# Revisiting Indecency: Considering a Medium-Specific Regulatory Approach to Disinformation and Hate Speech on Social Media

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# I. INTRODUCTION

Evidence of political, psychological, medical, and cultural harms associated with social media continues to mount, particularly in light of the many revelations contained within the documents and testimony shared by Facebook whistleblower Frances Haugen.[1] In many countries, efforts to impose regulatory safeguards related to the social responsibilities of these platforms are underway.[2] In the U.S., however, we have seen relatively little consequential action at the federal level beyond ongoing antitrust inquiries, a continuing array of congressional hearings, and a series of bills that show few signs of passing.[3]

One obvious explanation for this pattern is the predominantly laissez-faire model of media regulation that has existed in the U.S., fortified by a First Amendment tradition that has erected substantial barriers to most forms of government intervention.[4] There are, of course, compelling and justifiable reasons to insulate media from regulatory intervention thoroughly laid out in long traditions of democratic theory, First Amendment jurisprudence, and legal scholarship.[5] The basic underlying premise is that the media must remain free from government interference for democracy to function effectively. The crowning irony of the current moment is that this commitment to an unregulated media sector, in which the inevitable clash between truth and falsity leads to an informed citizenry through the invisible hand of the marketplace of ideas, may evolve from its 250-year tradition of sustaining American democracy to being a driving force behind its downfall.[6]

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1. *See* Kari Paul, *Facebook Whistleblower's Testimony Could Finally Spark Action in Congress*, GUARDIAN (Oct. 6, 2021, 5:50 PM), https://www.theguardian.com/technology/2021/oct/05/facebook-frances-haugen-whistleblower-regulation [https://perma.cc/BF7F-9H9L].

2. *See* Kim Mackrael & Rhiannon Hoyle, *Social-Media Regulations Expand Globally as Elon Musk Plans Twitter Takeover*, WALL ST. J. (May 11, 2022, 12:09 PM), https://www.wsj.com/articles/social-media-regulations-expand-globally-as-elon-musk-plans-twitter-takeover-11652285375 [https://perma.cc/W9UN-KNYQ]; *see generally* Asa Royal & Philip M. Napoli, *Platforms and the Press: Regulatory Interventions to Address an Imbalance of Power*, *in* DIGITAL PLATFORM REGULATION: GLOBAL PERSPECTIVES ON INTERNET GOVERNANCE 43 (Terry Flew & Fiona R. Martin eds., 2022).

3. *See* Meghan Anand et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021, 5:45 AM), https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html [https://perma.cc/T6QK-UGMW]; *see also* Philip M. Napoli, *The Symbolic Uses of Platforms: The Politics of Platform Governance in the United States*, 12 J. DIGIT. MEDIA POL'Y 215, 215-20 (2021); Will Oremus, *Lawmakers' Latest Idea to Fix Facebook: Regulate the Algorithm*, WASH. POST (Oct. 12, 2021, 9:00 AM), https://www.washingtonpost.com/technology/2021/10/12/congress-regulate-facebook-algorithm/ [https://perma.cc/NZY2-WTHJ].

4. For a thorough overview and discussion, see generally MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (2019).

5. *See id.* at 15, 119.

6. *See* Tabatha Abu El-Haj, *How the Liberal First Amendment Under-Protects Democracy*, 107 MINN. L. REV. 529, 545-74 (2022); *see also* MARGARET SULLIVAN, GHOSTING THE NEWS: LOCAL JOURNALISM AND THE CRISIS OF AMERICAN DEMOCRACY 84-87 (2020); ZAC GERSHBERG & SEAN ILLING, THE PARADOX OF DEMOCRACY: FREE SPEECH, OPEN MEDIA, AND PERILOUS PERSUASION 1-3 (2022).

That being said, the prospect of government intervention remains as threatening to a well-informed citizenry and the effective functioning of the democratic process as ever[7]—perhaps more so in light of the rising political extremism in the U.S. that has emboldened political actors to attack and subvert the independence and credibility of the media sector.[8]

In this context, debates over the appropriate regulatory framework to apply to social media platforms have persisted. These deliberations have turned to the question of whether useful precedents may be found in the regulatory approaches applied to older communications technologies. For instance, there is a line of reasoning contending that the common carrier model that has traditionally applied to telephony is the appropriate fit.[9] Legislation applying this framework to social media platforms has been introduced in Congress, which would restrict platforms' ability to engage in editorial decision-making regarding the content that they carry, and instead, compel them to behave like neutral common carriers.[10] State-level legislation has passed in Texas and Florida imposing this model on social media platforms.[11] Both pieces of legislation were blocked from going into effect by the Supreme Court and the U.S. Court of Appeals for the Eleventh Circuit, respectively.[12] However, in the case of the Texas legislation, the U.S. Court of Appeals for the Fifth Circuit recently upheld the legislation's characterization of social media platforms as common carriers, concluding that "Platforms fall within the historical scope of the common carrier doctrine," which "undermines their attempt to characterize their censorship as 'speech.'"[13]

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7. *See* Farhad Manjoo, *Regulating Online Speech Can Be a Terrible Idea*, N.Y. TIMES (May 19, 2022), https://www.nytimes.com/2022/05/19/opinion/buffalo-shooting-internet-regulations.html [https://perma.cc/72EC-SPYV].

8. *See, e.g.*, Manuel Roig-Franzia & Sarah Ellison, *A History of the Trump War on Media — The Obsession Not Even Coronavirus Could Stop*, WASH. POST (Mar. 29, 2020, 5:00 PM), https://www.washingtonpost.com/lifestyle/media/a-history-of-the-trump-war-on-media--the-obsession-not-even-coronavirus-could-stop/2020/03/28/71bb21d0-f433-11e9-8cf0-4cc99f74d127_story.html [https://perma.cc/7HUM-HQW2]; *see also The Trump Administration and the Media*, COMM. TO PROTECT JOURNALISTS (Apr. 16, 2020), https://cpj.org/reports/2020/04/trump-media-attacks-credibility-leaks/ [https://perma.cc/2RPQ-RVQQ].

9. *See* Brian Fung, *Are Social Media Platforms Like Railroads? The Future of Facebook and Twitter Could Depend on the Answer*, CNN BUS. (June 8, 2022, 10:49 AM), https://www.cnn.com/2022/06/08/tech/common-carriage-social-media/index.html [https://perma.cc/CLS5-WYYZ].

10. *See generally* 21st Century FREE Speech Act, H.R. 7613, 117th Cong. (2022).

11. *See* H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021) (enacted); S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) (enacted).

12. *See* NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1715-16 (2022) (vacating the stay of a preliminary injunction granted by the U.S. Court of Appeals for the Fifth Circuit, pending a full review of the legislation by the U.S. Court of Appeals for the Fifth Circuit); *see also* NetChoice, LLC vs. Att'y Gen., 34 F.4th 1196, 1203 (11th Cir. 2022) (finding that it is substantially likely that social media platforms are private actors whose content moderation decisions are protected by the First Amendment, but that some of the law's disclosure provisions likely do not violate the First Amendment).

