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“Standing Between Commerce and Democracy”: Media Regulation and the Battle Between the
Right to Free Expression and the Responsibility of Content Moderation

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Introduction

Modern society has always been intertwined with the rapidly growing state of media technology. This has become even more true since the birth of the internet, which has formed the digitized world as it is experienced today. Media, in its broadest sense, refers to different tools (mainly modern technologies) that humans have used throughout history to communicate with each other about a common reality across time and space (Jensen, 2013), but this definition gets complicated when media moderation gets brought into the picture.

The problem of media moderation, or regulation, stems from two opposing factors: the rise of “fake news” and the inability to control it in this highly digitized society. To address this problem, a fundamental question needs to be addressed. More specifically, how can media regulators effectively navigate the tension between the right to free expression and the responsibility of content moderation in the digital age?

To serve the best interest of a free society, regulation must successfully balance free expression and content moderation, while also simultaneously satisfying the often-conflicting requirements of the state and the marketplace. The privilege to freely distribute content of any nature, and own the means to which the messages are spread, comes with the exchange of being accountable by a system of standards. This is necessary because without sanctions, enforced socially or by the state, destructive motivations could easily lead to the failure to fulfill the democratic principle of maintaining a level of trust. Because of this, the media (i.e., news or social) is not just another business, and effective enforcement is essential for its survival in a civilized society. “The media finds itself in a position between commerce and democracy, motivated by the potential of this particular combination” (Sjøvaag, 2015). In other words, despite today’s widely accepted theory of mediatization, there is still misinformation— and it can be attributed to these selfish motivations driven by its profit-driven models.

There are three potential approaches to address the needs: first, through federal regulation involving stricter sanctions and laws that impose restrictions on media companies; second, via a company-driven approach, which leans towards allowing companies to self-regulate without much intervention; and third, a hybrid approach combining government regulation to establish a

framework and offer guidance while enabling companies to moderate themselves. Drawing on examples such as fake news during the Trump era and Facebook's challenges in regulation (Quach et al, 2022), I argue that cautiously administered government regulation can be viewed as a necessary step. This step aims to both uphold the private rights of media companies and safeguard democratic interests by preserving trust and journalistic standards. Consequently, the subsequent pages will support the third option, which involves a blend of government oversight and actions taken by content providers.

Before introducing existing literature related to the phenomena, it is important to note this paper takes a mainly American framework to the issue at hand. American legal code is followed and case studies are observed under an American understanding on effects, even though most of them have global relevance. For example, *amici curiae* (used in American legal cases) will be used to demonstrate the social media impacts of the U.S. 2020 election cycle. Even though a similar framework could be applied to other elections, or even the States' global impacts, those will be minimally discussed.

To address the question of how media regulators can effectively navigate the tension between the right to free expression and the responsibility of content moderation in the digital age, this paper is broken up into five main sections: (1) the paper reviews the important concepts that are essential to the arguments made. To accomplish this, literature is used to provide definitions and explanations to these concepts. These concepts will be divided into two main categories (i.e., mediatization and fake news) to first break down the overall environment in which today's media finds itself, which apply to the two case studies later that analyze this issue through social media and news contexts, respectively. (2) Next, the paper summarizes the relevant regulation that currently exists in media law and theory. (3) Once theoretical media concepts and an understanding of existing media regulation have been provided, the debate is first applied in a news context by analyzing the coverage of former President Donald Trump. (4) After the news context has been presented, the debate will be applied in a social media context by analyzing Facebook's public struggles with moderation. (5) Finally, potential solutions that answer the initial research question are presented by examining American cases. These current American cases will also be discussed along with an analysis of the recent European Media Freedom Act for comparison. Overall, this paper aims to justify its thesis that government regulation has a role in providing effective frameworks for private media conglomerates to

operate under, and to contribute solutions to effectively balance the right to free expression and responsibility both now and in the future.

