POLITICAL ADVERTISING ON FREE STREAMING SITES: CONFLICTS WITH FIRST AMENDMENT AND EXPLORING VIABILITY OF REGULATION

Pilar Gonzalez Navarrine†

INTRODUCTION

When broadcast TV first became a staple in the American household, it probably seemed unlikely that fifty years later, its hold on the American public would lessen in favor of other types of media. However, for years now, users have relied on

† J.D., Cornell Law School, 2024; B.A., Washington University in St. Louis, 2018. A special thank you to Professor Leslie Danks-Burke who guided me through the writing process, and to Cornell Law Review editors for all your time and effort in preparing this Note for publication. And last but not least, thank you to my family, especially my parents Nela and Pablo, and my friends for their constant support and encouragement.

online news—whether websites, social media sites, or streaming sites—instead of cable and broadcast networks. According to a Nielsen report, streaming viewership in July of 2022 exceeded cable and broadcast viewership for the first time.[1]

For the past few years, users have turned to paid services like Netflix and Hulu, but due to rising inflation in 2022, many users are choosing to cut many of these expenses.[2] Instead, users are turning to ad-supported streaming sites such as Pluto TV, Vudu, and Tubi. Many of the broadcast giants own these streaming sites: for example, Fox Corporation owns Tubi, while Viacom owns Pluto TV.[3] These platforms have seen tremendous growth in the last few years. Tubi had 33 million monthly active users at the end of 2020, and 51 million by the end of 2021, with a 40% year-over-year increase in total viewing time and a record of 3.6 billion hours watched.[4] Meanwhile, Pluto ended 2019 with over 64 million active monthly users, and over $1 billion in ad revenue.[5]

Users are not the only ones flocking to streaming platforms. Political advertisers are diversifying their ad investments, faced with growing public distrust of social media advertising and new privacy rules that affect ad efficacy. As a result, political advertising on social media is declining. For example, in the first half of 2022, a midterm year, a political advertising firm

---

1 *Streaming Claims Largest Piece of TV Viewing Pie in July*, NIELSEN (Aug. 2022), https://www.nielsen.com/insights/2022/streaming-claims-largest-piece-of-tv-viewing-pie-in-july/ [https://perma.cc/4QZZ-9945].

2 *The Subscription Economy Grows up as Consumers Cut Back*, NAT'L RSCH. GRP. (Oct. 3, 2022), https://www.nrgmr.com/our-thinking/technology/the-subscription-economy-grows-up-as-consumers-cut-back/ [https://perma.cc/RBK6-K4HX].

3 Jonathan Schieber, *Fox Gets Deeper into Streaming with $440 Million Acquisition of Tubi*, TECHCRUNCH (Mar. 17, 2020), https://techcrunch.com/2020/03/17/fox-gets-deeper-into-streaming-with-440-million-acquisition-of-tubi/ [https://perma.cc/BY9W-EG9T]; Ben Munson, *Pluto TV on Track to Pass $1B in Ad Revenue by Q4, ViacomCBS CEO Says*, STREAMTV INSIDER (June 7, 2021), https://www.fiercevideo.com/video/pluto-tv-track-to-pass-1b-ad-revenue-by-q4-viacomcbs-ceo-says [https://perma.cc/48DA-2QRC].

4 Bevin Fletcher, *Tubi Has 51M Active Users, 27% Not Reachable on Other AVODs: CRO*, STREAMTV INSIDER (May 2, 2022), https://www.fiercevideo.com/advertising/tubi-has-51m-active-users-27-not-reachable-other-avods-cro [https://perma.cc/5RMN-XQEG].

5 Munson, *supra* note 3; Tony Maglio, *Pluto TV Was an April Fool's Punchline 8 Years Ago. Today It's the Future of Streaming*, INDIEWIRE (Apr. 22, 2022), https://www.indiewire.com/features/general/pluto-tv-future-of-streaming-1234716270/ [https://perma.cc/K47F-W9LB].

saw a 1,500% increase in ad spending on streaming sites compared to the first half of 2020, a presidential election year.[6]

The growth of these sites is remarkable but also a cause for concern. These streaming sites are starting to encroach on the role of cable and broadcast networks in Americans' daily lives. These sites act like—and are owned by—broadcast networks in terms of providing news and entertainment, but they offer the same detailed ad targeting as social media sites. For example, whereas everyone viewing a broadcast channel will see the same ads, users viewing the same channel on a streaming site may receive different ads based on targeted demographics (like age, gender, interests, etc.).[7] This leaves streaming sites halfway between social media and television—they act like television networks, which the Federal Communications Commission (FCC) regulates, but provide the same ad targeting as social media sites, which neither the FCC nor the Federal Trade Commission (FTC) can regulate. This puts streaming services in a regulatory void, with no real guidelines on speech, much less political speech.

Unrestricted growth of streaming platforms also conflicts with the ideals and doctrines that underlie the First Amendment. Courts have explained that a basic rationale underlying the First Amendment is that less regulation will lead to a "marketplace of ideas" where the truth will emerge.[8] Courts have also expressed support for the doctrine of counter speech, which states that the remedy to falsehoods and allegations is more speech, not enforced silence.[9] An example of this doctrine in practice is the Equal Time Rule, which Congress created in the 1930s.[10] The Equal Time Rule requires that if a broadcast network provides air time for one candidate, the broadcast network must provide air time to a competing candidate at a

---

6 Laura Feiner & Jonathan Vanian, *Political Advertisers Shift Spending from Facebook to Streaming Platforms Ahead of Midterms*, CNBC (Nov. 2, 2022), https://www.cnbc.com/2022/11/02/facebook-has-lost-political-ad-dollars-since-apple-crackdown.html [https://perma.cc/Q7SM-GZZG].

7 John Vilade, *How Marketers Are Winning over Audiences with Ad-Supported Streaming*, DIGIDAY (Nov. 14, 2022), https://digiday.com/sponsored/how-marketers-are-winning-over-audiences-with-ad-supported-streaming/ [https://perma.cc/4J9S-DYQH].

8 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); United States v. Alvarez, 567 U.S. 709, 728 (2012) (plurality opinion); City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1477 (2022) (Breyer, J., concurring).

