

CHAPTER VI: A BASIC FRAMEWORK FOR PROMOTING “GOOD” CONTENT AND EXPOSURE TO DIVERSE SOURCES OF NEWS AND VIEWPOINTS.

Beginning with the Founding Fathers, political theorists throughout American history have worried that unlimited freedom of speech combined with democratic forms of government could give way to demagoguery and mob rule. Alexander Hamilton famously inveighed against the more democratic elements at the Constitutional Convention, and Washington used his final address to warn against the dangers of factionalism and party loyalty. At the same time, the Founders were convinced that allowing government (or any outlet blessed by government) to have a monopoly over the dissemination of the news would create a gatekeeper with enormous power to drive opinion by silencing opposition and hiding malfeasance by the ruling party (Sunstein 2018).

Our history reflects this tension between a democratic vision that requires citizens have access to diverse perspectives and our fear that citizens will fail that trust. The development of electronic media, which concentrated power in a limited number of electronic voices, shifted our concern increasingly toward fear of gatekeepers. Particularly in the early days of the Communications Act, the ostensible focus of media policy was to create diverse content through strict limits on the number of broadcast licenses anyone could hold. Policy makers over the years created frequency set-asides for non-commercial broadcasters, created the Corporation for Public Broadcasting to provide a national radio network and a national television network dedicated to educational television, and banned ownership of a daily newspaper and a broadcast license in the same market. In the late 1960s and early 1970s, the FCC imposed numerous broadcast requirements to fight what critics perceived as an unhealthy focus on commercialism and concentration of power over news broadcasting in the hands of television and radio broadcasters. These measures included limits on ownership of content, requirements that some portion of prime time be reserved for non-network programming, and — for a brief time in the 1970s — a requirement that licensees assess the programming needs of the community to ensure adequate coverage on issues of local importance. When cable began to develop, the FCC and localities focused on creating opportunities for government and educational programming (called “PEG” channels) and a right for independent programmers to lease access time on local cable systems. Even the overall deregulatory Cable Act of 1984 retained these requirements as a means of fostering opportunities for diverse programming.

Even assuming multiple outlets offering diverse programming, nothing ensures that people will take advantage of the opportunity. As the 20th century closed, consolidation created the curious phenomenon of homogenization on the one hand and segmented marketing on the other. Cable created the opportunity for a network devoted to African-American interests, while ownership consolidation ensured that there would be precisely one such network available to a growing

number of cable households served by a shrinking set of ever-larger cable systems. At first, the birth of the internet seemed tailor-made to break the increasing homogeneity of mass media by giving everyone an unfettered opportunity to publish on apparently equal footing. In those heady days, the Supreme Court declared in *Reno v. ACLU* that the “internet is as diverse as human thought.” Proponents predicted a world in which a transparent and diverse internet would enable widespread democratic engagement, moving the balance of power away from concentrated gatekeepers toward citizen reporters and activists (Wu 2016).

It quickly became apparent that while the internet offered an unparalleled opportunity to find diverse opinions and perspectives, nothing guaranteed that people would avail themselves of this opportunity to inform themselves. In a prescient 1994 article, legal scholar Cass Sunstein warned that the ability of people to filter their content was rising in parallel with the availability of greater potential sources of content (Sunstein 1994). As the new millennium wore on and the internet continued to grow and mature, the problems with abundance would quickly become as apparent as the previous problems with scarcity. It was not that optimists were wrong about the potential for the internet to provide unparalleled opportunities for news and diversity of views. But just as the early developers of the internet had emphasized the power of interconnection but failed to anticipate the opportunity this created for bad actors to penetrate systems, the promoters of the internet as a machine for citizen journalism and public accountability failed to consider the ability of bad actors to manipulate these capabilities to undermine faith in journalism and promote factionalism and hyper-partisanship (Farrell and Schneier 2018).

These concerns assume human agency, either from internet users preferring to create their own echo chambers by actively screening out contrary views, or from assaults on democracy by bad actors deliberately trying to divide and deceive and thus render democracy dysfunctional. Digital platforms introduce a new player into the mix: the platform itself. As explained by Eli Pariser in 2010, the algorithms that govern digital platforms such as search or social media create their own “filter bubbles” (Pariser 2010). Unlike a consciously constructed echo chamber, a filter bubble is the product of an algorithm designed by a platform to give its users more of the same. As a user, I don’t even know what possible views or perspectives are excluded. As the algorithm provides me with steady recommendations of more of the same, my perspective unconsciously narrows. The algorithm narrows the vast world of diverse perspectives to what it believes I and people like me want to see next. I never leave the filter bubble — not because I am afraid to be challenged, but because I am not even aware it exists.

