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## Essay

# Political Advertising, Digital Platforms, and the Deficiencies of Self-Regulation

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### INTRODUCTION

In October 2019, Twitter grabbed headlines (and racked up retweets) when it announced that it would no longer allow any paid political advertising on its platform.<sup>1</sup> Facebook and Google—by far the two largest sellers of digital advertising<sup>2</sup>—have declined to follow suit. Facebook’s approach to political advertising is, in some ways, the antithesis of Twitter’s. While Facebook has announced several new transparency and anti-abuse policies for the 2020 election cycle, the company has chosen to exempt politicians from its normal fact-checking processes, leaving them free to run even blatantly false ads. Google, meanwhile, has charted something of a middle course between Twitter and Facebook. In addition to adopting transparency and anti-abuse measures, Google at least nominally restricts verifiably false ads, and it also limits the ability of ad buyers to microtarget nar-

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1. See, e.g., Emily Glazer, *Twitter, Facebook Divergence on Political Ads Shows Tension in Regulating Speech*, WALL STREET J. (Oct. 31, 2019), <https://www.wsj.com/articles/twitter-facebook-divergence-on-political-ads-shows-tension-in-regulating-speech-11572561867> [<https://perma.cc/W2GW-6W49>].

2. See Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 527 (2019) (reporting that “in recent years Google and Facebook together have captured roughly three-quarters of all digital advertising sales in the United States and an even higher percentage of the growth.”); Daniel Kreiss & Shannon C. McGregor, *The “Arbiters of What Our Voters See”: Facebook and Google’s Struggle with Policy, Process, and Enforcement Around Political Advertising*, 36 POL. COMM. 499, 499 (2019) (“Facebook and Google dominate the market for digital advertising in all its forms, together making up 58% of the \$111 billion market.”).

row slivers of the electorate. The company's rules, however, apply to a relatively limited swath of political content.<sup>3</sup>

These emergent political advertising policies are highly consequential. A significant and growing proportion of the billions of dollars that candidates, parties, and other organizations spend on political advocacy is funneled into digital advertising.<sup>4</sup> The rules platforms adopt—or fail to adopt—thus directly shape the campaigns the public sees.

Platform companies have been attending to political advertising in advance of the 2020 election due in large part to events that unfolded during the 2016 election. High-profile scandals involving foreign interference, fake news, and more, put platforms under a harsh spotlight.<sup>5</sup> Once lauded as boons to democracy, platform technologies (including but not limited to digital ad tools) were exploited in ways that threatened the integrity of the very democratic discourse they helped to facilitate.<sup>6</sup> And platform companies turned out to be ill-prepared to address the unintended side effects of their creations. The problems that arose in 2016 exposed a host of vulnerabilities, including lax oversight of political advertising. Since 2016, platforms (with nudges from the media, government officials, and the mass public) have recognized the need to do more. The new political advertising policies they have been rolling out are part of an ongoing self-regulatory push to curb electoral mischief and other democratically deleterious conduct on their sites.<sup>7</sup>

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3. See *infra* Part I, for more detail on these companies' political advertising policies.

4. Glazer, *supra* note 1 (reporting that digital ad spending is expected to reach nearly \$3 billion for the 2020 election, more than twice the amount spent in 2016).

5. See, e.g., Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 67–71 (2017) (discussing the role of fake news, bots, and foreign propaganda during the 2016 election); Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1229–34 (2018) (describing the phenomena of "fake news" and "disinformation advertising" during the 2016 election).

6. See, e.g., Khan & Pozen, *supra* note 2, at 528 ("On multiple interacting levels that transcend any given user's experience, the behaviors of a few platforms have been affecting the fabric and functioning of our democracy—often for the worse."); cf. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1600 (2018) (observing that "online platforms are now essential to participation in democratic culture").

7. See, e.g., Persily, *supra* note 5, at 72–73 (identifying new policies adopted by Google, Facebook, and Twitter in the wake of the 2016 election);

As a descriptive matter, this recent flurry of platform activity sits at the intersection of two broader phenomena. First, it vividly illustrates campaign reform without law.<sup>8</sup> While we traditionally associate campaign regulation with government action, an array of private actors, including digital platforms, play a central role in shaping the conduct of campaigns. With constitutional constraints and political gridlock posing ever more formidable obstacles to meaningful legal regulation of political advertising and related matters, the relative importance of nongovernmental interventions has grown. Indeed, many of the most consequential ground rules that govern today's election contests, and today's political discourse writ large, come not from government, but from platforms and other private actors.<sup>9</sup>

Second, the political advertising policies that platforms have been promulgating underscore the status of platform companies as the "new governors" of speech.<sup>10</sup> Platform self-regulation extends far beyond the political advertising context. Platforms have developed a multitude of policies and practices that comprehensively shape the experiences of their users. Through their governance decisions, they have come to function as gatekeepers, opening the door to some forms of communication, and closing the door to others. A few large private companies are thus setting the terms for vast quantities of public expression, including campaign expression.<sup>11</sup>

How should we regard the self-regulatory choices of the new governors of political advertising? On one hand, it is encouraging

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Nick Clegg, *Facebook, Elections, and Political Speech*, FACEBOOK (Sept. 24, 2019), <https://about.fb.com/news/2019/09/elections-and-political-speech/> [<https://perma.cc/KLA3-DGRG>] (describing Facebook's efforts to address "fake news and malicious content").

8. See Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185 (2017) (identifying extra-legal forces that shape the role of money in campaigns);

9. See Nathaniel Persily, *The Campaign Revolution Will Not Be Televised*, AM. INTEREST (Oct. 10, 2015), <https://www.the-american-interest.com/2015/10/10/the-campaign-revolution-will-not-be-televised/> [<https://perma.cc/DY73-9HSC>] ("[F]uture campaign regulation . . . will not be the exclusive or even dominant province of government actors: The terms of service for platforms chiefly used for political communication will become more important than formal law in this regard.").

10. Klonick, *supra* note 6, at 1603; see also TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA (2018).

11. See Klonick, *supra* note 6, at 1613 (observing that "internet intermediaries have become more and more vital to speech").

that platforms have become more mindful of their advertising policies and are taking steps to address matters of real concern to their users and the democratic system. Given that platforms bear much of the blame for the controversies of 2016, it seems appropriate for them to undertake reform, especially given the dearth of responsive governmental action. Platform self-regulation might go at least some way toward filling the public regulatory void.

On the other hand, there is ample room for objections and skepticism. Some of the political advertising policies platforms have been putting into place may well be misguided, ineffectual, or insufficient. And even if their rules are sound, there is no guarantee that platforms will adequately implement and enforce them. Going forward, it is vital for scholars and others to scrutinize closely the choices and conduct of platforms. That undertaking, however, is largely beyond the scope of this short Essay.

Rather than attempting to assess the merits of particular political advertising policies or practices, this Essay zooms out and identifies a bigger picture concern. Platforms often use democratic rhetoric to justify their political advertising policies. On their telling, their choices aim to safeguard and enhance the democratic process. But platforms are pursuing these ostensible efforts to defend democracy in decidedly undemocratic ways. They have not adopted their policies through open, participatory processes, but rather by corporate fiat. The policies themselves do fairly little to empower the individuals they purport to benefit, and in at least some instances they likely reflect the preferences of political professionals more than they do the public at large. To put it in the starkest terms, the story of platform self-regulation of political advertising is a story of powerful technology industry elites working with powerful political elites to produce a veneer of democratic reform. If that is the reality, even in part, then it is worth considering the potential for more genuinely democratic alternatives.

This Essay proceeds as follows: Part I outlines the various steps that online platforms have been taking to regulate political advertising. Part II raises concerns about the undemocratic nature of these policies. Part III suggests steps to democratize the regulation of political advertising.

