

Political Advertising Law in the Age of Social Media

Challenges in Updating “Analog” Laws to the Digital 21st Century: The Cases of Canada, the US, and the UK

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Introduction

A common theme in conversations about online “fake news” is that misinformation and disinformation¹ have always existed. However, the nature of the Internet compared to the 20th century's print and broadcast mass media – such as the digital age's opaque system of filters and algorithms, its communication speed, interactivity of information and unprecedented data collection – have changed the playing field in which mass communication takes place, and have in turn changed the way disinformation happens. As the American First Amendment scholar Jack Balkin suggested in 2004, “in studying the Internet, to ask ‘What is genuinely new here?’ is to ask the wrong question.”² What matters is how contemporary digital technologies change the social conditions in which people communicate³ “and whether that makes more salient what has already been present to some degree.”⁴

Social media has changed the way political advertising is done, and has created new opportunities for mis- and disinformation,⁵ which have been exploited by political actors for political gain. Especially over the past several years, there has been a dramatic shift to online communications by political actors aiming to persuade voters. For example, the UK Electoral Commission reported that in the UK's 2017 general election, campaigners spent nearly 43% of their total advertising budgets on digital advertising; that figure was nearly double the share that online advertising took in the 2015 federal election (23.9%).⁶ Parliamentary investigations in a number of countries (including the UK, the US, and

1 The UK House of Commons' Digital, Culture, Media and Sport Committee (DCMS) recommended in July 2018 in its Interim Report, “Disinformation and 'fake news'”, that the British government avoid using the term “fake news” in referring to the problem of misinformation and disinformation online. It reasoned that the term has “developed its own, loaded meaning,” including “content that a reader might dislike or disagree with.” See the UK House of Commons Digital, Culture, Media and Sports Committee, “Disinformation and “fake news”: Interim Report” (29 July 2018) DCMS Committee, Fifth Report of Session 2017-2019, HC 363 [DCMS Report 2019] at para 14. Available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/inquiries/parliament-2017/fake-news-17-19/>. US President Donald Trump has described certain media outlets as “The Fake News Media” and “the true enemy of the people.” Applying the reasoning of the DCMS, I avoid using the term “fake news” in this paper. Instead, I apply the method of the DCMS interim and final reports and use the term “misinformation” to refer to the “inadvertent sharing of false information”, and the term “disinformation” to refer to the “deliberate creation and sharing of false and/or manipulate information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain.” The reasoning of the DCMS has also been accepted by the British government: see Digital, Culture, Media and Sport Committee, “Disinformation and 'fake news': Final Report: (18 February 2019). Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/179104.htm>.

2 Jack M. Balkin, “Commentary, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society” (2004), 79 NYU L Rev 1. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=470842 [Balkin 2004].

3 Balkin 2004, *supra* note 2.

4 Nabiha Syed, “Real Talk About Fake News: Towards a Better Theory For Platform Governance” (2017) 127 Yale LJ. Available at: <https://www.yalelawjournal.org/forum/real-talk-about-fake-news> at 337.

5 *Supra* note 1.

6 Electoral Commission, “Digital Campaigning: Improving transparency for voters” (June 2018). Available at:

Canada) have concluded that registered political actors and third parties had used the opaque nature of the Internet to advance political goals in a way that ran contrary to the purposes of electoral and political advertising law in the traditional media. In the UK, a number of parties that campaigned in the 2016 Brexit referendum have been fined the maximum statutory fines for breaking electoral laws⁷, and social media companies have faced equally strong sanctions as well.⁸ But despite the dramatic shift to the online space for political advertising in the digital age, most electoral laws, including laws that regulate paid political advertising, remain in the pre-digital 20th century when most of them were drafted. As the UK's Electoral Reform Society put it, “[s]o much as changed – yet our campaign rules have remained in the analog age.”⁹

This paper considers electoral law as it relates to political advertising in Canada, the US, and the UK and argues that laws need urgently to be updated to account for the digitization of public life in the 21st century. Updated political advertising legislation will require regulation of online content; however, rather than imposing new content restrictions, I argue that the process is rather an extension of existing regulation to the online space, and a recognition of the changed landscape of political communication. I argue that the financial incentives of digital tech giants, as well as a lack of expertise in balancing areas of law as diverse as privacy, media, electoral and human rights law, may preclude their reliability as legal arbiters of communication in the online space.

The paper will be structured in four parts. Part I outlines traditional paid political advertising laws in Canada, the US, and the UK, almost all of which were drafted in the pre-digital age, and discusses how Internet communications differ from traditional print and broadcast media, which the law generally regulates in the context of elections. Part II compares the legislative initiatives in Canada, the US, and

https://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/244594/Digital-campaigning-improving-transparency-for-voters.pdf [Electoral Commission 2018]. These figures also do not show that online advertising tends to be less costly than traditional advertising; see Henk Kox, “Targeted Advertising, Platform Competition, and Privacy” (2017) 26 J Econ & Mgmt Strategy 3. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3021392.

7 Emma Graham-Harrison, “Vote Leave broke electoral law and British democracy is shaken” (July 17 2018) The Guardian Online. Available at: <https://www.theguardian.com/politics/2018/jul/17/vote-leave-broke-electoral-law-and-british-democracy-is-shaken>. Matthew Weaver & Jim Waterson, “Leave.EU fined £70,000 over breaches of electoral law” (May 11 2018) The Guardian Online. Available at: <https://www.theguardian.com/politics/2018/may/11/leaveeu-fined-70k-breaches-of-electoral-law-eu-referendum>.

8 BBC, “Facebook fined £500,000 for Cambridge Analytica scandal” (October 25 2018) BBC News Online. Available at: <https://www.bbc.com/news/technology-45976300>. For a consideration of legal repercussions of the violations of electoral law during the Brexit referendum, see: Ewan McGaughey, “Could Brexit Be Void?” (2018) 39 King's LJ 3. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232632.

9 Electoral Reform Society, “Reining in the Political 'Wild West': Campaign Rules for the 21st Century” (February 2019). Available at: <https://www.electoral-reform.org.uk/latest-news-and-research/publications/reining-in-the-political-wild-west-campaign-rules-for-the-21st-century/>.

the UK that aim to address some of the gaps in political advertising law in the digital age, including proposed legislation such as the *Honest Ads Act*¹⁰ in the US and recently-enacted law in the *Elections Modernization Act*¹¹ in Canada.

Part III considers what the regulation of paid political advertising misses: organic reach – that is, *unpaid* “political content” online. This section discusses challenges in defining “political content” and international standards around acceptable content regulation and restrictions. It builds on Balkin's argument that content restrictions already exist in traditional media in the context of elections.¹² It argues that although content restrictions always carry the risk of unjustifiable human rights infringement, the online space requires similar regulation as exists in traditional media. Finally, I conclude that because of how central the online space has become for democratic deliberation, re-establishing public confidence in democratic institutions may require establishing an independent regulator that is capable of balancing competing interests between online accountability and freedom of expression.

PART I: Traditional Political Advertising Laws in Canada, the US, and the UK and the Challenge of the Digital Age

The purpose of political advertising law has generally been to maintain transparency and a level playing field among political parties, candidates, and third party actors, and to prevent financial interests from usurping the space where democratic deliberations happens.¹³ In Canada, the US, and the UK, political advertising regulations may be found in electoral, media, and privacy laws, but common regulations with respect to political advertising include: temporal limits on campaigning (because election campaigns have traditionally been expensive); limits on donations and spending; content requirements such as disclosures printed on advertisements that bear the source of the ad's funding; and reporting requirements on advertising expenses.¹⁴ In this section and Part II, I use Wood and Ravel's definition of political advertising, which defines it as any *paid* advertising that (1) can be seen, heard,

10 *Honest Ads Act* (S 1989, 115th Congress, 2017-2018).