9 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

10 Communications Act of 1934, Pub. L. No. 73-416, § 315, 48 Stat. 1064, 1088 (codified as amended at 47 U.S.C. § 315(a)).

similar time slot, to allow the competing candidate to counter allegations or untruths.[11] These rationales and doctrines are present in many of the key opinions that make up the Supreme Court's jurisprudence on the First Amendment, which Part I will discuss in more depth.

The evolving media landscape is weakening these basic First Amendment rationales and doctrines, as politicians can target misinformation ads to a specific part of the population, and the other affected politicians may not be aware of such an attack and may not be able to respond to the same targeted audience.

To reconcile the growth of streaming platforms with the basic doctrines underlying the First Amendment, this Note focuses on the viability of two potential solutions to the erosion of counter speech in the advent of free streaming sites. First, this Note explores the viability of enforcing an Equal Time Rule on these free streaming sites. Second, this Note explores the viability of requiring free streaming sites to create a publicly available database about political ads, including messaging and targeted audience, to allow other candidates to respond.

This Note proceeds in four parts. Part I explores various media types that are vehicles for political speech and provides an overview of First Amendment scrutiny of regulation and existing FCC political speech regulations across these various media types. Part II focuses on First Amendment scrutiny of disclosure legislation, existing disclosure rules across media types, and the growing movement to regulate speech on the Internet and social media platforms. Part III provides a more in-depth analysis of free streaming sites and ad targeting, highlighting how this practice undermines the doctrine of counter speech and basic First Amendment tenets. Lastly, Part IV puts forth the two proposed solutions: an Equal Time Rule for streaming sites, and a publicly available database on each streaming site disclosing candidate ads. This Note argues that while it is not clear whether an Equal Time Rule for streaming sites would survive judicial scrutiny under current Supreme Court jurisprudence, there are certain key attributes of free streaming TV that merit re-examination by the Supreme Court. The second proposal is more likely to succeed due to existing Congressional will, acquiescence from Big Tech, and its emphasis on disclosure rather than regulation.

---

11 47 U.S.C. § 315(a).

I
REGULATION OF POLITICAL SPEECH ACROSS VARIOUS MEDIA TYPES

To best understand the challenges in regulating political speech on free streaming sites, it is necessary to understand some key doctrines underlying the First Amendment—namely, the "marketplace of ideas" and counter speech doctrine. It is also necessary to examine the level of protection that the Supreme Court affords speech across different media types and how these frameworks have shaped existing legislation and FCC regulations of political speech across various media types.

A. Marketplace of Ideas Rationale & Counter Speech Doctrine

The idea that debate and exchange of ideas will give way to the truth predates the First Amendment and appears in the works of John Milton in the 1600s and John Stuart Mill in the 1800s.[12] It is not a surprise that eventually this idea found its way to Supreme Court jurisprudence. It first appeared in *Abrams v. United States* in Justice Holmes' dissent, which stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[13] To this day, the "marketplace of ideas" rationale remains strong in First Amendment jurisprudence as justices continue quoting this language in their related opinions.[14]

The idea of counter speech is related to the "marketplace of ideas" rationale. By eschewing more extensive government regulations on speech and instead enhancing the ability of citizens to speak, counter speech contributes to the debate that leads to the truth. Justice Louis Brandeis first articulated this idea in a concurring opinion in 1927, shortly after Holmes' focus on the "marketplace of ideas" rationale: "If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[15]

---

12 JOHN MILTON, AREOPAGITICA 51–52 (John W. Hales ed., Oxford Clarendon Press 1904) (1644); JOHN STUART MILL, ON LIBERTY 38–44 (2d ed. 1859).

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

14 *E.g.*, United States v. Alvarez, 567 U.S. 709, 728 (2012) (plurality opinion); City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1477 (2022) (Breyer, J., concurring).

15 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see also* Brown v. Hartlage, 456 U.S. 45, 61 (1982) ("In a political campaign . . . [t]he preferred First Amendment remedy of 'more speech, not enforced silence' . . . has special force."); 281 Care Comm. v. Arneson, 766 F.3d 774, 793

Less than a decade later, Congress enacted an example of counter speech into law: the Equal Time Rule through the Communications Act of 1934. This rule required that if a broadcaster allowed a political candidate to use the station, then it had to "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[16] This rule ensured that if broadcast networks gave time to Candidate A who made false statements about Candidate B, Candidate B could respond with their "truth" and allow the audience to decide what to believe.

Thirty years later, the FCC followed Congress' lead and enacted regulations for what became the "Fairness Doctrine."[17] The Fairness Doctrine expanded the Equal Time Rule and required broadcast networks to balance news coverage to controversial issues of public interest—not just political candidates.[18] For example, if a broadcast network ran a story about the right to abortion, a pro-life group could request equal coverage if they so requested. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court upheld the Fairness Doctrine as consistent with the FCC's statutory mandate, stating that Congress wanted licensees to prioritize public interest, and the FCC's goal of covering both sides of a controversial issue was consistent with that priority.[19] The Supreme Court also upheld the rule on constitutional grounds because the doctrine enhanced rather than restricted speech, and the public has a First Amendment right to access a marketplace of ideas free of monopolized control.[20] The FCC, under the leadership of former Reagan campaign counsel Mark Fowler, revoked the Fairness Doctrine in 1987, concluding that the rule violated the First Amendment and contravened public interest, despite Supreme Court acquiescence.[21] Congress attempted to preempt the FCC by codifying

---

(8th Cir. 2014) ("Especially as to political speech, counterspeech is the tried and true buffer and elixir.")

16 Communications Act of 1934, Pub. L. No. 73-416, § 315, 48 Stat. 1064, 1088 (codified as amended at 47 U.S.C. § 315(a)).

17 *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 app. (1949).

18 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 373–75 (1969).

19 *Id.* at 380–82.

20 *Id.* at 380, 390.

21 Syracuse Peace Council, 2 F.C.C. Rcd. 5043 (1987). For more information on Mark Fowler's ties to President Reagan's deregulatory agenda, see *Nomination of Mark S. Fowler to Be a Member of the Federal Communications Commission, and Designation as Chairman*, AM. PRESIDENCY PROJECT (Mar. 13, 1981), https://www.presidency.ucsb.edu/node/247206 [https://perma.cc/QLB6-QZHX].

the Fairness Doctrine, but President Reagan, in line with his deregulatory agenda, vetoed the bill.[22]

B. First Amendment Scrutiny Across Media Types

Time and time again, the Supreme Court has iterated an underlying "scarcity" argument to justify different scrutiny levels of speech regulations across different media types.[23] Essentially, the Supreme Court will allow government regulation of certain media types if they are scarcer like broadcast and radio spectrums, as opposed to media types that have a lower barrier to entry, like the press.