## I. PLATFORMS AND POLITICAL ADVERTISING: THE EMERGING SELF-REGULATORY LANDSCAPE

This Part surveys the range of political advertising policies that online platforms have adopted, or at least considered, in advance of the 2020 election. Most of these policies are quite new and remain largely untested. Indeed, the policy landscape will likely continue to evolve during the 2020 campaign season. What appears below is a snapshot of platforms' announced policies as of early 2020. Going forward, it will be important for researchers to examine how platforms implement and enforce these policies. For now, however, it is too early to assess how the policies operate in practice.

### A. POLITICAL AD PROHIBITIONS

As an initial matter, platforms have considered whether to allow political advertising at all. In late 2019, Twitter announced (initially via Tweet) that it would no longer host political ads. The company's posted advertising policy now "globally prohibits the promotion of political content," which it defines as "content that references a candidate, political party, elected or appointed government official, election, referendum, ballot measure, legislation, regulation, directive, or judicial outcome," "including appeals for votes, solicitations of financial support, and advocacy for or against any of the above-listed types of political content."<sup>12</sup> Twitter distinguishes political advertising from "caused-based advertising," which are "ads that educate, raise awareness, and/or call for people to take action in connection with civic en-

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12. *Political Content*, TWITTER BUS., <https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/political-content.html> [<https://perma.cc/8JVD-7XDB>]; see also *Political Content FAQs*, TWITTER BUS., <https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/political-content/political-content-faqs11.html> [<https://perma.cc/476C-698R>] ("[A]ds cannot reference past, current, or proposed referenda, ballot measures, bills, legislation, regulation, directives, judicial outcomes, or any country-specific equivalents."). The company has carved out a partial exemption from its political-content policy for qualified news publishers, which are permitted to "run ads that reference political content and/or prohibited advertisers" as long as they do not "include advocacy for or against those topics or advertisers." *Political Content*, *supra*; see also *How to Get Exempted as a News Publisher from the Political Content Policy*, TWITTER BUS., <https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/political-content/news-exemption-page.html> [<https://perma.cc/ZM5F-75JU>]; *Political Content FAQs*, *supra*.

gagement, economic growth, environmental stewardship, or social equity causes.”<sup>13</sup> Cause-based advertising on Twitter remains generally permissible, though not for certain political actors. Under Twitter’s policy, “candidates, political parties, or elected or appointed government officials,” as well as PACs, SuperPACs, and 501(c)(4)s, face special ad-buying restrictions.<sup>14</sup> They may not purchase “ads of any type,” even if the content is ostensibly nonpolitical.<sup>15</sup> Twitter’s attempt to differentiate political and cause-based advertising calls to mind longstanding debates among commentators and policymakers about how and where to draw the line when deciding what communicative content should be subject to campaign-finance regulation.<sup>16</sup>

Twitter has stated that its decision to eschew political ads rests on the company’s “belief that political message reach should be earned, not bought.”<sup>17</sup> Twitter CEO Jack Dorsey has elaborated that online advertising, with its “machine learning-based optimization of messaging and micro-targeting, unchecked misleading information, and deep fakes,” poses “significant risks to politics” and “civic discourse.”<sup>18</sup> These challenges, Dorsey acknowledged, extend to “ALL internet communication, not just political ads.”<sup>19</sup> In his view, however, Twitter would be

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13. *Cause-based Advertising Policy*, TWITTER BUS., <https://business.twitter.com/en/help/ads-policies/restricted-content-policies/cause-based-advertising.html> [<https://perma.cc/9CNL-7J2J>]; see also *Cause-based Advertising FAQs*, TWITTER BUS., <https://business.twitter.com/en/help/ads-policies/restricted-content-policies/cause-based-advertising/cause-based-advertising-faqs.html> [<https://perma.cc/DC6W-DA93>].

14. *Political Content*, *supra* note 12; see also *Political Content FAQs*, *supra* note 12 (“Similar to the restrictions on candidates, political parties, elected or appointed government officials, PACs and SuperPACs cannot advertise on Twitter.”).

15. *Political Content*, *supra* note 12.

16. See, e.g., Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1753 (1999) (discussing the “need to determine what is an election-related expenditure and what is not”); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1827 (1999) (noting the “difficult cluster of line-drawing questions often arises in the context of the distinction between candidate advocacy and issue advocacy”).

17. *Political Content*, *supra* note 12; see also Jack Dorsey (@Jack), TWITTER (Oct. 30, 2019), <https://twitter.com/jack/status/1189634360472829952> [<https://perma.cc/R485-GGPT>].

18. Dorsey, *supra* note 17.

19. *Id.*

better positioned to address “the root problems” of online communication if it avoided “the additional burden and complexity that taking money brings.”<sup>20</sup> He added that the ad ban’s fairly broad scope—extending to political content beyond mere “candidate ads” (though not to cause-based ads)—aimed to avoid circumvention.<sup>21</sup>

Although Twitter has captured most of the headlines, several other popular platforms have adopted similar political advertising restrictions. Twitch (a popular gaming platform), TikTok (a video-sharing app), LinkedIn, and Pinterest all preceded Twitter in banning political ads.<sup>22</sup> In the wake of Twitter’s decision, the music streaming service Spotify announced that it was suspending political advertising at least for the 2020 election cycle.<sup>23</sup> These companies have offered a variety of rationales for their decisions. TikTok officials, for instance, have described political ads as inconsistent with the user experience and ethos that the platform seeks to cultivate.<sup>24</sup> Spotify, meanwhile, stated that it currently lacks “the necessary level of robustness in [its] process, systems and tools to responsibly validate and review [political ad] content.”<sup>25</sup>

In contrast, Facebook and Google—the two most dominant digital platforms—have chosen to continue to accept political advertisements. Twitter’s decision to ban ads drew widespread attention in part because it represented a stark counterpoint to Facebook.<sup>26</sup> Twitter acted on the heels of statements from Mark

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20. *Id.*

21. *Id.*

22. See Glazer, *supra* note 1.

23. George P. Slefo, *Spotify To Suspend Political Ads in 2020*, ADAGE (Dec. 27, 2019), <https://adage.com/article/digital/spotify-suspend-political-ads-2020/2224281> [<https://perma.cc/9GJC-9LGX>].

24. See Blake Chandlee, *Understanding Our Policies Around Paid Ads, TIKTOK* (Oct. 3, 2019), <https://newsroom.tiktok.com/en-us/understanding-our-policies-around-paid-ads> [<https://perma.cc/7377-ZLEL>] (“[W]e’re intent on always staying true to why users uniquely love the TikTok platform itself: for the app’s light-hearted and irreverent feeling that makes it such a fun place to spend time. In that spirit, we have chosen not to allow political ads on TikTok. . . . To that end, we will not allow paid ads that promote or oppose a candidate, current leader, political party or group, or issue at the federal, state, or local level—including election-related ads, advocacy ads, or issue ads.”).

25. Slefo, *supra* note 23.

26. Daisuke Wakabayashi & Shane Goldmacher, *Google Limits ‘Microtargeting of Audiences for Political Ads*, N.Y. TIMES, Nov. 21, 2019, at B6 (“Twitter’s move was largely seen as a response to the controversy caused by Facebook.”).