13. NetChoice, LLC v. Paxton, 49 F.4th 439, 479 (5th Cir. 2022).

Another widely-embraced point of reference involves treating social media platforms like traditional publishers.[14] Doing so would involve removing the wide-ranging immunity from legal liability for content dissemination that platforms currently enjoy under Section 230 of the Communications Decency Act.[15] Traditional publishers receive no such wide-ranging immunity from liability for the content they produce.[16]

Critics have pointed out that neither component of this common carrier/publisher binary seems appropriate or satisfactory for the context at hand, and that a need for an alternative to either of these two models is required.[17] Nonetheless, there is another potentially relevant legacy media framework that has been largely ignored within current policy deliberations—broadcasting. This Article explores this third path and considers the potential applicability of applying elements of the regulatory framework developed for terrestrial broadcasting to social media platforms. This Article begins from the premise that current conditions compel us to explore whether there might be lessons from the broadcast regulatory model that are relevant to the contemporary challenges posed by the prevalence and impact of disinformation and hate speech on social media. As previous research has illustrated, there are a variety of aspects of broadcast regulation that could be relevant to how policymakers approach social media.[18]

Extending this previous work, the focal point of this analysis is that, alone amongst media technologies, broadcasting has a legally recognized and regulatable category of speech—indecency—that is exclusive to that medium. It may not be immediately clear why a discussion of broadcast indecency is relevant to contemporary concerns about disinformation and hate speech on social media. This Article's core argument is that the philosophy underlying the creation and enforcement of indecency regulations—that a particular medium may have sufficiently distinctive characteristics that justifies the creation and regulation of a category of speech exclusive to that medium—

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14. *See* Michael Shapiro, *For Democracy's Sake, Social Media Platforms Must Be Deemed Publishers Under Section 230*, E&P (Nov. 20, 2020, 12:46 PM), https://www.editorandpublisher.com/stories/for-democracys-sake-social-media-platforms-must-be-deemed-publishers-under-section-230,180554 [https://perma.cc/XZN7-TNNQ]; *see also* Dick Lilly, *Regulate Social-Media Companies Like News Organizations*, SEATTLE TIMES (Aug. 19, 2019, 2:51 PM), https://www.seattletimes.com/opinion/regulate-social-media-companies-like-news-organizations/ [https://perma.cc/6DLT-5FR3].

15. *See* Communications Decency Act of 1996, 47 U.S.C. §§ 223, 230; *see generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

16. *See generally* Matthew Ingram, *Of Platforms, Publishers, and Responsibility*, COLUM. J. REV. (Feb. 4, 2022), https://www.cjr.org/the_media_today/of-platforms-publishers-and-responsibility.php [https://perma.cc/E38X-XEFN].

17. *See* Laura Hazard Owen, *How Can Social Media Laws Evolve Beyond the "Shoes of Newspapers or Telephones"?*, NIEMAN LAB (June 9, 2022), https://www.niemanlab.org/2022/06/can-social-media-laws-evolve-beyond-the-shoes-of-newspapers-or-telephones/ [https://perma.cc/YW3Z-6YMM].

18. *See* Philip M. Napoli, *User Data as Public Resource: Implications for Social Media Regulation*, 11 POL'Y & INTERNET 439, 439-59 (2019); *see* Philip M. Napoli, *Back from the Dead (Again): The Specter of the Fairness Doctrine and Its Lesson for Social Media Regulation*, 13 POL'Y & INTERNET 300, 300-14 (2021).

may merit consideration as an approach to dealing with social media content moderation.

The purpose of this Article, then, is to revisit the origins and rationales of the indecency standard in broadcasting and to consider what aspects of the broadcast indecency context can potentially inform current policy deliberations about whether and how to address disinformation and hate speech on digital platforms. As is increasingly clear, social media platforms are fundamentally different from broadcast media in as many ways as they are similar.[19] For this reason, there may be more utility than is commonly assumed in revisiting the history, rationales, and implementation of broadcast regulation as a point of reference for considering legal and regulatory approaches to social media platforms.

The first section of this Article provides an overview of the pattern of *technological particularism* that has characterized media law, regulation, and policy in the U.S. As this section illustrates, the legal and regulatory frameworks for media in the U.S. have been built around the notion that the nature of the regulatory requirements and First Amendment protections that apply are, to some extent, a function of the distinctive technological characteristics of each medium.[20]

The next section explores the motivations, rationales, and implementation approach of the indecency standard in terrestrial broadcasting. As this section illustrates, the indecency standard represents a singular effort by policymakers and the courts to construct and maintain a category of speech that is exclusive to a particular medium, and that comes with its own unique regulatory treatment under the First Amendment. In addressing the core rationale for the creation of the indecency category of speech, this section necessarily delves into the *pervasiveness* rationale for media regulation.[21]

The third section of this Article focuses on whether indecency provides a relevant template for approaching the problems of disinformation and hate speech on social media. This analytical focus reflects the fact that while discussions about the possibility of government intervention into the operation of social media platforms are accelerating,[22] the fundamental question regarding how such interventions could be justified in the face of First Amendment scrutiny has received relatively little attention. Thus, this section considers the parallels across broadcast indecency and social media disinformation and hate speech in terms of regulatory motivations and rationales.

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19. *See* JOHN SAMPLES & PAUL MATZKO, KNIGHT FIRST AMEND. INST., SOCIAL MEDIA REGULATION IN THE PUBLIC INTEREST: SOME LESSONS FROM HISTORY 3-5 (2020), https://academiccommons.columbia.edu/doi/10.7916/d8-dhse-jy44/download [https://perma.cc/79DU-SEME].

20. *See, e.g.*, Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1378 (2005).

21. *See* Jonathan D. Wallace, *The Specter of Pervasiveness:* Pacifica*, New Media, and Freedom of Speech* 1-3 (Cato Inst., Briefing Paper No. 35, 1998), https://www.cato.org/sites/cato.org/files/pubs/pdf/bp-035.pdf [https://perma.cc/N395-6Y54].

22. *See, e.g.*, Paul, *supra* note 1.

The concluding section summarizes the argument and considers next steps in developing this perspective into a more comprehensive policy proposal. This section also considers the question of whether the adoption of this approach is an inevitable path to government overreach and how this approach might interface with current policy proposals.