11 *Elections Modernization Act*, SC 2018, c 31 [*Elections Modernization Act*].

12 See Balkin 2004, *supra* note 2. Also see: Jack Balkin, “Free Speech in the Algorithmic Society: Big Data, Private Governance, and the New School Speech Regulation” (2018) 51 UC Davis L Rev 1149. Available at: https://lawreview.law.ucdavis.edu/issues/51/3/Essays/51-3_Balkin.pdf [Balkin 2018].

13 Balkin 2018, *supra* note 12.

14 Note: these laws' application varies between the three states.

or read and (2) is promoting or opposing a political party or candidate.¹⁵ The purpose of this section is to provide an overview of how political advertising laws in Canada, the US, and the UK have traditionally functioned. This will set up the coming discussion of what these laws fail to capture in the online era of political campaigning.

A. Traditional Political Advertising Laws in Canada, the US, and the UK

1. Canada

In Canada, the *Canada Elections Act*¹⁶ (*CEA*) governs federal elections and contains many of the regulations that control political advertising. The *CEA* (s.319) defines election advertising as “transmission to the public during an election period of an advertising message that promotes or opposes a registered party of the election of a candidate, including one that takes a position on an issue with which a registered party is associated.” The section does not mention the medium in which the message is transmitted; it may therefore apply equally online as to traditional media. However, some sections of the *CEA* specify their application to “broadcasting” and “periodical publication[s]” only, and do not include online ads. For example, under s.348 of the *CEA*, no person may charge any political party or candidate a rate for broadcasting or periodical publication advertising that “exceeds the lowest rate charged by that person for an equal amount of equivalent advertising space” in that period. The section specifies its application only to “broadcasting” and “periodical publication”; the online space of political advertising is not included in the provision.

The *CEA*'s reporting requirements (s. 359(1)) require every registered political party and third-party actor to file an election advertising report within four months of an election. Reports must contain “a list of election advertising expenses” and the time and place “of the broadcast or publication of the advertisements to which the expenses related” (s.359(2)(ii)). Again, the reporting requirement does not extend to the online space; it is not clear how online advertising is covered. Third-parties – non-political party or candidate advertisers that communicate regulated content – must submit advertising reports if they contribute more than \$200 (adjusted yearly for inflation); they must also file an advertising report post-election. Foreign parties may not contribute to electioneering expenses in

15 Abby K. Wood and Ann M. Ravel, “Fool Me Once: Regulating Fake News and Other Online Advertising,” (2018) 91 Southern California Law Review. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3137311 [Wood and Ravel]. Note: Ann Ravel was a Democratic Commissioner on the Federal Election Commission.

16 *Canada Elections Act*, SC 200, c 9.

Canada, and may not buy political advertisements.

In December 2018, after Parliament recognized a problem in the lack of online transparency around political communications, Canada passed the *Elections Modernization Act*¹⁷ (*EMA*), which is due to go into force in May 2019, ahead of a federal election expected in October 2019. The provisions include new reporting requirements that specify the need to report online advertising expenses and compel political parties to publish information on how they store and process personal data. These amendments will be further discussed in Part II.

2. The United Kingdom

In the UK, political advertising is regulated under the *Political Parties, Elections and Referendums Act (PPERA) 2000*¹⁸ and the *Representation of the People Act (RPA) 1983*. The *Communications Act 2003* also establishes guidelines on when, where, and how political parties may communicate messages to the public, and what responsibilities media organizations have in the process. UK laws are much more restrictive than Canadian laws and prohibit political advertising in the broadcast media by both political parties and candidates, including any advertising that aims to influence public opinion on “matters of public controversy.” However, political advertising in non-broadcast forms of media is not generally subject to regulation.¹⁹

Under the *PPERA*, printed campaign materials are required to contain information about who is behind the campaign and who created the materials. However, UK law does not require political campaigners to include similar imprints on digital media.²⁰ The legislation also requires political parties to report their advertising spending to the UK Electoral Commission within six months of an election (Canadian law requires a four-month spending report turnaround).²¹ As in Canada, third-party campaigners must also be subject to these requirements and must register with the Electoral Commission if they spend above a certain amount.²² UK law requires ad spending to be categorized according to the medium

17 *Elections Modernization Act*, SC 2018, c 31.

18 *Political Parties, Elections and Referendums Act 2000*, 2000, c 41. Available at: <https://www.legislation.gov.uk/ukpga/2000/41/contents>.

19 Centre for Law and Democracy, “Levelling the Playing Field: Partisan Political Expression in the Digital World” (2018) Unpublished manuscript, available upon request [Centre for Law and Democracy 2018].

20 Electoral Commission 2018, *supra* note 6 at 7-11.

21 Electoral Commission 2018, *supra* note 6 at 15-16.

22 The thresholds for reporting, however, are higher in the UK: £20,000 in England or £10,000 in Scotland. See Electoral Commission 2018, *supra* note 6.

where it was spent; however, the categories of spending are broad and do not include a specific legal category for digital campaigning.²³ As a result, post-election ad spending reports do not provide details of how digital advertising budgets were spent and where funding was directed. As in Canada, UK law also prohibits foreign funding of election campaigns.

A unique feature of UK law as it applies to elections compared to Canada and the US is the data protection law of the *General Data Protection Regulation (GDPR)*.²⁴ Registered political parties in all three countries hold a privileged position in terms of collecting data because the law authorizes their access to the electoral register and corresponding personal information on voters (which may be collated with other data, such as that gathered from social media). In the UK, the *GDPR* binds private and public parties alike, which includes political parties and third parties. The UK also has stronger data protection laws than the US or Canada, which the Information Commissioner's Office (ICO) invoked in October 2018 to fine Facebook £500,000 for its data breach in the Cambridge Analytica scandal; this was the maximum allowable fine but “a drop in the ocean” in terms of Facebook's revenues. The ICO said that the fine would have undoubtedly been higher had the *GDPR* applied at the time of the data breach.²⁵ No similar data protection regulations exist in Canada or the US. (The *Election Modernization Act*, which will be discussed below, only requires parties to declare the way in which they collect and use personal data, but does not otherwise restrict political parties in their collection and use of individuals' data).

3. The United States

In the United States, the *Federal Election Campaign Act* of 1971 (*FECA*) and the *Bipartisan Campaign Reform Act* of 2002 (*BCRA*) regulate political advertising. Compared to Canada and the UK, the US is the least restrictive in terms of political advertising law, perhaps because of the unique role the First Amendment plays in American legal culture.

The *FECA* primarily regulates political campaign spending and fundraising, and establishes the Federal Election Commission (FEC). The *BCRA* requires disclosure (called disclaimers) for all “political

23 Electoral Commission 2018, *supra* note 6 at 7-11.

24 *General Data Protection Regulation* (EU) 2016/679. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679> [*GDPR*].

25 Jim Waterson, “UK fines Facebook £500,000 for failing to protect user data” (October 25, 2018) The Guardian Online. Available at: <https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>.

communications” regarding who paid for the communication and whether it was authorized by a candidate (a requirement that the FEC implements). The disclaimer requirement applies to all “political communications” made by political committees or individuals in the context of “electioneering communications,” defined as communications that expressly advocate the election or defeat of a federal candidate. The means of “public communication” are defined as “any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public political advertising.”