A Review of Relevant Concepts and Theories

Mediatization plays a major role in why the media is important enough to require a conversation around moderation or regulation to be discussed in the first place. Once that is explained and established, the inner workings of how a mediatized society could fall susceptible to ‘fake news’ is then explained with an explanation of how this creates what is known as the ‘infosphere’. With the foundational terms in this section, analysis can be drawn later on that rely on these ideas.

Mediatization Theory

Mediatization focuses on the impact of media on a general, societal level and how it permeates almost every moment of our existence. Such a process encourages different types of social change such as replacing traditional forms of social interaction and altering existing activities, hence reshaping them into media spectacles and events (Couldry et al., 2009). These processes also make media so woven into everyday lives that media representations contribute fundamentally to one’s conception of reality, and become integrated in the operations of other social institutions and cultural spheres,” while at the same time achieving “the status of social institutions in their own right.” (Hjarvard, 2013).

Media has consequences for communication based on its form and content, and although mediatization is not alone tied to digital media, its omnipresence is tied to the sheer pervasiveness of the smartphone (Scarcelli, et al, 2022). The smartphone has led to the intensification of more personal practices in digital spaces, which is seen with the expansion of social media. As mediatization is integrated with social institutions and cultural spheres, social media is an integral part of this process and has expanded the intermingling of personal media with media ecologies meaning that individuals have the possibility to become strongly influenced by what is on social media. As a whole, mediatization theories explain how embedded media – specifically social media – influence an individual in today’s climate, and how strongly it can influence political opinions, social views, or specifically susceptibility to the phenomena of fake news.

“A Unified Account” of Fake News in the Infosphere

The buzzword “fake news” is better broken down into Søe’s (2021) unified account of information, misinformation and disinformation. These accounts are outlined through her structure of specifying semantic information as natural and non-natural, until mis/disinformation can be introduced in the following manner:

- (1) Semantic information: a fundamental and inherently true notion; it is the baseline idea that is used to develop an account of knowledge. This would sound like a fact that is heard simply by itself with nothing added to it; the meaning from the information is rapidly understood for what was said and nothing more.
- (2) Natural information and non-natural information: all information will be either natural or non-natural, meaning information can either be taken for what it is (natural), or meaning can be added to it (non-natural) by agents in order to make sense of the information. For example, natural information would infer that smoke ‘means’ fire because tokens of smoke reliably correlate with tokens of fire. Non-natural information would infer that red traffic lights mean stop and hence mandate stopping because of explicit and implicit human interferences. These notions by Paul Grice as understood by Søe would place both misinformation and disinformation as non-natural since they both hold misrepresentation, which is gained in the process of turning information non-natural and inherently has or leaves room for mistakes.
- (3) Misinformation and Disinformation: if information is intentional non-misleadingness, then misinformation is unintended misleadingness and disinformation is intentional misleadingness. A rumor or insult would be misinformation, for instance, whereas propaganda or hoax would be disinformation. In short, they are variations of meaning without truth (Dretske, 1981).

Based on the definitions above, fake news can be classified as both misinformation and disinformation, as they both refer to types of wrong or false information, though only disinformation is wrong on purpose. Once fake news is understood to be a form of misinformation and disinformation, it can also be concluded that false information (or fake news) is non-natural. This ties into Søe’s (2021) notion of truth – or in this case the absence of it. Søe (2021) discusses whether information requires truth to still be classified as information, and although this varies between philosophical theorists, she argues that there is a default association

between ‘inform’ and truth, although association does not imply it as a semantic feature. This gets applied specifically to misinformation and disinformation by adherence to Grice’s Cooperative Principle (i.e., they try to be cooperative in their communication and conversation), in which the provision of true and relevant information is strived for, could be reasoned as why ‘misinform’ and ‘disinform’ are associated with falsity (Grice, 1975). True disinformation is thus generated through implicatures where what is literally said is true even though what is implied is false, leading to a misrepresentation on the whole. This proves that disinformation doesn’t even have to be false, it just has to be purposefully misleading.