## II. TECHNOLOGICAL PARTICULARISM AND U.S. MEDIA REGULATION

The term "technological particularism" has been applied in the media regulation context to describe policymakers' tendency to impose different regulatory frameworks on different communications media, with these different regulatory models derived in large part from their different technological characteristics.[23] These disparate regulatory frameworks can vary across a variety of dimensions, but perhaps most important to this analysis is the fact that these frameworks can differ in terms of the degree of First Amendment protection afforded to individual speakers.[24] As the Supreme Court noted in applying this logic to the unique regulatory framework that policymakers had constructed for broadcasting, "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[25]

This regulatory approach, with its varying degrees of First Amendment protection, has been subjected to extensive critique, with many legal scholars critical of conduit-based justifications for differing degrees of First Amendment protection.[26] As technological change (most notably, digitization) accelerated the process of convergence, in which the traditional boundaries between different media technologies and industry sectors became increasingly blurred, these critiques intensified. As Atkin noted back in 1992, specifically in reference to indecency regulation, "the fact that traditionally distinct media are now carrying each other's services—using similar modalities—calls into question the selective application of indecency in broadcasting."[27] More broadly, Levi has argued that "[i]f new technologies are indistinguishable . . . from radio and over-the-air television, then different

23. PHILIP M. NAPOLI, SOCIAL MEDIA AND THE PUBLIC INTEREST: MEDIA REGULATION IN THE DISINFORMATION AGE 143 (2019).

24. *See* Philip M. Napoli & Fabienne Graf, *Revisiting the Rationales for Media Regulation: The* Quid Pro Quo *Rationale and the Case for Aggregate Social Media User Data as Public Resource*, *in* DIGITAL AND SOCIAL MEDIA REGULATION: A COMPARATIVE PERSPECTIVE OF THE US AND EUROPE 45, 46 (Sorin Adam Matei et al. eds., 2021).

25. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387 (1969).

26. *See, e.g.*, Chen, *supra* note 20, at 1360; *see also* Frank D. LoMonte, *The "Social Media Discount" and First Amendment Exceptionalism*, 50 U. MEMPHIS L. REV. 387, 397-405 (2019).

27. David J. Atkin, *Indecency Regulation in the Wake of* Sable*: Implications for Telecommunications Policy*, 30 FREE SPEECH Y.B. 101, 103 (1992).

constitutional treatment appears arbitrary."[28] From the end-user's perspective, as convergence accelerates, traditional distinctions between media become more difficult to recognize.[29]

Despite these critiques of technological particularism, within the realm of media law and policy, "this habit has proved surprisingly durable."[30] This durability may be a function of institutional inertia.[31] In any case, this durability provides support for the exercise of exploring the social media context, which has been recognized as being fundamentally different from the Internet more broadly, across a range of factors.[32] A later section will delve more deeply into the question of whether social media might represent a compelling case for continuing a technologically particularistic approach. The next section examines one of the most pronounced manifestations of this technologically particularistic regulatory approach—the regulation of indecency in broadcasting.

## III. ORIGINS, RATIONALES, AND HISTORY OF BROADCAST INDECENCY

Across the entire spectrum of U.S. media regulation, First Amendment jurisprudence, and the various categories of speech that have been identified in connection with these regulations, policies, and legal decisions, indecency is the only category of speech that has been crafted and applied specifically and exclusively within the context of a particular medium. This exclusivity is explicitly articulated in indecency's formal definition by the Federal Communications Commission ("FCC"). According to the FCC, indecency is defined as: "material that, in context, depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards *for the broadcast medium*."[33]

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28. Lili Levi, *First Report: The FCC's Regulation of Indecency* 41 (U. Miami Sch. L., Rsch. Paper No. 2007-14, 2007), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1023822_code799786.pdf?abstractid=1023822&mirid=1 [https://perma.cc/QH98-783G].

29. *See* Nick Gamse, *The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 287, 314 (2011).

30. Chen, *supra* note 20, at 1378.

31. It is important to note that some have argued that a regulatory approach that utilizes technology as a means of crafting individual speech environments with differing degrees of openness to government intervention represents an appropriate means of cultivating an overall speech environment that is reflective of both individual and collectivist First Amendment values. *See generally* Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 1-42 (1976). For application of this argument within the more contemporary context of social media, see NAPOLI, *supra* note 23, at 144.

32. *See generally* Gerald C. Kane et al., *What's Different About Social Media Networks? A Framework and Research Agenda*, 38 MIS Q. 275, 284 (2014).

33. *Obscenity, Indecency and Profanity*, FCC, https://www.fcc.gov/general/obscenity-indecency-and-profanity [https://perma.cc/6WQY-9CL3] (last updated Dec. 20, 2022) (emphasis added).

In comparison, obscenity has no medium-specific constraints on its applicability. The Supreme Court has defined obscenity as follows:

> 1. whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> 2. whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[34]

Clearly, from a substantive standpoint, indecency represents a more restricted range of content than obscenity, with key points of distinction including the fact that indecency presumably possesses literary, artistic, political, or scientific value (whereas obscenity does not), and, of course, the fact that the indecency standard only applies in the broadcast context. Both obscenity and indecency are strongly oriented around content of a sexual nature.

Essentially, then, indecency is a category of speech that does not rise to the level of obscenity that has been crafted exclusively for application within the context of terrestrial broadcasting law, regulation, and policy.[35] This section considers how this unique category of speech came to be, as well the motivations that led to its creation.

### *A. Origins*

The carving out of indecency as a broadcast-specific category of regulatable speech begins with the very origins of U.S. broadcast regulation—the Radio Act of 1927.[36] Included in this Act is the statement that "[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."[37] This language was subsequently transferred to Section 326 of the Communications Act of 1934.[38]

Early in the history of broadcast regulation, however, neither the FCC nor the courts clearly laid out the distinction between the concepts of obscenity, indecency, and profanity, treating them instead as seemingly synonymous.[39] Efforts by policymakers or the courts to bring greater clarity to whether a meaningful distinction between these terms existed were slow to develop, due in part to the fact that, throughout much of broadcasting's early

34. *See* Miller v. California, 413 U.S. 15, 24 (1973).

35. *See* Milagros Rivera Sanchez, *The Origins of the Ban on "Obscene, Indecent, or Profane" Language of the Radio Act of 1927*, 149 JOURNALISM & MASS COMM. MONOGRAPHS 1, 10-12 (1995).

36. For a detailed history of the origins of the broadcast indecency standard, see generally *id.* This section draws heavily upon this work.

37. Radio Act of 1927, 47 U.S.C.A. § 109 (repealed 1934).

38. *See* Communications Act of 1934, 47 U.S.C. § 151.

39. *See* Rivera Sanchez, *supra* note 35, at 2-3.

history, broadcasters engaged in fairly intensive self-regulation.[40] This meant that the FCC and the courts were involved in broadcast obscenity/indecency/profanity-related issues relatively infrequently.[41]

Over time, the FCC and the courts initiated an evolutionary process in which the concept of indecency became something separate and distinct—from both a definitional and regulatory standpoint—from the concept of obscenity.[42] It was not until the mid-1960s that the FCC began to explicitly articulate that there existed a category of speech that did not rise to the level of obscenity but that still merited regulatory restriction.[43] However, at this point in time, the Commission had not yet settled on "indecent" as the preferred label.[44]

### *B. Toward Greater Clarity*

The FCC explicitly articulated the regulatory distinction between obscenity and indecency in a 1970 decision.[45] The Commission imposed a fine upon Philadelphia radio station WUHY for an on-air interview with Grateful Dead front man Jerry Garcia, in which Garcia frequently employed a variety of profanities.[46] The Commission noted that this language did not rise to the level of obscenity but did conclude that the statutory term "indecent" should be applicable, and that in the broadcast field, the standard for its applicability should be that the material broadcast is "(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value."[47] "The Court has made clear that different rules are appropriate for different media of expression in view of their varying natures."[48]

Here, we see the FCC lay out not only the conceptual distinction between obscenity and indecency, but also its philosophy of technological particularism—discussed above—that has undergirded the U.S. approach to media regulation.

