helen Norton explains, when "listeners have less information or power than speakers," the law can prohibit speakers from providing false information or can require truthful disclosures with respect to, for example, consumer products or professional speech.[22] The Supreme Court's

15. *See id.*
16. *Id.* at 101.
17. *See* Derek E. Bambauer, *The MacGuffin and the Net: Taking Internet Listeners Seriously*, 90 U. COLO. L. REV. 475, 477 (2019).
18. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 476–77 (1996).
19. NEUBORNE, *supra* note 14, at 103–04; Lamont v. Postmaster Gen. of U.S., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972).
20. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976).
21. *See* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1415 (2017).
22. *See* Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 441–42, 453 (2019).

deregulatory turn on compelled professional speech,[23] however, has created uncertainty about the status of a broad range of consumer-protective regulations.[24]

For both speakers and listeners, there are three principal values that animate the First Amendment: democratic self-government; autonomy or self-fulfillment; and truth seeking through the marketplace of ideas.[25] An additional value proposed by Vincent Blasi—checking the abuse of power—also seems particularly relevant for democratic self-government.[26] On this view, the freedoms of speech, assembly, and a free press provide a crucial countervailing force for checking the abuse of power by public officials.

However, there is considerable debate as to which value is predominant. According to Alexander Meiklejohn's influential theory, the First Amendment is exclusively geared to producing a democratic system of government; hence, "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[27] Owen Fiss likewise argues that the "purpose of free speech is not individual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live."[28] On this view, individual autonomy is simply a means to achieve collective self-determination.[29]

For Robert Post, however, the value of autonomy is inseparable from democratic self-government because democracy depends on the active participation of citizens.[30] Public discourse and free public debate—and, by extension, the autonomy of speakers—must be protected in service of democratic government.[31] Some scholars place primacy on individual autonomy or self-realization apart from self-government,[32] on the basis that, following Kant, all individuals possess the right to be treated as ends in themselves.[33] Finally, the value of truth seeking emphasizes the First

23. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 755 (2018).

24. *See* Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881, 912–13 (2022).

25. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963).

26. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 527 (1977).

27. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

28. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–10 (1986).

29. *See id.*

30. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1120–21 (1993).

31. *See* Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1526–27 (1997).

32. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

33. *See* Charles Fried, *Speech in the Welfare State—The New First Amendment Jurisprudence: A*

Amendment's role in protecting, and indeed maximizing, the free flow of information, in order for society to better pursue the truth. As stated by Justice Holmes, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[34]

This Article takes the view, as expressed by Cass Sunstein, that the First Amendment is "fundamentally aimed at protecting democratic self-government."[35] The other values—autonomy, truth seeking, and checking the abuse of power—will be treated as serving the democracy value.

A related, but conceptually distinct, question concerns the role of the democratic state: should the government regulate speech in order to promote the democracy value? There are two competing constellations of ideas, which correspond roughly with the libertarian and egalitarian approaches to speech. The libertarian approach asserts that state regulation of speech is particularly dangerous for democracy. Speech itself is a form of power: it enables citizens to hold leaders to account and check the abuse of official power. Given state incentives to stifle dissent and criticism, content-based regulations of speech are prohibited save for a few tightly circumscribed and justified exceptions for particularly disfavored speech such as obscenity or libel.[36] The overall posture is one of distrust of government,[37] in keeping with what Vincent Blasi has termed the "pathological perspective," whereby the First Amendment is "targeted for the worst of times."[38] Under the libertarian approach, expressive liberties are best served by minimizing state regulation, thereby enhancing the free flow of information in the marketplace of ideas. In general, this constellation of ideas is associated with a negative rights approach to the First Amendment, under which the role of the state is to refrain from interfering with citizens' freedom of speech.

The second, and opposing, constellation of ideas holds that the primary value of a system of free expression is to enable citizens to "to arrive at truth and make wise decisions, especially about matters of public import."[39] Under the egalitarian approach, listeners have an interest in being exposed to a wide

Threat to Liberty, 59 U. CHI. L. REV. 225, 233 (1992).

34. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

35. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263 (1992); *see also* Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1762–63 (1995) [hereinafter Sunstein, *Cyberspace*].

36. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 1–51 (1st Free Press Paperback ed. 1995).

37. *See* Helen Norton, *Distrust, Negative First Amendment Theory, and the Regulation of Lies*, 22-07 KNIGHT FIRST AMEND. INST. 3 (Oct. 19, 2022), https://knightcolumbia.org/content/distrust-negative-first-amendment-theory-and-the-regulation-of-lies [https://perma.cc/8F46-R2LH].

38. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

39. Kagan, *supra* note 18, at 424.

range of competing views.[40] However, due to certain factors, such as, for example, the cost of political advertising in the campaign finance context, the marketplace of ideas may be skewed toward elite viewpoints. Listeners would thus be deprived of hearing the full range of ideas and political preferences necessary to reach an informed decision. To ensure that listeners are fully informed, the government may have to impose restrictions in order for all points of view to have a roughly equal opportunity of being heard.[41] As described in more detail below,[42] this constellation of ideas is associated with a positive rights approach to the First Amendment, under which the government may have to take affirmative steps to protect individuals' expressive freedoms.

B. A NORMATIVE ACCOUNT OF A WELL-FUNCTIONING SPEECH ENVIRONMENT

As Justice Kagan observed, a "well-functioning sphere of expression" is "the whole project of the First Amendment."[43] But what does it mean to have such a sphere of expression?[44] This Article argues, as a normative matter, for the promotion of a well-functioning political speech environment for speakers and listeners, one that is free of domination and coercion, and in which acute asymmetries in political and economic power do not distort the capacity of individuals to engage in various self-governing activities, including the following:

(1) Informed Voting: individuals form opinions on public matters based on reliable information in both digital and non-digital mediums, with access to a wide array of competing viewpoints, thereby engaging in informed voting;

(2) Discussion and Deliberation: individuals engage in discussion and deliberation with other citizens whether online or in person as an integral and ongoing democratic practice necessary to self-governing activities, including but not limited to voting; and

(3) Meaningful Participation: individuals participate meaningfully in the democratic process through a variety of avenues, including voting,

40. *See id.* at 423–25.
41. *See id.*
42. *See infra* text accompanying notes 94–103.
43. Moody v. NetChoice LLC, 603 U.S. 707, 732–33 (2024).
44. For an alternative account of a well-functioning sphere of expression, see Joshua Cohen and Archon Fung, *Democracy and the Digital Public Sphere*, *in* DIGITAL TECHNOLOGY AND DEMOCRATIC THEORY (Lucy Bernholz et al. eds., 2021). Cohen and Fung offer an account of the informal public sphere (as opposed to formal political processes of elections and decision-making) which has five elements: rights to expression and association, fair opportunities to participate, access to information from reliable sources, a diversity of views, and the capacity for joint action arising from discussion. *Id.* at 29–30.

deliberating, associating with others whether online or in-person, organizing events, consuming or producing political content online, petitioning, and the like, thereby ensuring governmental responsiveness and accountability.

The idea is that democratic citizens should be able to participate in the democratic process with full knowledge and equal freedom.

To foster a healthy expressive realm for these self-governing activities, I further claim that the speech environment ought to protect individuals' liberty, equality, epistemic, and nondomination interests. The protection of these interests, I suggest, is required to ensure that public discourse is organized and conducted in a manner that serves the value of democratic self-government. To be sure, there will inevitably be conflicts among these interests that would require certain choices and tradeoffs to be made.[45] These interests may also overlap in various ways such that a given outcome could be described as involving, say, both equality and epistemic considerations. While it is beyond the scope of this Article to provide a full account of these interests and their possible conflicts, a few preliminary observations follow.

As described above with respect to the libertarian approach, individuals' liberty interests are best served by the robust protection of their expressive and associational freedoms under the First Amendment.[46] Speakers ought to be able to freely express their political opinions and policy preferences, while listeners' right to know should likewise be shielded from government censorship. In addition to their liberty interests, citizens have equality interests in being exposed to speech that reflects a wide range of competing views, ideas, and political preferences. As described above with respect to the egalitarian approach, the government may have to take affirmative steps to protect listeners' equality interests in hearing a wide range of viewpoints because the marketplace of ideas may be skewed in favor of elite viewpoints.[47] The speech environment should also protect citizens' epistemic interests in receiving accurate and reliable information, which is required for reaching good judgments. As Melissa Schwartzberg observes, these epistemic interests ought to also be understood to encompass the kinds of institutions and instruments needed to develop, inform, and assess such judgments.[48] To be sure, epistemic interests may overlap with

45. For an argument about how the conflicting values of equality and liberty should be instantiated in law, see Yasmin Dawood, *Democracy and the Freedom of Speech: Rethinking the Conflict Between Liberty and Equality*, 26 CANADIAN J.L. & JURIS. 293 (2013).