Others, such as Zeynep Tufekci, have argued that this warping tendency of the algorithm directly contributes to increased radicalization by favoring not merely similar content, but content the algorithm predicts will increase “engagement” (Tufekci 2016). This introduces a bias in favor of

content that is more extreme or that has more extreme reviews, comments, and shares. As Tim Wu warns in his history of advertising and the rise of the “attention economy,” our general vulnerability to certain attention triggers drives advertisers and others competing for our attention to push their techniques further and further until a backlash occurs (Wu 2016). Tufekci and others document that this drive to capture our attention creates a feedback loop when combined with recommendations based on our search history (and the search history of similarly situated others), offering similar content charged with superlatives and extremes; in the worst cases, it all culminates in conspiracy theories peddled by extremist hate groups (Tufekci 2017). Without the intent of those designing these algorithms, digital platforms can become engines of radicalization and division on a scale beyond the worst nightmares of Washington and Hamilton.

The regulatory history of electronic media offers important lessons for regulators trying to break the cycle of filter bubbles and algorithm-driven radicalization. In addition to the policies of content moderation discussed above, we can use policy choices to promote exposure to diverse content that does not mindlessly incite extremism. While we cannot force those who, like the mythological Narcissus, choose to gaze vacantly at their own reflection while an admiring Echo repeats their own words back to them, we can take steps to prevent algorithmic filter bubbles from transforming us without our knowledge or consent. Additionally, as we have done for decades, we can use limitations on consolidation to promote a robust marketplace of ideas.

A. The Marketplace of Ideas and the “Diversity Principle” In Electronic Media versus the Individual Speaker Right in Common Carriage.

The right to speak and publish freely has formed a fundamental part of the “American Experiment” in self-governance from the beginning. It is no coincidence that the First Amendment contains as the first prohibition on federal power the freedom of speech — or that freedom of the press is considered sufficiently important to be listed as a separate freedom. It was not until the 20th century, however, with the rise of capitalism and the belief in competition as a necessary check on the evils of monopoly, that the idea of free speech and a free press became linked to the concept of the “marketplace of ideas.”¹⁴⁰ As First Amendment jurisprudence evolved in the first half of the 20th century, the concept of economic competition and the purpose of the First Amendment as a cornerstone of self-governance became closely related. In *Associated Press v. United States*, the Supreme Court directly linked the exercise of antitrust laws to protect competition in the news business with the concepts of free speech and freedom of the press:¹⁴¹

¹⁴⁰ See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

¹⁴¹ 326 U.S. 1, 20 (1945).

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.... That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.... Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

The Supreme Court would build on this “diversity principle” — the need for antagonistic and diverse voices to preserve our democracy — over the next five decades of regulation of electronic media. Even before the decision in *Associated Press*, the Supreme Court upheld as a proper exercise of its “public interest” the FCC’s decision to limit assignment of broadcast licenses and regulate the practice of national networks in order to protect the independence of local broadcast affiliates.¹⁴² In *Red Lion Broadcasting Co. v. FCC*,¹⁴³ the idea of government regulation of the electronic media to facilitate a robust “marketplace of ideas” reached its apex in Supreme Court jurisprudence. Upholding the FCC’s regulatory requirement that broadcasters provide a “right of reply” to political candidates subject to personal attack or to respond to editorial views, the Supreme Court found that:

It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. Speech concerning public affairs is more than self-expression; it is the essence of self-government. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.¹⁴⁴

The Supreme Court would gradually retreat from this apex, in part due to the rise of the doctrine of commercial speech, which framed the First Amendment obligation of the government to protect the marketplace of ideas as a “compelling government interest” balanced against commercial speech rights.¹⁴⁵ Nevertheless, the concept of the “diversity principle” as animating our

¹⁴² *NBC v. U.S.*, 319 U.S. 190 (1943).

¹⁴³ 395 U.S. 367 (1969).

¹⁴⁴ *Idem.* at 391 (citations and quotation marks omitted).

¹⁴⁵ It did so in *Turner I* and in *Greater New Orleans Bcsting Assoc., Inc. v. United States*, 527 U.S. 173 (1999)

modern media policy remains strong. Concern for a healthy media landscape as a necessary predicate to self-governance and a functioning democratic society animates the current discussion on how to arrest the decline of the news industry as advertising revenue (the primary source of revenue for print journalism) shifts to online advertising through digital platforms such as search and social media.