This "scarcity" argument first appeared in *Red Lion* in a challenge to the Fairness Doctrine and Equal Time Rule.[24] The Court noted that "[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views," the regulations promulgated under the Fairness Doctrine were constitutional.[25] In coming to this decision, the Court highlighted that the objective of broadcast regulation was "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market," once again pointing to that "marketplace of ideas" language from Justice Holmes fifty years prior.[26] Because the interest of audience viewers in accessing diverse ideas was more important than the rights of the licensees in having complete control over the programming, the Court allowed government regulation of broadcast networks to ensure broadcasters provided diverse viewpoints on political or controversial issues.[27]

In contrast, the Court has held that this scarcity argument does not apply to the press and newspapers because there is no finite number of newspapers and there is a low bar to entry in publishing information.[28] In *Miami Herald Publishing Co. v.*

---

22 *Fairness Doctrine*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, https://www.reaganlibrary.gov/archives/topic-guide/fairness-doctrine [https://perma.cc/D9KY-WPCR] (last updated Apr. 7, 2023).

23 *See Red Lion Broad. Co.*, 395 U.S. at 390.

24 *Id.*

25 *Id.* at 400–01.

26 *Id.* at 390.

27 *Id.*

28 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 248 (1974).

Tornillo, the Court struck down a Florida statute that imposed on newspapers a right of reply for political candidates.[29] The Court struck down the statute, stating that despite growing monopolies in the newspaper space, the government cannot enforce a political candidate's right of access against publishers as it can with broadcast networks.[30] Therefore, First Amendment protections are at their highest when it comes to the press.[31]

While press is on one end of the spectrum, with strict scrutiny for speech regulations, and broadcast is on the other end of the spectrum with a lower scrutiny standard, cable networks lie somewhere in the middle. Cable does not have the same frequency limits as broadcast, thus making it different from *Red Lion*.[32] However, cable is also distinct from press: in *Turner Broadcasting System, Inc. v. FCC*, the Court differentiated cable from the press because cable operators have greater control over access to the relevant medium than do newspapers and can silence competing speakers.[33] The court noted:

> A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities. Thus, when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale.
>
> The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.[34]

---

29 *Id.* at 244.

30 *Id.* at 255–57.

31 *Id.*

32 Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 639 (1994).

33 *Id.* at 656.

34 *Id.*

Seeing this potential for abuse, the Court noted that the First Amendment allowed Congress to take steps to ensure that "private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas," and therefore subjected cable restrictions to intermediate scrutiny.[35] The Court held that to pass intermediate scrutiny, a regulation has to (1) be content-neutral, (2) further an important governmental interest that is incidental to the suppression of free expression, and (3) not be overbroad as to burden speech more than is necessary to further the government's interest.[36]

The advent of the Internet posed a new puzzle for the Court, which it tried to solve in *Reno v. American Civil Liberties Union*. In a challenge to a statute that regulated explicit images on the Internet, the Court applied strict scrutiny to such regulations on the Internet. The Court noted that, unlike broadcast and radio, there is no finite access to the web so this did not merit a lower scrutiny standard.[37] With the Internet's opportunity for low-cost unlimited communications, anyone could "become a pamphleteer."[38] To analogize this to counter speech, the government interest to regulate speech to ensure a diverse marketplace of ideas was lower in *Reno* because the Internet seemingly provides the tools to respond to attacks and create a marketplace of ideas. The Court also stated that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden," whereas broadcasting merits more regulation because "broadcasting is 'uniquely pervasive,' [and] can intrude on the privacy of the home without prior warning."[39] Therefore, the Court held that the Internet was not subject to a qualified First Amendment standard.[40]

For perspective on the soundness of this decision, Google did not exist at the time of the *Reno* decision. Facebook would not exist for another seven years. Streaming sites were not even on the horizon. The idea that anyone could respond to attacks with a low-cost website may have made sense at the time. But in today's age of social media giants and internet advertising,

---

35 *Id.* at 657.

36 *Id.* at 662.

37 Reno v. Am. C.L. Union, 521 U.S. 844, 870 (1997).

38 *Id.* at 870.

39 *Id.* at 869 (internal modifications omitted); Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 127 (1989).

40 *Reno*, 521 U.S. at 870.

the dissemination of political counter speech is at the hands of a select few companies and requires massive capital. The Court adhered to its *Reno* strict scrutiny of Internet speech regulations for years thereafter but briefly departed from standard in *Packingham v. North Carolina*. While the Court once again struck down a statute about Internet regulations, the Court instead applied intermediate scrutiny.[41] Justice Kennedy wrote in the opinion:

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today may be obsolete tomorrow.
>
> This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.[42]

While this shows the Court understood how fast-changing the Internet is, *Reno* and subsequent decisions—including *Packingham*—fail to grasp just how much of a dramatic departure the Internet is from prior media sources. The fact that a Supreme Court justice called the Internet "new" in 2017 is indicative of the magnitude of the problem. The Internet allows for an entirely new way of communication. It is not static in time but infinitely editable—a user can post something today and edit it in three years in a way that is not possible with TV or radio or press. Additionally, the Court's framing of the Internet as a resource that is freely available falls short today, as it fundamentally overlooks the realities of how the Internet has developed since. It loses even more relevance when the Court is confronted with the question of hybrid media sources like streaming sites.

Nevertheless, with these media distinctions in mind and a blurry understanding of how the Internet fits into these categories, Congress and the FCC enacted regulations predominantly focused on broadcast network speech.