46. *See supra* text accompanying notes 36–38.

47. *See supra* text accompanying notes 39–42. For an argument about how the conflicting values of equality and liberty should be instantiated in law, see Yasmin Dawood, *Democracy and the Freedom of Speech: Rethinking the Conflict Between Liberty and Equality*, 26 CANADIAN J.L. & JURIS. 293 (2013).

48. *See* Melissa Schwartzberg, *Epistemic Democracy and Its Challenges*, 18 ANN. REV. POL. SCI. 187, 201 (2015).

equality intersts to the extent that good judgments depend upon an exposure to a wide range of viewpoints.

Finally, a healthy expressive environment should also protect democratic actors from domination or coercion. As Philip Pettit argues in his influential account of republican freedom, an individual has dominating power over another person to the extent that they have the capacity to interfere on an arbitrary basis in certain choices that the other is in a position to make.[49] An act of interference is arbitrary to the extent that the dominating agent is not forced to track the avowable or relevant interests of the victim but instead can interfere as their will or judgment dictates.[50] Individuals' nondomination interests broadly capture the idea that speakers and listeners ought to be protected from the capacity of powerful agents, whether public or private, to interfere arbitrarily in their choices.[51]

While these four interests—liberty, equality, epistemic, and nondomination—apply to all three self-governing activities, they take different forms depending on the context. In addition, the self-governing activities overlap in various ways: meaningful participation may require informed discussion, for example. The discussion below provides additional details for each self-governing activity.

1. Informed Voting

Freedom of speech is a precondition for informed voting. As noted by the Supreme Court, the First Amendment has the objective of "securing . . . an informed and educated public opinion with respect to a matter which is of public concern."[52] Voters learn about the key issues at stake in the election, the differences among political candidates, and the main features of the platforms of various political parties. As Meiklejohn observes, the well-being of the political community depends on the wisdom of voters to make good decisions.[53] For voters to make wise decisions, they must be aware, to the extent possible, of all the relevant facts, issues, considerations, and alternatives that bear upon their collective life.

Thus, a well-functioning political speech environment provides voters with epistemically reliable information on matters of public import from a wide range of competing sources and perspectives. For this to take place, speakers' liberty interests must be fostered, and listeners' equality,

49. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 52 (1997).
50. *See id.* at 55.
51. For an elaboration of these ideas in the democratic context, see Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411 (2008).
52. Thornhill v. Alabama, 310 U.S. 88, 104 (1940).
53. *See* MEIKLEJOHN, *supra* note 27, at 24–25.

epistemic, and nondomination interests must be satisfied. Under these conditions, listeners as voters have access to the information they need to understand matters of public concern.

2. Discussion and Deliberation

Discussion and deliberation are crucial activities for those individuals we formally deem to be speakers. However, listeners are also, at times, speakers. Listeners do not develop their views in a vacuum: the activities of discussion and deliberation require democratic listeners to engage with others as they evaluate matters of public importance. The idea here is one of active listening, which involves not just the passive receipt of information but requires discussion and debate. Informal conversations among listeners enable them to consider issues of public policy and to make up their minds about what is best for their common lives—activities that lie at the heart of self-government. The First Amendment is principally concerned with the "authority of the hearers to meet together, *to discuss*, and to hear discussed by speakers of their own choice, whatever they may deem worthy of their consideration."[54]

As such, the normative account offered here departs in significant ways from Habermas's formal account of ideal deliberation. Habermas's theory of the "ideal speech situation" envisions a reasoned discussion among free and equal participants who aim for consensus by being persuaded by the force of the better argument.[55] Formal accounts of deliberative democracy, while differing in various respects, all tend to share a commitment to reaching collective decisions through public reasons, that is, reasons that are generally persuasive to all the participants in the deliberation.

However, in my view, this ideal form of deliberation is not mandatory in order to achieve a well-functioning sphere of expression. Instead, as John Dryzek observes, deliberation can include informal discussion, humor, emotion, and storytelling.[56] Rather than requiring consensus, we should instead focus on the values of mutual respect, reciprocity, cooperation, and compromise.[57] That being said, a basic predicate of a well-functioning

54. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 119 (1966) (emphasis added).

55. *See* Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, *in* MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 89 (Christian Lenhardt & Shierry Weber Nicholsen, trans., 1990).

56. *See* JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS 1 (2000).

57. *See* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 346 (1996); JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY 238 (2000); Jane Mansbridge, James Bohman, Simone Chambers, David Estlund, Andrea Føllesdal, Archon Fung, Cristina Lafont, Bernard Manin & José luis Martí, *The Place of Self-Interest and the Role of Power in Deliberative*

speech environment is that speakers and listeners can engage in discussion, debate, and deliberation free of coercion, harassment, and deception.

To be sure, deliberation has come under criticism for being exclusionary because it tends to favor advantaged citizens.[58] Critics have also charged that deliberation is simply unfeasible given the complexity of democratic institutions[59] or is difficult to realize in practice given the realities of electoral campaigns.[60] In addition, deliberation may accentuate group polarization.[61] These criticisms underscore the need for a more capacious and inclusive understanding of deliberation.

3. Meaningful Participation and Governmental Responsiveness

A well-functioning political speech environment must also facilitate meaningful participation by listeners and speakers. Participation can take many forms, including voting and deliberating, but can also include such activities as joining a political party, attending a town hall or a candidate rally, volunteering for a political cause, penning an op-ed, marching and protesting, organizing a petition, or running for office. Meaningful participation has online analogues, such as reading or posting messages on social media platforms, consuming or developing political content, reading or writing blogs, listening to podcasts, or running websites. Citizens engage in meaningful participation when they criticize public officials or government policies. Or when they join forces with like-minded others and vote for change. Or when they organize to influence public policy and legislation. All of these activities depend upon a robust sphere of expressive freedom.

Meaningful participation could also be understood as requiring a relatively equal opportunity to influence the outcome of an election. On this view, listeners as voters would have a strong interest in ensuring a somewhat level electoral playing field.[62] Meaningful citizen participation is also crucial for ensuring governmental responsiveness and accountability. By communicating and associating with one another, citizens can join together to vote for new political leaders. The threat of being removed from office in

Democracy, 18 J. POL. PHIL. 64, 94 (2010).

58. *See* Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 349 (1997).

59. *See* Ian Shapiro, *Enough of Deliberation: Politics Is About Interests and Power*, *in* DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 28, 31 (Stephen Macedo ed., 1999).

60. *See* JAMES A. GARDNER, WHAT ARE CAMPAIGNS FOR? THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS 1, 86, 92–93, 115 (2009).

61. *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 111–14 (2003).

62. *See* Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 906 (2017).

the next election is one of the most effective mechanisms for ensuring governmental accountability. A well-functioning speech environment is thus indispensable to ensure that state power is responsive to the interests of citizens.

C. DIGITAL EXCEPTIONALISM

Does the digital public sphere provide the conditions necessary to foster a well-functioning political speech environment? In what follows, I identify the central features of what I shall call "digital exceptionalism," the idea that the digital public sphere has distinctive features that not only distinguish it from the non-digital world but that also pose unique challenges for the promotion of a healthy expressive realm.

A principal challenge is that social media platforms wield vast "asymmetries of knowledge and power" over their users.[63] The platforms act as private governors of online speech—enacting, implementing, and enforcing the rules that govern online expression.[64] In addition, their power is remarkably concentrated: the digital public sphere is controlled in the main by three companies—Apple, Google, and Meta—that serve as the gatekeepers to online public discourse.[65] To be sure, the media landscape in the pre-digital age was likewise highly concentrated: three networks shaped the news on television and a small handful of newspapers comprised the national market.[66] This concentration of pre-digital media power is likewise problematic for it undoubtedly reduced the plurality of differing points of view. However, certain mitigating features of the pre-digital public sphere are either absent, or greatly attenuated, in the digital world, and conversely, certain features unique to the digital world amplify the dangers posed by these power asymmetries. I briefly canvass a few of the relevant distinctions, noting, first, that these observations capture general trends and, second, that there are, of course, notable exceptions to each of these distinctions.

The first difference is that the pre-digital news media exerted a "strong gatekeeper" approach as compared to the "weak gatekeeper" approach of social media platforms.[67] The traditional news media is bound by journalistic standards of objectivity and factual reliability. By contrast, social media

63. *See* Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1162 (2018).