Despite the breadth of the provision, the Internet is not expressly covered under the *BCRA*, and the FEC has in fact ruled that general public political advertising largely does not encompass content communicated on the Internet, with the exception of communications placed for a fee on another person's website.^{26 27} Although this exception may have been interpreted to include paid political ads on social media sites, social media companies successfully petitioned the FEC for exemptions for the political ads they served, claiming technical limitations. In 2010, Google asked the FEC for an advisory opinion on whether disclaimers were required on “text ads generated when Internet users use Google's search engine to perform searches.” Google's search engine ad model works such that when a user conducts a search, text ads do not display a disclaimer indicating who authorized or paid for the ad; however, the disclaimer appears after a user “clicks through” to the content. An FEC majority concluded that “under the circumstances described in the request, Google's conduct did not violate the [FECA] or Commission regulations.”²⁸ Similarly, in a 2010 request for an advisory opinion Facebook asked the FEC whether the site's small ads (up to 160 characters) were exempt from political advertising laws under the small items or impracticability exceptions, which exempt “bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.”²⁹ The FEC split in a deadlock and was unable to arrive at a decision, which gave Facebook a “loophole” which allowed it to avoid complying with disclaimer requirements online.³⁰ At the same time, while the FTC has broad discretion to pursue “unfair and deceptive trade practices claims” against publisher of disinformation, defendants have had increasing success in raising First Amendment

26 Ellen P. Goodman et al, “The Honest Ads Act Won't End Social Media Disinformation, but It's a Start” (November 2, 2017). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064451; Federal Election Commission, “FAQ on the *BCRA* and Other New Rules” (February 2005). Available at https://transition.fec.gov/pages/brochures/bcra_brochure.pdf [Goodman].

27 *Shays v FEC*, 337 F. Supp. 2D 28 (DDC 2004).

28 Goodman, *supra* note 26 at 3.

29 Goodman, *supra* note 26 at 3. Also see: Balkin 2018, *supra* note 12; and Jack Balkin, “Cultural Democracy and the First Amendment” (2016) 110 *Northwestern U L Rev* 1053. Available at: <https://scholarlycommons.law.northwestern.edu/nulr/vol110/iss5/3/>.

30 Goodman, *supra* note 26 at 3.

defences to criminal and regulatory claims involving restrictions on false and deliberately misleading speech.³¹

Although US legislation expressly prohibits the contributions and expenditures by foreign nationals in US election campaigns,³² and bans corporations from directly supporting candidates and limits how much individuals can contribute to political campaigns, in practice the United States does not have firm limits on advertising spending by political parties and candidates.^{33 34}

1.2 Social Media As the New Town Square

Over the last several years, political advertising has moved dramatically online, and in particular to social media. In 2017, nearly three out of every four European adults surveyed said they got their news online – up from 57% in 2016.³⁵ General advertising statistics also show that for every dollar spent on ads, 90 cents go to Google and Facebook. In the UK's 2015 general election, spending on digital advertising made up 23.9% of all reported advertising money spent; in the 2017 general election, however, that figure rose to 42.8%.³⁶ This shift of political advertising to the online space makes it important to consider how the online space, and particularly social media, differs from broadcasting and print. Although Internet communications and social media are constantly evolving as new platforms are developed, I use a widely-cited definition for social media from 2007 defined it as: networks that allow users to “(1) construct a public or semi-public profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections, and those made by others within the system.”³⁷

31 Note: this does not include defamation. See David O. Klein & Joshua R. Wueller, “Fake News: A Legal Perspective” (April 2017) 20 *Journal of Internet Law* 10 at 10.

32 For more on the *BCRA* and the context in which it was enacted see: Goodman, *supra* note 26.

33 Centre for Law and Democracy 2018, *supra* note 19.

34 See Centre for Law and Democracy 2018, *supra* note 19 at 11-12: “Since the 2010 Supreme Court ruling in *Citizens United v Federal Election Commission*, spending limits may effectively be bypassed by channeling funding through ‘independent’ third-party political action committees (super PACs). In effect, in the US, there is little transparency, oversight, or restrictions in elections financing, which makes the US an outlier in its approach to regulating political advertising. The US approach benefits ‘those with deep pockets who are able to take advantage of political advertising through unregulated third-party loopholes.’”

35 European Parliamentary Research Service, “Polarisation and the use of technology in political campaigns and communication” (March 2019) Panel for the Future of Science and Technology. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/634414/EPRS_STU\(2019\)634414_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/634414/EPRS_STU(2019)634414_EN.pdf).

36 Electoral Commission 2018, *supra* note 6.

37 Danah Boyd & Nicole B. Ellison, “Social Network Sites: Definition, History, and Scholarship” (2007) 13 *Journal of Computer-Mediated Communication* 1. Available at: <https://academic.oup.com/jcmc/article/13/1/210/4583062>.

Several themes emerge from academic studies of how online communication differs from print and broadcasting.³⁸ Among the most salient characteristics identified are: the private nature of communications (where only the voter, the campaigner and the platform know who has been targeted with which messages³⁹); that there is far too much speech online to consume, which creates a premium for content that may capture audiences' attention⁴⁰; and that the gatekeepers of information are no longer traditional media that decide what to print, broadcast, or not, but rather private algorithms that do not publicize information about how social media users are chosen to be targeted with which content. Research suggests that online, algorithms also work “with an eye toward maximizing [users’] attention to the platform”⁴¹ (with potentially a tendency to suggest content that may “become more extreme”⁴² 43). “Dark ads” are pieces of advertising that are displayed only to certain user groups specified by the ad-buyer, and inaccessible to others.⁴⁴ While in traditional news media, political ads were generally publicly visible or audible, online ads may be so targeted that only the sender and the receiver of the information will ever be aware of their existence. In this context, the ads may not be traceable by the public or candidates hoping to speak to the same audience.⁴⁵ Facebook facilitates the lack of transparency in political advertising online because it has made it easy for any user of the platform to turn a post into an ad by “boosting” it with paid promotion. A “boosted” post will indicate the page it comes from, but the administrator may be anonymous; in this way, only the advertiser and

38 See Wood and Ravel, *supra* note 15; Electoral Commission 2018, *supra* note 6; Also see Jack Balkin, “Free Speech in the Algorithmic Society: Big Data, Private Governance, and the New School Speech Regulation” (2018) 51 UC Davis L Rev 1149. Available at: https://lawreview.law.ucdavis.edu/issues/51/3/Essays/51-3_Balkin.pdf; Nabih Syed, “Real Talk About Fake News: Towards a Better Theory For Platform Governance” (2017) 127 Yale LJ. Available at: <https://www.yalelawjournal.org/forum/real-talk-about-fake-news> [Syed]; and Information Commissioner's Office, “Investigation into the use of data analytics in political campaigns: A report to Parliament” (November 2018). Available at: <https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf>.

39 Electoral Commission 2018, *supra* note 6 at 10-11.

40 Wood and Ravel, *supra* note 15; Syed, *supra* note 10.

41 Syed, *supra* note 49 at 356.

42 See Syed, *supra* note 49 at 346: “Platforms decide what content to serve an individual user with an eye towards maximizing that user’s attention to the platform. Evan Williams, co-founded of Twitter, describes this process as follows: if you glance at a car crash, the Internet interprets your glancing as a desire for car crashes and attempts to accordingly supply car crashes to you in the future. Engaging with a fake article about Hillary Clinton’s health, for example, will supply more such content to your feed through the algorithmic filter. [...] The suggested content [...] might also become more extreme. Clicking on the Facebook page designated for the Republican National Convention, as BuzzFeed reporter Ryan Broderick learned, led the “Suggested Pages” feature to recommend white power memes, a Vladimir Putin fan page, and an article from a neo-Nazi website.”

43 European Parliamentary Research Service, “Polarisation and the use of technology in political campaigns and communication” (March 2019) Panel for the Future of Science and Technology. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/634414/EPRS_STU\(2019\)634414_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/634414/EPRS_STU(2019)634414_EN.pdf) [European Parliament 2019] at 42-43.