---

41 Packingham v. North Carolina, 582 U.S. 98, 105 (2017).

42 *Id.*

C. Existing FCC Regulations

The 1952 election was the first time that presidential candidates used political TV ads to reach voters.[43] This was revolutionary: in 1952, both political parties spent a combined $3.7 million to purchase airtime, and that number tripled within twenty years.[44] Though the advent of political spots on TV was sudden, it did not blindside the FCC. From the very first Communications Act and the FCC's inception in 1934, Congress wrote the Equal Time Rule into law.[45] In 1972, Congress amended the Equal Time Rule to require broadcasters to offer the lowest unit charge in the forty-five days before a primary and in the sixty days before a general or special election.[46] Congress also set out a remedy to enforce the Equal Time Rule: the FCC can revoke licenses for broadcasters that willfully or repeatedly breach the Equal Time Rule.[47] Congress also showed its desire to adapt statutes to rapidly-changing campaign finance trends in the nation by providing that these aforementioned limitations also apply to authorized committees of candidates.[48]

In 1984, Congress amended the Communications Act to give the FCC jurisdiction over cable, in addition to broadcast and radio. In 1997, in *Turner Broadcasting II*, the Supreme Court upheld some cable regulations against constitutional challenge, thereby establishing that cable television was subject to regulation.[49] However, because of a higher First Amendment standard for cable TV as opposed to broadcast networks, the FCC stopped short of regulating political speech on cable networks. Therefore, there is no equivalent of the Equal Time Rule in the cable space.

Though Congress delegated authority to the FCC to regulate radio, broadcast, and cable, albeit to different degrees, this same delegation of authority never quite expanded to the Internet. Currently, the FTC is the only agency with broad

---

43 Stephen C. Wood, *Television's First Political Spot Ad Campaign: Eisenhower Answers America*, 20 PRESIDENTIAL STUD. Q. 265, 265 (1990).

44 MELVIN I. UROFSKY, THE CAMPAIGN FINANCE CASES: *BUCKLEY, MCCONNELL, CITIZENS UNITED*, AND *MCCUTCHEON* 24 (2020).

45 Communications Act of 1934, Pub. L. No. 73-416, § 315, 48 Stat. 1064, 1088 (codified as amended at 47 U.S.C. § 315(a)).

46 Campaign Communications Reform Act, Pub. L. No. 92-225, § 103, 86 Stat. 3, 4 (1972) (codified as amended at 47 U.S.C. § 315(b)(1)(A)).

47 47 U.S.C. § 312(a)(7).

48 *Id.*

49 Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

jurisdiction over social media and the Internet.[50] Such jurisdiction extends to prohibiting unfair methods of competition and deceptive acts that affect commerce, and thus does not include regulating or disclosing most political speech.[51] For about twenty years now, the Federal Election Commission (FEC) and Congress have proposed various ways to bring Internet political speech under the regulation of either the FCC or FEC. Subpart II-B further explores this topic.

II
Disclosure of Political Speech

A. Disclosure & Disclaimers on Electioneering Speech

Campaign finance disclosure rules pre-date the FEC. In 1905, in one of the first big campaign finance scandals, the New York state legislature uncovered a $48,000 undisclosed corporate expenditure to Teddy Roosevelt's campaign.[52] This scandal provoked massive media outcry, leading to 115 front-page stories in the *New York Times*.[53] Teddy Roosevelt, mindful of his public image, came out swinging in favor of campaign finance reforms, even endorsing a ban on corporate donations, which eventually became the Tillman Act.[54] In line with the zeitgeist of public distrust of corporate donations, Congress passed the first federal attempt at campaign disclosure rules: the Federal Corrupt Practices Act of 1910, also known as the Publicity Act.[55] This required national committees of political parties in the House general elections to keep records of contributions and expenditures and submit them for disclosure after the election.[56] In 1911, these disclosure requirements were extended to Senate races as well as political candidates.[57]

The Supreme Court's indicated its early support of disclosure rules in 1934. In *Burroughs v. United States*, the Court upheld disclosure rules, stating that Congress had made a legislative choice to prevent corruption, and the courts could not

---

50 15 U.S.C. § 45(a).

51 *Id.*

52 Adam Winkler, We The Corporations: How American Businesses Won Their Civil Rights 191–204 (2018)

53 *Id.* at 205.

54 *Id.* at 217–19.

55 Publicity Act, Pub. L. No. 61-274, 36 Stat. 822 (1910).

56 *Id.* at 823.

57 Act of Aug. 19, 1911, Pub. L. No. 62-32, 37 Stat. 25, 27.

deny that choice.[58] The Court relied on the broad powers of Congress to "pass appropriate legislation to safeguard such an election from the improper use of money to influence the result," and to "preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."[59] The Court pointed out that if the government did not have this power, it would be a "proposition so startling as to arrest attention and demand the gravest consideration."[60]

The Publicity Act was the governing law on disclosure for another thirty-five years, until Congress passed the Federal Election Campaign Act (FECA) in 1971.[61] Just a few years later, in response to Watergate, Congress substantially amended FECA in 1974.[62] The 1974 amendments limited contributions to and expenditures by candidates for federal office, limited candidate expenditures from personal funds, provided for public financing of presidential elections, required disclosure of political contributions, and created an enforcement mechanism in the FEC.[63] Congress wanted these amendments to tackle corruption in U.S. politics and create an enforcement mechanism for the new various regulations on campaign finance.[64]

Opponents of FECA swiftly challenged the law, and in 1976, the Supreme Court responded by issuing its largest opinion ever in *Buckley v. Valeo*, upholding disclosure rules and contribution limits, but ruling expenditure limits were unconstitutional.[65] The Court stated that while disclosure laws can infringe on the First Amendment right to freedom of association, the provisions in FECA survived exacting scrutiny because they served substantial government interests.[66] The Court noted three substantial government interests in formulating disclosure laws: aid voters in evaluating those who seek federal office, deter actual corruption and appearance of corruption by exposing large contributions and expenditures to

58 Burroughs v. United States, 290 U.S. 534, 548 (1934).

59 *Id.* at 545.

60 *Id.* at 546.

61 *See generally* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

62 *See generally* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

63 *Id.*

64 *See* UROFSKY, *supra* note 44, at 32.

65 424 U.S. 1 (1976).