64. *See id.* at 1197; Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1601–03 (2018).

65. *See* Nikolas Guggenberger, *Moderating Monopolies*, 38 BERKELEY TECH. L.J. 119, 121 (2023).

66. *See* Henry Farrell & Melissa Schwartzberg, *The Democratic Consequences of the New Public Sphere*, *in* DIGITAL TECHNOLOGY AND DEMOCRATIC THEORY 198 (Lucy Bernholz et al. eds., 2021).

67. *See id.* at 192.

platforms impose far fewer gatekeeping controls: while they filter certain prohibited topics such as graphic violence and pornography and rank or label other sorts of disfavored messages, there is far less ex ante quality control. Indeed, as of this writing, Meta has announced that it will eliminate fact checkers in the U.S. and rely instead on a "community notes" system similar to X (formerly Twitter).[68]

Second, as a result of this weak gatekeeping, there is said to be higher levels of misinformation on social media platforms. For example, Elon Musk's false or misleading claims about elections accrued nearly 1.2 billion views on the social media platform X.[69] Recent empirical evidence suggests, however, that the degree of exposure to misinformation tends to be overstated with respect to the vast majority of users, at least in North America and Europe.[70] Jurisdictions that rely heavily on social media, however, may have different outcomes. For instance, digital misinformation has proved to be a serious challenge in Brazil, with 90% of Bolsonaro supporters believing at least one piece of fake news in 2018.[71] In addition, deepfake technology may pose significant challenges for public discourse in the future.[72] This is particularly true as the capacity to generate deepfakes using generative AI will soon outstrip both the platforms' and users' ability to detect them.[73] A counterpoint, however, is that AI was used extensively, reportedly in a largely successful manner, in India's recent national election, wherein politicians connected with voters by including deepfake impersonations of candidates and deceased politicians in campaign materials.[74]

68. *See Our Approach to Political Content*, META (Jan. 7, 2025), https://transparency.meta.com/features/approach-to-political-content [https://web.archive.org/web/20250207231253/https://transparency.meta.com/features/approach-to-political-content]. Research suggests, however, that community-based fact checking systems garner greater trust among users than professional fact-checking, in part because community notes provide additional information and context. *See* Chiara Patricia Drolsbach, Kirill Solovev & Nicholas Pröllochs, *Community Notes Increase Trust in Fact-Checking in Social Media*, 3 PNAS NEXUS 1, 2, 9 (2024).

69. *See* David Ingram, *Elon Musk's Misleading Election Claims Have Accrued 1.2 Billion Views on X, New Analysis Says*, NBC NEWS (Aug. 8, 2024), https://www.nbcnews.com/tech/misinformation/elon-musk-misleading-election-claims-x-views-report-rcna165599 [https://perma.cc/7Q79-CYUH].

70. For an analysis of the empirical evidence, see Aziz Z. Huq, *Islands of Algorithmic Integrity: Imagining a Democratic Digital Public Sphere*, 98 S. CAL. L. REV. 1287, 1297–98 (2025).

71. *See* Christopher Harden, *Brazil Fell for Fake News: What to Do About It Now?*, WILSON CTR. (Feb. 21, 2019), https://www.wilsoncenter.org/blog-post/brazil-fell-for-fake-news-what-to-do-about-it-now [https://perma.cc/7Z6M-4GSH].

72. *See* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1786 (2019).

73. *See* COMMC'NS. SEC. ESTABLISHMENT, CYBER THREATS TO CANADA'S DEMOCRATIC PROCESS 18 (2023).

74. *See* Vandinika Shukla & Bruce Schneier, *Indian Election Was Awash in Deepfakes—But AI Was a Net Positive for Democracy*, THE CONVERSATION (June 10, 2024),

A third difference is that social media platforms create a loss of epistemic trust. The decline in trust, rather than truth, may ultimately prove to be more damaging to the public sphere. Experimental evidence suggests that while exposure to deepfakes did not mislead participants, it left them feeling uncertain about the truthfulness of content.[75] This uncertainty, in turn, led to lower levels of trust with respect to news on social media. Researchers surmise that an increase in political deepfakes "will likely damage online civic culture by contributing to a climate of indeterminacy about truth and falsity that, in turn, diminishes trust in online news."[76] Epistemic distrust "can severely undermine a sense of democratic legitimacy among large parts of society."[77] The decay of trust also benefits leaders with authoritarian impulses.[78] By contrast, in the pre-digital world, misinformation in public discourse was counteracted by civil society organizations, in particular the traditional news media, which maintained common standards for accuracy and objectivity, thereby instilling widespread trust in epistemic authorities.[79]

Fourth, social media platforms generate "epistemic fragmentation"—the idea that citizens no longer share a common set of facts and understandings about political life.[80] Social media platforms tailor content for each user, leading to what Sunstein has dubbed "the Daily Me."[81] Platforms also enable political campaigns to engage in microtargeting so that political advertising messages vary depending on the race and gender of the recipient. By contrast, citizens under the traditional news media paradigm were more likely to engage with the same news stories.[82] This fragmentation has compounded challenges to epistemic trust because "citizens no longer trust the same sources of information, and the reliability of the sources they do trust varies substantially."[83]

A fifth difference is that social media platforms rely on behind-the-scenes algorithms to do the vast majority of content filtering, in an effort to

https://theconversation.com/indian-election-was-awash-in-deepfakes-but-ai-was-a-net-positive-for-democracy-231795 [https://perma.cc/JT4C-3HWN].

75. *See* Cristian Vaccari & Andrew Chadwick, *Deepfakes and Disinformation: Exploring the Impact of Synthetic Political Video on Deception, Uncertainty, and Trust in News*, 6 SOC. MEDIA + SOC'Y 1, 2 (2020).

76. *Id.*

77. *See* Gilad Abiri & Johannes Buchheim, *Beyond True and False: Fake News and the Digital Epistemic Divide*, 29 MICH. TECH. L. REV. 59, 65 (2022).

78. *See* Chesney & Citron, *supra* note 72, at 1786.

79. *See* Abiri & Buchheim, *supra* note 77, at 65–66.

80. *See id.* at 66–67.

81. SUNSTEIN, *supra* note 7, at 2.

82. *See* Abiri & Buchheim, *supra* note 77, at 66–67.

83. Farrell & Schwartzberg, *supra* note 66, at 192.

provide listeners with the kind of filtered experience that each user is seeking.[84] Because the predominant characteristic of the expressive environment online is the scarcity of listener attention, an important "means of controlling speech is targeting the bottleneck of listener attention, instead of speech itself."[85] As a result of this algorithmic filtering, Erin Miller argues that media companies could exert "skewing power" over certain "consumers' information pools in a way that prevents them from forming epistemically justified beliefs."[86]

Finally, social media platforms "were not created principally to serve democratic values and do not have as their lodestar the fostering of a well-informed and civically minded electorate."[87] Instead, the platforms engage in "surveillance capitalism," trading users' behavioral data for vast profits.[88] This behavioral advertising business model depends on maximizing the amount of time users engage with social media. A variety of deleterious phenomena are thus good for the bottom line, including addictive behavior, sensationalist and divisive content, and weakened privacy norms.[89] Unlike the traditional news media, internet platforms "are not built to create a digital public sphere of common concern."[90] In addition, the platforms' system of private governance threatens citizens' opportunities to engage meaningfully in democratic participation, particularly in light of their lack of accountability to users.[91]

These features of the digital public sphere, taken together, raise serious questions about whether the online speech market provides the conditions necessary to sustain a well-functioning political speech environment. As of this writing, the asymmetry of power between platforms and users has arguably been heightened by the intertwining of governmental and private tech interests. Because social media platforms exert asymmetrical power on users in a way that does not track the public interest, this gives rise to the apprehension that listeners' interests in nondomination are not satisfied. By

84. *See* Jane Bambauer, James Rollins & Vincent Yesue, *Platforms: The First Amendment Misfits*, 97 IND. L.J. 1047, 1068 (2022); James Grimmelmann, *Listeners' Choices*, 90 U. COLO. L. REV. 365, 378–79 (2019).

85. *See* Tim Wu, *Is the First Amendment Obsolete?* KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Sep. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete [https://perma.cc/Y5DM-BJUG]; TIM WU, THE ATTENTION MERCHANTS (2016).

86. Erin Miller, *Media Power Through Epistemic Funnels*, 20 GEO. J.L. & PUB. POL'Y 873, 901 (2022).

87. Persily, *supra* note 7, at 74.

88. *See* ZUBOFF, *supra* note 10, at 16.