Zuckerberg and other Facebook leaders defending Facebook’s relatively permissive political advertising practices. In an October 2019 speech, Zuckerberg described political ads as “an important part of voice—especially for local candidates, up-and-coming challengers, and advocacy groups that may not get much media attention otherwise.”<sup>27</sup> According to Zuckerberg, “[b]anning political ads favors incumbents and whoever the media covers.”<sup>28</sup> Zuckerberg also noted the line-drawing difficulties that an ad ban entails: “There are many more ads about issues than there are directly about elections. Would we ban all ads about healthcare or immigration or women’s empowerment? . . . [W]hen it’s not absolutely clear what to do, I believe we should err on the side of greater expression.”<sup>29</sup> Google has been less outspoken than Facebook on the subject of political ads, but the company has likewise spurned calls to ban them.<sup>30</sup>

For Facebook and Google, the decision to accept political ads has spawned a litany of follow-on questions about how to handle those ads. A clear takeaway from the 2016 election cycle is that lax oversight of political advertising invites mischief. The controversies that took center stage in 2016—fake news, foreign interference, and the like—were multifaceted, but abuses involving paid advertising were an important part of the equation. Those platforms that continue to allow political advertising thus have had little choice but to consider potential constraints and

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27. Tony Romm, *Zuckerberg: Standing for Voice and Free Expression*, WASH. POST (Oct. 17, 2019), <https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression/> <https://perma.cc/TGE8-JSMY>; see also Mark Zuckerberg, *Preparing for Elections*, FACEBOOK (Sept. 12, 2018), <https://www.facebook.com/notes/mark-zuckerberg/preparing-for-elections/10156300047606634/> [<https://perma.cc/G69W-BL7Y>] (“[W]e decided against [banning political ads] . . . because we believe in giving people a voice. We didn’t want to take away an important tool many groups use to engage in the political process.”).

28. Romm, *supra* note 27.

29. *Id.*

30. See Scott Spencer, *An Update on Our Political Ads Policy*, GOOGLE: THE KEYWORD (Nov. 20, 2019), <https://blog.google/technology/ads/update-our-political-ads-policy> [<https://perma.cc/N5HC-MXP2>] (“We’re proud . . . that candidates use Google and search ads to raise small-dollar donations that help fund their campaigns.”). Google offers several different advertising formats. See *id.* (“The main formats we offer political advertisers are search ads (which appear on Google in response to a search for a particular topic or candidate), YouTube ads (which appear on YouTube videos and generate revenue for those creators), and display ads (which appear on websites and generate revenue for our publishing partners).”).



countermeasures. According to Facebook, its objective is “to promote authenticity and legitimacy for anyone wishing to run ads about social issues, elections or politics.”<sup>31</sup> Google likewise has stressed its desire “promote confidence in digital political advertising and trust in electoral processes worldwide.”<sup>32</sup> The following sections identify the various measures that these platforms have considered and adopted.

## B. CONTENT-BASED CONTROLS

For platforms that accept political advertising, one set of questions concerns whether and how to regulate ad content. Are some messages or tactics off limits? In particular, what about ads that convey false information? Facebook and Google have answered these questions in overlapping but somewhat distinct ways.

Google’s basic approach has been to subject political advertisements to the same content rules that apply to nonpolitical advertisements. In the words of a senior company official, “Whether you’re running for office or selling office furniture, we apply the same ads policies to everyone; there are no carve-outs.”<sup>33</sup> Google’s general ads policies are quite extensive, and include prohibitions on ad content “that incites hatred against, promotes discrimination of, or disparages an individual or group on the basis of” various protected characteristics; “that harasses, intimidates, or bullies an individual or group of individuals”; “that threatens or advocates for physical or mental harm on oneself or others”; that contains “obscene or profane language”; and more.<sup>34</sup> Significantly, Google’s policies also prohibit false and

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31. *About Ads About Social Issues, Elections or Politics*, FACEBOOK FOR BUS., <https://www.facebook.com/business/help/167836590566506?id=288762101909005> [<https://perma.cc/KPU5-NXRR>]; *New Requirements for Ads About Social Issues, Elections or Politics in the US*, FACEBOOK FOR BUS., <https://www.facebook.com/business/m/one-sheeters/ads-with-political-content-us> [<https://perma.cc/L6XU-DVW9>] (“Giving people more information about the ads they see across our platforms is a top priority of our election integrity efforts. That’s why over the past few years, we’ve made important changes to help ensure more transparency and authenticity in ads about social issues, elections or politics in the United States.”).

32. See Spencer, *supra* note 30.

33. *Id.*

34. *Inappropriate Content*, GOOGLE ADVERT. POLICIES HELP, [https://support.google.com/adspolicy/answer/6015406?hl=en&ref\\_topic=1626336](https://support.google.com/adspolicy/answer/6015406?hl=en&ref_topic=1626336) [<https://perma.cc/6KSR-DEWJ>]; see also Kreiss & McGregor, *supra* note 2, at 504–05 (describing general advertising guidelines on Facebook and Google).

misleading information.<sup>35</sup> According to the same company official, “It’s against our policies for any advertiser to make a false claim—whether it’s a claim about the price of a chair or a claim that you can vote by text message, that election day is postponed, or that a candidate has died.”<sup>36</sup> The company, however, has indicated that it will not vigorously police every arguable falsehood in political ads. Instead, “recogniz[ing] that robust political dialogue is an important part of democracy, and no one can sensibly adjudicate every political claim, counterclaim, and insinuation,” the company “expect[s] that the number of political ads on which [it] take[s] action will be very limited.”<sup>37</sup>

Tracking Google’s approach in part, Facebook applies many of its general advertising policies to political ads.<sup>38</sup> The company, for instance, has removed political ads in response to complaints about the misuse of intellectual property.<sup>39</sup> According to Zuckerberg, ads also cannot include content “that incites violence or risks imminent harm,” and advertisers cannot engage in “voter suppression.”<sup>40</sup>

Controversially, however, Facebook has exempted certain political ads from the third-party fact-checking process that it

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35. *Misrepresentation*, GOOGLE ADVERT. POLICIES HELP, [https://support.google.com/adspolicy/answer/6020955?hl=en&ref\\_topic=1626336](https://support.google.com/adspolicy/answer/6020955?hl=en&ref_topic=1626336) [https://perma.cc/YXJ6-TY6B].

36. Spencer, *supra* note 30; see also Kate Conger, *Twitter Says It’s Banishing Political Ads*, N.Y. TIMES, Oct. 31, 2019, at A1 (explaining that Google reviews all ads “for policy violations, including misrepresentation or dishonest claims” and conducts additional reviews “if users flag [an ad] as problematic”).

37. Spencer, *supra* note 30; see also Wakabayashi & Goldmacher, *supra* note 26.

38. See Clegg, *supra* note 7 (“[I]f someone chooses to post [a political] ad on Facebook, they must still fall within our Community Standards and our advertising policies.”).

39. *Facebook Removes Conservative Party Ad with BBC Presenters*, AP NEWS (Dec. 2, 2019), <https://apnews.com/e582ee19677b48e28ee4e42c4aa94783> [https://perma.cc/5BGU-EQTQ].

40. Romm, *supra* note 27; see also *About Ads About Social Issues, Elections or Politics*, *supra* note 31 (“Ads targeting the US that portray voting or census participation as useless or meaningless and/or advise users not to vote or participate in a census aren’t allowed.”); Rob Leathern, *Expanded Transparency and More Controls for Political Ads*, FACEBOOK (Jan. 9, 2020), <https://about.fb.com/news/2020/01/political-ads/> [https://perma.cc/Y768-3C54] (“All users must abide by our Community Standards, which apply to ads and include policies that, for example, ban hate speech, harmful content and content designed to intimidate voters or stop them from exercising their right to vote.”).

applies to other ads and to user-posted content.<sup>41</sup> Zuckerberg put it bluntly in an October 2019 speech: “We don’t fact-check political ads.”<sup>42</sup> Facebook’s formal policy is somewhat more nuanced. The company exempts organic content and ads *from politicians* from its standard fact-checking program.<sup>43</sup> But the company’s policy states that “organizations like Super PACs or advocacy organizations that are unaffiliated with candidates” “continue to be covered.”<sup>44</sup> And even politicians cannot run ads that contain “specific piece[s] of content” (such as “a link to an article, video or photo created by someone else”) that Facebook’s fact-checkers have previously debunked.<sup>45</sup> The upshot, however, is that Facebook does not preclude politicians from running ads that make false claims, no matter how brazen.