66 *Id.* at 68.

the light of publicity, and facilitate data collection for enforcement of campaign finance scheme.[67]

As disclosure regulations stood until the 2000s, FECA required disclosure only of express advocacy ads—ads that advocated for or against specific federal candidates.[68] Issue advocacy ads that did not use "magic" words like "vote for" or "elect" were not subject to disclosure.[69] In the 1996 elections, Bill Clinton and Bob Dole took advantage of this distinction by running ads that advocated for specific candidates but carefully avoided the use of magic words to avoid disclosure.[70] As this practice grew, Congress sought to correct this loophole by enacting regulations on electioneering communications in the Bipartisan Campaign Reform Act (BCRA) of 2002.[71] Electioneering communications were defined in BCRA as any communication on broadcast, cable, or satellite TV that referred to a clearly identified candidate for federal office and is made in the lead-up to the general or primary election, regardless of whether it uses express advocacy words.[72] BCRA forbade labor unions and corporations from contributing to electioneering communications unless done through a political action committee or another type of segregated funds.[73] Moreover, BCRA required that anyone spending more than $10,000 in aggregate electioneering advertising had to file disclosure statements with the FEC, clarifying the names of contributors over $1,000, the identity of the individual or group spending the money, the amount spent, and candidates it supported or challenged in the electioneering communications.[74] BCRA further required that anyone, besides a candidate who is funding a televised electioneering communication, include a disclaimer that "_____ is responsible for the content of this advertising."[75] If the funding came from a group not authorized by the candidate, then such group was required to present the name and address (or Web site address) of the person or group that funded the advertisement and "state that

---

67 *Id.* at 66–68.

68 *Id.* at 44 n.52.

69 *Id.* For more examples of the application of this rule, see UROFSKY, *supra* note 44, at 54–57.

70 UROFSKY, *supra* note 44, at 54–57.

71 *Id.* at 82.

72 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 89.

73 § 203, 116 Stat. at 91.

74 § 201, 116 Stat. at 88.

75 § 311, 116 Stat. at 106; 52 U.S.C. § 30120(d).

the communication is not authorized by any candidate or candidate's committee."[76]

Opponents of campaign finance regulations once again challenged disclosure rules in *McConnell v. FEC* in 2003 and *Citizens United v. FEC* in 2010. In *McConnell*, the Court upheld the disclosure requirements for electioneering communications, noting that the same compelling interests that justified disclosure in *Buckley* "apply in full to BCRA."[77] Importantly, the Court clarified that though in *Buckley* it had mandated the disclosure of express advocacy ads only, that was a decision based on statutory construction, not constitutional command.[78] With a change in the statute, BCRA's regulations of both express and issue advocacy ads were permissible.[79] In *Citizens United*, the Court once again upheld disclosure requirements, stating that disclosure is a less restrictive alternative to more comprehensive regulations of speech.[80]

It is remarkable that despite the Court adopting more permissive campaign finance regulations since *Buckley*, the Court has also stayed consistent in allowing disclosure. The Court has only struck down disclosure in two cases—*McIntyre v. Ohio Elections Commission* and *Americans for Prosperity Foundation v. Bonta.* In *McIntyre*, the Court struck down an Ohio statute mandating disclosure of the person issuing campaign literature.[81] However, the Court's opinion specifically distinguished *Buckley*, and its reasoning was based on the importance of anonymous speech in campaign literature and written documents.[82] In *Americans for Prosperity*, the Court struck down a California statute requiring 501(c)(3) organizations to disclose the names of major contributors on the basis that these requirements burdened associational rights and thereby chilled speech.[83] However, this decision was limited to the disclosure of names of donors to 501(c)(3) organizations, and did not extend to the disclosure of the expenditures of 501(c)(3)s themselves.[84]

Currently, the BCRA provisions defining electioneering speech and governing disclaimers and disclosure on broadcast,

---

76 52 U.S.C. § 30120(a)(3).

77 McConnell v. FEC, 540 U.S. 93, 196 (2003).

78 *Id.* at 191–93.

79 *Id.* at 193–94, 201–02.

80 Citizens United v. FEC, 558 U.S. 310, 369 (2010).

81 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358 (1995).

82 *See id.* at 353.

83 Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2388–89 (2021).

84 *See id.*

satellite, and cable TV continue to apply to both express candidate advocacy and issue advocacy.[85] These disclosure and reporting obligations do not apply to Internet sites, except in very limited situations. In 2006, the FEC enacted a regulation to clarify that "general public political advertising," as used in 52 U.S.C § 30120 (governing disclosure and disclaimer of electioneering communications), generally excludes communications over the Internet but includes ads on another person's website.[86] This regulation also included exceptions: disclaimers are not necessary on small items such as buttons and pins, or where it would be impracticable to include such a disclaimer.[87] As Big Tech initially stepped into the political advertising space, they claimed exceptions from disclosure. For example, in 2010, the FEC found that Google did not have to disclaim political advertising on text ads under the "small items" exception.[88] In 2011, the FEC reached gridlock when deciding whether to exempt Facebook ads from disclaimer requirements under the "small items" or "impracticable" exceptions.[89] Ironically, Facebook raised the impracticability exception even though they are the only ones with the power to modify their ad-delivery frameworks to render disclosure practicable. Even so, due to a lack of FEC action, Facebook proceeded with un-disclaimed ads.[90] In 2011, the FEC sought comments on revising the rules about Internet disclaimers.[91] The FEC did not actually promulgate any rules, but Facebook submitted comments asking the FEC not to "stand in the way of innovation" and to take a restrained approach to allow social media advertising to grow.[92]

---

85 *See* 52 U.S.C. § 30120.

86 11 C.F.R. § 100.26 (2006).

87 11 C.F.R. § 110.11 (2006).

88 FEC, Google Advisory Opinion Letter, Advisory Op. No. 2010-19, at 2 (Oct. 8, 2010), https://www.fec.gov/files/legal/aos/76083.pdf [https://perma.cc/2LM3-VK8V]; Brian Beyersdorf, Note, *Regulating the "Most Accessible Marketplace of Ideas in History": Disclosure Requirements in Online Political Advertisements After the 2016 Election*, 107 CAL. L. REV. 1061, 1076 (2019).

89 Beyersdorf, *supra* note 88; *see* FEC, Facebook Advisory Op. Request No. 2011-09, at 1 (June 15, 2011), https://www.fec.gov/files/legal/aos/77163.pdf [https://perma.cc/U26K-2QTD]; *see generally* Request by Facebook for Advisory Opinion (Apr. 26, 2011), https://www.fec.gov/files/legal/aos/77149.pdf [https://perma.cc/7BCD-AYN7].

90 *See* Request by Facebook for Advisory Opinion, *supra* note 89, at 8; FEC, *supra* note 89, at 1; Beyersdorf, *supra* note 88, at 1077–78.