89. *See* Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 505 (2019).

90. Abiri & Buchheim, *supra* note 77, at 66–67.

91. *See* Klonick, *supra* note 64, at 1603.

contrast, selection intermediaries that act in public-regarding ways, such as a well-run national broadcasting corporation, do not pose the same degree of risk. To be sure, traditional media could also exert dominating power on their listeners to the extent they are not forced to track listeners' avowable interests in a well-functioning public sphere. What matters is whether the selection intermediary is upholding public-regarding standards such as the provision of accurate information and a diversity of competing viewpoints.

Digital exceptionalism does not mean that the government *must* intervene in a way that differs from its regulation of traditional news media. Instead, the distinctive features of the digital public sphere suggest that a specialized and tailored set of regulatory responses *may* be warranted to foster a well-functioning speech environment. Jack Balkin's distinction between the "old-school" speech regulation of the predigital world and the "new school" speech regulation of digital intermediaries seems applicable.[92] Finally, the concerns raised here do not amount to a blanket condemnation of social media platforms. These platforms provide a range of goods such as entertainment, commerce, convenience, and connection that are rightly valued by consumers.

II. LAW AND THE SPEECH ENVIRONMENT

To what extent is the normative account outlined in Part I reflected in First Amendment jurisprudence? Or to put the question another way: does the First Amendment offer any conceptual resources that would enable the government to respond to the challenges posed by digital exceptionalism? While it is beyond the scope of this Article to provide a comprehensive answer to these questions, this Part begins by briefly describing the positive conception of the First Amendment, under which the state's role is to affirmatively protect the democratic public sphere from powerful private actors. Part II then offers a snapshot view of the current law of public discourse,[93] focusing in particular on campaign finance regulation and the *Moody* decision to show that the Supreme Court has for the most part abandoned the positive conception and, as a result, has significantly restricted the range of allowable regulatory responses to the deficits of digital exceptionalism.

92. *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2306 (2014).

93. By "public discourse," I mean speech that is relevant to the formation of public opinion and that deals with matters of public concern. *See* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493 (2011). For an alternative interpretation of this concept, see Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 488 (2011) (arguing that the "boundaries of public discourse are inherently normative").

A. THE FIRST AMENDMENT AS A POSITIVE RIGHT

A positive conception of the First Amendment, as mentioned above, holds that the government may have to take affirmative steps to protect expressive freedom from powerful private entities.[94] Owen Fiss asserts, for instance, that "the impact that private aggregations of power have upon our freedom" means that "sometimes the state is needed simply to counteract these forces."[95] The state has a duty to "preserve the integrity of public debate" in order to "safeguard the conditions for true and free collective self-determination."[96] In keeping with this duty, the state may have to intervene to protect the "robustness of public debate in circumstances where powers outside the state are stifling speech."[97] Sunstein argues for a "New Deal for speech" under which the supposed democratic interferences with the autonomy of private actors are not abridgements of speech; indeed, the autonomy of private actors is itself a product of law and may amount to an abridgment.[98] As such, "what seems to be government regulation of speech might, in some circumstances, promote free speech, and should not be treated as an abridgment at all."[99]

As Genevieve Lakier observes, the Supreme Court understood the freedom of speech as having a positive dimension during the New Deal and Warren Court eras.[100] That is, the First Amendment did not only provide individuals with personal expressive freedom; it also provided them with the means for democratic self-government.[101] For example, in *Red Lion Broadcasting Co. v. FCC*, the Supreme Court upheld, against a First Amendment challenge, the FCC's fairness doctrine, which required broadcasters to provide adequate and fair coverage to public issues in a way that accurately captured competing viewpoints.[102] According to the Court, the fairness doctrine furthered the "First Amendment goal of producing an informed public capable of conducting its own affairs."[103] However, in the ensuing years, the Court has largely abandoned the positive conception of

94. *See supra* text accompanying notes 39–42.
95. OWEN M. FISS, THE IRONY OF FREE SPEECH 2–3 (1996).
96. Fiss, *supra* note 28, at 1416.
97. FISS, *supra* note 95, at 4.
98. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 202 (1993).
99. *Id.* at 204.
100. *See* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1247 (2020).
101. *See id.* at 1333.
102. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969). The FCC repealed the fairness doctrine in 1987.
103. *Id.* at 392.

the First Amendment,[104] including in the campaign finance context, as discussed below.

B. PUBLIC DISCOURSE AND CAMPAIGN FINANCE REGULATION

The Supreme Court has interpreted the First Amendment as providing the highest possible protection to public discourse due to its centrality to self-government. One of the main ways in which public discourse—specifically electoral speech—is regulated is through campaign finance law.[105] In recent years, the Supreme Court has taken a deregulatory posture to campaign finance law, striking down significant parts of the legal infrastructure governing money in politics. This skepticism was apparent in an early landmark case, *Buckley v. Valeo*,[106] in which the Court struck down limits on campaign expenditures because they were not justified by the government's interest in preventing the actuality and appearance of corruption. In *Buckley*, the Court explicitly rejected the egalitarian—or equalization—rationale, stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[107] Hence, the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" did not justify expenditure limits.[108] The *Buckley* court found, however, that limits on campaign contributions were justified by the government's interest in preventing corruption and its appearance. The provision of large contributions "to secure political *quid pro quos* from current and potential office holders" undermined the integrity of representative democracy.[109]

In a subsequent decision, *Austin v. Michigan State Chamber of Commerce*,[110] the Supreme Court broadened the definition of corruption beyond *quid pro quo* corruption to encompass the concept of antidistortion which arose from the "corrosive and distorting effects of immense

104. *But see* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (upholding against a First Amendment challenge must-carry rules requiring cable television networks to allocate some channels to local broadcast stations).

105. The discussion that follows is drawn from Yasmin Dawood, *The Theoretical Foundations of Campaign Finance Regulation*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 817–42 (Eugene D. Mazo ed., 2024).

106. Buckley v. Valeo, 424 U.S. 1 (1976).

107. *Id.* at 48–49.

108. *See id.* at 49.

109. *See id.* at 26–27.

110. Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010); *see also* FEC v. Mass. Citizens for Life, 479 U.S. 238, 257–58 (1986) (observing that the "corrosive influence of concentrated corporate wealth" may make "a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas").

aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[111] The antidistortion concept was ultimately based on an equality rationale.[112] Concentrated corporate wealth gives certain voices far greater political influence than others due to the fact that speech is expensive.[113] As a result of these inequities in speech capacities, listeners do not have access to the full range of views, which may affect their voting patterns and, hence, skew electoral outcomes. In *McConnell v. FEC*,[114] the Court held that corruption also encompassed the "undue influence on an officeholder's judgment, and the appearance of such influence."[115] Undue influence arises when political parties sell special access to federal candidates and officeholders, thereby creating the perception that money buys influence. The undue influence standard is concerned with the skew in legislative, rather than electoral, outcomes.

The Supreme Court's decision in *Citizens United v. FEC*,[116] however, marked a turning point, implicating listener interests in at least four ways. First, the Supreme Court rejected *Austin*'s antidistortion rationale on the basis that it was actually an equalization rationale in violation of *Buckley*'s central tenet that the First Amendment prevents the government from restricting the speech of some in order to enhance the voice of others. The Court held that preventing *quid pro quo* corruption or the appearance thereof was the only governmental interest strong enough to overcome First Amendment concerns. Listener interests in the maintenance of a relatively level electoral playing field were undercut by this decision. In other cases, the Court has rejected equality-based arguments on the grounds that leveling the electoral playing field is impermissible under the First Amendment.[117]

Second, the Court held in *Citizens United* that corporations were henceforth allowed to spend unlimited sums from their general treasury

111. *Austin*, 494 U.S. at 660.

112. *See, e.g.*, Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 229 (1989); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 679 (1997).

113. *See* David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 266 (1991).

114. McConnell v. FEC, 540 U.S. 93 (2003) (quoting FEC v. Colo. Republican. Fed. Comm., 533 U.S. 431, 441 (2001)), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

115. *Id.* at 95.