Running closely with this “diversity principle” is the concept of “representational diversity.” We all want to see ourselves, and people like us, represented in the picture of the world painted by the mass media. This applies not simply to news, but to entertainment as well. When Nichelle Nichols, who played Lieutenant Uhura on *Star Trek*, intended to leave after the first season, Martin Luther King, Jr. persuaded her to stay in the role as vital to inspiring African Americans and educating white Americans that people of color could live and work together as equals. As Nichols would later recall King telling her:

‘Nichelle, whether you like it or not, you have become a symbol. If you leave, they can replace you with a blonde-haired white girl, and it will be like you were never there. What you’ve accomplished, for all of us, will only be real if you stay.’ That got me thinking about how it would look for fans of color around the country if they saw me leave. I saw that this was bigger than just me. (Ohlheiser 2015)

This may seem over the top for a supporting role often limited to “hailing frequencies open, Captain.” But MLK and Nichols were hardly the only African Americans to feel that way in 1966, when the show first aired and African Americans were either non-existent on television or confined to roles clearly subordinate to whites. Whoopi Goldberg has described her reaction to seeing *Star Trek* as a nine-year old when it first aired:

I looked at it and I went screaming through the house, “Come here, mum, everybody, come quick, come quick, there's a black lady on television and she ain't no maid!” I knew right then and there I could be anything I wanted to be. (Star Trek 2019)

Such is the power of mass media and representation — and a hopeful tale of positive change that what was considered progressive, even revolutionary, in 1966 is considered inadequate today. Nor is it only members of traditionally marginalized communities who benefit from seeing themselves reflected in the mass media, or having their perspectives reflected in the news. Society at large also benefits enormously. We absorb a great deal of our information about others from their portrayal in mass media. Although former Vice President Joe Biden was roundly mocked for crediting the sitcom *Will & Grace* with increasing tolerance for LGBTQs, media scholars and social critics have made precisely this connection not only for *Will & Grace* but with regard to acceptance

of the changing role of women in society and acceptance of people of color generally (Borden 2017).

At first glance, it would appear that the issue of representation on digital platforms is a non-problem. Unlike the world of broadcast or cable, digital platforms enable nearly everyone to participate as a creator as well as a viewer. But it is one thing to create content, it is another for it to compete on equal footing in the marketplace of ideas. We have strong evidence that platforms sell advertising based on racial and gender stereotypes, effectively recreating the segregated world of broadcasting and cable with “urban” (read African-American) programming and programming (and advertisements) targeted at male or female demographics. Even where platforms do not consciously try to create segregated programming, filter bubbles create the same effect over time. While algorithms carry the veneer of scientific accuracy, they “learn” based on the underlying assumptions programmed into them by their developers and from the surrounding environment — which reflects the less-than ideal world in which we live. One of the oldest clichés in programming is GIGO: garbage in, garbage out. Algorithms function on a principle of RIRO: racism in, racism out (Clough 2018b).

Policy designed to address the “diversity principle” must therefore address the traditional problems of stereotypes and representation. In addressing the problem of filter bubbles, we must be conscious of the tendency to filter by race, gender, and sexual orientation. We must address how filters reflect systemic biases and assumptions based on stereotypes in a way that reinforces marginalization, and consider how to promote diversity effectively and within the limits of the First Amendment.

Finally, it is important to recognize that we have treated the First Amendment differently in the context of common carrier one-to-one communications than in the mass media. Whereas we have recognized a compelling government interest in structuring and regulating mass media to promote the diversity concept, we have regarded common carriage as sufficient regulation to protect freedom of speech by the individuals at either end of the “dumb pipe.” In the world of common carriage communications, First Amendment protections lie with the speakers on either end and government regulation is limited to ensuring that such communications capabilities are available to everyone.

This point is relevant here for two reasons. First, it tends to get blurred when discussing regulation of the internet. As discussed at length in Chapter V above, the nature of the First Amendment inquiry depends on a wide range of factors. *Reno v. ACLU*, the 1997 Supreme Court decision striking down the indecency restriction of the Communications Decency Act as a “content-based” prohibition, does not stand for the proposition that any regulation of any part of the internet

ecosystem must survive strict scrutiny. Nor does the First Amendment reduce the obligation not to discriminate or prevent imposition of common carrier obligations when applicable. Particularly in light of the longstanding fight over “net neutrality” and common carriage obligations for broadband access providers, with the constant effort by opponents of net neutrality to blur the distinction between access to the internet and the commerce and content provided by digital platforms delivered through these access providers, it is important to stress the difference between traditional common carrier point-to-point communication and electronic media.