Defending its policy, Facebook has maintained that it “is grounded in [the company’s] fundamental belief in free expression, respect for the democratic process, and the belief that, especially in mature democracies with a free press, political speech is the most scrutinized speech there is.”<sup>46</sup> In Zuckerberg’s words,

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41. As a general matter, “Facebook prohibits ads that include claims debunked by third-party fact checkers or, in certain circumstances, claims debunked by organizations with particular expertise.” *Advertising Policies, 13. Misinformation*, FACEBOOK, [https://www.facebook.com/policies/ads/prohibited\\_content/misinformation#](https://www.facebook.com/policies/ads/prohibited_content/misinformation#) [<https://perma.cc/GJ4M-EC99>]. Facebook relies on “third-party fact-checkers who are certified through the non-partisan International Fact Checking Network to help identify and review false news.” *Fact-Checking on Facebook: What Publishers Should Know*, FACEBOOK FOR BUS., <https://www.facebook.com/help/publisher/182222309230722> [<https://perma.cc/BE3Q-9J3Y>].

42. Romm, *supra* note 27.

43. See *Fact-Checking on Facebook: What Publishers Should Know*, *supra* note 41 (“Posts and ads from politicians are generally not subjected to fact-checking.”). Facebook defines politicians to include candidates for office, current office holders, and at least some political appointees, as well as “political parties and their leaders.” *Id.*

44. *Id.*

45. *Id.*; see also *id.* (“This is different from a politician’s own claim or statement. If a claim is made directly by a politician on their Page, in an ad or on their website, it is considered direct speech and ineligible for our third party fact checking program — even if the substance of that claim has been debunked elsewhere.”); Clegg, *supra* note 7 (“[W]e will not send organic content or ads from politicians to our third-party fact-checking partners for review. However, when a politician shares previously debunked content including links, videos and photos, we plan to demote that content, display related information from fact-checkers, and reject its inclusion in advertisements.”).

46. *Fact-Checking on Facebook: What Publishers Should Know*, *supra* note 41; see also Clegg, *supra* note 7 (invoking “Facebook’s fundamental belief in free

“people should be able to see for themselves what politicians are saying,” and “a private company” generally should not step in “to censor politicians or the news in a democracy.”<sup>47</sup> Perhaps in an effort to placate its critics, Facebook has apparently considered a further measure to deter blatant falsehoods—namely, “requiring campaigns to have or share authoritative backup documentation of claims made in ads.”<sup>48</sup> To date, however, no such rule has been adopted, and it is not clear precisely what form it would take.

### C. IDENTITY-BASED CONTROLS

In addition to establishing policies for political ad content, Facebook and Google have both taken steps to limit who can buy ads. Following the 2016 election, online platforms were roundly criticized for lacking safeguards to prevent legally ineligible actors, such as foreign nationals, from purchasing political ads. In response, Facebook developed an “ad authorization process” for anyone who seeks to run ads about “social issues, elections or politics.”<sup>49</sup> The company defines these content categories in fairly substantial detail.<sup>50</sup> Among other things, the authorization process requires individual administrators who place ads to

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expression and respect for the democratic process, as well as the fact that, in mature democracies with a free press, political speech is already arguably the most scrutinized speech there is”).

47. Romm, *supra* note 27; see also *Fact-Checking on Facebook: What Publishers Should Know*, *supra* note 41 (“[B]y limiting political speech we would leave people less informed about what their elected officials are saying and leave politicians less accountable for their words.”); Tony Romm & Isaac Stanley Becker, *Facebook Has Floated Limiting Political Ads and Labeling that They Aren’t Fact-Checked, Riling 2020 Campaigns*, WASH. POST (Dec. 4, 2019), <https://www.washingtonpost.com/technology/2019/12/04/facebook-has-floated-limiting-political-ads-labeling-they-arent-fact-checked-riling-campaigns/> [<https://perma.cc/68QM-CF5V>] (“The tech giant has maintained it should not serve as the arbiter of truth, determining what elected officials can say to potential voters.”).

48. Romm & Becker, *supra* note 47.

49. *About Ads About Social Issues, Elections or Politics*, *supra* note 31.

50. *Id.* “Social issues,” for instance, are “topics discussed or debated at a national level that may influence the outcome of an election or result in/relate to existing or proposed legislation.” *Ads About Social Issues, Elections or Politics: About Social Issues*, FACEBOOK FOR BUS., <https://www.facebook.com/business/help/214754279118974?id=288762101909005> [<https://perma.cc/K4SK-Q53N>]. In the United States, “top-level social issues” include “civil and social rights, crime, economy, education, environmental politics, guns, health, immigration, political values and governance, and security and foreign policy.” *Id.* Facebook offers additional guidance on each of these topics, including examples

confirm their identities by providing a “US state’s driver’s license, US state ID card or US passport,” as well as a “US-based residential mailing address” to verify the individual’s domestic location.<sup>51</sup> Google, meanwhile, requires ad buyers to verify their eligibility and identity before they can purchase “election ads”—a category narrower than the “social issues, elections or politics” categories that Facebook’s policy covers.<sup>52</sup> Although Twitter has banned advertising with “political content,” the company has established an “advertiser certification process” for anyone wishing to run the “cause-based” ads that remain permissible.<sup>53</sup>

In a few instances, platforms also have chosen to distinguish among different types of legally eligible political advertisers. As discussed above, Facebook’s exemption from fact checking applies only to ads run by politicians themselves (i.e., by candidates

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of covered and non-covered ads. *Ads About Social Issues, Elections or Politics: How Ads About Social Issues, Elections or Politics Are Reviewed (with Examples)*, FACEBOOK FOR BUS., <https://www.facebook.com/business/help/313752069181919?id=288762101909005> [<https://perma.cc/Q7P2-6UKP>].

51. *Ads About Social Issues, Elections or Politics: Get Authorized to Run Ads About Social Issues, Elections or Politics*, FACEBOOK FOR BUS., <https://www.facebook.com/business/help/208949576550051?id=288762101909005> [<https://perma.cc/69CE-LGGH>]; see also *New Requirements for Ads About Social Issues, Elections or Politics in the US*, *supra* note 31.

52. See, e.g., *About Verification for Election Advertising in the United States: Requirements for Verification*, GOOGLE ADVERT. POLICIES HELP, <https://support.google.com/adspolicy/answer/9002729#require> [<https://perma.cc/ZFM2-WF76>]; Daisuke Wakabayashi, *For Federal Election Ads, Google Will Ask for ID*, N.Y. TIMES, May 5, 2018, at B2; Kent Walker, *Supporting Election Integrity Through Greater Advertising Transparency*, GOOGLE: THE KEYWORD (May 4, 2018), <https://blog.google/topics/public-policy/supporting-election-integrity-through-greater-advertising-transparency/> [<https://perma.cc/TS7U-7JSM>]. “Election ads” are those that feature an officeholder or candidate for federal or state office, a “federal or state level political party,” or a “state-level ballot measure, initiative, or proposition that has qualified for the ballot in its state.” *Political Content: Election Ads in the United States*, GOOGLE ADVERT. POLICIES HELP, <https://support.google.com/adspolicy/answer/6014595#700> [<https://perma.cc/2W6J-AZHR>].

53. *Cause-based Advertising Policy*, *supra* note 13. The process requires would-be advertisers to supply information such as Tax-ID numbers and certificates of incorporation for organizations and government-issued IDs for individuals. See *Cause-based Advertising Certification*, TWITTER BUS., <https://business.twitter.com/en/help/ads-policies/restricted-content-policies/cause-based-advertising/cause-based-certification1.html> [<https://perma.cc/RS4G-78K6>].

and, apparently, political parties). The exemption does not extend to other political advertisers, such as SuperPACs.<sup>54</sup> For the most part, though, platforms have not embraced policies that favor some legally eligible advertisers over others.