116. Citizens United v. FEC, 558 U.S. 310 (2010).

117. Davis v. FEC, 554 U.S. 724 (2008) (striking down on First Amendment grounds a federal statute that raised contribution limits for non-self-financed candidates who were running against wealthy self-financed opponents); Ariz. Free Enter. Club's Freedom Club PAC v Bennett, 564 U.S. 721 (2011) (striking down on First Amendment grounds a state law that provided matching funds to publicly financed candidates in order to level the playing field by offsetting high levels of spending by privately funded opponents and independent committees).

funds as independent expenditures. According to the Court, independent expenditures do not give rise to the actuality or appearance of *quid pro quo* corruption. This reasoning gave rise to the emergence of Super PACs. In a subsequent case, *SpeechNow.org v. FEC*,[118] a lower court struck down contribution limits on PACs that engaged exclusively in independent spending—entities that are now known as Super PACs. Super PACs can accept unlimited contributions from individuals, corporations, and labor unions to fund independent ads supporting or opposing federal candidates. Listener interests are arguably undermined by the phenomenon of Super PACs: these entities have changed the political landscape by flooding huge sums of money into elections.[119] Not only is coordination with candidates a reality,[120] but Super PACs lack accountability and transparency relative to political parties and candidates, thereby further decreasing the influence of individual listeners on the democratic process.

Some may argue, however, that the increases in corporate advertising, and hence in available information, are beneficial to listeners. Indeed, the Court majority in *Citizens United* took this position, stating that 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."[121] The Court also asserted that "it 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."[122]

Third, *Citizens United* and the deregulatory turn it ushered in, has broader implications for democracy. Money skews legislative priorities because it provides legislative access to large donors and lobbyists.[123] While access does not guarantee legislative outcomes, it is required to exert political influence. As such, officeholders are disproportionately responsive to the wishes of large donors than to other constituents.[124] Empirical studies have shown, for instance, that elected representatives are more responsive to the preferences of the affluent than to the preferences of low-income and

118. SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied sub nom* Keating v. FEC, 562 U.S. 1003 (2010).

119. *See* Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902 (2013).

120. *See* Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012). For a contrary view, see Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 635 (2013).

121. *Citizens United*, 558 U.S. at 339 (emphasis added).

122. *Id.* at 341.

123. *See* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 16 (2011); Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1055 (2010) (arguing that "electoral systems should render elected bodies responsive to the interests and concerns of the normative electorate, i.e., the class of persons entitled to vote").

124. *See* NICHOLAS O. STEPHANOPOULOS, ALIGNING ELECTION LAW 240–46 (2024).

middle-income individuals.[125] The emphasis on the donor class disproportionately impacts the participation and representation of people of color and ordinary citizens.[126] Empirical research has demonstrated that donors "are not only wealthy, they are almost all white."[127] This racial gap has an impact on representation by affecting the electoral candidate pool and the behavior of legislators in office.[128]

Finally, listener interests were at issue in the Court's holding that disclosure and disclaimer requirements survived exacting scrutiny. The Court found that disclosure was "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending."[129] The transparency resulting from disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[130] Abby Wood argues that disclosure provides multiple informational benefits for voters.[131] By contrast, critics argue that disclosure rules violate privacy and raise the risk of retaliation. In a recent decision, *Americans for Prosperity Foundation v. Bonta*,[132] however, the Supreme Court has made it easier for disclosure laws to be found unconstitutional.[133]

C. PUBLIC DISCOURSE AND SOCIAL MEDIA PLATFORMS

In the campaign finance realm, listeners' liberty interests in unrestricted access to the commercial speech market are protected. However, their equality interests in a relatively level electoral playing field are significantly undermined. A similar pattern is evident in the emerging law of social media platform regulation. Listeners' liberty interests are largely protected on

125. *See, e.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2d ed. 2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012). It should be noted, however, that this does not speak directly to the impact of campaign money on legislative decision-making.

126. *See* Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004).

127. Abhay P. Aneja, Jacob M. Grumbach & Abby K. Wood, *Financial Inclusion in Politics*, 97 N.Y.U. L. REV. 566, 569 (2022).

128. *Id.* at 630.

129. Citizens United v. FEC, 558 U.S. 310, 368 (2010) (citing Buckley v. Valeo, 424 U.S. 1, 66 (1976)).

130. *Id.* at 371.

131. *See* Abby K. Wood, *Learning from Campaign Finance Information*, 70 EMORY L.J. 1091, 1102 (2021).

132. Ams. for Prosperity Found. v. Bonta, 594 U.S. 595 (2021).

133. Although *Bonta* is not a campaign finance case as it concerns disclosure by nonprofit organizations (and not candidates, parties, or PACs), it has clear implications for campaign finance disclosure laws. *See* Michael Kang, *The Post-Trump Rightward Lurch in Election Law*, 74 STAN. L. REV. ONLINE 55, 64–65 (2022); Abby K. Wood, *Disclosure*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 923, 924, 928–29 (Eugene D. Mazo ed., 2024).

social media platforms given the sheer volume of information available, but their equality interests in a level electoral playing field, an open deliberative sphere, and access to competing viewpoints appear to be compromised in the online world. As described in Part I.C above, listeners' epistemic and nondomination interests are likewise threatened as a result of the key features of digital exceptionalism.

In *Moody v. NetChoice, LLC*,[134] the Court considered the constitutionality of state laws from Florida and Texas that restricted the ability of social media platforms to engage in content moderation. The laws required internet platforms to carry speech that might otherwise be demoted or removed due to the platforms' content moderation policies.[135] The laws also required a platform to provide an individualized explanation to any user whose posts had been altered or removed.[136] The states' underlying concern was that the platforms were politically biased and were unfairly silencing the voices of conservative speakers.[137] NetChoice, an internet trade association, brought facial challenges to the laws. The U.S. Court of Appeals for the Eleventh Circuit upheld a preliminary injunction, finding that the Florida law likely violated the First Amendment.[138] However, the Court of Appeals for the Fifth Circuit reversed a preliminary injunction of the Texas law, partially on the basis that the platforms' content moderation activities did not amount to speech, and hence did not infringe the First Amendment.[139]

Writing for the Supreme Court in *Moody*, Justice Kagan vacated the lower court decisions and remanded the cases, on the grounds that there was an insufficient record to sustain a facial challenge.[140] While the Court was unanimous that NetChoice's facial challenge had failed, Justice Kagan, speaking for a six-member majority,[141] nonetheless proceeded to provide substantive guidance as to how the lower courts should conduct the facial analysis.

The Court majority's central proposition was that the laws in question infringed the First Amendment rights of large social media platforms (specifically with respect to Facebook's NewsFeed, YouTube's homepage, and the like). Drawing an analogy to newspapers, the Court asserted that such platforms should be viewed as speakers with the right to compile and

134. Moody v. NetChoice, LLC, 603 U.S. 707 (2024).
135. *Id.* at 713–22.
136. *Id.*
137. *Id*. at 740–41; NetChoice, LLC v. Att'y Gen., Fla., 34 F. 4th 1196, 1203 (11th Cir. 2022).
138. *NetChoice, LLC*, 34 F. 4th at 1227–28.
139. NetChoice, LLC v. Paxton, 49 F. 4th 439, 494 (2022).
140. *Moody*, 603 U.S. at 713–18.
141. Justice Kagan was joined by Chief Justice Roberts and Justices Sotomayor, Kavanaugh and Barrett in full and Justice Jackson in part.

curate the speech of others. Justice Kagan relied on *Miami Herald Publishing Company v. Tornillo*,[142] in which the Court had struck down a right-of-reply law that required newspapers to print the reply of any political candidate who received critical coverage in their pages. In *Tornillo*, the Court held that the First Amendment protects newspaper editors in their "exercise of editorial control and judgment."[143] The Court majority drew upon additional cases—involving a private utility's newsletter (*Pacific Gas and Electric Co. v. Public Utilities Commission of California*),[144] must-carry rules for cable operators (*Turner Broadcasting System, Inc. v. FCC*),[145] and regulations affecting parades (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*)[146]—to find that the First Amendment prohibits the government from directing a private entity to include certain messages where that entity is curating the speech of others to create its own expressive product.[147]

In the same way, the curating activity of social media platforms amounts to expressive activity protected by the First Amendment. Justice Kagan noted that Facebook's News Feed and YouTube's homepage use algorithms to create a personalized feed for each user.[148] Their content moderation policies filter prohibited topics, such as pornography, hate speech, and certain categories of misinformation, and rank or label disfavored messages. In making these choices, social media platforms "produce their own distinctive compilations of expression."[149] The *Moody* majority thus appears to have resolved the debate as to whether platforms should be treated as publishers or as common carriers under the First Amendment (at least with respect to Facebook's NewsFeed and the like).[150]

Consistent with the campaign finance context, the Court majority was adamant that the First Amendment prevents the state from interfering with "private actors' speech to advance its own vision of ideological balance."[151] Government may not "decide what counts as the right balance of private