The FCC offered further clarity in 1975, when, in a decision involving the daytime radio broadcast of George Carlin's soon-to-be-infamous Seven Words You Can Never Say on Television routine, the Commission stated that

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40. *See id.* at 3-4.

41. *See id.* at 3.

42. For a detailed discussion of indecency and its points of distinction from obscenity, see generally Kristin A. Finch, Comment, *Lights, Camera, and* Action for Children's Television v. FCC*: The Story of Broadcast Indecency, Starring Howard Stern Comment*, 63 U. CIN. L. REV. 1275 (1994).

43. *See* Milagros Rivera Sanchez, *Developing an Indecency Standard: The Federal Communications Commission and the Regulation of Offensive Speech, 1927-1964*, 20 JOURNALISM HIST., no. 1, Spring 1994, at 9-11.

44. *Id.* at 10.

45. WUHY-FM, E. Educ. Radio, *Notice of Apparent Liability*, 24 F.C.C. 2d 408, para. 10 (1970).

46. WUHY-FM, E. Educ. Radio, *Notice of Apparent Liability*, 24 F.C.C. 2d 408, para. 16 (1970).

47. WUHY-FM, E. Educ. Radio, *Notice of Apparent Liability*, 24 F.C.C. 2d 408, para. 10 (1970).

48. *Id.*

"[t]here is authority for the proposition that the term 'indecent' . . . is *not* subsumed by the concept of obscenity—that the two terms refer to two different things."[49] The Commission went on to note that "indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest . . . and . . . (2) when children may be in the audience, it cannot be redeemed by the claim that it has literary, artistic, political, or scientific value."[50]

The extent to which this represented new territory in the realm of media regulation is well-reflected in the fact that, as then-FCC Commissioner Glenn O. Robinson noted in his concurring statement (joined by Commissioner Benjamin Hooks), there was not, at that point in time, any "significant jurisprudence explaining the meaning" of the indecency terminology.[51] Further, then-FCC Chairman Richard Wiley explained in an interview years later that the FCC itself was not at that point clear on the difference between obscenity and indecency.[52]

It is also important to note that, at this stage, the FCC articulated that indecency was not subject to a blanket ban within the broadcast medium, but rather that it needed to be channeled to times of the day when children were not likely to be part of the audience. As the Commission stated, "[w]hen the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used."[53] Over time, and across a myriad of FCC and court decisions, as well as proposed congressional legislation, this position would ultimately evolve into the current 10:00 PM to 6:00 AM "safe harbor" for broadcast indecency that exists today.[54]

Finally, it is worth briefly noting that the FCC maintains the same regulatory framework for content deemed "profane," with profanity defined as "'grossly offensive' language that is considered a public nuisance."[55] However, given that from a regulatory standpoint, the FCC treats profanity identically to indecency (despite the different definition), and the fact that FCC and Court decisions involving profanity (offensive language of a non-sexual nature) still also (and primarily) employ the indecency terminology,[56] for simplicity's sake, the focus going forward will remain on the notion of indecency.

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49. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), *Memorandum Opinion and Order*, 56 F.C.C. 2d 94, para. 10 (1975) [hereinafter *Pacifica Found. Order*] (emphasis in original).

50. *Id.* at para. 11.

51. *Id.* at 104. (Robinson, Comm'r, concurring).

52. *See* Angela J. Campbell, Pacifica *Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 FED. COMM. L.J. 195, 206 (2010).

53. *Pacifica Found. Order*, 56 F.C.C. 2d at para. 12.

54. Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enf't Policies Regarding Broad. Indecency, *Policy Statement*, 16 FCC Rcd 7999, para. 5 (2001).

55. *Obscene, Indecent and Profane Broadcasts*, FCC, https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts [https://perma.cc/E6YU-8563] (last updated Jan. 13, 2021).

56. *See, e.g.*, FCC v. Fox Television Stations, Inc., 567 U.S. 239, 239 (2012).

### *C. The Supreme Court and Indecency*

The FCC's decision in what came to be known as the "seven dirty words" case provided the basis for the Supreme Court's landmark *FCC v. Pacifica Foundation*[57] decision in 1978.[58] The Court upheld the FCC's decision, importantly noting that from a legal standpoint, the words "obscene" and "indecent" each have "a separate meaning."[59] Also important was that the Court reaffirmed the general philosophy of technological particularism, noting that "each medium of expression presents special First Amendment problems."[60] The special problems relevant to broadcasting are that "the broadcast media ha[s] established a uniquely pervasive presence in the lives of all Americans"[61] and that children were particularly vulnerable to adult content and, thus, in need of protection.

### *D. The Pervasiveness Rationale*

It is important to note that pervasiveness is not the sole rationale for broadcast regulation. Indeed, the core rationale for broadcast regulation is that broadcasters utilize a "scarce public resource."[62] However, as demonstrated, the pervasiveness rationale is particularly central to the realm of indecency regulation.[63] Naturally, the question of whether broadcasting is now—or ever was—"*uniquely* pervasive"[64] has been the subject of much debate.[65] Clearly, the notion of broadcasting being uniquely pervasive, and this pervasiveness providing justification for different regulatory treatment, is an explicit manifestation of the technological particularism discussed earlier.

It is important to note that policymakers' efforts to expand the reach of indecency to non-broadcast technological contexts have, to this point, generally failed, due largely to the perceived lack of applicability of the pervasiveness rationale.[66] For example, the courts have overturned efforts by Congress and the FCC to regulate indecency in telephony and on cable television.[67] Within the telephony context, the Supreme Court rejected a blanket ban on obscene and indecent "dial-a-porn" services that was instituted by Congress as an amendment to the Communications Act of 1934.[68] As the Court noted in its decision, "sexual expression which is indecent but not

57. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).
58. *See* Campbell, *supra* note 52, at 201 (providing a detailed account of the arguments and deliberations that ultimately led to the *Pacifica* decision).
59. *Pacifica Found.*, 438 U.S. at 740-41.
60. *Id.* at 748 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952)).
61. *Id.*
62. Napoli & Graf, *supra* note 24, at 46-47.
63. *See* Chen, *supra* note 20, at 1433.
64. FCC v. Pacifica Found., 438 U.S. 726, 727 (1978) (emphasis added).
65. *See, e.g.*, Matthew Bloom, *Pervasive New Media: Indecency Regulation and the End of the Distinction Between Broadcast Technology and Subscription-Based Media*, 9 YALE J.L. & TECH. 109, 115, 118 (2006); Wallace, *supra* note 21, at 10.
66. *See* Wallace, *supra* note 21, at 5.
67. *See* Atkin, *supra* note 27, at 105-08.
68. Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989).