91 *See* Internet Communication Disclaimers, 76 Fed. Reg. 63567 (proposed Oct. 13, 2011).

92 Colin S. Stretch, Facebook Deputy Gen. Couns., Comment Letter on Proposed Rule on Internet Communication Disclaimers (Nov. 14, 2011), https://

B. Emerging Efforts to Increase Disclosure on the Internet

Big Tech's antipathy to the regulation of political speech on the Internet took a drastic turn during and after the 2016 election, when the United States saw unprecedented foreign meddling in U.S. elections through social media advertising.[93] As a result, Facebook self-regulated to enact disclaimer requirements and create its own "Ad Library," which is a publicly available database of all election and issue ads run on Facebook, and is searchable by advertisers.[94] Similarly, Google also began to include disclaimers and created a transparency center for all election and issue ads.[95] Twitter banned all political and issue ads on its platform in 2019.[96]

The FEC also took steps to regulate the Internet space. In 2017, it reopened its comment period for its 2011 promulgated regulations that never came to fruition. Whereas Facebook had previously commented and asked the FEC to not stand in the way of innovation, this time Facebook and Google expressed support for further regulation.[97] Facebook even expressed its support for expanding the definition of electioneering communications to include digital or online communications.[98] Ironically, these promulgated regulations have never achieved the requisite votes at the FEC to become binding.

As the FEC had not achieved much success in regulating the Internet, Congress stepped in and introduced legislation

---

sers.fec.gov/fosers/showpdf.htm?docid=98769 [https://perma.cc/55Y2-RNZR].

93 Mark Hosenball, *Russia Used Social Media for Widespread Meddling in U.S. Politics*, REUTERS (Dec. 18, 2018), https://www.reuters.com/article/us-usa-trump-russia-socialmedia/russia-used-social-media-for-widespread-meddling-in-u-s-politics-reports-idUSKBN1OG257 [https://perma.cc/PV2Y-A9Y8].

94 *See* Rob Goldman & Alex Himel, *Making Ads and Pages More Transparent*, META (Apr. 6, 2018), https://about.fb.com/news/2018/04/transparent-ads-and-pages/ [https://perma.cc/CJL3-RL77]; *see generally Ad Library*, META, https://www.facebook.com/ads/library/ [https://perma.cc/93FC-8A2M] (last visited Sept. 29, 2023).

95 Google, Comment Letter on Proposed Rule on Internet Communications Disclaimers (Nov. 9, 2017), https://sers.fec.gov/fosers/showpdf.htm?docid=358482 [https://perma.cc/U6ZA-F7TZ]; *see generally Political Advertising on Google*, GOOGLE, https://adstransparency.google.com/political?political&region=US [https://perma.cc/7BDH-Y4YL] (last visited Sept. 29, 2023).

96 Donie O'Sullivan & Brian Fung, *Twitter Will Ban Political Ads, Jack Dorsey Announces*, CNN (Oct. 31, 2019) https://www.cnn.com/2019/10/30/tech/twitter-political-ads-2020-election [https://perma.cc/P7MS-8EAN].

97 *See* Google, *supra* note 95, at 2; Colin S. Stretch, Facebook Gen. Couns., Comment Letter on Proposed Rule on Internet Disclaimers, at 1 (Nov. 13, 2017), https://sers.fec.gov/fosers/showpdf.htm?docid=358468 [https://perma.cc/3GP6-QUB2].

98 Stretch, *supra* note 97, at 4.

with the Honest Ads Act in 2019.[99] The bill sought to "enhance transparency and accountability for online political advertisements by requiring those who purchase and publish such ads to disclose information about the advertisements to the public, and for other purposes."[100] The bill expanded the definition of electioneering speech to include paid digital communications.[101] The bill also required that any platform or website with more than 50 million unique monthly users keep a publicly available database of all political ads, with information on the targeted audience, the rate charged for the advertisement, and who paid for the ad.[102]

In many ways, this bill was an attempt to codify what most giants in the Internet space were already doing, but it showed Congressional will to regulate this space and acquiescence from Big Tech/Internet companies. This bill was folded into the Freedom to Vote Act and introduced in the Senate in 2021 but blocked by a filibuster vote.[103]

III
MECHANICS OF MICROTARGETING

The Internet as it existed twenty years ago, as the Court analyzed in *Reno*, was very accessible—anyone could create a blog and disseminate information. However, today the Internet has grown exponentially, controlled by giants like Google and Facebook. While it is true that anyone can still create a blog, the reach of that blog is no longer competitive without some sort of social media, search engine, or programmatic advertising. Social media sites have evolved to have detailed information on users to deliver content to their feeds that either line up with their existing views or introduce new information to convince them of new points of view.

To illustrate this, let's say you are a user on Facebook. If you join groups like "baking recipes" or "keto recipes," Facebook will add you to a cooking or baking interest group for their ad targeting.[104] Most users understand this—whatever

---

99 *See* Honest Ads Act, S. 1356, 116th Cong. (2019).

100 *Id.*

101 *Id.* § 6(a)(1).

102 *Id.* § 8.

103 *See* Freedom to Vote Act, S. 2747, 117th Cong. (2021).

104 *See* Michelle Castillo, *Here's How Facebook Ad Tracking and Targeting Works*, CNBC (Mar. 19, 2022), https://www.cnbc.com/2018/03/19/how-facebook-ad-tracking-and-targeting-works.html [https://perma.cc/E7EH-AYRS].

they search or like will shape the advertisements that they will see in their feed. However, tracking a user's behavior is much more detailed than simple likes or searches.[105] Over time, Facebook gets to know you. They know how fast you scroll, and how much time you spend viewing pictures, videos, or posts according to who has posted them or the content within them.[106] Therefore, when you slow down over an ad of Dunkin' Donuts' new Christmas selection, Facebook will take note. Its algorithm will understand what behaviors are out of the norm, and therefore will know the ad caught your attention.[107] Your interest in donuts then becomes part of their targeting efforts—even if you did not mean to provide that information to them. Now, Dunkin' Donuts may begin to target ads to keep you engaged as a customer. Alternatively, Krispy Kreme will begin running ads to convert you into a customer.