#### D. LIMITATIONS ON AUDIENCE TARGETING

Thanks in part to the vast quantities of data they glean from their users, online platforms enable advertisers to disseminate their messages with far greater precision than was possible with traditional mass advertising methods.<sup>55</sup> Advertisers, both commercial and political, value these microtargeting capabilities as a powerful tool for tailoring messages to individuals with particular characteristics.<sup>56</sup> But critics have identified important downsides. Targeting, they say, can enable opportunistic actors to spread disinformation and invective to niche audiences without the scrutiny that comes with broader circulation.<sup>57</sup> Promi-

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54. Facebook has likewise given special treatment to political figures when it moderates organic content, explaining that what those figures say is newsworthy even when their statements violate the platform's usual community standards. Klonick, *supra* note 6, at 1655 (observing that "the speech of powerful people" is sometimes "kept up despite breaking the platform policies" in light of the newsworthiness of the statements); *see also id.* at 1665 ("[P]rivate platforms are increasingly making their own choices around content moderation that give preferential treatment to some users over others.")

55. Khan & Pozen, *supra* note 2, at 511 ("A business model built around behavioral advertising demands that companies like Facebook assemble a maximally detailed portrait of their users' lives, which the companies then sell to marketers and developers."); Persily, *supra* note 5. ("The microtargeting enabled by new media is really what sets it apart.")

56. *See, e.g.*, JACK M. BALKIN, *FIXING SOCIAL MEDIA'S GRAND BARGAIN 2* (2018).

57. *See, e.g.*, Christopher S. Elmendorf & Abby K. Wood, *Elite Political Ignorance: Law, Data, and the Representation of (Mis)perceived Electorates*, 52 U.C. DAVIS L. REV. 571, 608 (2018) ("[I]t seems reasonable to fear that as broad, public appeals to the common good and national identity are supplanted by microtargeted appeals to the idiosyncratic beliefs, preferences, and prejudices of individual voters, citizens will come to think of politics as less a common project than an occasion for expressing and affirming their narrow identities and interests."); Wood & Ravel, *supra* note 5, at 1236 ("Microtargeting small groups of voters with content that appeals to their preexisting biases can deepen the democratic problem by subdividing the electorate, creating an endless number of potential cleavages among voters."); Ellen L. Weintraub, *Don't Abolish Political Ads on Social Media. Stop Microtargeting*, WASH. POST (Nov. 1, 2019), <https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/> [<https://perma.cc/QMC7-BJ3P>].

ment voices, from Microsoft founder Bill Gates to FEC Chair Ellen Weintraub, have argued in favor of restrictions.<sup>58</sup>

Responding to these concerns, Google has chosen to restrict “election ads audience targeting to the following general categories: age, gender, and general location (postal code level).”<sup>59</sup> Google also has stated that it will no longer permit advertisers to direct ads “to specific audiences based on people’s public voter records or political affiliations,” or to upload their own lists of targeted audiences.<sup>60</sup> But Google continues to allow political advertisers to engage in “contextual targeting, such as serving ads to people reading or watching a story about, say, the economy.”<sup>61</sup> And Google’s policy does not appear to restrict the ability of advertisers to microtarget ads that contain political content but that fall outside the company’s fairly narrow definition of “election ads.” Thus, Google may be somewhat overstating things when it asserts that its approach “align[s] . . . with long-established practices in media such as TV, radio, and print.”<sup>62</sup>

Twitter has also imposed targeting restrictions on the “cause-based” ads that it continues to allow. Twitter’s policy goes further than Google’s in two respects. First, Twitter’s policy applies to a broader set of ads, since, by definition, cause-based ads cannot mention particular candidates, parties, or ballot measures, and thus do not qualify as “election ads” subject to Google’s targeting limits.<sup>63</sup> Second, Twitter’s constraints appear to be somewhat more stringent than Google’s. Under Twitter’s policy, cause-based ads can be targeted only “at the state, province, or region level and above. Zip code level targeting is not allowed.” Twitter also bars advertisers from targeting using “terms associated with political content, prohibited advertisers,

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58. Ahiza Garcia, *Bill Gates: The Problem with Political Ads is Targeting, Not Fact-Checking*, CNN (Nov. 6, 2019) <https://www.cnn.com/2019/11/06/tech/bill-gates-political-ad-targeting-fact-checking/index.html> [<https://perma.cc/SL72-R9DN>]; Weintraub, *supra* note 57.

59. Spencer, *supra* note 30.

60. Wakabayashi & Goldmacher, *supra* note 26; *see also id.* (explaining that Google’s policy applies “to ads shown to users of Google’s search engine and YouTube, as well as display advertisements sold by the company that appear on other websites”); Kreiss & McGregor, *supra* note 2, at 504 (explaining that, previously, “[b]oth Facebook and Google enable[d] campaigns and other advertisers to leverage their own data for purposes of targeting through ‘custom audiences’ (Facebook) and ‘customer match’ (Google).”).

61. Spencer, *supra* note 30.

62. *Id.*

63. *Cause-based Advertising Policy*, *supra* note 13.

or political leanings or affiliations (e.g., ‘conservative,’ ‘liberal,’ ‘political elections,’ etc.).”<sup>64</sup>

An array of political professionals—from the Democratic National Committee to President Trump’s campaign manager—have condemned these targeting restrictions.<sup>65</sup> Perhaps for this reason, Facebook equivocated about whether and how to limit the targeting of political ads.<sup>66</sup> After floating potential restrictions, such as raising the minimum number of targets from 100 to 1000 or more,<sup>67</sup> the company ultimately declined to impose any constraints.<sup>68</sup>

#### E. TRANSPARENCY MEASURES

The major online platforms have all moved at least some distance in the direction of greater transparency for the political ads they host, although many observers still see significant room for improvement. For transparency advocates, the basic idea is straightforward: platform users (and others) should be able to see who is running ads that seek to influence political outcomes. Toward this end, campaign finance laws have long imposed disclaimer and disclosure requirements on political advertisers.<sup>69</sup>

64. *Id.*; see also *Cause-based Advertising FAQs*, *supra* note 13 (“This is our initial approach [to targeting] and it may evolve over time.”).

65. See Mike Isaac, *Why Everyone Is Angry at Facebook Over Its Political Ads Policy*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/technology/campaigns-pressure-facebook-political-ads.html> [<https://perma.cc/RZT7-M9CJ>]; Matthew Rosenberg & Nick Corasaniti, *Campaigns Say Google Ad Policy Sidesteps Problem of Disinformation*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2019/11/21/us/politics/google-ads-disinformation.html> [<https://perma.cc/H8SL-J3EU>] (“[T]wo separate groups of digital strategists—a bipartisan coalition from the University of Chicago, and a group of roughly 40 Democratic and progressive strategists—released letters criticizing Google’s new policy.”); Wakabayashi & Goldmacher, *supra* note 26.

66. Isaac, *supra* note 65 (“The pressure on Facebook over what to do about political ad targeting has been unrelenting. Organizations on both sides of the political aisle—from as large as President Trump’s re-election campaign to smaller, grass-roots groups—have tried to persuade Facebook not to rein in the ad targeting.”).

67. *Id.*; Emily Glazer, *Facebook Weighs Steps to Curb Narrowly Targeted Political Ads*, WALL STREET J. (Nov. 21, 2019), <https://www.wsj.com/articles/facebook-discussing-potential-changes-to-political-ad-policy-11574352887> [<https://perma.cc/DR64-VM7Q>].

68. Leathern, *supra* note 40.

69. See Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 628–32 (2010) (summarizing federal and state disclosure and disclaimer requirements).



Those laws, however, have significant gaps, especially when it comes to digital ads.<sup>70</sup> The transparency measures that platforms have been adopting partially supplement the underinclusive legal regime.