obscene is protected by the First Amendment."[69] Further, the Court noted that *Pacifica* was not applicable, given that dial-up services require users to "take affirmative steps to receive the communication."[70] According to the Court:

> There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.[71]

In the cable television context, the Supreme Court struck down a provision in the Telecommunications Act of 1996 which required cable television providers to completely scramble or block channels that are primarily dedicated to sexually-oriented programming or limit their transmission to the hours of 10:00 PM to 6:00 AM (akin to the channeling parameters established for broadcast indecency).[72] As with *Sable,* the fact that the policy extended into the realm of indecent speech was a factor in the Court's decision.[73] As Justice Clarence Thomas noted in his concurring opinion,

> What remains then is the assumption that the programming restricted by § 505 is not obscene, but merely indecent. The Government, having declined to defend the statute as a regulation of obscenity, now asks us to dilute our stringent First Amendment standards to uphold § 505 as a proper regulation of protected (rather than unprotected) speech.[74]

Once again, the Court based its decision on fundamental differences between media. In noting the inapplicability of *Pacifica,* the Court noted that, "[t]here is, moreover, a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis."[75]

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69. *Id.* at 126.
70. *Id.* at 128.
71. *Id.*
72. *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 806, 827 (2000).
73. *See id.* at 814 ("[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.").
74. *Id.* at 830.
75. *Id.* at 815.

In addition, efforts by Congress to bring indecency regulation to the Internet in the form of the Communications Decency Act of 1996[76] were similarly rejected,[77] with the Supreme Court noting that, "the Internet is not as 'invasive' as radio or television," requiring more "affirmative steps" on the part of users.[78] Ultimately, the constitutionality of indecency regulation seems to hinge on the distinction between "push" and "pull" media; that is between "media that deliver information passively and those that await user intervention."[79] A push medium, it would seem, is inherently more pervasive.

## IV. EXTENDING THE BROADCAST INDECENCY LOGIC: DISINFORMATION, HATE SPEECH, AND SOCIAL MEDIA

The goal thus far has been to illustrate the motivations and rationales of the broadcast indecency standard and to illustrate how they have, to this point, been found by the Supreme Court to not be transferrable to other media. As has been made clear, indecency is a broadcast-specific category of speech. The creation and maintenance of the indecency standard has been motivated primarily (though not exclusively) by the need to protect a particularly vulnerable group (children). And, importantly, the application of the indecency standard has been limited to a medium possessing certain distinguishing characteristics, notably a unique pervasiveness but also one that utilizes a scarce public resource. This section considers whether the general underlying principles that have led to the creation and continued application of the indecency standard in broadcasting might be transferable to completely different speech contexts (disinformation and hate speech) on a completely different medium (social media).

Indeed, the goal of this section is not to argue for—or even consider—the wholesale transference of the indecency standard to the social media platform context (in a manner similar to what Congress attempted with the Internet and the Communications Decency Act of 1996).[80] Rather, the goal of this section is to consider whether the fundamental notion of crafting a distinctive category of speech that, from a regulatory standpoint, is exclusive to a specific medium, might be a viable path forward in the context of social media platform regulation. Specifically, this section considers the possibility of categorizing disinformation and hate speech as distinctive categories of speech that, within the narrow context of large social media platforms such as Facebook, Twitter, Tik Tok, and YouTube, are subject to a lower level of First Amendment protection and, thus, more intensive government regulation. These categories of speech would remain constitutionally protected in other

76. Communications Decency Act of 1996, 47 U.S.C. §§ 223, 230.

77. Maria Fontenot & Michael T. Martínez, *FCC's Indecency Regulation: A Comparative Analysis of Broadcast and Online Media*, 26 UCLA ENT. L. REV. 59, 67 (2019).

78. Reno v. ACLU, 521 U.S. 844, 853-70 (1997).

79. Chen, *supra* note 20, at 1433-34.

80. Telecommunications Act of 1996, 47 U.S.C. § 223(a)(I)(B)(ii), 223(d) (1994 ed., Supp. II). (These sections of the Telecommunications Act of 1996 were subsequently struck down by the Supreme Court in *Reno v. ACLU*). *See* Reno, 521 U.S. at 853-70.

communicative contexts, given the First Amendment's established wide-ranging protections for falsity and hate speech.[81]

This section begins by acknowledging that disinformation and hate speech are far from exclusively social media problems. Traditional media forms, such as print, cable television (e.g., certain cable news networks), and broadcast radio (in particular political talk radio), are also substantial contributors.[82] Indeed, a growing sphere of critique argues that the academic community's and popular press' fixation on disinformation on social media has exaggerated social media's overall contribution, and perhaps more important, has distracted attention away from understanding and addressing the broader underlying causes of, and defenses against, disinformation.[83]

Nonetheless, the unprecedented scale of social media platforms' operations (in terms of both audience reach and content distributed) has meant that they have been well-documented contributors to the broader disinformation and hate speech problem.[84] Given that at this point—at least in the U.S.—these platforms operate free of any regulatory obligations to police disinformation and hate speech, exploration of possible mechanisms for altering the status quo seem warranted. The framework for this analysis involves considering which aspects of the broadcast indecency model translate to the social media disinformation/hate speech context and which do not.

### *A. Motivations*

Examining motivations is an appropriate starting point. Within the broadcast context, the primary (though not exclusive) motivation for indecency regulation has been the protection of children from harmful content. This is the "compelling government interest" that is essential for any government intrusions into speakers' First Amendment rights.[85]

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81. For overviews of the First Amendment protections afforded disinformation and hate speech, see generally G. Edward White, *Falsity and the First Amendment*, 72 SMU L. REV. 513 (2019), and Lauren E. Beausoleil, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2101 (2019).

82. Emily Bazelon, *The Problem of Free Speech in an Age of Disinformation*, N.Y. TIMES MAG. (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/magazine/free-speech.html [https://perma.cc/G7VW-6DGT].

83. *See* Joseph Bernstein, *Bad News: Selling the Story of Disinformation*, HARPER'S MAG., Sept. 2021, at 25, 31.

84. *See generally* NAPOLI, *supra* note 23; YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018); Caroline Atkinson et al., *Recommendations to the Biden Administration on Regulating Disinformation and Other Harmful Content on Social Media* 4 (Harvard Kennedy Sch., Mossavar-Rahmani Ctr. for Bus. & Gov't, Working Paper No. 2021-02, 2021), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/FWP_2021-02.pdf [https://perma.cc/8QWN-UPEJ]; ANDREA C. NAKAYA, SOCIAL MEDIA HATE SPEECH: THE RISKS OF SOCIAL MEDIA (2020).

85. *See, e.g.*, Ronald Steiner, *Compelling State Interest*, FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest [https://perma.cc/GG25-SQWG] (last visited Mar. 13, 2023).