Fake news exists in the “infosphere”, as described by Michael Lynch. The infosphere encompasses the idea that digital data no longer drowns us like it used to– we are adapting to life underwater and essentially becoming digitally human (Lynch, 2016). Information is the new atmosphere, hence the term ‘infosphere’ as first dubbed by Luciano Floridi (2014). We take this reality for granted and do not usually think critically about it in a natural attitude. For example, Google tends to be the first place thought of when an individual today wants to gain knowledge about the world. Lynch notes this as a direction of where our own culture is moving as society adapts to digital life: taking the infosphere for granted and accepting it as being as seamlessly integrated in our lives as the air we breathe. “The Internet of Things is becoming the Internet of Us,” he explains, as we move towards becoming digital humans. Lynch notes how quickly this is happening, especially how easily it has become to accept without reflection (Lynch, 2016).

Digital humans have more access to information than ever before, and this means that the walls of our digital life make real life objective knowledge harder to come by– the internet is changing how we learn information to become more passive or differential. When we depend too much on one way of accessing the world and letting our senses dull, we inherently open ourselves to being susceptible to fake news, as this ease of information is taken for granted and information is not actively evaluated for its accuracy.

What Already Exists on Media Regulation: Laws and Literature

To apply these concepts to the specific phenomena of media regulation, it is worth acknowledging what currently exists in this area – both the laws and literature surrounding it. Media law and regulation in the United States is strongly guided by the U.S. Constitution. In regards to social media regulation, state-level anti-censorship laws have directly implicated the

Dormant Commerce Clause (from the Commerce Clause of Article I which gives Congress the power to regulate commerce among states), which refers to the prohibition of states to pass legislation that discriminates against or excessively burdens interstate commerce. The concept of the Commerce Clause encompassing "dormant" or implied restrictions on individual states' authority to regulate commerce extends far beyond the scope of social media. However, in the context of social media, it can be inferred that any state intending to regulate social media platforms must consider their jurisdictional rights. These platforms enable interstate commerce by enabling businesses of varying scales to access customers across state boundaries, effectively functioning as global commercial enterprises (Rasheed, 2023).

Because of their substantially longer history, the laws of news media look different and are more defined compared than social media regulation. Media's federal regulation is outlined by the Federal Communications Commission (FCC) and state jurisdictions, which align with the First Amendment's freedom of the press protections. Defamation, for instance, is not protected speech under the First Amendment which means that media outlets cannot make false statements about an individual with impunity. Media personnel, however, are legally protected when the public interest in receiving a report outweighs the potential damage to an individual reputation. This protection, however, operates with the assumption that journalists are reporting responsibly (University of Minnesota Libraries Publishing, 2010).

Outside of legal frameworks, philosophical and other academic perspectives on moderation are extensive in this area pertaining to the media as well. Jillian C. York and Ethan Zuckerman (2019) explain the issue well, and their main concepts of hard and soft control are particularly relevant for social media moderation. Hard control is a platform's authority over what can be published online, while soft control is a platform's authority over what we are likely to see and what is deprioritized in algorithms that govern a user's view of posts on the network or feed.

Hard control extends to a platform's community guidelines, outlining not only their legal obligations to remove specific content but also often encompassing content that is otherwise permissible by law. This authority lies with the company, granting them discretion, rather than the user. This becomes the focal point for regulators, as these platforms are accountable to shareholders and advertisers while aiming to minimize the cost of content moderation. To keep

overhead costs relatively low, most platforms heavily depend on ‘flagging’ or user reporting to identify prohibited content. This approach has largely shaped the existing system of moderation.

To regulate non-natural information in news media, the U.S.’s Federal Communications Commission (FCC) has two very important tools. First, the FCC has a news distortion policy which can be used to challenge the license of a broadcaster that deliberately distorts the news. In addition, the FCC also has a broadcast hoax rule which allows it to punish stations that air false information under certain circumstances (Timmer, 2019). With these, the FCC can target broadcasters for airing ‘fake news’ under either of these plans in accordance with the protections of the First Amendment. In practice, however, the FCC operates under a large number of exclusions that eliminate most modern cases from their penalties. Due to the relatively limited enforcement options available to the FCC, it can be concluded that current jurisdiction is not equipped to handle the problem of fake news, and this has become especially evident in the past decade.