More importantly, as discussed numerous times above, digital platforms often combine features associated with common carriage with features associated with electronic media. This combination can make it complicated to apply policies to promote diversity. To be clear, the interrelationship of common carrier and content has been the subject of antitrust concern since the early days of electronic communications. Even prior to the Communications Act, the Department of Justice prevented collusion between RCA and AT&T to use AT&T’s control over the telephone lines to share network programming (known at the time as “chain broadcasting”) (Wu 2010). The prohibition on common carrier communications providers entering into the electronic media business, for fear their pre-existing vast network and control of the “pipe” would allow them to dominate the industry, continued in many forms until the Communications Act of 1996 eliminated these restrictions and encouraged telephone companies to compete with incumbent cable operators (Bresnahan 1995).

Nothing in the history of promoting diversity justifies interfering with direct communications between individuals. But where a platform is being used to amplify particular news stories or to drive particular narratives, users move from the realm of common carriage into the realm of electronic media. While the ability to forward a story multiple times in WhatsApp may in some ways be no different from the traditional “telephone chain,” the ease with which this is accomplished and the demonstrated ability of individuals and organizations to manipulate these features to achieve the effects of mass communication make them different (Kastrenakes 2019). As with content moderation to police harmful content, application of the “diversity principle” in these contexts will require careful line-drawing.

B. Specific Recommendations to Promote a Robust Marketplace of Ideas.

What we need is what law scholar Cass Sunstein calls an “architecture of serendipity.” As explained by Sunstein, many human beings naturally congregate with similar people who hold similar views — a phenomenon known as “homophily.” At the same time, many people also have an interest in learning about people who are different from themselves, and in trying to understand different perspectives and opinions. Serendipity, exposure to things we did not consciously seek

out, helps to counteract the trend to homophily. This, argues Sunstein, is critical in a diverse democracy to avoid hyper-partisanship and societal fragmentation (Sunstein 2018).

At present, the underlying architecture of digital platforms deliberately selects for homophily. People who read this book also read and enjoyed these other books. People who watched this video also liked these other videos. But just as the current architecture of digital platforms selects for homophily, and therefore creates and reinforces filter bubbles, we can alter the underlying algorithms to create an architecture of serendipity.

This does not, of course, mean simply giving people the opposite of what they want. Such a course of action would prove useless, or even worse than useless. When radio listeners or television viewers had relatively limited choices, it was perhaps possible to force people to sit through presentation of an opposing point of view in the same way they sit through commercial advertising to watch the programs they do enjoy. Even if we could overcome the constitutional and technical problems, psychologists have demonstrated that when people are exposed to points of view that directly challenge their underlying opinion, they tend to respond by doubling down on those opinions rather than considering that their deeply held beliefs and comfortable certainties might be wrong (Klein 2018). Forcing people to watch the polar opposite of what they want to watch, even if it were possible, would likely reinforce rather than solve the problems associated with filter bubbles and echo chambers.

Fortunately, existing technology permits a more nuanced architecture of serendipity.

1. Recommendation 1: The Wobbly Algorithm.

Behavioral economists and product designers both are aware of the power of “nudge” and “nudging.” (Thaler and Sunstein 2008; Candeub 2014) Rather than dictate specific content to a user, certain elements of design make it easier for a user to choose one action or harder to choose another. It takes surprisingly little additional “friction” to have a statistically significant impact on user behavior. This is why targeted advertising charges a premium. In theory, targeted advertising permits advertising to the most receptive audience at the most receptive time.

Platforms often use this power of the nudge to drive users toward content and deepen engagement with the platform. Whether it is Amazon recommending similar products, YouTube recommending videos, or Facebook organizing your news feed, platform operators collect a wide range of information based on your past history and the history of similarly situated people to make predictions as to what content will most likely encourage further engagement. Their algorithms do not produce a single perfect result, or even a set of perfect results. Rather, they make predictions

that fall along the lines of a probability curve, from most likely to be relevant to least likely to be relevant. The algorithm then serves the selections that are at the center of the probability curve. Because people tend to like content described in extremes (“best” or “worst” rather than “OK” or “enjoyable”), and generally like more of what they have liked in the past, the algorithmic filter bubble selects for content that is more homogenous in perspective and more extreme in nature (or has triggered more extreme reactions from other users).