44 European Parliament 2018, *supra* note 43 at 24.

45 European Parliament 2018, *supra* note 43 at 22: “Several manipulation techniques and mechanisms are well-established in the political mainstream. The first of these is the misuse of personal user data harvested over social media for micro-targeting and psychographic profiling. The second [includes] manipulation of attention-driven social media algorithms for political, economic or social gain in new and traditional media ecosystems. A third [includes] automated bots.”

the recipient will be aware of the advertisement and there is “almost no way to know [if the ad is] being promoted to other users.”⁴⁶ Online, “human attention has also emerged as a limited resource and those who succeed in commanding it can leverage attention for economic, political, or social gain.”⁴⁷ The lack of transparency about what kind of political messaging is circulating, who it is targeting and why, creates a problem for the quality of democratic engagement during elections, and has decreased trust in the political system.⁴⁸

On top of the interactive, opaque nature of the Internet, academics have identified further features that distinguish online communication from traditional media, such as Syed's “five newly conspicuous features that shape the ecosystem of speech online”: (1) filters, (2) communities, (3) amplification, (4) speed, and (5) profit incentives.⁴⁹

From Syed, it is clear that filters and information bubbles are not unique to the online space. Indeed, people may tend naturally to ideas that support and reinforce their points of view. However, the “community” nature of social media means that information travels between people who have established relationships of trust, within communities built around affinity, political ideology, hobbies, etc.⁵⁰ The element of trust and personal connections among users within these networks may compensate for a lack of fact-checking for shared information. Under Syed’s third, fourth and fifth characterizations of social media space, social media networks enable information to be amplified quickly and easy, and to travel widely and rapidly, all of which is what the profit-making system of social media is set up to enable. As Syed puts it, “[s]ocial media platforms make fake news uniquely lucrative. Advertising exchanges compensate on the basis of clicks for any article, which creates the incentive to generate as much content as possible with as little effort as possible. Fake news, sensation and wholly fabricated, fits these straightforward economic incentives.”⁵¹

46 Tess Townsend, “Why Political Ads Are Regulated but Fake News on Facebook Isn't” (December 9, 2016) Inc.com. Available at: <https://www.inc.com/tess-townsend/facebook-fake-news-political-ads.html>.

47 European Parliament 2018, *supra* note 43 at 15.

48 See Wood and Ravel, *supra* note 15 at 1255, who identify perhaps the three characteristics of social media communications that are most relevant for understanding how political advertising differs online than in broadcast or print. They argue that, online: (1) information is more likely to be disguised as informational content, or “native” content (authenticated by trusted networks); (2) it is more likely to contain disinformation; and (3) it is cheaper to produce than in broadcast or print.

49 Syed, *supra* note 49 at 346-351.

50 See Syed, *supra* note 49 at 346, where she discusses the persuasive power of online communities: “even if TV news anchor show your Obama’s birth certificate, your online community – composed of members you trust – can present to you alternative and potentially more persuasive perspectives on that birth certificate.”

51 Syed, *supra* note 49 at 348.

As another point of difference between social media and traditional sources of information, the role of digital communications companies in the 21st century is not the same as the role of mass media companies in the 20th century. Print and broadcasting giants have not been “the conduits for the speech for the vast majority of the people who constituted the audience for their products.”⁵² Rather, 20th century mass media companies (1) produced their own content (and generally backed it with professional reputation); (2) published the content of small number of creative artists (who often staked their own professional reputation on the work they published); (3) delivered content made by other organizations to a mass public.⁵³ Digital communications companies, on the other hand, do not produce content. Rather, their business model requires them to induce as many people as possible to post, speak, and broadcast to each other; this allows the companies to sell advertising, collect data about users, and use this data to sell even more advertising. As Balkin puts it, “[i]deally, Facebook would like each and every person on Earth to talk incessantly and check their Facebook feeds constantly. Unlike a 20th century movie studio or television station, it is not enough for Facebook to have a large audience. Facebook needs people perpetually to speak to each other and post new content.”⁵⁴

1.3 “Analog” Political Advertising Laws Not Fit For Purpose in the Digital Age

Digital tech companies now play a central role in public deliberation and the implications for the nature of public deliberation have been dramatic. The numbers of daily Facebook users and statistics on the percentage of people who primarily get their news online are indicative, as are debates about the desirability of features such as the “I Voted” button which some studies indicated increased voter turnout by half a percent, enough to swing an election.⁵⁵ Despite this, the legal status of digital communication companies, especially social media – whether they are private or public entities, platforms or publishers, etc⁵⁶ – remains uncertain.⁵⁷ The director of public policy research and the

52 Balkin 2018, *supra* note 12 at 1191.

53 Balkin 2018, *supra* note 12 at 1192.

54 Balkin, *supra* note 12 at 1192.

55 See Hannes Grassegger, “Facebook says its ‘voter button’ is good for turnout. But should the tech giant be nudging us at all?” (April 15, 2018) *The Guardian*. Available at: <https://www.theguardian.com/technology/2018/apr/15/facebook-says-it-voter-button-is-good-for-turn-but-should-the-tech-giant-be-nudging-us-at-all>; European Parliament, *supra* note 35 at 33.

56 This paper does not consider the nature of digital tech companies, but see Balkin's critique of the public/private dichotomy in analyses that consider the nature of digital tech companies: Balkin 2018, *supra* 4 at 1194.

57 Social media companies argue, in efforts to justify the absence of regulation, that they are technology companies, rather than media companies. See Michelle Castillo, “Zuckerberg tells Congress Facebook is not a media company” (April 18 2018). Available at: <https://www.cnbc.com/2018/04/11/mark-zuckerberg-facebook-is-a-technology-company-not-media-company.html>. However, lawyers for Facebook have contradicted the statement and argued that because Facebook is a media company, it benefits from freedom of speech protections. See Sam Levin, “Is Facebook a publisher? In public it says no, but in court it says yes” (July 3 2018) *The Guardian*. Available at:

Electoral Reform Society in the UK has put the problem this way: “Tech platforms do not have the same liability as traditional news outlets, and the fact that they are not based in the UK raises jurisdictional and regulatory enforcement concerns. External agencies are increasingly involved in data collection and analysis, including outside of regulated campaign periods, but the extent of their involvement remains hard to ascertain.”⁵⁸

Contemporary practicalities of political advertising and campaigning in all three countries are now that, with the cheap and easy access to new campaigning techniques that the Internet offers, political parties have shifted to low-cost, year-round campaigning outside of the periods regulated by law.⁵⁹ Political actors now also collect vast amounts of data on voters and use it in opaque ways. The scale of influence contained in social media, as well as the opaque nature of that influence, have sparked concerns about the quality of democratic deliberation and the potential for nefarious interests being able to infiltrate and influence elections. As the UK's House of Commons Committee on Digital, Culture, Media and Sport concluded a nearly year-long investigation into online misinformation, it may be that electoral laws that were written in the age of newspapers and broadcast are “not fit for purpose” in the digital age.⁶⁰

PART II: Legislative Change in Political Advertising Laws in the UK, Canada, and the US

So far, I have considered how current election laws as they relate to political advertising may not be up to scratch in the digital age. A number of states have responded to the problem of online disinformation by opening investigations into they might draft new laws to account for the move of political advertising into a less-transparent online space. This section provides an overview of the legislative initiatives in Canada, the UK, and the US for regulating online political advertising. This section defines “political advertising” as electioneering communications that are paid for by registered political

<https://www.theguardian.com/technology/2018/jul/02/facebook-mark-zuckerberg-platform-publisher-lawsuit>.

58 Electoral Reform Society, “Reining in the Political 'Wild West': Campaign Rules for the 21st Century,” (February 2019). Available at: <https://www.electoral-reform.org.uk/latest-news-and-research/publications/reining-in-the-political-wild-west-campaign-rules-for-the-21st-century> [Electoral Reform Society] at p. 13.

59 Electoral Reform Society, *supra* note 58 at 14.

60 Charles Hymas, “Britain's electoral laws are not 'fit for purpose' to combat disinformation and fake news, say MPs” (February 17, 2019) The Telegraph UK Online. Available at: <https://www.telegraph.co.uk/politics/2019/02/17/britains-electoral-laws-not-fit-purpose-combat-disinformation/>.

actors in each country. Unpaid content is not considered until Part III.