With respect to disclaimers, platforms require defined categories of ads to provide certain identifying information about the purchaser. Facebook, for instance, has adopted a disclaimer requirement for all ads about “social issues, elections or politics.”<sup>71</sup> The disclaimer displayed tracks the identifying information that the ad buyer submits during Facebook’s ad authorization process.<sup>72</sup> Google similarly requires “in-ad disclosures” for election ads (again, a narrower set of ads than Facebook’s policy covers).<sup>73</sup>

As for disclosure, platforms have established searchable databases for anyone who wishes to see what ads are being run and who is paying for them. While Facebook has been reluctant to restrict content and targeting, the company has been more proactive about creating transparency tools. Indeed, at least rhetorically, transparency is the centerpiece of Facebook’s approach to

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70. See Wood & Ravel, *supra* note 5, at 1227 (“Our campaign finance laws are riddled with gaps and loopholes, which exclude a large portion of online advertising from disclosure and disclaimer requirements.”).

71. *About Ads About Social Issues, Elections or Politics*, *supra* note 31; *New Requirements for Ads About Social Issues, Elections, or Politics in the US*, *supra* note 31 (“As of November 7, 2019, advertisers must set up new ‘Paid for by’ disclaimers to continue running ads about social issues, elections or politics in the US.”).

72. *New Requirements for Ads About Social Issues, Elections, or Politics in the US*, *supra* note 31; *Ads About Social Issues, Elections or Politics: How Disclaimers Work for Ads About Social Issues, Elections or Politics*, FACEBOOK FOR BUS., <https://www.facebook.com/business/help/198009284345835?id=288762101909005> [<https://perma.cc/A4HQ-H8WJ>] (“All ads about social issues, elections or politics need to have a disclaimer. This disclaimer will appear at the top of any ads you run and include information on the entity that paid for the ad.”). Disclaimers are not shown in shared versions of an ad. *Id.* (“[I]f someone sees and chooses to share the ad, the shared version of the ad will be considered an organic piece of content and will no longer show the disclaimer.”). Facebook has apparently considered, but thus far not adopted, an additional disclosure requirement that would “label political ads to indicate they have not been fact-checked.” Romm & Becker, *supra* note 47. Some political actors, particularly on the Democratic side, have expressed concern that such a practice “would create an equivalence between well-sourced ads and those containing debunked claims.” *Id.*

73. Spencer, *supra* note 30.

political ads.<sup>74</sup> The company has established a searchable Ad Library that archives all ads involving social issues, elections, or politics for seven years.<sup>75</sup> The Library offers data about ads and their sponsors beyond what the in-ad disclaimers provide, including “a range for the amount spent on the ad (ex, \$1K-\$5K),” “a range for the number of impressions the ad received (ex 1K-5K),” “the % of people by age and gender who saw an ad,” and “information about the location(s) where the ad was viewed.”<sup>76</sup> Google has its own version of such a database for election ads, which it calls the Transparency Report.<sup>77</sup> And Twitter maintains an Ads Transparency Center that covers cause-based advertising.<sup>78</sup>

## II. SELF-REGULATION’S DEMOCRACY DEFICITS

At one level, this flurry of self-regulatory activity is encouraging. Since 2016, major platform companies do seem to have become more mindful of how their services can negatively impact campaigning and political discourse.<sup>79</sup> High-level executives

74. See, e.g., *New Requirements for Ads About Social Issues, Elections, or Politics in the US*, *supra* note 31; Leathern, *supra* note 40.

75. See *Facebook Ad Library*, FACEBOOK, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US&impression\\_search\\_field=has\\_impressions\\_lifetime](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime) [https://perma.cc/8SLW-9GQJ]; see also *Ads About Social Issues, Elections or Politics: About the Ad Library*, FACEBOOK FOR BUS., <https://www.facebook.com/business/help/2405092116183307?id=288762101909005> [https://perma.cc/8APQ-NHN2] (“The Ad Library contains all active ads running across our products. Transparency is a priority for us to help prevent interference in elections, so the Ad Library offers additional information about ads about social issues, elections or politics, including spend, reach and funding entities. These ads are visible whether they’re active or inactive and will be stored in the Ad Library for seven years.”); *Facebook Ad Library Report*, FACEBOOK, <https://www.facebook.com/ads/library/report/?source=archive-landing-page&country=US> [https://perma.cc/X5HF-NWYV] (compiling political advertising data).

76. *Ads About Social Issues, Elections or Politics: About the Ad Library*, *supra* note 75.

77. *Transparency Report: Political Advertising in the United States*, GOOGLE, <https://transparencyreport.google.com/political-ads/region/US?hl=en> [https://perma.cc/S2K6-Y649].

78. *Ads Transparency Center*, TWITTER, <https://ads.twitter.com/transparency> [https://perma.cc/5XZ2-BT2E].

79. After initially being dismissive of the problems that occurred in 2016, Facebook has shown more awareness and recognition that it was underprepared in 2016. See Klonick, *supra* note 6, at 1667 (“In statements directly following the election of Trump as President, Zuckerberg emphatically denied the role of fake news in the result. But due to many of the factors discussed here—media

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have devoted significant attention to democracy-related issues,<sup>80</sup> and at least in some instances, they appear to have engaged in real reflection and soul-searching. Several of the measures they have implemented in advance of the 2020 election—such as identity verification systems—respond directly to abuses that occurred in 2016, particularly with respect to foreign influence and fake news. Although malefactors may well pursue new tactics to disrupt or manipulate the 2020 election, it should at least be more difficult for them to orchestrate a repeat of their earlier misdeeds. That’s something.

These developments, however, call for muted cheers at most. Substantively, the policies are band-aids, not silver bullets. Critics can legitimately question the wisdom of particular measures, and legitimately wonder if additional or alternative steps are warranted. Should platforms ban political ads entirely (à la Twitter), or might categorical prohibitions go too far and perhaps have unintended side effects, such as advantaging established incumbents over upstart challengers (as Facebook executives have suggested)? How aggressively should platforms be checking the truthfulness of political ads, if at all? To what extent, if any, should they curb political ad targeting? How much information should they be requiring ad buyers to disclose? And how, exactly, should they be defining the political content that triggers special treatment? As evidenced by the very fact that platforms have made divergent choices, the right answers are far from clear. Indeed, it is far from clear that there are right answers to be had.

Additionally, as platforms commit to particular rules, myriad questions arise about implementation and enforcement. Will platforms have the capacity and the will to carry out their policies? Can their systems of algorithmic and human review reliably identify content subject to regulation? Will they be able to make appropriate judgments with the speed that election campaigns demand? How will platforms respond to efforts to circumvent their rules? What sort of protocols will they use to review their decisions and correct errors?

These are all important questions that deserve attention. My primary aim in this short Essay, however, is to identify a different, and arguably deeper, concern about platforms’ self-

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pressure, corporate responsibility, and user expectations—Facebook was forced to start tackling the issue.”); Zuckerberg, *supra* note 27 (“In 2016, we were not prepared for the coordinated information operations we now regularly face.”).

80. Zuckerberg, *supra* note 27.

regulatory efforts with respect to political advertising. It is a process-oriented concern. Platforms have been acting in the name of democracy, taking steps that they maintain will help to ensure free and fair elections and safeguard the sanctity of democratic self-government.<sup>81</sup> They are adopting the sort of policies that traditionally would have come from government, in many instances going further than government can go given the First Amendment doctrines that constrain public actors but not private ones.<sup>82</sup> Yet there is nothing particularly democratic about how these regulations have come about, and the rules themselves show limited regard for the preferences and autonomy of individual users.