Regulating News Media and the Coverage of Donald Trump

When dealing with issues related to ‘fake news’, it is impossible to not discuss the former president and his appeal, which tied him to the issue and the ‘deep story’; the story that claimants were cutting in line for a slice of the ‘American Dream’, and those who were not were scorned as ‘white trash’ and ‘rednecks’ (Hochschild, 2018). The deep story is based more in feelings than conclusive fact, yet it is still responsible for the success of Donald Trump with the help of the essentially unchecked coverage of his campaigns. The former president voiced the deep story that is rooted in fake news, in both senses of misinformation and disinformation, on social media and was then covered by news media, especially news sources that would technically be considered political-opinion media rather than news media, but is still often where Americans consume news.

In 2012, more Americans relied on cable channels for information about elections than on network news. By 2016, two-thirds of Trump’s support came from people who said that Fox News was their most-trusted news source (Polletta & Callahan, 2017). A further blurring of the lines exists in the United States as a single media source will have both news and opinion portions of their broadcasts, but Fox News has built a media empire largely based on the popularity of its current and former opinion personalities (i.e., Sean Hannity, Tucker Carlson,

Glenn Beck, Bill O'Reilly) rather than their "hard news" shows. Right-wing opinion media platforms like this are not legitimate news sources, as they are legally classified as entertainment platforms, but that fact makes little difference if they are still able to take advantage of the deregulations of the FCC and other legal frameworks surrounding deregulation.

Opinion platforms often present themselves as news sources. By packaging opinion as news, they establish a sense of truth for numerous viewers, given that many rely on them as credible news outlets. This enables these platforms to employ tactics akin to Trump's approach—shaping false stories into narratives rather than factual accounts. This dissemination of disinformation significantly impacts social spheres, including federal elections and political landscapes. When supporters curate their information sources to solely embrace the storytelling narratives that align with the underlying themes driving Donald Trump's success, an entirely new definition of truth and falsehood emerges.

Possible solutions may lie in examining how other countries address false information within news media, particularly during election cycles. In comparison to the United States, European countries generally experience smaller circulations of fake news, with countries like Germany and France exhibiting less prevalence than both the UK and the US. In the 2017 British election, despite the presence of fake news, its impact was somewhat mitigated by an effective team of fact checkers, partly supported by Google and Facebook.

One key reason for Europe's better control of fake news is their ability to observe its rise in the United States preceding the 2016 presidential election. This prompted them to implement more rigorous fact-checking measures and security protocols. Additionally, European nations tend to consume and trust mainstream media more, resulting in fewer opinion-based news sources that substitute factual and responsible journalism (Douglas, 2018).

In contrast, within the US, certain political factions, such as Trump's supporters, seek separate and parallel news formats that reinforce their conservative views within an enclosed infosphere. To counter the repetition of fake news in these isolated spaces, fostering critical and inclusive dialogue formats could prove pivotal. Initiating such strategies might serve as a potential approach to addressing fake news originating from content creators, particularly in the absence of robust policy regulations.

Regulating Social Media and Facebook's Fight Against Non-Natural Information

As mentioned earlier, the presence of fact-checking in online spaces has been a fundamental part of regulating the spread of fake news. This is mainly done on social media, as this represents more of private companies' role in free speech whereas news media represents more of a journalistic obligation to report truthfully. Facebook (now Meta) is the main and most clear example of a social media company navigating digital moderation, as they functioned as a main perpetrator in Donald Trump's eventual success in 2016.

Facebook announced changes in their algorithm to counter fake news in early 2017 that introduced their new practices of "flagging and tagging". They explained their signals would "identify and rank authentic content" as well as "predict and rank in real-time when posts might be more relevant to you" (Andersen & S  , 2020). This still leaves the user in charge of deciding what to believe, which felt safe from Facebook's end as a way to ensure they were not encroaching on any rights that were expected as something that should fall to the hands of the users. After a few months, they reworked their scope from 'fake news' to 'false news', which carries the same definition as S  's (2021) understanding of non-natural information broken into misinformation and disinformation. This clarification meant that the company would shift only to disinformation, which they classify as false news, and basically disregard misinformation.