As has been noted, a key motivator for broadcast indecency regulations has been the protection of children from harmful content. Many of the revelations from Facebook whistleblower Frances Haugen focused on harms suffered by children, in relation to issues such as bullying, body image problems, and addiction.[86] Thus, the motivation for protecting children would persist here and easily extend to disinformation and hate speech. Just as children are more vulnerable than adults to the negative effects of exposure to indecent programming, it would stand to reason that they are also more vulnerable to the negative effects of exposure to disinformation and hate speech.[87]

One could even go further and argue that, within the contexts of disinformation and hate speech, there are other groups that are similarly vulnerable and in need of protection. Consider, for instance, the growing body of research indicating that the elderly are particularly susceptible to accepting disinformation that they encounter on social media as truth and to sharing it with others. Research has found that elderly social media users are significantly over-represented amongst "supersharers"—a group responsible for over eighty percent of fake news sharing on social media.[88] On Facebook, compared to young users, those over sixty-five shared seven times more links to fake news domains.[89] The effect of age was found to hold after controlling for other explanatory factors, such as partisanship, education, and overall posting activity.[90]

Such findings are particularly concerning because voters over sixty-five have the highest rate of voter turnout of any age category.[91] Essentially, then, a group with the greatest engagement with the democratic process is most susceptible to organized efforts to subvert this process—a process that presumably there is a compelling state interest in protecting.

There are a number of possible explanations for this pattern. Researchers have highlighted factors such as less online experience,

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86. *See generally,* Paul, *supra* note 1; Dan Milmo & Kari Paul, *Facebook Harms Children and Is Damaging Democracy, Claims Whistleblower*, GUARDIAN (Oct. 6, 2021), https://www.theguardian.com/technology/2021/oct/05/facebook-harms-children-damaging-democracy-claims-whistleblower [https://perma.cc/ZF43-9ZG7].

87. *See generally* PHILIP N. HOWARD ET AL., UNICEF OFF. OF GLOB. INSIGHT & POL'Y, DIGITAL MISINFORMATION / DISINFORMATION AND CHILDREN (2021), https://www.ictworks.org/wp-content/uploads/2021/10/UNICEF-Global-Insight-Digital-Mis-Disinformation-and-Children-2021.pdf [https://perma.cc/YY7G-PBE88]; Julia Kansok-Dusche et al., *A Systematic Review on Hate Speech Among Children and Adolescents: Definitions, Prevalence, and Overlap with Related Phenomena*, 25 TRAUMA, VIOLENCE, & ABUSE (forthcoming 2024) (manuscript available at https://journals.sagepub.com/doi/pdf/10.1177/15248380221108070 [https://perma.cc/G5TR-AT4W]).

88. Nir Grinberg et al., *Fake News on Twitter During the 2016 Presidential Election,* 363 SCIENCE 374, 375 (2019).

89. Andrew Guess et al., *Less than You Think: Prevalence and Predictors of Fake News Dissemination on Facebook,* 5 SCI. ADVANCES 2 (2019).

90. *Id*.

91. Press Release, U.S. Census Bureau, 2020 Presidential Election Voting and Registration Tables Now Available (Apr. 29, 2021), https://www.census.gov/newsroom/press-releases/2021/2020-presidential-election-voting-and-registration-tables-now-available.html [https://perma.cc/DNU4-C3VX].

suboptimal capacity for judgment, and higher levels of trust in one's social network.[92] These are descriptors that, needless to say, could just as easily be applied to children. However, the key difference here is that children do not vote (though certainly a child reared on disinformation is not likely to grow into a well-informed participant in the democratic process).

The inherent vulnerability of the elderly to other forms of disinformation, such as online and telephone scams, has been recognized by policymakers,[93] and has led to the enactment of speech-related laws and regulations that are explicitly motivated by the need to protect this sector of the population.[94] The 2018 Senior Safe Act, for instance, allows banks, credit unions, investment advisers, and brokers to report suspected fraud against seniors to law enforcement without fear of being sued, as long as they have trained their employees in how to detect suspicious activity.[95] In a recent request that the FCC take more aggressive enforcement actions implementing existing regulations regarding robocalls, Senators Edward Markey and John Thune noted:

> Although Congress, the FCC, private companies, and consumer advocates have taken important steps to address the plague of robocalls in recent years, Americans continue to receive illegal robocalls. In many cases, these calls inflict serious harm on consumers and can lead to significant financial damage to members of vulnerable communities, particularly more elderly individuals.[96]

Vulnerable communities are central to concerns about the proliferation of hate speech on social media platforms as well. Obviously, the subjects of hate speech face the risks of violence, social marginalization, and the accompanying psychological effects that can arise from hate speech. Targets of social media-disseminated hate speech tend to be populations with a

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92. *See* Nadia M. Brashier & Daniel L. Schacter, *Aging in an Era of Fake News*, 29 CURRENT DIRECTIONS PSYCH. SCI. 316, 317-19 (2020).

93. *See* Lilianne Daniel et al., *Protecting the Public and Vulnerable Populations from Fraudulent Scams on Social Media*, NAT'L ASS'N OF ATT'YS GEN. (Apr. 12, 2019), https://www.naag.org/attorney-general-journal/protecting-the-public-and-vulnerable-groups-from-fraudulent-scams-on-social-media/ [https://perma.cc/ZPC3-5BC8]; *see also* FED. BUREAU OF INVESTIGATION, 2021 IC3 ELDER FRAUD REPORT 3 (2021), https://www.ic3.gov/Media/PDF/AnnualReport/2021_IC3ElderFraudReport.pdf [https://perma.cc/W9BV-5KTK].

94. *See* Slide Deck Presentation, Odette Williamson, Att'y, Nat'l Consumer L. Ctr., & Lisa Weintraub Schifferle, Att'y, Fed. Trade Comm., Nat'l Ctr. on L. & Elder Rts., Legal Basics: Protecting Older Adults Against Scams, at slide no. 5 (Apr. 10, 2018), https://ncler.acl.gov/pdf/Protecting%20Older%20Adults%20Against%20Scams%20Slides.pdf [https://perma.cc/GW7W-N6HB].

95. *See* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub L. No. 115-174, § 303, 132 Stat. 1296, 1335-38 (2018) (Senior Safe Act).

96. Letter from Edward J. Markey & John Thune, U.S. Senators, to The Hon. Jessica Rosenworcel, Chairwomen, FCC 1 (Feb. 3, 2022) (available at https://www.markey.senate.gov/imo/media/doc/letter_-_fcc_itg.pdf [https://perma.cc/4Y9P-TCZB]).

minority status, with hate speech essentially compounding their vulnerabilities.[97] Researchers have documented effects on hate speech victims:

> [They have e]xperienced physiological and emotional symptoms ranging from rapid pulse rate and difficulty in breathing, to nightmares, post-traumatic stress disorder, psychosis and suicide. [Attacks have resulted in] deep emotional scarring, and feelings of anxiety and fear that pervade every aspect of a [hate speech] victim's life.[98]

It is important to emphasize that in both the disinformation and hate speech contexts, there is a growing body of evidence that—particularly on social media—traditional remedies to "bad speech," such as counterspeech, are ineffective.[99] For instance, a study of hate speech on Twitter found that counterspeech from a white speaker could discourage racist hate speech; but if that same counterspeech originated from a Black speaker, the amount of hate speech was not affected at all.[100] Such findings suggest that targets of hate speech may be uniquely powerless to utilize counterspeech.