What of the discarded results? These cover a wider range of possible content that is still similar enough that it might engage the user. It simply is not judged by the algorithm to be as likely to be engaging, because it is less like the most recently viewed content, because it generates less-extreme responses from users, or both. Nothing stops the algorithm from selecting content from lower down the probability curve — from the “shoulders” of the curve rather than from the top of the curve.

Requiring algorithms to include somewhat lower-ranked content in recommended content would at least slow the drive toward homogeneity and would nudge users toward more diverse content. Critics might argue that this ensures that the “diversity” of the content will still be fairly close to the most recently viewed content. True. But if the offered content is radically different from what users like or expect, they will reject it. This phenomenon of rejecting information people find too challenging to their beliefs, called the “backlash effect,” tends to reinforce core beliefs rather than open people to new perspectives. This is why proposed diverse content should be similar enough to be acceptable. Over time, the introduction of more diverse content may stimulate users to look at more content like the diverse content, encouraging exposure to new inputs over time. As marketers and product designers have long understood, a nudge can be far more effective than a sledgehammer.

2. Recommendation 2: Eliminate Suspect Classifications, or Actively Reverse Them, at Random Intervals.

Advertisers have always used racial and gender stereotypes when placing advertisement. Anyone who listens to an “urban format” radio station will hear very different advertisements than on a classical music or “classic rock” station. Similarly, advertisements broadcast in association with most professional or college sports games emphasize cars, beer, and erectile dysfunction/male “enhancement” remedies on the assumption that the primary audiences are men and that men who like sports are also most likely to buy beer, purchase the latest-model SUV, and show an interest in other products designed for a male audience.

Digital platforms take this a step further, and not simply for advertising. Algorithms do not teach themselves from nowhere. To the extent that stereotypical assumptions about sex or race drive programming and advertising choices, the algorithm will learn these patterns and replicate them. Worse, to the extent that developers harbor implicit or explicit biases, these are also likely to be incorporated into the algorithm. Algorithms, even self-teaching ones, start by examining a basic set of data. If those designing the algorithm consider race or sex important criteria for determining things like credit worthiness or interest in science or sports, then the algorithm will seek that data and include it in its calculations.

It would be nice to declare that algorithms should simply ignore certain suspect criteria. But that has not worked even in the world of human judgment. For decades, human beings have used proxies such as address or speech pattern to determine race or sex when the law prohibits asking about these characteristics. Additionally, using race or sex is not always irrelevant or pernicious. To take a simple example, we wish to prevent the use of race as a factor in sentencing. Studies have repeatedly shown that African Americans, particularly African-American men, receive harsher sentences than whites who commit comparable offenses. An algorithm that studies this pattern to learn what sentences to recommend will reinforce this racial inequality. On the other hand, we want to analyze arrest and sentencing records precisely so that we can find such patterns of discrimination and address them.

This paper cannot even begin to address this issue. I will therefore limit myself to a single suggestion for modifying the algorithms used to screen or promote content. At random intervals, the algorithm should make its selection with certain criteria blank, and on other random occasions actually reverse or alter the criteria. Imagine as an example a platform that has created a detailed picture of a user. On every fifth run of the algorithm, it assumes I am a woman rather than a man, but holds all else equal. Does it yield different recommendations? If so, the platform should make that result visible in the name of promoting diversity.

3. Recommendation 3: Encourage Development of New Tools to Identify Reliable Sources of Information.

The “diversity principle” in communications focuses in large part on the production of news necessary for self-governance. It is well beyond the scope of this paper to tackle the role of digital platforms in shaping the business of news and the evolution of journalism — two very different things. In the section on content moderation above, I describe steps that the law should require of platforms to determine when bad actors are deliberately seeking to spread misinformation and manipulate users for commercial or political gain. But platforms, as intermediaries in distributing news, can also assist in developing and distributing tools that enhance trust.

We must first distinguish between the problem of misinformation and the question of trust. There are many things that can be proven true or false. Then there are statements of opinion or belief that may be accurate but are not amenable to proof — either because they represent a balancing of factors on which reasonable minds may disagree, or because they rest on values that are simply not amenable to rational proof. As an example, I can determine by consulting the IRS code the current tax rate for personal or corporate income. But whether that rate is too high or too low is a statement that requires complicated factual analysis balancing multiple factors, as well as assumptions about the purpose of taxes and the impact of tax rates on things such as economic productivity.