142. Mia. Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974).
143. *Id.* at 258.
144. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1 (1986).
145. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994). The Court noted that in a later decision, the regulation was upheld because it was necessary to protect local broadcasting. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189–90 (1997).
146. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557 (1995).
147. Moody v. NetChoice, LLC, 603 U.S. 707, 731–32, 742–43 (2024).
148. *Id.* at 710.
149. *Id.* at 716.
150. *See, e.g.*, Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020); Eugene Volokh, *Treating Social Media Platforms like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021); Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127 (2022).
151. *Moody*, 603 U.S. at 741.

expression," and must instead "leave such judgments to speakers and their audiences."[152] This principle holds true even when there are credible concerns that certain private parties wield disproportionate expressive power in the marketplace of ideas. The majority noted that the regulations in *Tornillo*, *PG&E*, and *Hurley* "were thought to promote greater diversity of expression" and "counteract advantages some private parties possessed in controlling 'enviable vehicle[s]' for speech."[153] The Court also drew on its campaign finance jurisprudence, citing *Buckley*'s proposition that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."[154] Justice Kagan argued that "[h]owever imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others."[155]

In a concurring judgment, Justice Alito (joined by Justices Thomas and Gorsuch) agreed with the majority's facial unconstitutionality argument but took issue with the majority's First Amendment analysis. Justice Alito argued that the states' laws, at least in some of their applications, appeared to regulate passive carriers of third-party speech, which receive no protection under the First Amendment.[156] He criticized the majority for failing to address the states' argument that Facebook and YouTube amount to common carriers,[157] as did Justice Thomas in a separate concurrence.[158] Justice Alito also seemed more sympathetic to the states' concerns, noting that the content moderation decisions of social media platforms can have "serious consequences," including impairing "users' ability to speak to, [and] learn from," others; impairing a political candidate's "efforts to reach constituents or voters"; compromising "the ability of voters to make a fully informed electoral choice"; and exerting "a substantial effect on popular views."[159] He described the Florida law as an attempt "to prevent platforms from unfairly influencing elections or distorting public discourse,"[160] in a manner reminiscent of the very antidistortion arguments that were rejected by the conservative Justices in the campaign finance context.

152. *Id.* at 719.
153. *Id.* at 733 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 577 (1995)).
154. *Id.* at 742 (citing Buckley v. Valeo, 424 U.S. 1, 48–49 (1976)).
155. *Id.* at 733.
156. *See id.* at 788 (Alito, J., concurring).
157. *See id.* at 793–94 (Alito, J., concurring).
158. *See id.* at 751–52 (Thomas, J., concurring).
159. *Id.* at 768 (Alito, J., concurring).
160. *Id.* at 770 (Alito, J., concurring).

III. POSSIBILITIES FOR COUNTERVAILANCE

The *Moody* majority's stance was consistent with a long line of precedent that has treated state control of speech with grave distrust. By "requir[ing] the platforms to carry and promote user speech that they would rather discard or downplay,"[161] the states' content moderation policies violated a central tenet that the government may not influence the content of speech. However, the Supreme Court's interpretation of the First Amendment gives rise to a genuine conundrum: although this approach protects listeners from the power of the state, it does not protect the speech environment from the power of the platforms nor from the deficits that ensue from digital exceptionalism. Indeed, actions on the part of the state that would amount to an effective fix of the challenges of digital exceptionalism would very likely involve too great a governmental intrusion into expressive freedom. Hence, the gap between the ideal of a well-functioning speech environment and the challenges of digital exceptionalism cannot be resolved without dramatic changes to current First Amendment jurisprudence. As a result, there is a very narrow space for measures that might lessen the deleterious effects of digital exceptionalism without falling afoul of the First Amendment.

In light of this conundrum, this Part canvasses some possibilities for countervailance; that is, mechanisms that could lessen the deficits of the digital public sphere such that listeners' interests are better protected, even if that protection does not rise to the level of establishing the kind of equality required for democratic self-governance. With respect to the challenge of disinformation in social media, I have argued elsewhere for a "multifaceted public-private approach that employs a suite of complementary tactics including: (1) disclosure and transparency laws; (2) content-based regulation and self-regulation; (3) norm-based strategies; and (4) civic education and media literacy efforts."[162] Using Canada as a case study, I suggested that the "combined and interactive effects of a multifaceted approach provide helpful protections against some of the harms of disinformation while still protecting the freedom of speech."[163]

A similar type of approach might be an appropriate way to think about countervailance. The idea is not that any one countervailing tactic will protect listener interests. Instead, the combined and interactive effects of a number of measures may serve as a countervailing force against the immense

161. *Id.* at 728.

162. Yasmin Dawood, *Protecting Elections from Disinformation: A Multifaceted Public-Private Approach to Social Media and Democratic Speech*, 16 OHIO STATE TECH. L.J. 639, 641 (2020).

163. *Id.* at 642.

power of social media platforms. A caveat, however, is in order. These countervailing measures are imperfect, even deeply so, in terms of their ability to counter the challenges of digital exceptionalism. These measures will not on their own bring about a well-functioning speech environment; instead, they will bring such an environment closer to realization. Hence, the effect of this countervailance will no doubt be modest: listeners would still very much be at the mercy of the platforms. The objective would be to at least lessen the acuteness of the asymmetry and its resulting deficits.

Indeed, the majority opinion in *Moody* suggests that there are possibilities for regulation. Justice Kagan acknowledged, for instance, that "[i]n a better world, there would be fewer inequities in speech opportunities; and the government can take many steps to bring that world closer."[164] Citing *Turner I*,[165] Justice Kagan explicitly recognized that the "government can take varied measures, like enforcing competition laws, to protect th[e] access"[166] to information from many sources. In recent years, the federal government has been pursuing antitrust cases against Google, Meta, and Amazon. The Court majority also noted that "[m]any possible interests relating to social media" can meet the First Amendment intermediate scrutiny test.[167] The Court was pointed in its assertion that "nothing said here puts regulation of NetChoice's members off-limits as to a whole array of subjects."[168]

In what follows, I briefly canvass an array of countervailing mechanisms, including disclosure and transparency rules; a narrow prohibition of false election speech; strategies to manage deepfakes; state-led incentive structures and norms, including mechanisms to provide listeners with increased choices and powers of their own; public jawboning; and civil society efforts. Each of these measures warrants a far more extensive treatment—particularly with respect to their advantages and disadvantages—than I am able to offer here. Although it is beyond the scope of this brief discussion to attempt anything more than a cursory analysis, I hope that it nonetheless provides some indication of the kinds of possibilities that merit attention.

164. Moody v. NetChoice, LLC, 603 U.S. 707, 741 (2024).

165. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647 (1994) (protecting local broadcasting).

166. *Moody*, 603 U.S. 707 at 732–33.

167. *Id.* at 711 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)). Under intermediate scrutiny, a law must advance a "substantial governmental interest" that is "unrelated to the suppression of free expression." *Id.*

168. *Id.* at 740.

A. DISCLOSURE AND TRANSPARENCY

As described above, disclosure provides multiple informational benefits for voters, including not only the content of the disclosures but also their quality and the amount of information provided.[169] Disclosure and disclaimers with respect to online political advertising would help to facilitate counterspeech and deter disinformation.[170] Disclosure would also provide listeners with the context they need to assess political advertising. That being said, the disclosure regimen in the campaign finance context is subject to various limitations, including structural barriers to connecting disclosures to voters and enforcing disclosure rules against violators.[171] Disclosure rules have also been criticized for violating privacy, raising the risk of retaliation, chilling speech, and discouraging political participation.[172]

Outside of the campaign finance context, online platforms could increase transparency about the content curation decisions they make. Transparency requirements are also an appropriate regulatory response to political disinformation.[173] Compared to other regulatory responses, transparency laws have various benefits: they provide additional information to consumers, allow for public accountability, and nudge companies to make better decisions in anticipation of public disclosure.[174] In his concurring opinion in *Moody*, Justice Alito remarked that the platforms are providing various disclosures under the European Union's Digital Services Act, and that "complying with that law does not appear to have unduly burdened each platform's speech in those countries."[175] Justice Alito further suggested that courts on remand should investigate whether such disclosures chilled the platforms' speech.

169. *See* Wood, *supra* note 131, at 1102.

170. *See* Abby K. Wood, *Facilitating Accountability for Online Political Advertisements*, 16 OHIO STATE TECH. L.J. 520, 523–24 (2020).

171. See Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1486, 1498 (2014).

172. *See, e.g.*, Richard Briffault, *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983, 988–92, 1013–14 (2011).

173. *See* Wood, *supra* note 170, at 539–40.