In the disinformation context, research has identified a wide range of factors that explain why, particularly in the social media context, disinformation can easily be over-produced relative to factual news and information, why it tends to travel faster through social networks than factual news information, and why individuals are likely to not be exposed to—or not respond favorably to—factual corrections to disinformation.[101] Such findings further undermine the traditional reliance on counterspeech as a remedy.

The key point here is that, as is the case with indecency, there are specific communities that have proven to be uniquely vulnerable to the effects of disinformation and hate speech on social media. That being said, there is no reason to assume that the identification of a vulnerable group is fundamental to the carving out of a less-protected category of speech. No FCC or court decision has articulated such a principle of exclusivity. Presumably, such an action could also be motivated by other compelling government interests, such as the preservation of the democratic process, which the First

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97. The United Nations ("UN") published investigative findings on hate speech on social media which contextualized the experiences of populations uniquely vulnerable to hate speech. *See Targets of Hate*, U.N.: HATE SPEECH, https://www.un.org/en/hate-speech/impact-and-prevention/targets-of-hate [https://perma.cc/5SN2-T56A] (last visited July 21, 2022). The UN calculated that 70 percent or more of the targets of hate speech internationally are populations belonging to a minority status, specifically national, ethnic, religious, or linguistic minorities. *Id.*

98. Michael J. Cole, *A Perfect Storm: Race, Ethnicity, Hate Speech, Libel and First Amendment Jurisprudence*, 73 S.C. L. REV. 437, 444 (2021).

99. For an overview of this evidence, see generally Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55 (2018).

100. *See* Kevin Munger, *Tweetment Effects on the Tweeted: Experimentally Reducing Racist Harassment*, 39 POL. BEHAV. 629, 642 (2017).

101. For a detailed discussion of these findings, see Napoli, *supra* note 98, at 68.

Amendment is intended to support in part through the cultivation of an informed citizenry.[102] Disinformation undermines the well-informed decision making that is central to a well-functioning democracy, potentially leading to a form of market failure in the marketplace of ideas.[103]

### *B. Rationales*

Within the U.S. approach to media regulation, compelling motivations typically are not sufficient for government intervention. There must also be a compelling rationale—characteristics of the particular mediated context that provide justifications to pursue the motivation in question.[104] As was noted previously, indecency regulations were premised in large part on the rationale that the broadcast medium was uniquely pervasive, widely and freely available, and virtually universally adopted and used. As noted above, the application (or lack thereof) of indecency regulations to other media hinged, in large part, on whether these media were similarly pervasive. From the Court's perspective, the answer to this question has consistently been no.[105]

It should be noted that the regulation of broadcast content (particularly in relation to news and information, which is the focus here) has been premised on rationales other than pervasiveness, such as broadcasters' use of a scarce public resource.[106] Consequently, a compelling case can be made that if one of these other rationales were found to apply, then that might be sufficient to justify some form of disinformation regulation for social media platforms.[107] This is a topic that is beyond the scope of this analysis but has been dealt with extensively elsewhere.[108]

Here, we take up the question of whether there is a compelling case to be made that contemporary social media platforms possess the kind of pervasiveness that characterized broadcasting at the peak of its reach and influence.[109] Toward this end, it would certainly be useful if either the FCC or the courts had fleshed out the notion of pervasiveness in substantial detail. Unfortunately, this is not the case. We are, however, left with a few basic components upon which we can build this analysis.

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102. *See* PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 37 (2001).

103. *See* Napoli, *supra* note 99, at 97-98.

104. *See* NAPOLI, *supra* note 23, at 144-48.

105. *See supra* pp. 307-08.

106. *See, e.g.*, Napoli & Graf, *supra* note 24, at 47.

107. *See* Philip M. Napoli & Fabienne Graf, *Social Media Platforms as Public Trustees: An Approach to the Disinformation Problem*, *in* ARTIFICIAL INTELLIGENCE AND THE MEDIA: RECONSIDERING RIGHTS AND RESPONSIBILITIES 93, 107-15 (Taina Pihlajarinne & Anette Alén-Savikko eds., 2022).

108. Napoli, *supra* note 18, at 442; Philip M. Napoli, *Treating Dominant Digital Platforms as Public Trustees*, *in* REGULATING BIG TECH: POLICY RESPONSES TO DIGITAL DOMINANCE 151, 145-47 (Martin Moore & Damian Tambini eds., 2021).

109. For a pre-social media effort to conduct a similar analysis in relation to post-broadcast technologies, such as cable, satellite, and Internet radio, see Bloom, *supra* note 65, at 117-26.

At the most basic level, there is the issue of reach. As the Supreme Court noted in *Pacifica*, a key aspect of what made broadcasting pervasive was its "presence in the lives of all Americans."[110] This statement reflects the near universality of broadcasting's reach and influence circa 1978. Of course, no one broadcaster had this kind of reach, due to the license allocation system that granted licenses at the local level and due to broadcast station ownership limits (much more stringent than now) that limited the national reach of any one owner.[111] But the medium itself was essentially ubiquitous, with the traditional Big Three broadcast networks accumulating massive audiences through their networks of local affiliates.[112] The same degree of ubiquity can be found for social media today, with social media usage exceeding eighty-two percent in 2021 and still trending upward.[113] And today, individual platforms, such as Facebook and YouTube, are used by a substantial proportion of the American public [114] in a way that is comparable to how the public relied upon the Big Three broadcast networks at their peak. These networks each reached ninety-seven percent of American households and divided that audience amongst themselves with relatively little competition.[115] Thus, from the reach dimension of pervasiveness, social media—both collectively and in terms of individual networks—would seem to meet or exceed broadcasting.

Another distinguishing characteristic that is, to some degree, implicit in the notion of pervasiveness is the distinction between media available for free and media requiring audience payment.[116] This distinction is part of the reason why the FCC and the courts have refused to characterize media such as cable television and satellite radio as pervasive, even though from an end user's standpoint, they are virtually identical to their free, ad-supported counterparts, broadcast television and radio.[117] When consumer payment/subscription is involved, not only can this payment/subscription arrangement be interpreted as a more affirmative step on the part of the end user to receive the content, it can also facilitate mediation of the relationship between content provider and

110. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

111. For an overview of the current state of U.S. media ownership regulations and of how they have evolved over time, see generally DANA A. SCHERER, CONG. RSCH. SERV., R43936, THE FCC'S RULES AND POLICIES REGARDING MEDIA OWNERSHIP, ATTRIBUTION, AND OWNERSHIP DIVERSITY (2016).