In the past, news outlets and others have focused on “fact checkers” to analyze news and opinion statements with ratings on some sort of truth scale from literal truth to utter falsehood. But only a relatively small percentage of news stories fall easily into such a neat dichotomy. Worse, journalists may have excellent reason to report a story, only to alter their understanding of events after more facts are brought to light (sometimes in response to the original story). Conversely, a journalist may recklessly report something that ultimately turns out to be true, despite the lack of evidence when the story was first reported. Fact checkers’ ratings are not only useless in these situations, but counterproductive. To rate a story “true” based on the known facts, and then reclassify it as wrong (or worse, “false”) when new facts are discovered undermines trust in even reliable reporting.

Accordingly, platforms should help to develop and deploy tools that do not seek to be final arbiters of truth or falsehood, but do help to evaluate the reliability of the news source. A source that applies good journalistic practices is more reliable than one that simply runs the most outrageous rumors possible — or actively promotes stories long disproven. Additionally, while factors such as ideological alignment or financial interest do not determine whether something is true, they are relevant to assessing the reliability of the source material. Tools can provide those interested with such information, and thus enhance overall trust in the news.

Policy can encourage the development of such tools, rather than require them to be proscriptive. Additionally, disinterested regulators can promote the development and distribution of such tools. Regulators can also provide opportunities for platforms and tool developers to share information necessary to develop such tools without exposing trade secrets and can ensure a competitive market in the development of such tools. Finally, regulators can serve as vetting authorities, testing the reliability tools to ensure that they do not favor a particular perspective or financial interest.

4. Recommendation 4: Use Traditional Safeguards of Structural Regulation to Promote Competition.

We should recall that specific policies designed to promote diversity are most effective when used in conjunction with policies designed to foster economic competition. These recommendations are complements to, not substitutes for, the recommendations discussed above to ensure robust economic competition. The history of FCC regulation to promote diversity of voices includes rigorous ownership limits, as well as behavioral regulations on national programming networks to ensure the independence of independently owned network affiliate stations.¹⁴⁶ It also includes extensive cross-ownership limits, such as the prohibition on owning a broadcast station and a daily newspaper, or a broadcast station and a cable system in the same geographic market.¹⁴⁷ Indeed, in the realm of speech, such structural regulation is critical. Neither Congress nor enforcement agencies can legislate specific content or perspectives. Using independent ownership and/or removal of editorial control is a content-neutral means of encouraging the development of a diverse and robust marketplace of ideas.

5. Recommendation 5: Promote News and Media Literacy as a Component of Education.

Finally, we should recognize that one way to encourage users to actively seek out diverse content and avoid echo chambers and filter bubbles is by teaching basic media literacy skills. For all that we depend on an informed electorate as a necessary predicate to democracy, we do little as a society to provide our citizens with the skills needed to achieve this end. As a result, Americans have enormous difficulty holding media accountable or selecting reliable media sources, which contributes to the corrosive distrust of news and the attraction of filtering out uncomfortable opinions and perspectives. To take just one example, a recent Pew survey found that a significant number of Americans, when presented with a mixture of statements of fact (e.g., “the sun rises in the East”) and statements of opinion (e.g., “the weather was pleasant yesterday”) had difficulty distinguishing which were statements of fact and which were statements of opinion (Mitchell *et al.* 2018).

¹⁴⁶ *National Broadcasting Corp. v. United States*, 319 U.S. 190 (1943).

¹⁴⁷ This later prohibition was eliminated by judicial fiat in 2002, in *Fox Television Stations v. FCC*. The role of an overactive judiciary in shaping telecommunications regulation is often overlooked and underappreciated. As an advocate, I have observed the FCC staff or commissioners refuse to consider policies that clearly lie within the law but which they believed the D.C. Circuit would reverse as contrary to the deregulatory agenda of its more activist conservative judges. For this reason, Congress needs to describe clearly, unambiguously, and emphatically the authority it entrusts to enforcement agencies, authorizing numerous tools so as to emphasize that choice of appropriate remedy is delegated to the judgment of the enforcement agency, not the preferences of judges.

To enhance the robust marketplace of ideas and foster greater civic engagement and self-governance, we should consider funding basic media-literacy programs as part of our overall education system. To be clear, the point is not to foster any particular point of view. Rather, it is to focus on such basics as distinguishing statements of fact from statements of opinion, or advertisements from actual news.