174. *See* Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. 1203, 1206 (2022).

175. Moody v. NetChoice, LLC, 603 U.S. 707, 797–98 (2024) (Alito, J., concurring).

B. FALSE ELECTION SPEECH

In general, falsehoods and lies are constitutionally protected speech.[176] As Sunstein observes, "[p]ublic officials should not be allowed to act as the truth police" because if they are empowered to "punish falsehoods, they will end up punishing dissent."[177] There are, of course, a few narrow exceptions to the general rule that false statements are protected speech, such as, for example, regulations concerning defamation and false or misleading advertising.

The best response to false speech is not censorship but counterspeech. As the Supreme Court plurality noted in *United States v. Alvarez*, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society."[178] Abby Wood observes that as a remedy for disinformation, counterspeech "fits well in the court's 'marketplace of ideas' theory of the First Amendment."[179] Lies stated by a candidate during an election campaign should likewise be addressed by the counterspeech of the candidate's political opponent.[180] That being said, counterspeech is often ineffective given the realities of echo chambers and the partisan divide in the news media.

Although restrictions on false speech are generally unconstitutional, a narrowly drawn prohibition of false election speech aimed at disenfranchising voters might survive constitutional scrutiny.[181] Such a prohibition would target the mechanics of voting. Indeed, in *Minnesota Voters Alliance v. Mansky*, the Supreme Court indicated that false speech about when and how to vote could be banned by the government.[182] The government's compelling interest in protecting the right to vote could serve as the justification for the law. An additional consideration is that false speech about the mechanics of voting would be difficult to redress with counterspeech particularly in the few days leading up to an election.[183]

176. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964).
177. CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 3 (2021).
178. United States v. Alvarez, 567 U.S. 709, 727 (2012).
179. Wood, *supra* note 170, at 541.
180. *See* Eugene Volokh, *When Are Lies Constitutionally Protected?*, 4 J. FREE SPEECH L. 685, 704 (2024).
181. *See* Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 ST. LOUIS U. L.J. 535, 548 (2020).
182. Minn. Voters All. v. Masky, 585 U.S. 1 (2018).
183. *See* Volokh, *supra* note 180, at 707.

C. DEEPFAKES AND AI

Deepfake technology poses serious threats of harm to democracy, including by distorting public discourse, eroding citizens' trust in news media, and manipulating elections.[184] There have been several attempts to regulate deepfakes by the states,[185] such as legislation in California and Texas that prohibited the use of deepfakes within a designated pre-election period.[186] However, deepfakes are better regulated—by both public officials and private entities—through disclosure and counterspeech rather than by outright bans.[187] Disclosure requirements could, for example, label deepfakes as "altered."[188]

To be sure, there are real dangers to having the government determine what is true and false, which suggests that laws regulating deepfakes should be treated with caution. If platforms on their own accord institute deepfake bans, they should exempt parody, education, or art, and should provide accountability to users for any speech that is suppressed, including a meaningful opportunity to contest the decision.[189]A growing challenge facing both public and private interventions, however, is that it will become increasingly difficult to detect deepfakes, particularly given the availability of generative AI.[190] As the technology advances, the capacity to create deepfakes "will diffuse and democratize rapidly."[191]

D. INCENTIVES AND NORMS

The government can also use incentive structures to pressure platforms into making responsible choices about the democratic public sphere. For example, online platforms are protected from liability for hosting third-party content under Section 230 of the Communications Decency Act—a protection that arguably encourages platforms to moderate harmful speech and thereby perform a task that the government is not permitted to do.[192] Platforms may also be motivated to respond to harmful content out of a concern that the government could amend Section 230 if they fail to take

184. *See* Chesney & Citron, *supra* note 72, at 1777.

185. *See* Jack Langa, *Deepfakes, Real Consequences: Crafting Legislation to Combat Threats Posed by Deepfakes*, 101 B.U. L. REV. 761, 786 (2021).

186. *See* Yinuo Geng, *Comparing "Deepfake" Regulatory Regimes in the United States, the European Union, and China*, 7 GEO. L. TECH. REV. 157, 162–63 (2023).

187. *See* SUNSTEIN, *supra* note 177, at 117.

188. HASEN, *supra* note 7, at 27.

189. *See* Chesney & Citron, *supra* note 72, at 1818.

190. *See* COMMUNICATIONS SECURITY ESTABLISHMENT, *supra* note 73, at 18.

191. Chesney & Citron, *supra* note 72, at 1762.

192. *See* Erwin Chemerinsky & Alex Chemerinsky, *The Golden Era of Free Speech*, *in* SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 92 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022).

action (although this eventuality is, of course, dependent on the priorities of the incumbent administration).[193] The Digital Services Act promulgated by the European Union provides a more extensive regulatory model, one that is unlikely to be adopted in the U.S. It imposes several mandatory obligations on platforms, including transparency, notice-and-takedown systems, internal complaint handling systems, deplatforming, and independent auditing.[194]

The government could also create incentives for platforms to provide users with greater control over the content they receive. Many platforms already enable users to block or mute content they do not wish to see. However, they could take additional steps to enable users to actively moderate their own feeds.[195] In addition, the government could impose data interoperability requirements, thereby enabling users to easily move their data across platforms.[196] Platforms that violate users' rights would lose followers in favor of rival platforms with healthier environments.[197] To be sure, greater user control could also lead to greater epistemic fragmentation if users choose to avoid competing viewpoints.

Public-regarding behavior could be indirectly encouraged by such mechanisms as digital charters.[198] These public-private norm-based initiatives "identify standards, best practices, and objectives to govern the digital world."[199] For example, the Declaration of Electoral Integrity, an initiative between the Canadian government and the major platforms, endorsed the values of integrity, transparency, and authenticity as the pillars of a healthy political discourse.[200] Another initiative, the Digital Charter, identified ten principles, including universal access; safety and security; control and consent; transparency, portability and interoperability; a level playing field; strong enforcement and real accountability.[201] Although these norm-based approaches were not legally binding, they identified democracy-enhancing norms that could serve as a "standard by which to judge actions taken or not taken."[202]

193. *See* Chesney & Citron, *supra* note 72, at 1813.
194. Council Regulation, 2022/2065, arts. 14, 16, 20, 23, 39, 2022 O.J. (L 277) 1 (EU).
195. *See* Bambauer, Rollins & Yesue, *supra* note 84, at 1069.
196. *See* Khan & Pozen, *supra* note 89, at 538–39.
197. *See id.*
198. *See* Dawood, *supra* note 162, at 663–65.
199. *Id.* at 663.
200. *See id.* at 663–64.
201. *See id.* at 665.
202. *Id.*

E. PUBLIC JAWBONING

Can public jawboning play a salutary role as a countervailance mechanism? A recent Supreme Court decision, *Murthy v. Missouri*,[203] involves what is colloquially referred to as "jawboning," which takes place when the government pressures private actors to take certain actions without directly using its coercive power to do so. In *Murthy*, the record revealed that, over the last few years, White House and other federal officials had routinely communicated with social media platforms about misinformation related to COVID-19 vaccines and electoral processes. Some of these communications were public: government officials, in response to vaccine misinformation on the platforms, opined that reforms to antitrust laws and to Section 230 of the Communications Decency Act may be in order.[204] Other communications were private: officials in the White House, CDC, FBI, and CISA "regularly spoke" with platforms about misinformation over several years.[205] The District Court for the Western District of Louisiana had issued a preliminary injunction, which was affirmed by the Fifth Circuit, on the basis that government officials had "coerced or significantly encouraged" the platforms to censor disfavored speech in violation of the First Amendment.[206]

In a 6-3 majority opinion by Justice Barrett, the Supreme Court overturned the Fifth Circuit's decision on standing grounds.[207] Dissenting in *Murthy*, Justice Alito (joined by Justices Thomas and Gorsuch) asserted that the issue was whether the government engaged in "permissible persuasion" or "unconstitutional coercion."[208] While the government may inform and persuade, it is barred under the First Amendment from coercing a third party into suppressing another person's speech.[209] Drawing on the Court's approach in *National Rifle Association v. Vullo*,[210] Justice Alito analyzed three factors—the authority of the government officials; the nature of the statements made by those officials; and the reactions of the third party alleged to have been coerced—to find that the government had engaged in coercion.[211]

203. Murthy v. Missouri, 603 U.S. 43 (2024).
204. *See id.* at 51–52.
205. *See id.* at 51.
206. Missouri v. Biden, 83 F. 4th 350, 392 (5th Cir. 2023).
207. *See Murthy*, 603 U.S. at 58–62. Justice Barrett also rejected the plaintiffs' "right to listen" theory—which asserted that the First Amendment protects the interest of social media users to engage with the content of other social media users—on the grounds that it provided a "startlingly broad" right to users to "sue over *someone else's* censorship." *Id.* at 74–75.
208. *Id.* at 98–100 (Alito, J., dissenting).
209. *See id.* (Alito, J., dissenting) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963)).
210. Nat'l Rifle Ass'n v. Vullo, 602 U.S. 175, 189–90 (2024).
211. *See id*. at 100–07 (Alito, J., dissenting).