Additionally, Meta issued a subsequent update addressing the commercial aspects of the issue. They began using a more proactive approach, going beyond simply flagging false news. They aimed to target advertisers and pages spreading misinformation by revoking their advertising privileges if they repeatedly share stories marked as false. Meta will heavily rely on fact-checking in its systems to combat misinformation. While their focus on combating false information became more defined, Meta also aimed to uphold user rights. They intended to provide users with contextual information on articles they encounter, while leaving the decision of what to read, share, and trust entirely to the user. Their aim remained centered on being a social media company rather than assuming the role of a news entity or any other authority that might infringe upon user rights.

This is in no way a perfect solution to the problem, however. This strategy will not work for 'true disinformation', for example, as their fact-checking systems are indifferent to distinguishing stories that would technically be true disinformation: stories that are technically true but framed in ways that are purposefully misleading. This is particularly pervasive because

those stories still generate clicks, in turn generating money which is the ultimate incentive of creating and distributing false or fake news. Facebook supports their approach by saying false news is harmful and makes the world less informed and erodes trust, but Floridi (2014) counters that this would only be true if such information is defined as inherently true— as Facebook’s approach would be in a lot of cases. The profit motive possessed by Facebook, and by every for-profit platform, presents a clear hurdle to their ability to ever reach a point where they can truly be successful in moderating content on their own. Thus, more government guidance is clearly needed.

Discussion: Where Do We Go Next? A Look into Current Cases

As the proliferation of misinformation expands, particularly in online spaces, companies like Facebook have developed various methods of content moderation. In response, states like Florida and Texas have endeavored to regulate these platforms, seeking to control and curtail their capacity to censor content. The companies most impacted by this are part of Netchoice, a lobbying group for tech giants such as Google, Meta, TikTok, Twitter (X), and other similar companies. Two Supreme Court cases will be heard about the two states’ seizures of control: NetChoice, LLC v. Paxton (Texas) and Moody v. NetChoice, LLC (Florida), and will be discussed as one in this discussion as they represent essentially the same issue.

These cases can shape the future of American media law, especially in regards to the scope of which social media should be regulated from a government or company standpoint. If the Court upholds Texas and Florida’s laws, content moderation could advance a vision of a state-by-state internet speech regulation that can allow the state to assert extraterritorial authority without a clear mechanism for deciphering in-state and out-of-state users. If the Supreme Court sides with Netchoice, or the companies, then implications would likely continue to look more similar to what is seen today: companies such as Facebook or Twitter will continue to have the right to regulate at their own discretion. The cases implicate the violation of the Dormant Commerce Clause, which requires that no state or local law places an undue burden on interstate commerce, along with the editorial judgment rights granted under the First Amendment. The cases are scheduled to be heard in June of 2024, but amicus briefs (from *amicus curiae* meaning “friends of the court”: they present information for the court to consider in deciding the appeal from outside parties) were released this December that highlight the importance of these cases

and their implications on the future of content regulation, especially in social media spaces that have dominated the need for regulation in recent years.

Giving the power to moderate on the level of individual states would increase the risk of political violence and election subversion, according to the amicus from Professors Richard L. Hasen, Brendan Nyhan, and Amy Wilentz (2023). They argue that based on the 2020 election cycle, social media has exacerbated this potential by inherently promoting disinformation just from its nature of being an unprecedented level of communication. The false claims and incendiary speech from these platforms spurred election violence and undermined voter confidence in the fairness of the vote count or disrupted the peaceful transition of presidential power with the attack at the United States Capitol on January 6, 2021 that all was the result from the inevitable— they argue— spread of disinformation on social media. But things could have been far worse without platforms’ actions in moderating and removing dangerous content which included deplatforming Donald Trump after the January 6 attack. If Florida and Texas were to win their cases, such moderation would have never occurred and political violence and election subversion in the United States could have held the potential to be much greater.