Thanks to the detailed data gathered from a user's behavior and Big Tech's enormous advancements in microtargeting, advertisers are now able to reach incredibly niche audiences to deliver content. For example, Facebook's minimum audience is 100 people.[108] A politician could theoretically run an ad for women in Ithaca, New York who have children ages three to five, and are interested in Ross Dress for Less, thereby reaching a tiny portion of the population.

In the context of streaming sites, they can collect user information by observing the type of content a user watches, when they switch the channel, and how they interact with ads. For example, if they are watching Pluto TV on their laptops, are they staying on the page during ads, clicking any links, or leaving while the ad runs?[109] This helps build a profile for the advertisers that they can then target and tailor messaging to. In a way, this is an even more dramatic departure from social media's targeting. While users expect tracking on social media because of various privacy scandals in the last few years, they

---

105 *See How the Game of Facebook Algorithm Works in 2022*, StatusBrew (Sept. 9, 2021), https://statusbrew.com/insights/facebook-algorithm/ [https://perma.cc/4H7D-YCGU].

106 *Id.*

107 *See id.*

108 *See How to Create a Lookalike Audience on Meta Ads Manager*, Meta, https://www.facebook.com/business/a/custom-to-lookalike-audiences [https://perma.cc/JC5W-3ZWY] (last visited Sept. 29, 2023).

109 Tiffany Hsu, *They Know What You Watched Last Night*, N.Y. Times (Oct. 25, 2019), https://www.nytimes.com/2019/10/25/business/media/streaming-data-collection-privacy.html [https://perma.cc/6EPV-J8JB].

likely do not expect tracking while they do something as passive as watching television.

While the advent of such advanced algorithms merits technological praise, it also poses dangers to key First Amendment doctrines. If a politician targets an inflammatory ad against another politician to a small segment of the population on a social media or streaming site, this politician's opponent would never know what the ad is showing these users. Even if the opponent wanted to respond to the original ad, they would not know who to target the message to, since Big Tech and streaming services keep targeting information confidential. This does not allow for a "marketplace of ideas," since only a one-sided viewpoint reaches viewers. Moreover, it does not allow the attacked politician to respond with their 'truth' as the counter speech doctrine requires.

IV
Solutions to Increase Transparency on Free Streaming Sites

A. Equal Time Rule for Streaming Sites

This Note offers two potential solutions to reconcile the growth of political advertising on streaming services with the doctrines underlying the First Amendment. To begin, Congress could require streaming platforms to offer candidates equal airtime for the same rate, like an Equal Time Rule but for streaming services. This proposal should be codified, rather than enacted as a regulation related to current statutes to avoid what happened to the Fairness Doctrine nearly forty years ago, which did not have a firm statutory basis and was easily rescinded by an anti-regulation FCC.

There are several justifications for the viability of this proposition. First, many of the free streaming sites are owned by broadcast networks. Enforcing an equal time provision on the broadcasts but not the free streaming sites enables broadcasters to circumvent this requirement and instead provide more time to one candidate over another or charge disparate rates. An equal time provision would ensure that regulations for broadcasting companies such as Viacom and Fox are the same across the board and eliminate loopholes that allow these companies to dispose of their duties solely because their same broadcasts are being transmitted through a different platform.

Second, a provision like the Equal Time Rule would serve the purpose of the counter speech doctrine. Whereas a broadcaster cannot deny airtime to a candidate if it has afforded another candidate airtime, free streaming services can technically

do so. Just like the Court recognized the potential for abuse in *Turner Broadcasting* and thus allowed regulation, this has potential for abuse and therefore Congress can also "tak[e] steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[110] If the basis of counter speech is to justify loose restrictions on speech because responding to speech is "easy enough," then making the ability to respond subject to approval from streaming sites impedes that ability to respond and no longer warrants such loose restrictions. An Equal Time Rule would lower this obstacle to counter speech and thereby avoid having to enact more restrictive political speech regulations to ensure a "marketplace of ideas."

Third, this solution is not a restriction but rather an enhancement of speech. In *Red Lion*, the Court upheld the Fairness Doctrine partly because it enhanced rather than restricted speech.[111] Similarly here, an Equal Time Rule for streaming sites does not silence advertisers but rather allows them to speak and share their 'truth' to lead to a more fruitful debate and exchange of ideas.

While it may first appear that this proposal would have a tough time clearing the Supreme Court's strict scrutiny for regulation of speech on streaming sites, a closer look at the rationales underlying key cases including *Reno*, *Packingham* and *Turner Broadcasting* shows a viable path for this proposal.

The regulation of streaming sites today does not fit into the framework created in the 1990s to regulate the Internet. *Reno* made sense in the 1990s, but no longer. The Supreme Court eschewed regulation of the Internet in part because the Internet is not a "scarce" expressive commodity, it is "low-cost" and any person "can become a town crier."[112] While the Supreme Court was correct in their understanding that *technically* anyone can publish their opinions on the Internet and there is no "scarcity" associated with it, the Court was unaware of the unprecedented growth that social media and streaming sites would have just a decade later and the eventual transformation of the political advertising space at the hands of these sites. Today, it takes millions of dollars to get a competitive streaming service or social media site off the ground. It is no longer a "low-cost" speech medium as it was when *Reno* was

110 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 657 (1994).

111 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380, 390 (1969).

112 Reno v. Am. C.L. Union, 521 U.S. 844, 870 (1997).

decided. Moreover, it takes hundreds of dollars to spread messages through ads, which a person with a simple blog run out of their home cannot compete with; therefore, not everyone can become a "town crier." In short, the circumstances that led to the decision in *Reno* have changed. As Justice Kennedy stated in *Packingham*, prior decisions on the regulation of speech on the Internet should not remain static in time as the Internet is changing so fast that past regulations may become obsolete.[113] Here, *Reno* is now obsolete, especially when dealing with the regulation of giant streaming services.

Second, an Equal Time Rule for streaming services merits intermediate, not strict, scrutiny for two reasons. First, *Reno* does not mandate the application of strict scrutiny in Internet speech cases, as shown by Justice Kennedy adopting intermediate scrutiny in *Packingham* to adapt to the modern Internet. The characteristics of streaming services mirror characteristics of cable networks that the Court decided merited intermediate scrutiny in *Turner Broadcasting.* In *Turner Broadcasting*, the Court recognized that cable networks were technically not a limited, scarce source of media, and the same is true here—the Internet is technically unlimited. However, the Court recognized that cable services exercise far greater control because "a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."[114] Therefore, to ensure a critical pathway of communication and free flow of information and ideas, Congress enacted regulations for cable.[115] By controlling which users see which ads and holding control of who can even air ads, streaming services hold similar control over the medium. As noted earlier, this is ripe for abuse and therefore merits Congress taking steps to remedy this, subject to intermediate scrutiny.