Consider first how platform companies have developed and adopted their law-like political advertising policies. Their processes certainly have not approximated direct or representative democracy. The policies were not debated and voted upon by the companies' users or by a body chosen to represent user interests. Nor have the companies' processes approximated conventional administrative law practices. The policies, for instance did not undergo anything akin to formal notice and comment. Instead, corporate executives simply decreed them. Twitter CEO Jack Dorsey announced the company's decision to prohibit political ads in a series of tweets.<sup>83</sup> This is not to suggest that the policies were issued on a whim. They are no doubt the product of internal deliberation and debate. To some extent, the companies also appear to have consulted with external stakeholders, such as political consultants, and considered the views of influential outsiders, such as elected officials. But this behind-the-scenes vetting is opaque, not transparent. And whatever their processes have entailed, companies have not put these issues to their users in any meaningful way. There has been no systematic effort to solicit user perspectives or feedback and not even a pretense of seeking formal user approval.

Consider, in addition, the nature of the rules themselves. The companies have cast many of their policies in user-protect-

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81. *Id.*

82. *See, e.g.*, Wood & Ravel, *supra* note 5, at 1237 (observing that, given First Amendment constraints on government actors, substantial "responsibility for reducing disinformation on social media falls to social media platforms" themselves); Yablon, *supra* note 8, at 199–205 (outlining constitutional limits on governmental campaign finance regulation).

83. *See* Dorsey, *supra* note 17.

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tive terms. Targeting restrictions, for example, are said to prevent advertisers from exploiting people with strategically tailored messages. Transparency requirements are said to give users the tools to assess advertisers' credibility or motives. There may be good reasons for such policies. But the policies reflect a paradigm of centralized control. The platform itself has made the relevant choices for its users in a one-size-fits-all manner. By and large, the policies are not ones that enable users to personalize their experiences and decide for themselves what sort of political advertisements, if any, they want to receive, or what sort of information about themselves they want ad buyers to be able to access.<sup>84</sup>

The picture that emerges looks quite different from the image that platforms typically cultivate. The major platform companies almost invariably portray themselves as democratic facilitators. Facebook is especially vocal on this score. A repeated refrain, from Mark Zuckerberg and others, is that the company aims to empower people by giving them a voice and enabling them to build connections and communities.<sup>85</sup> When it comes to political advertising, platforms have given their users little voice in setting policy and little power to chart their own paths.

These observations about the democratic deficiencies in how platforms regulate political advertising underscore themes that animate a broader literature on democracy and online governance. In an influential essay on the digital revolution and the freedom of expression, Jack Balkin described how new technologies can both enhance and threaten democratic culture.<sup>86</sup> By democratic culture, he referred to a culture that, by embracing

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84. As described below, *see infra* at note 105 and accompanying text, Facebook recently announced two measures to expand user control over political ads. If anything, these relatively small steps simply call attention to how much more platforms might do in this regard.

85. *See, e.g.*, Romm, *supra* note 27 (describing "voice and inclusion" as Facebook's animating values and observing that platforms have given people "the power to express themselves at scale" and "decentralized power by putting it directly into people's hands"); *id.* ("In everything we do, we need to make sure we're empowering people, not simply reinforcing existing institutions and power structures."); Zuckerberg, *supra* note 27 ("One of our core principles is to give people a voice."); *see also* Mark Zuckerberg, *Facebook's Commitment to the Oversight Board*, FACEBOOK, <https://about.fb.com/wp-content/uploads/2019/09/letter-from-mark-zuckerberg-on-oversight-board-charter.pdf> [<https://perma.cc/WLX7-L3NG>] ("Facebook is built to give people a voice.").

86. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

“individual liberty as well as collective self-governance,” offers “everyone—not just political, economic, or cultural elites— ... a fair chance to participate in the production of culture, and in the development of ideas and meanings that constitute them and the communities and subcommunities to which they belong.”<sup>87</sup> Platform companies like to stress the democratic promise that comes with giving ordinary people the ability to search and share like never before.

Numerous commentators, however, have observed that, as platforms empower with one hand, they disempower with the other. In her prominent account of platform self-governance, Kate Klonick, for instance, expresses concern that, by governing themselves without significant public participation or direct accountability to users, platforms can disserve democratic culture.<sup>88</sup> Others go further in criticizing platform paternalism, comparing platforms (and Facebook in particular) to autocracies,<sup>89</sup> or to “system[s] of authoritarian or absolutist constitutionalism.”<sup>90</sup> Whatever one thinks of these particular analogies, platforms certainly are not themselves democratic institutions in any conventional sense. Control ultimately rests with the owners, not the users.

These democracy deficits are particularly glaring and incongruous in the context of political advertising. Much of the scholarship on platform governance, including Klonick’s account, focuses on how platforms moderate user-generated content. Such work criticizes platforms for making consequential decisions on matters like hate speech and harassment with limited public participation, transparency, and accountability.<sup>91</sup> When the governance decisions of platforms implicate the democratic process itself, the absence of democratic safeguards is all the more concerning.

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87. *Id.* at 3–4.

88. Klonick, *supra* note 6, at 1603.

89. Evelyn Douek, *Facebook’s “Oversight Board:” Move Fast with Stable Infrastructure and Humility*, 21 N.C. J. L. & TECH. 1, 9–10 (2019) (“Scholars have previously drawn the comparison of Facebook as an autocracy due to Zuckerberg’s unchecked power over what Zuckerberg calls the Facebook ‘community.’”).

90. David Pozen, *Authoritarian Constitutionalism in Facebookland*, KNIGHT FIRST AMEND. INST. COLUM. U. (Oct. 30, 2018), <https://knightcolumbia.org/content/authoritarian-constitutionalism-facebookland> [https://perma.cc/32SY-8NUC].

91. Klonick, *supra* note 6, at 1665.

Making matters worse, platforms may have less incentive to show regard for their users when regulating advertising than when regulating organic content. As they decide how to moderate user-generated content, platforms face “the economic necessity of creating an environment that reflects the expectations of their users,” which incentivizes them to try to “reflect[] the democratic culture and norms of their users.”<sup>92</sup> Thus, even if their moderation systems are not democratic, those systems will often produce results that roughly align with prevailing public sensibilities about the bounds of free expression. In contrast, when platforms set policies on advertising, they balance the preferences and well-being of their users against the wishes of ad buyers who are willing to pay to influence those users. Platforms must regulate advertising and advertisers enough to avoid mass user discontent and exit. But beyond that, platforms have economic incentives to craft advertising policies and practices with an eye toward maximizing revenue, even if those policies and practices diverge from user preferences.<sup>93</sup> Indeed, if it were purely a matter of user preference, platforms likely would be ad free.<sup>94</sup>

With respect to political advertising in particular, platforms thus have incentives to cater to the desires of ad-buying political professionals, who tend to prefer more tools and fewer constraints.<sup>95</sup> In practice, platforms such as Facebook and Google

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92. *Id.* at 1602.

93. *Cf.* Wood & Ravel, *supra* note 5, at 1242 (observing that “only speakers pay platforms for their services, leading platforms to cater their terms of service to speakers rather than listeners”).

94. Khan & Pozen, *supra* note 2, at 520 (noting that “surveys have found that an overwhelming majority of Facebook users do not want to be exposed to *any* targeted political or commercial advertisements, reflecting a ‘resounding consumer rejection of surveillance-based ads and content’”) (quoting Joseph Turow & Chris Jay Hoofnagle, *Mark Zuckerberg’s Delusion of Consumer Consent*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/opinion/zuckerberg-facebook-ads.html> [<https://perma.cc/6Q23-V62N>]).