112. *See id.* at 20-21.

113. *See* Slide Deck Presentation, Edison Rsch. & Triton Digit., The Infinite Dial 2021, at slide no. 20 (Mar. 11, 2021), http://www.edisonresearch.com/wp-content/uploads/2021/03/The-Infinite-Dial-2021.pdf [https://perma.cc/6R5M-SLCW]. The Infinite Dial is the longest-running survey of digital media consumer behavior. *Id.* at slide no. 2.

114. *See Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/ [https://perma.cc/6264-RKBF].

115. For an overview of the era of Big Three network dominance, see generally KEN AULETTA, THREE BLIND MICE: HOW THE TV NETWORKS LOST THEIR WAY (1992).

116. *See* Bloom, *supra* note 65, at 122.

117. *Id.*

end user on an individual level,[118] unlike the more indiscriminate nature of the relationship between broadcasters and their audiences.

A third articulated dimension of pervasiveness (related to the free component) has been the likelihood of accidental exposure to harmful or offensive content. In the broadcast context, this meant that one could be listening or watching some free, widely available broadcast programming, and unexpectedly and involuntarily be exposed to indecent programming. As the Supreme Court noted in the *Pacifica* case, "prior warnings cannot completely protect the listener or viewer from unexpected program content."[119]

Comparable situations arise in the social media disinformation/hate speech context when we consider users scrolling through their news feeds from a freely available social media platform and suddenly being exposed to posts containing anything from the livestream of a shooting to racist hate speech, to, of course, various categories of disinformation. And while social media users make affirmative decisions about which other accounts to follow, the operation of many contemporary social media platforms is such that a user's news feed is increasingly populated by content from other accounts that the platforms' curation algorithms have determined the user is likely to find interesting.[120] This is, in many ways, the central problem with social media—the extent to which individual users are now saddled with the challenge of processing and making sense of the disparate stream of content that social media platforms push at them.

This brings us to the important distinction noted earlier between "push" and "pull" media. As has been argued elsewhere, the fundamental transformation that social media imposed on the Internet was the shift from a pull medium to a push medium.[121] While the notion of the traditional Web being pervasive can be countered by the 1990s-2000s-era Internet user's need to proactively seek out content, by the 2010s, social media flipped that dynamic, pushing streams of content to users without them having to take the traditional proactive steps. And so, to the extent that the notion of pervasiveness depends at least in part on whether a medium has a "push" orientation, social media platforms possess that fundamental characteristic, whereas the broader Internet largely does not.

In sum, though it is questionable whether the core dimensions of the pervasiveness rationale need to be met in order to borrow the medium-specific speech carve-out model from broadcast regulation, the analysis presented in this section suggests that the basic criteria that policymakers and the courts have applied to broadcasting in order to characterize the medium as pervasive—and to bolster their justification for indecency regulation—seem to translate reasonably well to the social media context.

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118. *See* United States v. Playboy Ent. Grp., Inc., 529 US 803, 804 (2000).

119. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

120. Michael Kan, *Facebook, Instagram to Show You More Content from People You Don't Follow*, PC MAG. (July 28, 2022), https://www.pcmag.com/news/facebook-instagram-to-show-you-more-content-from-people-you-dont-follow [https://perma.cc/LS89-AQ2A].

121. NAPOLI, *supra* note 23, at 42-48.

As was noted above, the notion of pervasiveness as a regulatory rationale remains woefully under-developed, heightening its vulnerability to critique. Nonetheless, the pervasiveness rationale and its associated regulatory carve-out for broadcast indecency remain accepted precedent in U.S. media law and policy, maligned as they may be from many quarters. As policymakers today consider possible approaches to address the problem of disinformation and hate speech on social media, considering these as regulatable categories of speech exclusively within the context of social media, while continuing to remain free to circulate on the broader Internet and other mediated contexts, may be an idea worthy of further consideration.

## V. CONCLUSION

The proposal put forth here is, in many ways extreme, particularly in light of the way in which the dominant media regulatory philosophy has evolved since the days when regulatory obligations, such as indecency and the Fairness Doctrine, were being introduced and fleshed out.[122] These regulatory requirements represent the apex of government intervention into the media sector and have, retrospectively, been characterized by many critics as the epitome of government overreach.[123] The question implicit in this analysis is whether we might be at another moment when a deviation from the more established philosophical norm might be in order. If the answer to that question is yes, then this Article has laid out a foundation for charting a path forward.

Obviously, this Article has focused on the core issues of motivations and rationales upon which any media regulatory framework is built. It has not tackled the complex definitional and implementation challenges that would, of course, be essential next steps. As the history of concepts such as obscenity and indecency has taught us, defining such terms is inherently fraught, and the end result is likely to be imperfect. But the task is not impossible. In its re-examination of indecency regulation, this Article has identified some potential starting points from an implementation standpoint. For instance, what is the social media equivalent of "channeling" disinformation/hate speech in a way that is analogous to how broadcasters have been required to channel indecency to the late-night hours? Is the process of algorithmic amplification the appropriate analogue? If it is, could we imagine a regulatory framework that requires that platforms refrain from algorithmically amplifying posts that the platforms' own processes determine to be disinformation or hate speech? Could we imagine an approach akin to indecency's focus on a particularly vulnerable population but focused on channeling the harmful content away from audience segments that have a similarly empirically demonstrated vulnerability?

Finally, a key caveat of this analysis: embracing that social media may represent a unique context where disinformation and/or hate speech may be

122. For discussions of this evolution in regulatory philosophy, see generally Napoli (2021), *supra* note 18, at 304-05; SCHERER, *supra* note 111.

123. *See, e.g.*, Napoli (2021), *supra* note 18, at 306.

subject to less First Amendment protection does not automatically create an authoritarian model of media regulation any more than treating broadcasters as trustees of a scarce public resource has. Broadcasters have maintained a substantial degree of First Amendment protection. And so, when we think of the implications of this analysis for future social media regulation, it would be a mistake to jump to extreme conclusions about some form of an authoritarian Ministry of Truth, passing self-interested judgment on the veracity of individual social media posts.

Indeed, it is important to keep in mind that some of the even fairly modest regulatory proposals that have been put forth by various stakeholders—such as requiring social media platforms to develop their own standards of conduct related to the policing of disinformation and hate speech; mandating increased accountability for the behaviors of disinformation super spreaders; or scaling back the expansive Section 230 liability protections exclusively in relation to disinformation, or to algorithmically amplified content more broadly[124]—would likely incur First Amendment challenges. The analysis presented here suggests that there may exist an established means of overcoming such challenges based on precedents developed within the context of indecency in broadcasting.

124. *See, e.g.*, ASPEN DIGIT., COMMISSION ON INFORMATION DISORDER FINAL REPORT 5 (2021), https://www.aspeninstitute.org/wp-content/uploads/2021/11/Aspen-Institute_Commission-on-Information-Disorder_Final-Report.pdf [https://perma.cc/7UK8-9WBH]; Atkinson et al., *supra* note 84, at 7.