To pass intermediate scrutiny as the Court outlined in *Turner Broadcasting*, a regulation must be (1) content-neutral, (2) further an important governmental interest that is incidental to the suppression of free expression, and (3) not be overbroad as to burden speech more than is necessary to further the government's interest.[116] An equal time provision meets

113 Packingham v. North Carolina, 582 U.S. 98, 105 (2017).

114 *Turner*, 512 U.S. at 656.

115 *Id.* at 657.

116 *Id.* at 662.

these three requirements. First, the rule is content-neutral—it applies a blanket rule. Second, it furthers an important governmental interest that is incidental to the suppression of free expression—here, the interest in a "marketplace of ideas" which the Court upheld in both *Red Lion* and *Turner Broadcasting*.[117] Third, it does not burden speech more than necessary—it enhances speech.

B. Publicly Available Database

Given the need for the Supreme Court to properly apply its First Amendment scrutiny standard to changed circumstances of political speech on the Internet, this solution may take longer to achieve. A more achievable alternative is requiring free streaming sites to create a publicly available database of political and issue advertisements and make targeting information available for those specific ads. There are several justifications for this.

First, this proposal serves the goal of counter speech. Take this hypothetical: if Raphael Warnock were to run an attack ad against Herschel Walker during prime time on a broadcast network for millions to see, Walker would either likely see the ad or receive notice of the ad. Walker, in response, could run a response ad within the same prime time spot, and many of Warnock's previous audience will see Walker's ad. With streaming networks, this becomes more difficult. Warnock could choose to run the attack ad for $100 and target the following demographics: female, 50+, teachers, in Atlanta metropolitan area. For $100, only a few thousand users may see the ad, and therefore Walker may never get wind of this ad. Even if Walker were to receive notice of this ad, Warnock's targeting information is not public, so Walker would not be able to run an ad to the same demographics.

If, instead, a database existed with ad and targeting information, Walker would be able to see who is running ads against him and who is seeing those ads, and therefore be able to respond to those same demographics. This would allow an exchange of ideas and goes to the "marketplace of ideas" rationale underlying the First Amendment. It would satisfy the doctrine of counter speech with minimal intrusions on speech instead of opting for more restrictive regulations.

---

117 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380, 390 (1969); *Turner*, 512 U.S. at 657.

Second, this alternative is more about disclosure than regulation of speech. Throughout the last seventy years, the Court has tended to strike down most regulations that regulate speech. However, the Court has repeatedly supported disclosure, even as the political leanings of the Court have repeatedly changed. The only two times the Court struck down disclosure were on matters of names of individuals donors or speakers, not organizations. Here, the purpose of this publicly available database would not be to disclose individual donors, but to disclose how organizations and candidates are targeting viewers. This goes to the substantial interests that the Supreme Court has held allows for disclosure regulations: it can aid voters in evaluating those who seek federal office, and it deters actual corruption and the appearance of corruption by exposing expenditures from specific groups on behalf of the candidates.[118]

Lastly, this proposal is already a part of the Honest Ads Act, which shows congressional will from many lawmakers to move forward with this solution. Big Tech companies are already doing this, which shows technological possibility. This proposal would not just include social media networks but also streaming services. The owners of these streaming services—Viacom, Fox, etc.—already do this for their CBS and FOX News broadcast networks as required by 45 U.S.C. § 315, which states broadcast licensees must maintain records, available for public inspection, of any requests to purchase broadcast time by a candidate or for an issue.[119] Such a record must contain information about the rate, date and time of airing. Here, the publicly available database would also provide similar information.[120]

CONCLUSION

For two centuries, doctrines about the importance of sharing information in a marketplace of ideas and the power of counter speech have been a core part of First Amendment jurisprudence. These doctrines have remained strong through the advent of new media types such as cable and broadcast as the Supreme Court developed frameworks to reconcile media freedom with the First Amendment.

The advent of streaming services poses a new challenge for the Supreme Court. These sites provide the same programming

---

118 Buckley v. Valeo, 424 U.S. 1, 66-68 (1976).

119 47 U.S.C. § 315(e)(1).

120 *See id.*

as television but offer the same targeting as internet sites. As this Note shows, these sites conflict with the ideas of counter speech, as they create a marketplace where political advertisers can amplify messages about their opponents, and their opponents may never even know of such messaging, let alone be able to reply. The existing Supreme Court frameworks for assessing regulation of speech on Internet sites are outdated to deal with the reality of social media and streaming site giants that did not exist at the time the Court developed such frameworks.

This Note argues for two solutions to this conflict between the advent of advertising on streaming services and the rationales underlying the First Amendment: an Equal Time Rule for streaming services that disseminate political ads, and a publicly available database disclosing each ad, targeting information, and advertiser info. The first solution requires the Supreme Court to bring its understanding of the Internet into the 21st century, and instead apply intermediate scrutiny to regulations of political speech on the Internet. While this is a departure from the current strict scrutiny test, the Court has hinted about changing the standard in prior cases, recognizing the Internet is rapidly changing and old decisions may be obsolete. Additionally, this is a speech-enhancing measure, which the Court is more amenable to than a speech-restricting measure. The second solution is more likely in the short run, as it focuses on disclosure rather than regulation of speech, and the Court has repeatedly expressed support for disclosure rules. It does not require the Court to definitively change the level of scrutiny for Internet and streaming sites. Lastly, many tech giants are already doing this as part of their transparency policies.

Though these solutions begin to reconcile political advertising on streaming sites with the doctrines underlying the First Amendment, these solutions do not wholly address the enormous issue of dark money in electioneering communications. The solutions proposed here do not solve the dramatic flow of money through independent expenditures, or the lack of donor reporting requirements for 501(c)(4) and 527 organizations. However, a small step toward tackling a big problem is better than the alternative—watching dark money pour into elections with no disclosure or opportunity to respond.