95. See Tony Romm et al., *Facebook Won’t Limit Political Ad Targeting or Stop False Claims Under New Ad Rules*, WASH. POST (Jan. 9, 2020), <https://www.washingtonpost.com/technology/2020/01/09/facebook-wont-limit-political-ad-targeting-or-stop-pols-lying/> [<https://perma.cc/XH8Z-KSYS>] (reporting that “political strategists, both Democrats and Republicans, . . . fought fiercely behind the scenes to keep the digital tools that have helped them find new supporters, solicit donations and mobilize voters on Election Day”); *Cf.* Robert Yablon, *Campaigns, Inc.*, 103 MINN. L. REV. 151, 157–80 (2018) (describing the rise of political professionals and the campaign industry).

work closely with political campaigns, even embedding employees with major campaign and political consulting operations to assist with advertising purchases.<sup>96</sup> And platforms have directly sought input from political professionals as they have developed their advertising policies.<sup>97</sup> This does not mean that platforms will always give advertisers what they want. Other considerations—media scrutiny, pressure from government officials, notions of corporate responsibility—may win out in particular cases. But, on the whole, we should expect platforms to choose political advertising policies that tilt toward the preferences of the political elites who seek to shape public opinion rather than the preferences of the public itself. This may be especially true for Facebook and Google, which appear to have become particularly enmeshed in the business of politics as a result of their market dominance.

In short, we can commend platforms for doing more today than they did four years ago to counter abuses surrounding political advertising, but we should remain wary of their self-regulatory activities. The fact that platforms adopt political advertising policies through undemocratic means heightens the danger that those policies will not serve democratic ends. Part III briefly considers options for democratizing political advertising regulation.

### III. DEMOCRATIZING POLITICAL ADVERTISING REGULATION

If, as Part II suggests, platform governance of political advertising is insufficiently democratic, then it is appropriate to consider how to foster a more participatory and autonomy-enhancing regime. Several possibilities flow quite straightforwardly from the discussion above. They essentially urge platforms to live up to their own democratic rhetoric.

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96. See, e.g., Kreiss & McGregor, *supra* note 2, at 505; Persily, *supra* note 5, at 65 (“Teams from Google, Facebook, and Twitter were in a single room in the [Trump] campaign’s digital headquarters in San Antonio, Texas, pitching ideas on how the campaign should spend its money.”).

97. See, e.g., Glazer, *supra* note 67 (observing that “Facebook has sought feedback from large Republican and Democratic political ad buyers”); Isaac, *supra* note 65 (describing Facebook’s discussions with “digital strategists, campaign officials and political operatives”); Romm & Becker, *supra* note 47 (noting that Facebook has engaged “with Democratic and Republican operatives” about potential policy changes, even as it “declined to discuss any specific changes under consideration” in response to media requests).



First, although it is unrealistic and probably unwise to ask private companies to replicate traditional democratic processes, platform companies could certainly give the public a greater role in developing political advertising policies and monitoring their implementation. Companies could, for instance, share drafts of proposed policies with users, solicit feedback prior to adoption, and more systematically explain their choices.<sup>98</sup> Once policies are in place, companies could offer more details about how the policies are functioning and perhaps be more transparent about their enforcement decisions and rationales.<sup>99</sup>

Going further, platform companies could establish governance systems for political advertising that sit outside of normal corporate decision-making processes. Facebook has already taken a novel step in this direction with respect to content moderation. Specifically, the company has launched an independent Oversight Board, which is supposed to function as something akin to an independent judiciary for Facebook. The Board can issue binding rulings on content-related disputes at the request of both the company and users.<sup>100</sup> In explaining the decision to establish the Board, Mark Zuckerberg opined that private companies like Facebook should not “be making so many important decisions about speech on our own.”<sup>101</sup> As presently constituted, however, the Board does not have a role in superintending political advertising disputes or setting political advertising policy. Those matters remain fully in the company’s hands, notwithstanding the potentially conflicting interests of the company’s shareholders and its users. If Zuckerberg truly believes that Facebook and its users would “benefit from a more democratic process, clearer rules for the internet, and new institutions,”<sup>102</sup> then it is worth considering whether to extend the jurisdiction of the

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98. See, e.g., Klonick, *supra* note 6, at 1670 (urging “more direct platform accountability to users”).

99. Kreiss & McGregor, *supra* note 2, at 500 (identifying opacity in how Google and Facebook implement their political advertising policies and encouraging greater transparency).

100. See Douek, *supra* note 89, at 34–37. Notably, as it set up the Board, Facebook engaged in a process of public consultation, something it has not done with respect to political advertising. See Brent Harris, *Global Feedback and Input on the Facebook Oversight Board for Content Decisions*, FACEBOOK (June 27, 2019), <https://about.fb.com/news/2019/06/global-feedback-on-oversight-board/> [https://perma.cc/L9RG-LS5S].

101. Zuckerberg, *supra* note 85.

102. Romm, *supra* note 27.

Oversight Board, or to create a parallel independent entity with authority over political advertising.

Platforms also should consider democratizing the content of their political advertising policies. Users who are encouraged to build their own communities and design their own searches should have similar autonomy when it comes to deciding what information they want to make accessible to political actors and what sort of political ads, if any, they want to see. If platforms truly aim to “empower[] people” and “not simply reinforc[e] existing institutions and power structures,”<sup>103</sup> then they should allow their users to make these choices. To the extent companies really believe that their users benefit from exposure to paid political advertising, they should make that case to the users themselves, rather than forcing that content upon them. In defending Facebook’s decision not to fact-check ads from politicians, Zuckerberg asserted that, “in a democracy, ... people should decide what is credible, not tech companies.”<sup>104</sup> Why shouldn’t people, not tech companies, likewise decide whether they want to see those ads in first place?

Shortly before this Essay was published, Facebook took an initial step in this direction. The company announced that, by “early . . . summer” 2020, it will roll out two features to give users somewhat more control over their exposure to political ads.<sup>105</sup> First, users will be given at least some ability to prevent advertisers (both political and commercial) from targeting them using Facebook’s Custom Audience tool, which enables advertisers to direct ads to specific individuals on advertiser-supplied lists.<sup>106</sup> Second, Facebook’s Ad Preferences tools will allow users to choose “to see fewer political and social issue ads.”<sup>107</sup> The company, however, has yet to provide details, so it remains unclear just how powerful or prominent these features will be. It will be disappointing if Facebook merely provides for nominal reductions in ad volume and buries the options deep in users’ settings. Facebook—and other platforms—owe their users real opportunities to shape their experiences with political advertising.

Finally, the realities of platform self-regulation may strengthen the case for at least some forms of public regulation of political advertising and campaigns. In a world of powerful

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103. *Id.*

104. *Id.*

105. Leathern, *supra* note 40.

106. *Id.*

107. *Id.*

online platforms, we face a choice not between regulated campaigns and unregulated ones, but rather a choice about who regulates. Platform companies have been self-regulating so actively in part because constitutional constraints, legislative inaction, and administrative paralysis have combined to create a public regulatory vacuum. Those who traditionally have been skeptical of public regulation ought to ask themselves whether private regulation is really preferable. The answer may be that public regulation, which offers democratic legitimacy that private regulation cannot match, has a role to play, at least as a complement to private platform governance.<sup>108</sup> Public regulation can potentially establish ground rules for platforms, ensuring, for example, that companies self-regulate in accordance with certain standards for transparency or user choice.<sup>109</sup> Ultimately, if we want platforms to be more democratic, we may need to get there democratically.

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108. To some extent, platform companies themselves seem to recognize the propriety of public oversight. *See, e.g., id.* (“Ultimately, we don’t think decisions about political ads should be made by private companies, which is why we are arguing for regulation that would apply across the industry. . . . Frankly, we believe the sooner Facebook and other companies are subject to democratically accountable rules on this the better.”).

109. Along these lines, Abby Wood and Ann Ravel have proposed several regulatory reforms to increase the transparency of online political ads, such as requiring platforms to maintain detailed ad repositories. *See Wood & Ravel, supra* note 5, at 1256–68. They also have suggested that the “government require[] platforms to default users to not view narrowly targeted political or issue ads,” giving “users the choice to opt-in to viewing that content.” *Id.* at 1269; *see also* Elmendorf & Wood, *supra* note 57, at 613 (proposing that regulators “establish[] default rules and disclosure requirements, ensuring that only users who elect to receive microtargeted political appeals are reachable”).