An amicus brief from Reddit gives an insight on the case from the perspectives of actual content moderators. Reddit uses a different approach than sites like Facebook or Twitter to moderate content on its platform. Facebook and Twitter have created teams of moderators to review flagged material. Every user on Reddit, on the other hand, is a moderator. These moderators can create their own subreddits and control how other users interact with their pages. These subreddits function as their own social media platforms that are curated by the users themselves, which is unlike most other social media platforms which present a much more unified approach.

The amicus by the moderators of the subreddits r/law and r/SCOTUS (2023) point out that content curation and careful moderation has allowed for the success of internet forums as found on their platform but the laws of Florida and Texas are attempting to commandeer these forums and force them to host and publish content that the moderators might object to. Together, these briefs outline what could result from the outcome of this case and show its greater implications. Either way the cases are decided have their own problems: state-by-state regulation creates inconsistent chaos, but company regulation is not sufficient as it is known and seen today. Despite this, “even if certain moderation decisions were imperfect in hindsight, the platforms’

efforts were vastly preferable to an alternative in which government fiat deprives platforms of the power to remove even dangerous speech” (NetChoice, LLC v. Paxton & Moody v. NetChoice, LLC, 2023).

If the United States continues to fail on a federal level to enact media regulation that achieves an appropriate level of moderation that reflects the depths of nonnatural information in digital media, maybe the European Union or individual states can provide some insight on what a step in the right direction could look like. The European Union has recognized the role that disinformation played in the attacks of January 6th and understands it as a cautionary example of what happens when social media companies are left to regulate information themselves. The EU’s response to online disinformation includes efforts to strengthen democracy due fears of both domestic and foreign interference. The 2020 European democracy action plan combined with the Digital Markets Act and the Digital Services Act have all been enacted to demand fairness and responsibility from online platforms (Bentzen, 2021) . More recently, there is a new media rulebook called the European Media Freedom Act (EMFA) which aims to foster pluralism in its journalistic landscape. The EU has been able to push for regulation in these ways because the European Parliament has consistently pushed fighting disinformation to the top of the EU's agenda. Even within regulation attempts that are still economically driven or grant media companies considerable leeway in the control of their abilities to moderate, still, the interventions that have stemmed from watching the failures of the United States demonstrate a level of attention to the issue and willingness to make strides towards change that have not been seen on an American federal level yet.

In the current absence of a strong federal response, California has made some strides towards greater regulatory practices. California’s Governor, Gavin Newsom, signed a social media transparency measure bill in 2022 with the goal of cutting down nonnatural information and hate speech in digital spaces (Office of Gov. Gavin Newsom, 2022), by requiring social media companies that generate more than \$100 million in gross revenue to submit their first content moderation reports to the state on Jan. 1, 2024. X (formerly Twitter) sued the state saying this was unconstitutional, but a federal judge upheld it and told the media giant they likely won’t be able to avoid compliance. Regulations like this represent successful measures that hold media companies accountable for moderating the content of their sites, while maintaining their rights to do so in a way that still leaves the decisions to the company. By combining regulation attempts

on different levels such as these, media regulation can hopefully navigate the tension that falls between the right to free expression and the responsibility to moderate digital content.

Conclusion

Media regulation falls at a messy intersection of infringing on personal freedoms and creating a successful business; it can't overstep on personal freedoms without sacrificing users that generate business, but it can't be a successful business without regulating what is said on its platform. Standing between commerce and democracy, navigating this tension falls to the separation of the two sides. Effective moderation will never come as long as companies have ultimate monetary goals— and this will not change unless broad, federal regulations are in place. While the emerging combination of self-regulation, incomplete federal law, guidelines from the EMFA, and some recently signed state level legislation provide a start at providing a framework that can balance the needs of the public and private industry, it is certainly far from complete. To be more effective, federal regulation will not look like the attempted efforts of Florida or Texas, but instead will support, encourage, and require media companies to uphold high journalistic standards that actively reflect the era of mediatization that is here to stay.

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