Ashutosh Bhagwat draws a helpful distinction between public jawboning and private jawboning: while public jawboning should rarely be considered coercive, in large part because government actors routinely hector corporations and often do so as part of their official responsibilities, private jawboning can sometimes amount to unconstitutional coercion.[212] However, "[d]etermining when private jawboning crosses the constitutional line . . . raises extremely difficult questions," which require courts to engage in a highly contextual analysis.[213] Justice Alito contended, for instance, that while the coercion in *Murthy* was "more subtle than the ham-handed censorship found to be unconstitutional in *Vullo* . . . it was no less coerceive."[214] The danger is that if "a coercive campaign is carried out with enough sophistication, it may get by."[215] Ilya Somin catalogues the various ways in which government agencies post-*Murthy* can ensure that their pressure tactics avoid judicial scrutiny.[216]

Despite these legitimate concerns, there may be a role for public, but not private, jawboning to serve as a countervailing force against the power of the tech giants. Helen Norton's "transparency principle"—namely, "an insistence that the governmental source of a message be transparent to the public"—could serve as a guide.[217] As Norton observes, the "government's speech is most valuable and least dangerous to the public when its governmental source is apparent: only then is the government's speech open to the public's meaningful credibility and accountability checks."[218] In an August 2024 letter to Congress, Mark Zuckerberg was unequivocal that Meta would no longer compromise its content standards in response to government pressure.[219] Indeed, Meta later announced the adoption of a new content moderation protocol that, among other things, removed restrictions on topics such as immigration and gender identity. If other platforms follow Meta's lead, the protection (or not) of listener interests would be even more subject to the platforms' decisions. Provided that the government's use of public jawboning does not violate *Vullo*'s standards for coercion, it may

212. *See* Ashutosh Bhagwat, *The Bully Pulpit or Just Plain Bully: The Uses and Perils of Jawboning*, 22 FIRST AMEND. L. REV. 292, 306 (2024).

213. *Id.* at 310.

214. *Murthy*, 603 U.S. at 80 (Alito, J., dissenting).

215. *Id.*

216. *See* Ilya Somin, *The Supreme Court's Dangerous Standing Ruling in* Murthy v. Missouri, REASON.COM: THE VOLOKH CONSPIRACY (June 26, 2024, 5:57 PM), https://reason.com/volokh/2024/06/26/the-supreme-courts-dangerous-standing-ruling-in-murthy-v-missouri [https://perma.cc/64XB-E7FV].

217. *See* HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 30 (2019).

218. *Id.*

219. *See* Letter from Mark Zuckerburg, Founder, Chairman & CEO of Meta Platforms, Inc. to the Hon. Jim Jordan, Chairman, Comm. on the Judiciary, United States House of Reps. (Aug. 26, 2024).

prove to be a useful measure to protect users from the overwhelming power of the platforms.

F. CIVIL SOCIETY AND THE STATE

Civil society can also play a countervailing role. Truth-finding institutions, such as journalists and political activists, can combat false statements in an iterative process akin to the scientific method.[220] Collaborations between platforms and outside researchers could also lead to better responses for online misinformation.[221] More generally, the concept of "knowledge institutions," as developed by Vicki Jackson, captures the indispensable contribution of public and private entities, including universities, government agencies, libraries, and the press, to the collection and dissemination of knowledge needed for democratic self-governance.[222]

The state can bolster the speech environment by supporting knowledge institutions. Over the last several decades, the federal government has fostered the public sphere by enacting legislation to support newspapers, establishing a system of broadcast licenses, regulating cable, and implementing antitrust laws.[223] With respect to the threats currently facing private news organizations, Martha Minow argues that "[n]othing in the Constitution forecloses government action to regulate concentrated economic power . . . or strengthen public and private investments in the news functions presupposed by democratic governance."[224] Minow further suggests that the "First Amendment's presumption of an existing press may even support an affirmative obligation on the government to undertake reforms and regulations to ensure the viability of a news ecosystem."[225] Emily Bazelon proposes that federal and state governments could create publicly funded TV or radio, in addition to funding nonprofit journalism.[226] To be sure, the independence of news organizations must be protected by

220. *See* Volokh, *supra* note 180, at 696–98.

221. *See* Ceren Budak, Brendan Nyhan, David M. Rothschild, Emily Thorson & Duncan J. Watts, *Misunderstanding the Harms of Online Misinformation*, 630 NATURE 45, 45 (2024).

222. *See* Vicki C. Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, 7 CANADIAN J. COMPAR. & CONTEMP. L. 156 (2021); *see also* Heidi Kitrosser, *Protecting Public Knowledge Producers*, 4 J. FREE SPEECH L. 473 (2023).

223. *See* MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 42–57 (2021).

224. Martha Minow, *Does the First Amendment Forbid, Permit, or Require Government Support of News Industries?*, *in* CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? 86 (Vicki C. Jackson & Yasmin Dawood eds., 2022).

225. MINOW, *supra* note 223, at 98.

226. *See* Emily Bazelon, *The Disinformation Dilemma*, *in* SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 41, 49 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022).

various mechanisms so that the government cannot control the media it funds and supports.[227]

Finally, community participation in regulating online platforms may also improve the speech environment. For example, Reddit is internally governed by volunteer moderators, who establish and enforce rules about what conduct is permitted or prohibited in each subcommunity.[228] These moderators often put in "dozens of hours a week to ensure that content meets community standards and that participants understand why their content was permitted or banned."[229] Although Reddit is by no means perfect, it may be an example of what Aziz Huq has described as an "island of algorithmic integrity"; that is, a model of a well-functioning social media platform that acts in public-regarding ways and may thereby shift norms and expectations.[230]

CONCLUSION

This Article has offered a normative account of a well-functioning speech environment for speakers and listeners, under which individuals engage in three self-governing activities—informed voting; discussion and deliberation; and meaningful participation—while having their liberty, equality, epistemic, and nondomination interests satisfied. It also argued for digital exceptionalism—the idea that the expressive realm on social media platforms suffers from certain unique deficits that not only undermine the speech environment but that also pose challenges for regulation. The Article then turned to the law of public discourse, focusing on campaign finance regulation and the *Moody* decision, to find that First Amendment jurisprudence provides few conceptual resources to protect listeners' equality, epistemic, and nondomination interests. Finally, the Article argued for countervailance, which is the idea that certain mechanisms could lessen the deficits of the online realm such that listener interests are better protected.

To be sure, there continues to be great uncertainty about how digital technologies will evolve over time and what new difficulties they will pose. The rapidly changing landscape of social media technology poses genuine challenges for regulation. While the *Moody* majority insisted that free speech principles do not change despite the challenges of applying them to evolving technology, the concurring Justices expressed reservations about how

227. *See* MINOW, *supra* note 223, at 138–42.

228. *See* Ethan Zuckerman, *The Case for Digital Public Infrastructure*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Jan. 17, 2020), https://knightcolumbia.org/content/the-case-for-digital-public-infrastructure [https://perma.cc/F5EX-XTKV].

229. *Id.*

230. *See* Huq, *supra* note 70, at 1301–03.

evolving algorithmic and AI technology would be covered by the First Amendment. For example, Justice Barrett queried whether there was a difference between an algorithm that did the curation on its own versus an algorithm that was directed by humans.[231] Justice Alito noted that the vast majority of the content moderation on the platforms is performed by algorithms, and now that AI algorithms are being used, the platforms may not even know why a particular content moderation decision was reached.[232] He asked: "Are such decisions equally expressive as the decisions made by humans? Should we at least think about this?"[233] It is fair to say that much work remains to be done when considering how best to protect and promote a well-functioning political speech environment.

231. Moody v. NetChoice, LLC, 603 U.S. 707, 745–48 (2024) (Barrett, J., concurring).

232. *See id*. at 793–95 (Alito, J., concurring).

233. *Id*. (Alito, J., concurring); *see also* Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1174 (arguing that AI speakers should be covered by the First Amendment due to the value of their speech to humans and the risk of government suppression).