A. The United Kingdom: Legislative Proposals for Adapting Political Advertising Laws to Digital Challenges

The UK has led the charge in conducting investigations into how political actors, registered, third-party, official and unofficial, have used social media to target voters. Over the past year, public authorities including the Electoral Commission, the Information Commissioner's Office (which described its investigation into online political misinformation as “the most complicated” it had ever undertaken), and the House of Commons' Digital Culture, Media and Sport Committee (DCMS), have all released reports of the results of their investigations into the issue of online mis- and disinformation. Three themes emerged from their reports. All of the public bodies urged the British parliament to legislate greater transparency in the digital sphere to ensure that: (1) voters know the source of information they are seeing, (2) who has paid for it and (3) why the information has been sent to them.

All of the investigations concluded that a lack of transparency regarding the source of information online posed a problem for meaningful deliberation, especially when it involved information communicated as part of election campaigns. Among its first recommendations, the Electoral Commission noted that while printed campaign materials must carry an “imprint” that sets out who paid for them, the same is not true for online materials.⁶¹ It made two principal recommendations about immediate changes needed in UK law as it has to do with political advertising: (1) to compel online materials produced by parties, candidates and campaigners to include an imprint stating who has created them, which would allow voters scrolling through their social media feeds to know who was targeting them with information, and (2) for the law to require more detailed information regarding how money has been spent on digital campaigning.⁶²

The Electoral Commission estimated that in the 2017 UK general election, 42% of campaigners' spending reported to the Commission was spent on online campaigning, a sharp increase from the 23% share during the general election in 2015. However, the Commission said that because the law does not currently require detailed reporting on how the funding was spent on online campaigning, it has little

61 Electoral Reform Society, *supra* note 58 at 17; Electoral Commission 2018, *supra* note 6.

62 Electoral Reform Society, *supra* note 58 at 18; Electoral Commission 2018, *supra* note 6.

information about campaigners' process. In its 2018 report, the Commission urged the UK government to require campaigners to sub-divide their spending returns in a more detailed and transparent way, so that outside parties may understand more about how digital campaigning is growing.⁶³ The Electoral Commission also urged the UK government to increase its investigatory and enforcement powers, including powers to compel campaign enablers, including social media companies, to provide it with information when commissioners suspect that rules may have been broken, as well as increasing the maximum allowable fine for violators, which currently stand at a maximum of £20,000 per offence, which the Electoral Commission pointed out may merely be a “cost of doing business.”⁶⁴

Common recommendations among the British reports also included urging social media companies to create an easily-accessible database of which ads were sent where, when, and who paid for them. The Electoral Commission said it wanted “to see [social media companies] deliver on their proposals for clarity about where political adverts come from, and to publish online databases of political adverts in time for planned elections in 2019 and 2020.”⁶⁵ It suggested that if social media companies did not comply,⁶⁶ direct regulation of tech communications companies may be necessary. The DCMS Committee, on the other hand, outright concluded that the time had come for such direct regulation, overseen by an independent regulator.⁶⁷

Regarding keeping foreign funding out of UK election campaigns, Electoral Commission noted that it has recommended since 2013 that company donations should be funded from UK-generated activities only, whereas the current requirement is for companies to be registered and carry on business in the UK

63 Electoral Reform Society, *supra* note 58 at 18.

64 Electoral Reform Society, *supra* note 58 at 19.

65 Electoral Reform Society, *supra* note 58 at 19.

66 Note: Facebook is working (since 2018) on a database of political advertising tailored to countries, and beginning with countries that have upcoming elections. See Facebook for Business, “Ad Library” (2019). Available at: <https://www.facebook.com/business/help/2405092116183307> [Facebook Ad Library]. As of April 6, 2019, countries where Facebook would implement an Ad Library included: Brazil, the European Union, India, Israel, Ukraine, the United Kingdom, and the United States. The library compiles information about groups that paid for advertising on Facebook, and makes available weekly reports on how much groups spent, whether a source imprint was included, and how many ads were created. The library includes information on all advertisers, not only political advertisers. However, Facebook claims on its Ad Library page that “[t]ransparency is a priority [...] to help prevent interference in elections, so the Ad Library offers additional information about ads related to politics and issues of importance, including spend, reach, and funding entities.” In the UK, the Ad Library requires that all UK advertisers complete an ad authorization process to run ads related to politics or to “issues of national importance” in the UK. If a user reports that an ad is related to politics or an issue of national importance but the ad does not have a disclaimer, the ad will be reviewed. After review, if the ad is deemed to be related to politics or an issue of national importance, the ad will appear in the Ad Library and the advertiser who created the ad will be notified that the ad needs to include a disclaimer.

67 DCMS, *supra* note 2. For a synopsis of the report and this particular recommendation, see House of Commons, Digital, Culture, Media and Sports Committee, “Disinformation and 'fake news': Final Report Shorthand Series” (February 2019) Shorthand Series. Available at <https://houseofcommons.shorthandstories.com/dcms-committee-disinformation-fake-news/index.html>.

(but not for the companies' funds to have originated through UK-based activities). The Commission urged the British government that “[i]n the digital era, this is an overdue safeguard to help ensure that online and other campaign activities are not funded by foreign sources.”⁶⁸

Although the UK government has not yet responded to calls for the reports' legislative change, distracted perhaps by Brexit, British proposals have been the most extensive in investigating the problem of online disinformation and suggesting legislative ideas for a way forward.⁶⁹ Some of the changes identified have been implemented, at least in part, by other countries such as Canada.

B. Canada's Response: The Elections Modernization Act

In December 2018, the Standing Committee on Access to Information, Privacy and Ethics published a report⁷⁰ that agreed with many of the UK's DCMS committee recommendations, but focused primarily on data privacy as it relates to elections. The report noted the Committee's “concern that the Canadian democratic and electoral process [had become] vulnerable to improper acquisition and manipulation of personal data”⁷¹ and recommended that the application of privacy legislation should be extended to “political activities” and urged Parliament to impose new labelling requirements on online political advertising. It also recommended new regulations regarding transparency in political advertisements (such as a database of online political ads and information about who they targeted) and noted “structural problems inherent in social media platforms” in their facilitation of online mis- and disinformation.⁷² The report urged Parliament to provide new powers to an existing regulatory body or to create a new regulatory body to proactively audit digital communications algorithms.

Canada also enacted the *Elections Modernization Act (EMA)*⁷³ to go into effect in May 2019, ahead of an expected autumn election. Among its provisions, the *EMA* requires online platforms to keep a registry of all “political” and “partisan” advertisements that are published on their sites. This

68 Electoral Reform Society, *supra* note 58 at 19; Electoral Commission 2018, *supra* note 6.

69 There unfortunately not enough space in a short paper to consider all of the proposals coming from the UK for reforming electoral law. The purpose of the paper is, rather, to provide a broader consideration of how “analog” electoral laws as they relate to political advertising fail to function in the digital age.

70 Standing Committee on Access to Information, Privacy and Ethics, “Democracy Under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly” (December 2018) 42nd Parliament, 1st Session. Available at: <https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP10242267/ethirp17/ethirp17-e.pdf> [Canadian Privacy Committee Report].

71 Canadian Privacy Committee Report, *supra* note 70.

72 Canadian Privacy Committee Report, *supra* note 70.

73 *Elections Modernization Act*, *supra* note 11.

requirement responds to one of the main problems identified in online political advertising, which is a lack of transparency in the online space regarding who was targeted, when, and with what political information. In response, Google announced a ban on political advertising on its platform in Canada, saying that it would be impossible for the company to comply with the requirement before the autumn election.⁷⁴ Facebook, by contrast, announced the creation of an advisory committee “of prominent Canadians from diverse political platforms” to guide how the company would implement the *EMA*.⁷⁵ Facebook's strategy will include an online Ad Library, which will feature all paid political ads, and include some information about the ad's reach (details about which information will be included are not yet clear). Twitter has not made its compliance plans public and in March 2019, the *Globe and Mail* quoted a Twitter spokesperson says that the *EMA* “is not a topic that [the company] is discussing.”⁷⁶

The *EMA* also requires that political parties publish a policy on how they use and protect voters' personal information; registration (or continued registration) with Elections Canada hinges on compliance with this requirement. Although it requires that policies must be published publicly on parties' websites, the Act does not otherwise regulate how political parties may collect and use personal data.

Similarly to legislation in the UK and the US, the *EMA* prohibits foreign actors from funding Canadian election campaigns. However, the Canadian legislation does not include the requirement (proposed in the UK) that political advertisers earn the money they spend on advertising within Canada; all that is required is that advertisers have a Canadian address. Finally, the *EMA* addresses the contemporary nature of campaigning and prescribes limits to spending by political parties *between* elections, as well as during regulated periods,⁷⁷ recognizing that elections are not as bound in time as they had been in the

74 David George-Cosh, “Google bans political ads ahead of next Canadian federal election” (March 5, 2019) BNN Bloomberg. Available at: <https://www.bnnbloomberg.ca/google-bans-political-ads-ahead-of-next-canadian-federal-election-1.1224076>.

75 Howard Solomon, “Facebook Canada creates advisory committee to help screen issue ads during election” (March 18, 2019) IT World Canada Online. Available at: <https://www.itworldcanada.com/article/facebook-canada-creates-advisory-committee-to-help-screen-issue-ads-during-election/416053>.

76 *Ibid.*

77 Under the *EMA*, Canada's formal “election period” is limited to 50 days before an election, and the two months that precede this period are a new “pre-election period.” See Andrew Coyne, “Bid to 'overhaul' Canada's election law falls short of Liberals' hype” (May 4, 2018) *National Post*. Available at: <https://nationalpost.com/opinion/77308983> [Coyne]; John Ivison, “Liberals end era of SuperPACs in federal elections, but leave door half-open to foreign funding” (May 1, 2018) *National Post*. Available at: <https://nationalpost.com/opinion/john-ivison-liberals-end-era-of-superpacs-in-federal-elections-but-leave-door-half-open-to-foreign-funding>; JJ McCullough, “Justin Trudeau's terrible new election rules will limit citizen activism” (December 26, 2018) *Washington Post*. Available at: https://www.washingtonpost.com/opinions/2018/12/26/justin-trudeau-terrible-new-election-rules-will-limit-citizen-activism/?utm_term=.c97fb27c3f63.

past.

The Canadian government described the *EMA* an important step “to modernize the *Canada Elections Act* to address the realities facing Canadian democracy in 2019” and “part of a comprehensive plan to safeguard Canadians' trust in [the country's] democratic processes and increase participation in democratic activities.”⁷⁸ However, the *EMA* falls short of the British and Canadian investigatory reports' recommendations in a number of ways, in particular in the Act's regulations on data protection. While the Act requires each political party to publish how it uses, collects, and secures Canadians' personal information, it does not prevent them from doing what they choose to do with voters' data. As Andrew Coyne puts it, parties “can still use, collect and secure Canadians' personal information as they like [...] so long as everyone fills out the proper forms.”⁷⁹

C. Proposals in the United States: The Honest Ads Act

The *Honest Ads Act*,⁸⁰ which is a bill in the US Senate that has not yet passed into law, aims to extend the *FECA* to the Internet. In particular, the bill aims to extend the same transparency and reporting requirements around political advertising to the Internet that already exist in print and broadcasting. Like proposed and enacted legislation in Canada and the UK, the *Honest Ads Act* reflects changes in the contemporary process of political campaigning, which has moved dramatically online⁸¹, and in particular toward social media. According to the bill's findings, the last time the FEC considered online political advertising was in 2006, when only 18% of Americans cited the Internet as their leading source of news about elections; meanwhile, Pew Centre research showed that in 2016, 65% of Americans used the Internet as their leading source of elections information.⁸²

The bill would amend the definition of “public communication” to include “paid Internet, or paid digital communication.” Similarly, it would expand the definition of “electioneering communication” to include “qualified Internet or digital communication” and “communication which is placed or promoted for a fee on an online platform.” Under the *Honest Ads Act*, disclaimer and reporting rules

78 Democratic Institutions, “Government of Canada passes *Elections Modernization Act*” (2018) Government of Canada website. Available at: <https://www.canada.ca/en/democratic-institutions/news/2018/12/government-of-canada-passes-elections-modernization-act.html>.

79 Coyne, *supra* note 77.

80 *Honest Ads Act*, H.R. 4077, 115th Cong. (1st Session, 2017).

81 For example, see Madison, “Illuminating Dark Digital Politics: Campaign Finance Disclosure for the 21st Century” (2018). Available at: <https://mymadison.io/documents/illuminating-dark-digital-politics>.

82 Goodman, *supra* note 26 at 3.

would therefore apply to any online political advertising. The bill also defines “online platform”, as “any public-facing website, web application, or digital application” that has 50,000,000 or more unique monthly United States visitors or users for a majority of months in the past year and sells political ads. This definition would thus encompass: Google, Facebook, Twitter, Pinterest, and YouTube.⁸³ The bill adds transparency requirements for “online platforms” with respect to “political advertisements.”

Implementing this requirement would for the first time define what a political ad is in the context of elections. The bill defines a political ad as “any advertisement (including search engine marketing, display advertisements, video advertisements, native advertisements, and sponsorships) that (i) is made by or on behalf of a candidate; or (ii) communicates a message relating to any political matter of national importance, including (a) a candidate; (b) any election to federal office; or (c) a national legislative issue of public importance.”⁸⁴ Though the scope of the definition remains uncertain, this would be a positive development. The bill would also force “online platforms” to make “reasonable efforts” to ensure that foreign nationals did not fund election campaigns in the US, a weaker provision than the online foreign funding restrictions in Canada's *EMA*, but nonetheless a positive extension of “analog” political advertising law online.

While the *Honest Ads Act* would give the American public the chance to see which parties are behind *paid* online political advertisements, the bill does not extend to unpaid, organic political content. The bill would not therefore attach to online misinformation by parties posing, for example, as activists or legitimate media sources. Issues concerning unpaid *content* will be considered further in Part III.

D. Commonalities in Political Advertising Law Reform: Analysis

Many legislative movements aimed at addressing the problem of online disinformation are recent and it is not yet clear how they will apply in practice. Extending “imprint” requirements that apply to broadcasting and print media regarding the source of funding for a political ad to the online space cannot be anything but a positive legal development aimed at increasing transparency in electioneering. Requirements for public databases of political advertising and the users they targeted, as well as clear access to these databases through the ad posts themselves, would equally be a positive development that may allow different perspectives to better cut through online “filter bubbles.” However, none of

⁸³ Goodman, *supra* note 26 at 5.

⁸⁴ Goodman, *supra* note 26 at 5.

these initiatives – other than the recommendation identified in each investigatory report in all three countries, which called for improving voters' digital literacy⁸⁵ – may capture perhaps the most important component of online political advertising: organic reach.⁸⁶ This will be the subject of the following section.

It seems to have become a unique but defining characteristic of online culture that privacy is valued less online than in the non-digital world. It may be that digital tech companies, whose profits are largely driven by data collection and the sales of that data to advertisers, are driving this cultural trend. There is a pressing need to extend existing privacy⁸⁷ and election transparency laws (including international law) to the online space as exist in “analog” electoral laws.

PART III. Organic Reach: Freedom of Speech and the Challenge of Unpaid Political Advertising Online

So far, I have focused on paid political advertising defined by two components of (1) costs and (2) intent to influence votes,⁸⁸ paid for by registered political actors and third parties, as defined by legislation in each state. However, addressing a lack of transparency in paid political advertising online through legislation will only address part of the online mis- and disinformation problem. Organic reach – posts that are not paid for and are shared by individuals nonetheless – constitutes a key part of political campaigning online. The challenge is that regulating unpaid political advertising requires regulating content, which carries with it risks of unjustified freedom of speech infringement. And in fact, digital tech and social media companies have generally invoked freedom of speech arguments to argue against regulation.

This section considers *unpaid* political advertising, a new phenomenon facilitated by the low costs of

85 It is interesting to note that while digital tech companies continue to resist direct regulation – often arguing on the principles of freedom of speech, as will be discussed in Part III – many have announced plans to fund online literacy campaigns.

86 *Supra*, note 81.

87 See the Human Rights Committee, “General Comment 16” (1994) UN Doc HRI/GEN/1/Rev.1. Available at: www1.umn.edu/humanrts/gencomm/hrcom16.htm: “The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.”

88 See Wood and Ravel, *supra* note 15.

Internet communication. It first notes challenges of defining “political content.” It then considers how states have historically regulated communications in the context of elections. The section grounds itself in Balkin's contextualizing work regarding the First Amendment and in theories of freedom of expression and their limits. It argues that digital communications technology has changed the nature of speech and, just as limits to freedom of expression in the context of elections were justified in the age of newspapers and broadcasting, the digital age requires its own comparable regulation of online political speech. Nevertheless, content regulation carries with it serious risks. The section considers these risks and how some online speech regulation has been implemented in practice (in France and Germany). Despite well-grounded concerns, I nonetheless argue that similar regulations as exist in “analog” media should be extended online, and that this may require the establishment of independent regulatory authorities.⁸⁹

A. Historical “Political Content” Regulation in the Context of Election

Defining “political content” is even more difficult than defining a “political advertisement” and is a “persistent and sticky problem in campaign finance regulation.”⁹⁰ The space constraints of this paper do not allow me to properly consider the meaning of “political content.” Instead, I focus on the *purpose* of regulating “political content. Governments have sought to regulate communication in the context of elections because it affects how democratic deliberation happens; they have sought to regulate communications to keep deliberation “democratic” rather than dominated by financial and other interests. Before I consider arguments about free speech in the context of online political communication, it is important to set the historical context of how “political speech” has been regulated in the past, and the justifications that have been found.

Balkin explains how in the late 19th century, newspapers were “rabidly partisan.” The freedom of speech principle had evolved to protect speakers rather than listeners; and as media conglomerates grew into competing and profit-maximizing quasi-monopolies, the principle came to protect the speech of those who owned the means of (communication) production. In the 1920s, after journalists perceived threats both to journalism and to democracy from the rise of political propaganda and public relations campaigns in the 1910s and 1920s “influenced by Progressive Era reforms”, newspaper publishers and

89 There is unfortunately no space in this paper to consider the global nature of digital tech companies and the related challenges for implementing online advertising regulations (indeed, many of the UK's investigations into online misinformation noted the challenges of the cross-border nature of Facebook and Cambridge Analytica, for example). However, overall, the section takes inspiration from cosmopolitan theories of international law.

90 Wood and Ravel, *supra* note 5 at 1254.

reporters gradually recognized that they had social responsibilities to the public as a whole rather than to political parties.^{91 92}

In the 20th century, “political” speech was regulated in a number of ways, including through broadcasting policy. It was reasoned that because broadcasters, cable companies, and satellite companies provided programming and exercise editorial judgment, they should be treated as speakers with free speech rights. However, because they controlled key communications networks that are not freely available to all, they were also subject to structural public-interest regulation.⁹³

According to Balkin, the digital revolution undermined the scarcity of bandwidth justification for structural regulation of mass media. Telecommunications companies have argued that the nearly-limitless number of cable, satellite, and the Internet platforms constituted reasons to remove regulations on the grounds that they infringe companies' First Amendment rights, and US courts are showing a tendency to agree.⁹⁴ Balkin argues that “implicit in these arguments is a controversial capitalism theory of freedom of speech,” controversial because it subordinates freedom of expression to the protection and defence of capital accumulation in the information economy.”⁹⁵ However, the real purpose of the freedom of speech principles, he argues, is “to protect and foster a democratic culture,” defined as “a culture in which individuals have a fair opportunity to participate in the forms of meaning-making and mutual influence that constitute them as individuals.”⁹⁶

Digital tech and social media companies often argue, in efforts to justify the absence of regulation, that they are technology companies rather than media companies.⁹⁷ However, lawyers for Facebook have also argued the opposite: that Facebook *is* a media company and as such benefits from freedom of

91 Balkin 2018, *supra* note 105 at 61.

92 In other words, the professional ethics codes that guide the news media today evolved in the early 20th century, as a response to external (and internal) pressures.

93 The traditional news media were (and partly still are) required to cover public issues and cover both sides of these issues fairly; they were required to provide equal time to political candidates and to sell advertising time to federal candidates for office; to make room for public, educational and government channels, carry signals from spectrum broadcasters, and provide cable access to low-income areas. See Balkin 2004, *supra* note 2 at 19-20.

94 Balkin 2004, *supra* note 2 at 19.

95 See Balkin 2004, *supra* note 2 at 19-20: “The capitalist theory identifies the right to free speech with ownership of distribution networks for digital content. [...] The capitalism theory is controversial precisely because telecommunication enterprises are hybrids of content providers and conduits for the speech of others. [...] Under the capitalist theory, these conduits exist primarily to promote the speech of the owner of the conduit, just as newspapers exist to promote the speech of the newspaper's owner.”

96 Balkin 2018, *supra* note 105 at 1151.

97 Michelle Castillo, “Zuckerberg tells Congress Facebook is not a media company” (April 18 2018). Available at: <https://www.cnn.com/2018/04/11/mark-zuckerberg-facebook-is-a-technology-company-not-media-company.html>.

speech protections.⁹⁸ The inconsistency is not the only difficulty in Facebook's argument against structural regulation. Digital tech companies already limit their users' freedom of speech in a number of ways: through acceptable content policies; algorithms that determine which content is seen; and other algorithms that control users' online experience.⁹⁹ These regulations are generally motivated by profits, because “if users dislike the culture of a platform, they will leave and the platform will lose.”^{100 101}

In practice, digital tech giants like Facebook and Google have inadvertently become the world's largest media organizations.¹⁰² They create and enforce rules in multiple linguistic, societal and cultural contexts; and one of the main challenges of social media companies' decision-making regarding what content is acceptable is the “secrecy and murkiness” of its decision-making process.¹⁰³ As the UN Special Rapporteur on freedom of opinion and expression noted in a report for the Human Rights Council, content take-downs are often imposed “with little clarity” or public input.¹⁰⁴

B. Risks and Challenges in Regulating Content in Political Advertising

The “marketplace” theory of the freedom of speech has often been advanced as a way to justify communications deregulation. However, I have suggested that content has traditionally been regulated to an extent deemed justifiable. I have also argued that, in the digital age, existing regulations and doctrines of freedom of speech are proving insufficient, and regulation is falling by default to digital

98 Sam Levin, “Is Facebook a publisher? In public it says no, but in court it says yes” (July 3 2018) *The Guardian*. Available at: <https://www.theguardian.com/technology/2018/jul/02/facebook-mark-zuckerberg-platform-publisher-lawsuit>.

99 Balkin 2004, *supra* note 2 at 20.

100 Syed, *supra* note 4 at 344.

101 Note: Balkin (2014) coined the term “ideological drift” in arguing how principle of freedom of expression has changed in meaning over time. He notes: “What is especially interesting about the Algorithmic Society, however, is the way that the new systems of governance and control arise out of data collection, transmission, and analysis. The Industrial Age fought over freedom of contract and the rights of property; the Algorithmic Age is a struggle over the collection, transmission, use, and analysis of data. For this reason, the central constitutional questions do not concern freedom of contract. They concern freedom of expression.” See also Balkin 2018, *supra* 105 note at 1156: “In the Algorithmic Society, surveillance and data collection are now widely distributed, but there is no guarantee that they will be democratically controlled. Data about many people are collected in many places, but a relatively small number of people have the resources and practical ability to collect, analyze, and use this data.”

102 European Parliament 2018, *supra* note 43 at 21.

103 *Ibid.*

104 See European Parliament 2018, *supra* note 43 at 21: “In 2016, Facebook, YouTube, Twitter and Microsoft agreed to abide by a code of conduct on countering illegal hate speech online while ‘defending the right to freedom of expression’ and ‘identifying and promoting independent counter-narratives.’ [...] Yet actual company policies on hate speech, abuse and harassment often fail to clearly define what constitutes a punishable offence. Both Twitter’s prohibition against ‘behaviour that harasses, intimidates, or uses fear to silence another user’s voice’ and Facebook’s two-pronged distinction between direct attack on a protected class and merely humorous or distasteful commentary that might be ‘self-referential’ are excessively subjective and vague, and have been criticized as insufficient bases for good content moderation.”

tech companies which are primarily working toward the goal of profit. At the same time, it is not evident that social media platforms are a “marketplace” of ideas in which the truth will eventually win out. As Wood and Ravel put it, “truth stood little chance against the volume of disinformation advertising and other false political messaging that flooded the ‘marketplace’ in the weeks leading up to the 2016 [US] election.”¹⁰⁵ Despite a need to extend regulations over political advertising and content to the online space, a number of countries that have attempted to regulate online content have illustrated the challenges of regulations in practice.

For example, Germany has drafted a law that aim to regulate online content such as hate speech or disinformation. The *Network Enforcement Protection Act (NEPA)*, which came into effect in January 2018,¹⁰⁶ forces online communications companies to remove hate speech from their sites within 24 hours after receiving a user complaint. Under *NEPA*, hate speech is defined in terms taken from pre-existing Germany law, and applied to the online sphere. Failure to remove the content within that timeframe provokes fines of up to €20 million.^{107 108} However, the law has faced challenges in implementation. For example, on the day the *NEPA* came into effect, a politician from the Alternative für Deutschland (AfD), a right-wing, anti-immigration political party in Germany, tweeted about “barbaric, Muslim, group-raping hordes of men” on German streets. Twitter responded, under *NEPA*, by deleting the tweet and suspending his account.¹⁰⁹ A day later, the German satire magazine, *Titanic*, humorously reported that their Twitter account had been taken over by the politician, and again tweeted about “group-raping hordes of men” to satirize the original tweet. Twitter responded to the tweet in the same way, deleting the tweet and suspending the account. The incident sparked criticism and debate about the *NEPA* and its restrictions on the freedom of expression¹¹⁰ and posed questions about whether social media networks are properly authorized to implement hate speech law and *NEPA* and to properly balance the competing human rights interests in Germany.

Although content regulations will likely always face similar challenges in implementation, I do not

105 Wood and Ravel, *supra* note 15 at 1237, 1242.

106 DCMS 2018, *supra* note 1 at 12.

107 Although the *NEPA* pioneered regulation of online public discourses on social media in Europe, it did little more than strictly enforcing already-existing hate speech law in the online sphere.

108 Germany’s *NEPA* was introduced in response to pressing concerns about hate speech, unlawful content, and radicalization online, as well as concerns regarding influence campaigns and fake news and applies to commercial social media platforms with more than two million registered users in Germany. As a result of this law, one in six Facebook moderators works in Germany, which suggests that legislation may be effective in changing ICT companies’ behaviour.

109 European Parliament 2019, *supra* note 43.

110 *Ibid*

consider this to be an adequate reason to reject regulation altogether.

C. Self-Regulation Versus Public Regulation

Major digital technology companies are playing an increasingly central role in the controlling the global flow of information and creating the rules of how issues of public importance are deliberated and decided. This role has given them enormous power to decide the scope and tone of conversations that happen online, and what kind of speech and content is appropriate.¹¹¹ However, as Balkin has argued, freedom of speech has over time grown to assume a role as “a generalized right against economic regulation of the information industries.”¹¹²

Despite some legislative change toward increasing transparency in the online space when it comes to political advertising, few meaningful accountability mechanisms exist for digital tech platforms “aside from public outcry.”¹¹³ It may be that, as Wood and Ravel argue, that digital tech companies' “incentives and the public's social welfare are misaligned in a way that would prevent the platforms from self-regulating,” and states must do what they can *within constitutional limits* to help re-align actors' incentives.¹¹⁴

The legal nature of social media companies needs to be defined,¹¹⁵ which may require the definition of a clear theory of freedom of speech in the digital age, including how individual and group interests are best balanced, and the extent of their liability established. Balkin has suggested the concept of “information fiduciaries” for digital tech companies, akin to some professional bodies' (doctors, lawyers) obligations to maintain clients' privacy. He has also suggested the “democratic culture” theory of freedom of expression (in which the principle seeks to ensure that each individual can meaningfully participate in the production and distribution of culture), and subsequent writers have urged for a new

111 European Parliament 2019, *supra* note 43 at 21.

112 Balkin 2004, *supra* note 2.

113 Syed, *supra* note 4 at 356.

114 Wood and Ravel, *supra* note 15 at p. 1248.

115 See DCMS, *supra* note 1 at 10, 16, which highlighted: “We are recommending a new category of social media company, which tightens technology companies' liabilities, and which is not necessarily either a 'platform' or a 'publisher.' [...] Platforms do have responsibility, even if they are not the content generator, for what they host on their platforms and what they advertise. [...] Social media companies cannot hide behind the claim of being merely a 'platform' and maintain that they have no responsibility themselves in regulating the content of their sites. We repeat the recommendation from our Interim Report that a new category of technology company is formulated, which tightens tech companies' liabilities, and which is not necessarily either a 'platform' or a 'publisher.' This approach would see the tech companies assume legal liability for content identified as harmful after it has been posted by users.

theory of freedom of expression in the digital era to be build around Balkin's “scaffolding.”¹¹⁶

Conclusion

I have argued that although disinformation and “politically-aligned bias which purports to be news”¹¹⁷ has likely existed for as long as people have gathered into political communities, misinformation has taken on new forms in the context of contemporary online communications. The nature of the digital age is unlikely to change in the coming years. What does need to change the current lack of legislation enforcing transparency in political advertising and online communications, especially in the context of election campaigns. New legislation must empower voters to know the source of what they are reading, who has paid for it, and why the information was sent to them. As the DCMS Committee's final report put it: “[w]e need to apply widely-accepted democratic principles to [...] the digital age.”¹¹⁸

Updating political advertising laws will help governments address some of the challenges that digital age, but extending content regulation online will be necessary to meaningfully address the problem of online disinformation. In the long term, it may be that legislation will need to establish specialized, independent public authorities that regulate political communication in the online space,¹¹⁹ although social media companies will likely adapt as well. As Balkin suggested, while a “new set of social responsibilities confront new media companies in the twenty-first century,” there is “reason to hope that the story of the early twentieth century will repeat itself in the twenty-first.”¹²⁰

116 Syed, *supra* note 4 at 356.

117 DCMS 2019, *supra* note 1 at 5.

118 DCMS 2019, *supra* note 1 at 5.

119 These authorities would need to combine aspects of already-existing public regulation, such as the work of privacy, electoral, media human rights commissions, and to balance competing interests online.

120 Balkin 2018, *supra* note 105 at 61; see also Balkin, 2004, *supra* note 2 at 18.

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